DOCKET NUMBER: _____

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IN THE SUPREME COURT OF THE UNITED STATES

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DION TERRY TAYLOR,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this honorable Court should grant *certiorari* to clarify the Sixth Circuit's "*Pinney Dock*" standard governing review of claims which were not raised during the District Court proceedings.

2. Whether this honorable Court should grant *certiorari* to resolve inter-Circuit inconsistencies regarding whether sentencing enhancements under U.S.S.G.§5K2.1 must be supported by a finding that the death of an individual had been "intentional" or "knowingly risked."

3. Whether this honorable Court should grant *certiorari* to resolve an intra-Circuit inconsistency regarding the Sixth Circuit's treatment of sentencing issues under U.S.S.G. 5K2.1, specifically, whether such sentencing enhancements must be established by "proof beyond a reasonable doubt" rather than by a mere "preponderance of the evidence."

4. Whether this honorable Court should grant *certiorari* to resolve the issue of whether the District Court abused its discretion in imposing an upward departure for Mr. Taylor's case.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings, both in the Federal District Court for the Eastern District of Kentucky, Central Division, as well as in the United States Court of Appeals for the Sixth Circuit, included the United States of America, Respondent herein, and Dion Terry Taylor, the Petitioner herein. While there were co-Defendants in the proceedings below, including one of whom has separately petitioned for *certiorari* under Docket Number 18-5112 (*Benjamin Fredrick Charles Robinson v. United States*), there are no parties to these present proceedings other than those named in the Petition.

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## PETITION FOR A WRIT OF CERTIORARI

Mr. Dion Terry Taylor (hereinafter, Mr. Taylor) respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued May 1, 2018.

## OPINIONS BELOW

The Decision of the Sixth Circuit in this matter was issued on May 1, 2018. It was not selected for full-text publication, and the unpublished decision of the Sixth Circuit is reproduced at Petitioner's Appendix A.

The relevant District Court Judgment underlying Mr. Taylor's conviction was not published, but, is reproduced at Petitioner's Appendix B.

## STATEMENT OF JURISDICTION

Because the underlying cases involved a federal indictment against Mr. Taylor for violations of federal law, the United States District Court for the Eastern District of Kentucky, Central Division at Lexington, had jurisdiction pursuant to 18 U.S.C. §3231. Because Petitioner Taylor timely filed a notice of appeal from the final judgment of a United States District Court, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Because Petitioner Taylor is timely filing this Petition for Writ of Certiorari within the extended time allowed by Justice Kagan, this honorable Court has jurisdiction pursuant to 28 U.S.C. §1254. *See also*, Supreme Court Rules 13.1, 13.5 (respectively setting forth the ninety-day time limit for filing a petition for writ of certiorari, and the extension of that deadline upon Motion to an individual Justice).

## STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The relevant statutory provisions are 18 U.S.C. §3553 and U.S.S.G. §5K2.1, which are set forth, respectively, in the attached Petitioner's Appendix C and D.

## STATEMENT OF THE CASE

A. Statement of Relevant Facts

This case arises out of a conspiracy to distribute heroin and/or fentanyl in the Eastern District of Kentucky from 2014 to 2015. (Plea Agreement at 2) (RE:95)(Page ID 253); *see also*, Presentence Investigation Report ("PSIR") at 6, ¶22.

During the indictment period, an end-user of drug products overdosed on what was ruled to be a fatal dose of fentanyl, the origin of which allegedly rested with the defendants to this conspiracy, including Mr. Taylor. PSIR, 4-6; *see also*, (Plea Agreement at 2-6) (RE:95)(Page ID 253-257).[1] Specifically, on March 13, 2015, Kathy Miller met with Corey Brewer, the above-referenced decedent, and "D.M.", a friend, in Richmond, Kentucky. (Plea Agreement at 2) (RE:95)(Page ID 253). They travelled together in a car operated by Brewer to a residence on Irvine Street in Richmond, Kentucky. *Id* at 2-3; PAGE ID 253-254. Miller went into the residence alone and obtained one-quarter of a gram of what she believed to be heroin from Benjamin Robinson, one of Taylor's co-defendants, who had received the substance from Mr. Taylor, who had originally received the substance from co-Defendant Westberry. *Id.* at 3; PAGE ID 254; *see also*, PSIR at 6, ¶20. She then met with D.M. and Corey Brewer, providing them with the substance she had received from Robinson, and receiving a small quantity in exchange. (Plea Agreement at 3) (RE:95)(Page ID 254).

[1] A second end-user also suffered a non-fatal fentanyl overdose during the relevant time frame. *See*, Decision of the Sixth Circuit, Appendix A at 2.

The next morning, at approximately 5:00am, officers from the Richmond Police Department were dispatched to the parking lot of a department store regarding an unresponsive male in the driver's seat of an SUV. *Id.* Corey Brewer was pronounced dead at the scene, and an autopsy subsequently concluded that the cause of death was "acute fentanyl toxicity," that there was approximately 2.5 more fentanyl in his blood than the top of the therapeutic range, and that no other controlled substances were in his system. *Id.*

Special Agents of the Drug Enforcement Agency later interviewed "D.M.", who admitted consuming heroin with Brewer on multiple occasions, and that they had, on each occasion, purchased the controlled substance from Miller. *Id.* He further admitted that, after each purchase, he and Brewer would travel to the parking lot of the department store in Richmond to ingest the substance nasally. *Id.* at 4; PAGE ID 255. He further indicated that the last time he saw Brewer was in the department store parking lot, after they had used the substance provided by Miller. *Id.* However, D.M. was unsure whether Brewer was still in the parking lot in his SUV, or if he was leaving the parking lot. *Id.*

Several controlled buys were also made by a confidential informant from Robinson on March 26, 2015 and April 17, 2015. *Id.* at 5; PAGE ID 256. Lab results showed that the purchases, respectively, were seven grams of fentanyl and 6 grams of fentanyl. *Id.* A search warrant later executed at Robinson's residences yielded 20 grams of fentanyl, 5 grams of heroin, and drug ledgers/debt lists. *Id* at 5-

6; PAGE ID 256-257. Robinson admitted to "selling dope" to "feed his family." *Id.* at 6; PAGE ID 257.

Mr. Taylor was later arrested, whereupon he signed a *Miranda* waiver and was ultimately interviewed by a DEA Agent and a Detective from the Richmond Police Department. Taylor admitted that he had come from Detroit, Michigan, to Madison County, Kentucky, in the fall of 2014, and that he had distributed heroin which had been supplied by Westberry before assuming a supervisory role for Westberry. *Id. See also*, Sent.T.p. at 9; Doc ID 195; PAGEID 1060. While Mr. Taylor directed most customers to Robinson, Taylor would become personally involved if the customer needed more than 10 grams of heroin, or needed to have the substance "fronted." PSIR at 6; ¶22. *See also*, Sent.T.p. at 9; Doc ID 195; PAGEID 1060.

For instance, on March 3, 2015, officers utilized a confidential informant to purchase approximately 8 grams of "heroin" from co-Defendant Robinson. *Id.* at 2; PAGE ID 253. At that time, a recorded and monitored call was placed by the confidential informant to co-Defendant Westberry, who instructed the informant to go to the residence of "D," who was later identified as Mr. Taylor, to receive the drugs. *Id.* The informant then purchased a controlled substance from Robinson while Mr. Taylor was present. *Id.* Subsequent lab testing revealed that the substance was fentanyl, and contained no heroin. *Id.*

Mr. Taylor further admitted that he had received packages of heroin for distribution every two to three weeks, and that he knew some of the "heroin" was

actually a mixture of heroin and fentanyl and had been so for approximately four to five months, and that fentanyl had been added to the mix because customers had complained it was previously too weak. *Id.*; *see also*, PSIR at 6, ¶22; *see also*, Sent.T.p at 9; Doc ID 195; PAGE ID 1060. Mr. Taylor indicated that he did not personally add fentanyl to the heroin, although he had mixed the heroin with "sleep aid pills" in order to increase the quantity of the heroin. *Id.*; *see also*, PSIR at 6, ¶22. Mr. Taylor further indicated that the customers knew the drugs they were receiving were different because of a different taste, and the effects of the substance. Plea Agreement. at 6-7; RE 95; PAGE ID 257-258. Mr. Taylor further indicated his ultimately-incorrect belief that the product he had received and sold from Westberry was always a mix of heroin and fentanyl, whereas several buys detailed above had yielded only fentanyl. PSIR at 7, ¶24.

The additional information in the PSIR confirmed much of the factual basis of the Plea Agreement itself. Further, while the PSIR related that the parties had agreed the marijuana equivalent of the heroin and fentanyl attributable to Mr. Taylor was between 700 kilograms and 1,000 kilograms, Mr. Taylor had advised that he had received "between 5,000 and 6,000 grams of heroin." PSIR at 7, ¶30.

In addition, the PSIR makes clear that it was unknown exactly when Mr. Taylor had become aware that the drugs he had distributed were having consequences such as bodily injury. For example, the PSIR does make clear that, because of the overdose suffered, but survived, by one end-user on January 13, 2015, *Robinson* likely knew of the potential, more-harmful-than-normal effects that

the drugs could have. PSIR at 4. However, nothing in the Plea Agreement or the PSIR indicates a similar time period, or any other, for *Taylor*.

The transcript of the sentencing hearing is similarly silent on when Mr. Taylor gained knowledge of the more-harmful-than-normal effects of the drugs he was distributing. Sent.T.p. at 10; Doc ID 195; PAGEID 1061. Candidly, Mr. Taylor had indicated in his interview in April of 2015 that "he knew it had been killing people," the he "knew this was wrong" and that he "knew people were dying." Sent.T.p. at 10; Doc ID 195; PAGE ID 1061. However, it is unclear from either the written records or the transcript of the Agent's testimony whether Taylor gained this knowledge before, or, more importantly, *after*, the death of Corey Brewer.

B. Proceedings Below

1. District Court Proceedings

On December 17, 2015, Mr. Taylor was indicted for three counts of violating 21 U.S.C. 841(a)(1) and 21 U.S.C. 846. (Indictment) (RE: 1) (Page ID#1-12). A Plea Agreement was reached, and Mr. Taylor plead guilty to Count 1 of the Indictment. A "Presentence Report" was prepared, and was finalized on September 30, 2016, after which each party filed their sentencing briefs. (Defendant's "Sentencing Memorandum and Request for Relief Pursuant to 18 U.S.C. §3553(a)"); *and*, ("Motion by the United States for an Upward Departure Pursuant to U.S.S.G. §5K2.1); *and*, (Defendant's "Response in Opposition to Motion for Upward Departure"); respectively (RE: 115)(Page ID 361-367); (RE: 176)(Page ID 778-784); (RE: 178)(Page ID 786-790).

Sentencing was held on February 10, 2017. At that time, the remaining counts in the Indictment were dismissed, and the Court heard arguments regarding sentencing. *See generally*, Transcript of Sentencing Hearing, ("Sent.T.p.")(RE 195)(Page ID 1052). The Court also took testimony from Special Agent Jared Sullivan, of the DEA, and as outlined above. *See generally*, Sent.T.p. at 5-15; Doc ID 195; PAGE ID 1056-1066. The government asked for an upward departure pursuant to U.S.S.G. §5K2.1, because of the death of Corey Brewer. Sent.T.p. at 18; Doc ID 195; PAGE ID 1069. On the other hand, Mr. Taylor, through counsel, had opposed the upward departure prior to the sentencing hearing. *See generally*, (Defendant's "Response in Opposition to Motion for Upward Departure")(RE: 178)(Page ID 786-790).

Further, Mr. Taylor had emphasized in his written Sentencing Memorandum the mitigating facts in support of the more lenient sentence requested by Mr. Taylor: his young age, his difficult upbringing but positive family life, his lack of any significant criminal history, and his positive plans for the future after his release, including further education and hopes of employment in the field of information technology. *See generally*, (Defendant's Sentencing *Memorandum)*; Doc ID115; PAGE ID 361-367. Ultimately, Mr. Taylor's sentencing memorandum requested a sentence in the applicable guideline range for a total offense level of 32 with a criminal history score of I, between 70 to 87 months, and at sentencing he requested that the court "not going to the very top end" in the event that an upward departure were granted. *Id. See also*, Sent.T.p. at 42; Doc ID 195; PAGE ID 1075.

Ultimately, the District Court imposed a sentence of imprisonment for 220 months, which represented a 69 month "upward departure" above the top of the recommended "guideline" sentence of 151 months. *Id.* at 46, 16, Page ID 1097, 1067. The Court waived the fine, but imposed six years of supervised release, $4,190.00 in restitution, along with a $100.00 special assessment, and conditions related to his supervised release. *Id.* at 46-49 Page ID 1097-1100.

2. Sixth Circuit Proceedings

Mr. Taylor timely appealed to the Sixth Circuit. (Notice of Appeal) (RE: 182) (Page ID 800-801). In his brief, he argued that the District Court had abused its discretion in fashioning his sentence. *Appellant Brief of Dion Taylor*, Sixth Circuit Docket Number 17-5220, Document 27. First, Taylor argued that U.S.S.G. §5K2.1 should be read to require a demonstration that a Defendant had "intended" or "knowingly risked" the death of a victim. *Id.* Second, Taylor argued that, even if U.S.S.G. §5K2.1 did not contain such a requirement, the record below still did not substantiate a departure under that section. Third, Taylor argued the standard of proof for his particular sentencing proceedings should have been "proof beyond a reasonable doubt" rather than the standard "preponderance of the evidence." *Id.* Fourth, Taylor argued that the District Court had rendered a substantively unreasonable sentence. *Id.*

The United States responded to each contention. *Appellee Brief of United States*, Sixth Circuit Docket Number 17-5220, Document 38. First, Respondent addressed Mr. Taylor's "standards of proof" arguments by framing the issue as one

of "plain error," and by distinguishing Mr. Taylor's cited authority, *United States v. Rebmann*, as having dealt with a disparate section of the Sentencing Manual, §2D1.1, whereas Mr. Taylor's sentencing was conducted pursuant to §5K2.1. *Id.* Second, the United States responded to Mr. Taylor's arguments regarding the "intended or knowingly risked" elements of a §5K2.1 analysis, arguing that Taylor could not demonstrate plain error because the Sixth Circuit had "never addressed the issue," and because, in any event, "the district court made findings that satisfied a requirement that Taylor knowingly risked the resulting death." *Id.* Finally, the United States argued that Mr. Taylor's sentence was not substantively unreasonable.

Mr. Taylor submitted a timely reply. *Reply Brief of Dion Taylor*, Sixth Circuit Docket Number 17-5220, Document 46. Therein, Mr. Taylor argued that a §5K2.1 enhancement should be proved by proof beyond a reasonable doubt, rather than by a simple preponderance, in prosecutions under 21 U.S.C. §841. *Id.* Further, Taylor argued that the Court below was not limited to a plain error review, but that the Court could instead review the merits of his claims for an abuse of discretion under the principles of *Pinney Dock & Transp. Co. v. Penn Cent. Corp.* 838 F.2d 1145 (6th Cir. 1998), which allows a Circuit Court to address an argument not raised in the District Court. *Id.*

The Sixth Circuit held oral argument on April 24, 2018, and issued an unpublished Decision on May 1, 2018. *See*, Decision, Appendix A. The Court found that Taylor's arguments regarding whether a §5K2.1 departure should be

substantiated by proof "beyond a reasonable doubt" were foreclosed by adverse precedent. *Id.* at 4. Specifically, the Court found "it has long been settled that the government must establish such enhancing conduct by a preponderance of the evidence" and that Taylor's cited case of *Rebmann* was distinguishable because *Rebmann* dealt with sentencing under §2D1.1 whereas Taylor's sentence arose under §5K2.1. *Id.* at 4-5.

Second, the Court rejected Taylor's arguments about whether §5K2.1 required a showing that Taylor's conduct had either "intended or knowingly risked" the death of another. *Id* at 5. The Court found that "plain error" review applied, and rejected Taylor's claims regarding *Pinney Dock*, instead finding that Taylor had "conflate[d] the plain error review standard with our general forfeiture principles." *Id.* Since plain error applied, the Court further found that Taylor could not succeed because there was a lack of precedent (and a possible Circuit split) on the issue, therefore foreclosing the possibility of successful plain error review. *Id.* at 5-6. Further, the Court held that, in any event, the District Court's factual findings satisfied the proposed standard.

Finally, the Court rejected Taylor's claims regarding the substantive reasonableness of his sentencing, finding that he had not informed the Court "how" the court abused its discretion, thereby abandoning it on appeal, and finding that the District Court had otherwise imposed a reasonable sentence.

Mr. Taylor requested and received an extension of time to submit the present Petition, and this Petition is submitted within that extended time.

## REASONS FOR GRANTING THE WRIT

For all of the following reasons, Mr. Taylor is requesting that this honorable Court grant a writ of certiorari.

**I.** *Certiorari* is requested to clarify the Sixth Circuit's "*Pinney Dock*" standard for reviewing claims which were not raised during the District Court proceedings.

In his briefing below, Mr. Taylor acknowledged that the particular §5K2.1 arguments raised in his appeal were not presented by his counsel in the District Court. *See*, *Reply Brief of Dion Taylor*, Sixth Circuit Docket Number 17-5220, Document 46, CM/ECF page 7. However, Mr. Taylor argued that his claims should be reviewed on their full merits, rather than through the lens of plain error, *Id.* at 7-8. In support of this argument, he cited *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) for the proposition that, while the Sixth Circuit will generally not address an issue that was not properly raised and preserved in the District Court, this rule was not jurisdictional, but was instead a "rule of practice." Taylor further relied upon Circuit precedent to draw the lines of demarcation for when a Circuit Court may, or should, address an argument not raised in the District Court:

> First, we **may** deviate from the general rule if this is an exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if this appeal presents a "particular circumstance" warranting departure. We also **may** hear an issue for the first time on appeal if doing so would serve an overarching purpose other than simply reaching the correct result in this case. Finally, we **should** address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case.

*Poss v. Morris (In re Morris)*, 260 F.3d 654, 664 (6th Cir. 2001) (emphasis in original) (internal citations omitted)[2]; *see also*, *Foster v. Barilow*, 6 F.3d 405 (6th Cir. 1993); *see also*, *United States v. Ellison*, 462 F.3d 557, 560-561 (6th Cir. 2006) (applying *Foster* and *Pinney Dock* exception in criminal appeal).

Further, Taylor argued that, in such cases, it appeared that the appropriate standard of review was that which normally would have been employed by the Circuit Court, had the issue been properly preserved in the proceedings below. *See generally*, *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 502 (6th Cir 2013)(applying *de novo* review to a partial summary judgment ruling regarding contributory liability); *see also*, *Jones v. Caruso*, 569 F.3d 258 (6th Cir. 2009)(abuse of discretion for review of preliminary injunction); *see also*, *D.D. v. Scheeler*, 645 Fed. Appx. 418, 423 (6th Cir. 2016)(applying *de novo* standard to review "district court's denial of summary judgment based on qualified immunity"); *see also*, *Lockhart v. Napolitano*, 573 F.3d 251, 261 (6th Cir. 2009)(appearing to apply *de novo* standard of review); *but see*, *e.g.*, *United States v. Lucas*, 640 F.3d 168 (6th Cir. 2011)(reviewing "only for plain error" where Appellant failed to object to report and recommendation of magistrate); *and*, *e.g.*, *United States v. Agbebiyi*, 575 Fed. Appx. 624, 631-632 (6th Cir. 2014) (enforcing waiver where "Defense counsel not only failed to object to the calculations in the PSR, he also affirmatively agreed with them").

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[2] It is noted, in the interests of complete candor, that *Poss* cited *Pinney Dock*, which in turn cited *Alexander v. Aero Lodge No. 735, etc.*, 565 F.2d 1364 (6th Cir. 1977), which appears to have been overruled by *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982), which itself appears to have been later overruled. *See generally*, *Defoe v. Spiva*, 2008 U.S. Dist. LEXIS 4116 (T.N.E.D. 2008).

From these authorities, Mr. Taylor argued that his case presented a particular circumstance warranting departure from the normal rule because clarifying his presented legal issues regarding 5K2.1 departures would not just reach a "correct result" for the parties, but would instead serve the overarching purpose of establishing and/or clarifying the law of the Sixth Circuit. As such, Mr. Taylor argued that the Sixth Circuit remained free to address the substance of his arguments under an "abuse of discretion" standard, and as part of which Mr. Taylor is not foreclosed from relief based simply on the unsettled nature of these questions.

The Sixth Circuit rejected Mr. Taylor's invitation. Instead, the Court found that plain error review should apply because Taylor had "conflate[d] the plain-error review standard with our general forfeiture principles." *See*, Decision, App'x A, at 5, FN 2.

True enough, the Sixth Circuit distinguishes between "forfeiture" of claims and "abandonment" of claims. *See generally*, *U.S. v. Sheppard*, 149 F.3d 458, 461 n.3 (6th Cir. 1998)("forfeiture is the failure to timely assert a right, whereas waiver is the intentional relinquishment or abandonment of a known right."). But it is submitted that *Pinney Dock* and its progeny stand as a separate doctrine from the traditional standards of waiver and forfeiture, and thereby justify departure from those traditional standards where, as here, resolving an issue unaddressed in the District Court would serve an overarching purpose other than simply reaching the "correct result" in a case. The Sixth Circuit erred in failing to distinguish these two bodies of jurisprudence, and *certiorari* should be granted to address the scope of

these two doctrines, as well as their application to Taylor's case (as it materially, and perhaps dispositively, affects the disposition of many of his legal claims).

Further, it is requested that the Court grant *certiorari* to clarify the interplay between *Pinney Dock* and the Sixth Circuit's traditional analysis of forfeited vs. waived claims. As noted above, the Sixth Circuit distinguishes between forfeiture and waiver, and the general rule is that a Circuit Court may conduct a plain error analysis over forfeited claims, but that the Courts will not generally review a claim which has been actually "waived." *See*, *e.g.*, *United States v. Rodriguez*, 544 F.App'x 630, 633 (6th Cir 2013). In fact, *Rodriguez* indicated that *Pinney Dock* itself was the vehicle which allowed for plain error review of forfeited claims. (*Id.* at 633). However, *Rodriguez's* principle regarding the standard of review (i.e, that *Pinney Dock* allows forfeited claims to be reviewed for plain error) seems to stand in tension with the greater weight of *Pinney Dock* precedent (which would appear to apply whatever standard would have applied had the issue been properly preserved in the District Court). As such, *certiorari* is requested to clarify that, where *Pinney Dock* applies, the standard of review is that which normally would have been employed had the issue been properly preserved in the District Court.

Under this proper standard, Taylor's arguments would not have been foreclosed by the "plain error" standards, under which an error cannot be "plain" unless the answer is clear under current law. *See generally*, *United States v. Olano*, 507 U.S. 725 734 (1993)). Therefore, the fact that there was no binding (or perhaps even conflicting) precedent answering Taylor's questions presented should not have

stood as a dispositive obstacle to the resolution of his claims. The Sixth Circuit erred when it found to the contrary, and *certiorari* should be granted so that this matter can be reversed and remanded for further proceedings.

**II.** *Certiorari* is requested to resolve inter-Circuit inconsistencies regarding whether sentencing enhancements under U.S.S.G.§5K2.1 must be supported by a finding that the death of an individual had been "intentional" or "knowingly risked."

As noted in the proceedings below, Mr. Taylor's sentencing structure for his offense was governed both by statute and by the United States Sentencing Guidelines. 21 U.S.C. §841(b)(1)(B) provided an initial, statutory sentencing range, and the PSIR for Mr. Taylor indicated that U.S.S.G. §2D1.1(a)(5) and (c)(4) set forth the appropriate base offense level of 32 and a total offense level of 32 which, at Mr. Taylor's criminal history of I, provided for a range of 121-151 months of incarceration.

The Court below, however, fashioned its ultimate sentence of 220 months' incarceration based on the death of Corey Brewer as justification for the "upward departure" issued pursuant to U.S.S.G. §5K2.1. That section provides:

> If death resulted, the court may increase the sentence above the authorized guideline range.
>
> Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two

> guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

*Id.*

As noted in the Circuit proceedings below, several Courts have required a finding that a person's death was either "intended" or "knowingly risked" when determining whether a defendant's conduct "resulted" in the death of a victim for purposes of 5K2.1 sentencing enhancements. *See generally*, *United States v. Rivalta*, 892 F.2d 223 (2d Cir. 1989); *see also*, *United States v. White*, 979 F.2d 539 (7th Cir. 1992)(explicitly following the Second Circuit but expanding the "test" by finding that the "knowingly risked" prong could be, and had been, satisfied by an implicit finding that the defendant had "'put into motion' a chain of events that contained an 'inevitable tragic result'" and that the outcome of this chain of events was "foreseeable.");*see also*, *United States v. Kitchen*, 87 Fed.Appx. 244, 248 (3d Cir. 2004)(affirming departure under 5K2.2 because defendant had "recklessly initiated a course of events that resulted in" victim's injuries), *citing*, *United States v. Diaz*, 285 F.3d 92, 101 (1st Cir. 2002)(*but see*, *Diaz* and *Sanchez*, *infra*); *United States v. Ihegworo*, 959 F.2d 26, 29-30 (5th Cir. 1992)(affirming upward departure under §5K2.1 for defendant convicted of distribution of heroin based on the accidental overdose of one of his customers; court held that defendant "'reasonably foresaw death or serious bodily injury as a result of the heroin he was distributing'"

(quoting sentencing court))[3]; *see also*, " *United States v. Grover*, 486 F.Supp.2d 868 (N.D. Iowa 2007)("when determining whether a death 'resulted' from the offense for purposes of section 5K2.1, a factual finding 'that death was intentionally or knowingly risked is sufficient.'"), *citing*, *White*, *supra*; *see also*, *United States v. Williams*, 51 F.3d 1004, 1012 (11th Cir 1995)("We . . . agree with the Second and the Seventh Circuits that, when determining whether a death 'resulted' from the offense for purposes of section 5K2.1, a factual finding 'that death was intentionally or knowingly risked' is sufficient," including a situation where a Defendant "'put into motion' a chain of events that contained an 'inevitable tragic result.'" White, 979 F.2d at 545.), *quoting*, *White*, *supra*, at 545; *overruled on other grounds*, *Jones v. United States*, 526 U.S. 227 (1999).

This analysis, however, has not been uniform. For example, the First Circuit significantly stretched the borders of this analysis in *United States v. Sanchez*, 354 F.3d 70, 80-81 (1st Cir. 2004)(finding that an upward departure pursuant to §5K2.1 may be warranted even if "'an intent to harm is entirely absent and the defendant was not directly responsible for the death'" as long as the defendant had "'put[] into motion a chain of events that risk[ed]serious injury or death." *Id. citing and quoting*, *United States v. Diaz* (*supra*), 285 F.3d 92, 101 (1st Cir. 2002). And, the Fourth Circuit has explicitly rejected both *White* and *Rivalta*. *See generally*, *United States v. Bayles*, 1993 U.S. App LEXIS 2877 (4th Cir. 1993).

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[3] As Mr. Taylor did in his proceedings below, Mr. Taylor, in the interests of complete candor to the tribunal, acknowledges the factual and procedural similarities between this case and *Ihegworo*.

As it currently stands, the Sixth Circuit does not appear to have ruled directly on this particular topic, and the panel below recognized that "our sister circuits appear to be in discord." *See*, Decision of the Sixth Circuit, Appendix A at 5-6. As such, *certiorari* is respectfully requested so that these conflicting precedents can be harmonized, and so that an appropriate standard for §5K2.1 departures can be established. As to that standard, it is respectfully submitted that this honorable Court should follow the well-reasoned approaches of the Second and Seventh Circuits, as adopted and interpreted by the Third, Fifth, and Eleventh Circuits, and under which §5K2.1 departures must be substantiated by a finding that the death of a victim was "intentional" or "knowingly risked," including situations where the defendant put into motion a "chain of events" that contained a "inevitable tragic result" which was "reasonably foreseeable."

Furthermore, it is submitted that, in Mr. Taylor's case, this is a "distinction with a difference." Although the Court below found that Taylor's argued-for standard had been satisfied (Appx.A. at 6), it is submitted that the evidence adduced below actually fails to substantiate the upward departure. In the District Court proceedings, it was established that Kathy Brown Miller, a co-defendant to Mr. Taylor, had sold what she believed to be heroin to Corey Brewer "on multiple occasions," including the night of his death. Sent.T.P. at 6-7, Doc ID 195; PAGE ID 1057-58 (Testimony of Special Agent Jared Sullivan). However, it appears that the "heroin" was received by Kathy Miller from Benjamin Robinson, another co-

defendant to Mr. Taylor, and who had received the "heroin" from Mr. Taylor. *Id.* at 7-11; Page ID 1058-1062.

It is submitted that these circumstances fail to meet Taylor's argued-for analysis under §5K2.1. Certainly, there was no evidence at sentencing that Mr. Taylor had "intentionally" caused the death of Corey Brewer, and it is submitted that the above conduct fails to demonstrate that Mr. Taylor "knowingly risked" the death of Corey Brewer as the inevitable tragic result of a reasonably foreseeable chain of events. Certainly, all drug illicit drug activity carries with it the risk that an end-user may ultimately overdose on the drugs provided. However, it clearly exceeds the boundaries of the test laid out above to say that *all* drug distribution carries with the "knowing risk" that an overdose is the reasonably foreseeable result at the end of a tragic chain of events – if that were the case, then all such cases would automatically qualify for a departure under §5K2.1 which is not, or at least should not be, the law.

Further, there was no evidence which established when Taylor actually knew the harm the drugs were causing. For example, the PSIR made clear that, because of the overdose suffered, but survived, by one end-user on January 13, 2015, co-Defendant Robinson likely knew of the potential, more-harmful-than-normal effects that the drugs could have. PSIR at 4. However, nothing in the Plea Agreement or the PSIR indicates a similar time period, or any other, for *Taylor*.

Similarly, the transcript of the sentencing hearing is silent on when Mr. Taylor gained knowledge of the more-harmful-than-normal effects of the drugs he

was distributing. Sent.T.p. at 10; Doc ID 195; PAGEID 1061. Candidly, Mr. Taylor had indicated in his interview in April of 2015 that "he knew it had been killing people," the he "knew this was wrong" and that he "knew people were dying." Sent.T.p. at 10; Doc ID 195; PAGE ID 1061. However, it is unclear from either the written records or the transcript of the Agent's testimony whether Taylor gained this knowledge before, or, more importantly, *after*, the death of Corey Brewer. Thus, the evidence adduced below does not demonstrate that Taylor "knowingly risked" the death of Corey Brewer unless that "knowing risk" can be demonstrated through nothing more than Taylor's participation in drug distribution, in and of itself, which, again, Mr. Taylor submits should not be the law.

As such, *certiorari* is requested so that an appropriate standard for §5K2.1 departures can be established, and under which it is clear that the District Court abused its discretion in imposing the §5K2.1 departure in this case.

**III.** *Certiorari* is requested to resolve an intra- Circuit inconsistency regarding the Sixth Circuit's treatment of sentencing issues under U.S.S.G. §5K2.1, specifically, whether such sentencing enhancements must be established by "proof beyond a reasonable doubt" rather than by a mere "preponderance of the evidence."

During the Circuit proceedings below, Taylor respectfully suggested that there was an incongruity in the Sixth Circuit's precedent regarding the level of proof required at a sentencing proceeding for a violation of 21 U.S.C. §841 where it is alleged that a death occurred as a result of a defendant's activity. Specifically, Taylor noted that the Sixth Circuit had held that the "death" provisions under U.S.S.G. §2D1.1 must be proved "beyond a reasonable doubt" but that sentencing

enhancements under §5K2.1, lodged for the exact same conduct, need only be proved by a preponderance of the evidence. *See and compare*, *United States v. Rebmann*, 321 F.3d 540, 542-545 (6th Cir. 2003) *with United States v. Pinkney*, 644 Fed. Appx. 478, 484 (6th Cir. 2016); *see also*, *United States v. Lawler*, 818 F.3d 281, 285 (7th Cir. 2016); *See also*, *Appellant Brief of Dion Taylor*, Sixth Circuit Docket Number 17-5220, Document 27, at CM/ECF 32-34.

From these precedents, Mr. Taylor submitted that, under *Rebmann*, the general preponderance standard should be inappropriate for determinations in 21 U.S.C. §841 cases where the "enhancement" sought is based on death pursuant to §5K2.1. In making this argument, Taylor recognized that a sentencing enhancement could *generally* be proved by a preponderance of the evidence, so, an "abduction" enhancement under 5K2.4 or a "property damage" enhancement under 5K2.5 would still be appropriately subject to proof by a preponderance of the evidence. *Id.* CM/ECF 33. However, Taylor argued that, under *Rebmann*, "death" has been found to be not simply a sentencing enhancement, but an element of the offense of conviction which requires proof beyond a reasonable doubt. Therefore, Taylor argued that government should not be allowed to use 5K2.1 to obtain, under a lesser standard of proof, exactly what it would be prohibited from obtaining under 2D1.1 without proof beyond a reasonable doubt. Thus, Taylor requested that the Circuit Court hold that enhancements for death pursuant to 5K2.1 must be proved beyond a reasonable doubt in prosecutions under 21 U.S.C. §841.

The government distinguished these sentencing provisions, as well as Taylor's cited case of *Rebmann*, on the basis that §2D1.1 contained limiting language which linked the "death" to the "offense of conviction," and that did not appear in §5k2.1. *Appellee's Brief*, Sixth Circuit Docket Number 17-5220, Document 38, at CM/ECF 17-18. The Sixth Circuit (largely) agreed, finding that *Rebmann*, and its standard of "beyond a reasonable doubt" was inapposite because the death enhancement in *Rebmann* was "part and parcel of the elements of the convicted offense" whereas the enhancement in the present case was based on relevant conduct under 5K2.1, not offense conduct. Appendix A at 4-5.

True enough, 5K2.1 and 2D1.1, along with their disparate burdens of proof at sentencing, can peacefully coexist in many circumstances. So, a death which results from the "offense of conviction" of drug trafficking might still be subject to proof beyond a reasonable doubt, whereas a preponderance might be appropriate for relevant conduct / 5K2.1 purposes where death "resulted" from a car accident. *See generally*, *United States v. Munoz-Tello*, 531 F.3d 1174 (10th Cir. 2008)).

But, that is not what was alleged herein. Instead, the United States alleged that Mr. Taylor's conduct introduced drugs into a transaction stream which eventually led to the death of the victim. *Id.* at 23-24, 27 (CM/ECF pages 33-34, 37). Thus, even if the "offense of conviction" is slightly different (based on whether the death itself is an actual element of the offense), this case still presents a situation where the exact same conduct – death resulting from the distribution of drugs – is subject to different burdens of proof at sentencing simply depending upon which

section of the Manual is used. As with the last item, this either cannot, or at least should not be, the correct interpretation of the law.

As such, it is respectfully requested that this honorable Court grant *certiorari* to clarify that where, as here, the conduct that forms the basis of a §5K2.1 enhancement is that a death resulted from the use of a substance that was at issue in a 21 U.S.C. §841 prosecution, the §5K2.1 enhancement must be demonstrated by proof beyond a reasonable doubt.

As with the last item, it is submitted that so holding in this case provides a "distinction with a difference." As noted above, a review of the sentencing transcript and plea agreement raises, at least, non-frivolous questions about whether the specific drugs which caused Brewer's death had been obtained from the chain of distribution which involved Mr. Taylor. For example, Brewer could have previously obtained other drugs from a different source which ultimately caused his death, and it is possible that Brewer could have sought additional drugs even after having obtained drugs from the distribution chain involving Mr. Taylor. This alternative is certainly possible given that the last person to see Brewer alive "wasn't sure if Brewer was still parked in the parking lot at [the department store] in his SUV or if he was leaving the parking lot." *See*, Plea Agreement at 4, Doc ID 95; Page ID 255.

Clearly, the courts below found that these facts met the preponderance standard. However, it is far less clear that these facts would be sufficient to prove the sentencing enhancement beyond a reasonable doubt. As such, Mr. Taylor respectfully requests that this honorable Court grant *certiorari* to clarify that

where, as here, the conduct that forms the basis of a §5K2.1 enhancement is that a death resulted from the use of a substance that was at issue in a 21 U.S.C. §841 prosecution, the §5K2.1 enhancement must be demonstrated by proof beyond a reasonable doubt, and to remand this matter for further sentencing proceedings under the appropriate standard.

**IV.** *Certiorari* is requested to determine whether the District Court and the Sixth Circuit acted in an abuse of discretion by imposing a substantively unreasonable sentence in Mr. Taylor's case.

The substantive reasonableness of a District Court's sentence is reviewed for an abuse of discretion, and a sentence of a district court may be found to be substantively unreasonable if the sentence is selected arbitrarily, if it is based on impermissible factors, if it fails to consider a relevant sentencing factor, or if it gives an unreasonable amount of weight to any pertinent factor. *See generally*, *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008); *see also*, 18 U.S.C. §3742(a)(3) *and* (f)(review of above-guidelines sentences). Although a properly-calculated, within-guidelines sentence is presumed to be reasonable, a sentence falling outside the guidelines range, while not "presumptively unreasonable," does not enjoy the same presumption of reasonableness. *Id.* In order to make a determination of reasonableness, courts must consider the statutory factors contained at 18 USC §3553(a), although the District Court is not required to explicitly state each one. *United States v. Kirby*, 418 F.3d 621, 626 (2005). In the present case, the facts presented, when read in light of §3553(a) demonstrate that the District Court improperly weighed the 3553(a) factors, and that, even if the 5K2.1 departure is

affirmed, the amount of the departure constituted an abuse of discretion when the sentence is considered with reference to the two most pertinent factors: 18 U.S.C. §3553(a)(1) and (2).

First, and as argued below regarding the nature and circumstances of the defendant, Mr. Taylor is a young man with no significant prior criminal history. PSIR at 9-10. He immediately accepted responsibility for his role in the offenses, and offered substantial assistance, although not as much as the United States had originally hoped. *Id.* He had a difficult background in his youth, suffering the loss of his mother and the lack of involvement of his father, but otherwise had strong family ties, and an intent to further his education and his vocational abilities through a career in information technology. *Id.*

Second, and as also argued below, Mr. Taylor acknowledged the serious nature and circumstances of his offense. However, there are mitigating legal arguments outlined herein regarding Taylor's level of knowledge, intent, "knowing risk" of, or perhaps even culpability for, the most serious event in the conspiracy: the death of Corey Brewer. As such, while the facts of the case are serious, it is equally true that the case contained mitigating circumstances which should have served to further reduce Mr. Taylor's sentence. Also, it is noted that the ultimately-calculated-range vs. the actual-sentence-imposed yields a sentence that is almost six years longer than the guidelines sentence, which is a significant departure, even considering the underlying facts alleged.

Furthermore, the provisions at §5K2.1 demonstrate that a lesser sentence was warranted. For example, §5K2.1 instructs the sentencing court to consider the defendant's state of mind, and the degree of planning or preparation. *Id.* Here, there was (and is) substantial mitigating evidence regarding Mr. Taylor's knowledge or intent regarding the death of Corey Brewer. Thus, while a court may (and did) find legal culpability, it is submitted that it is lessened from a circumstance from where a death was intentional. Further, and as to other "appropriate factors" under 5K2.1, it is noted that there were not "multiple deaths." Id.

In addition, 5K2.1 instructs a court to consider "the dangerousness of the defendant's conduct [and] the extent to which death or serious injury was intended or knowingly risked. . .". Id. The arguments set forth above regarding the lack of evidence in the record about Mr. Taylor's knowledge or intent in this matter should again provide mitigating circumstances for consideration.

In sum, the nature and circumstances of the offense, as well as the history and characteristics of Mr. Taylor, provided mitigating circumstances that should have weighed in favor of a sentence of less than 220 months, and *certiorari* should be granted to review the substantively unreasonable sentence of the District Court.

Furthermore, and as argued below, it is submitted that a lesser sentence would have still reflected the seriousness of the offense, promoted respect for the law, and provided just punishment for the offense. In this case, the Guidelines range based on the higher drug quantity still provided for a significant sentence of incarceration – 121 to 151 months. Thus, this is not a case where, but for the

upward departure, a defendant would have been "getting off light" – this is a case where, even under the base Guidelines range, the Defendant would still spend greater than ten years in a federal correctional institution.

As argued below, this base sentence, in and of itself, would have provided strong deterrence, both specifically societally and specifically. It would have provided specific deterrence, especially given that even the short time of incarceration had made a profound impact on Mr. Taylor. See, Defendant's Sentencing Memorandum at 5, Doc ID 115; PAGE ID 365. And it would have provided societal deterrence, as even a sentence at the bottom of the range, 10 years, is a significant sentence that would promote respect for the law, reflect the seriousness of the offense, and provide just punishment. As noted in Mr. Taylor's appellate briefing, given that he was, at the time of sentencing, a young man with no significant criminal history, a sentence at even the bottom of the range, 10 years, sends a starkly clear message to all who would listen: there are no second chances, and a federal court will not hesitate to severely punish wrongful conduct. Thus, it is submitted that a sentence well under 220 months would have served the goals of 18 U.S.C. §3553(a)(2), and that the District Court abused its discretion in holding otherwise.

Finally, 5K2.1 is clear that it does not "automatically suggest a sentence at or near the statutory maximum." Id. However, and despite this clear policy statement, the Court below stated that it considered the "starting point for the analysis" to be "240 months," which it considered to be the capped end of the statutory range. *See*,

Sent.T.p. 31, 45, Doc ID 195; PAGE ID 1082, 1096. ("It's capped at 240. Now, that would be the starting point for the analysis before I consider the factors of 3553, and that would include any arguments that would be made for earlier cooperation in the case under the authorities that have been cited, including United States versus Blue.") *Id.* at 31. It is submitted that the Court's use of what it considered to be the statutory maximum as the "starting point" for the sentencing analysis violated the policy statement of 5K2.1.

Finally, in no way, shape, or form, did Taylor "abandon" this argument in his Circuit proceedings below, as alleged by the Circuit Court in its opinion. Indeed, even the case cited by the Court as support of its "abandonment" claim, *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063-1063 (6th Cir. 2014), holds no water with respect to the issues raised herein. First, it is a civil case, having nothing to do with the arguments before this honorable Court. Second, and to the extent that the Court in *Boegh* addressed "abandonment," the principles set forth therein (i.e., "that 'perfunctory and undeveloped arguments' are waived on appeal") actually demonstrate that Taylor did not "abandon" this argument at all – in fact, he dedicated nearly five full pages of his merits briefing to this issue. In sum, Taylor did not "abandon" his substantive reasonableness arguments, and the Sixth Circuit erred when it held to the contrary.

Given the foregoing, it is respectfully submitted that this honorable Court should grant *certiorari* to find that the 220 month sentence constituted an abuse of discretion, to reverse that sentence, and to remand for further proceedings.

## CONCLUSION

Therefore, and for all of the foregoing reasons, Petitioner Taylor respectfully requests that this honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, along with the attached Appendix, was served this 27th Day of September, 2018, via overnight FedEx delivery service, postage prepaid, upon the following persons:

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I further certify that an electronic copy shall be sent to the following email addresses:

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