No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA D. EWING,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. §3006A(e)(7) and Rule 39 of this Court, Petitioner Joshua D. Ewing requests leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed *in forma pauperis*.

Petitioner was represented by counsel appointed pursuant to 18 U.S.C. §3006A in the Sixth Circuit Court of Appeals.

Respectfully submitted,

Dated: November 28, 2018

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QUESTION PRESENTED FOR REVIEW

I. Whether this Court's Opinion in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) needs updating to address what constitutes sufficient evidence, in identifying the user of an electronic communication device in the commission of a singular, user-level drug transaction, where no other indicia of user identity exists beyond its registration to the defendant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua D. Ewing ("Petitioner") respectfully petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 31, 2018.

OPINIONS BELOW

The August 31, 2018 Opinion of the United States Court of Appeals for the Sixth Circuit (12-3806) is unpublished and is not yet available in the Federal Appendix Reporter. (App. A-1).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 31, 2018 affirming his conviction and sentence. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution, Fifth Amendment:

No person shall be . . . deprived of life, liberty or property without due process of law. . .

STATEMENT OF THE CASE

An Overdose Death –

Jeremy Deaton was an opioid addict. Petitioner had been an honors student, the kicker for his high school football team, and was college bound with a soccer scholarship, when his own opioid addiction derailed his life. Both men lived in Lexington, Kentucky in 2016. Joshua was 27 years-old and Jeremy was 37. Mr. Deaton had just finished a stint in rehab in late 2015 for his addiction; but sadly, by early 2016, he was using again.

In the early morning hours of February 8, 2016, after Super Bowl Sunday, Jeremy Deaton used cocaine, heroin and fentanyl at his residence and died. His death certificate said he died because of acute cocaine and fentanyl toxicity.

Who Is To Blame? –

One of the first responders to the scene was Lexington Police Officer Nicholas Music. Officer Music recovered Mr. Deaton's cell phone. A technology

vender for the Lexington P.D. was able to download the text messages and phone calls Deaton had made on February 7 and 8, 2016. Officer Music examined Deaton's phone on the scene for text messages and took photos of those messages.

The texts appeared to show Mr. Deaton looking to buy drugs on the night of February 7, 2016, when he sent a text to a contact in his phone labeled "Josh." The time was 11:25 p.m. on 2/7/16. The person using the phone on the other end texted back that he or she had some "KILLA" and the two appeared to make arrangements to meet that night for the transaction.

Officer Music said he could not tell if a drug transaction ever took place between Mr. Deaton and someone named "Josh." Nor did he know if anyone came to Deaton's house between 11:25 p.m. and the next morning.

Lexington Narcotic's Detective, Lieutenant Timothy Graul was assigned to the local DEA task force for just over 18 months at the time of his testimony, but had over 10 years experience in law enforcement prior to that assignment.

Detective Graul was asked to try and figure out what was being communicated in Deaton's texts the night he took the drugs that killed him. He indicated that Deaton texted with a phone number assigned to a "Josh" in the contacts on his phone. There was what appeared to be a potential drug transaction being set up. The "Josh" number texted that he or she had some "KILLA." Deaton texted that the seller should "ride this way" and that he needed a "half," if possible. The texting indicated the price per "G" (or gram, according to Det. Graul) would be $170, which Detective Graul said was a common price for

heroin in the Lexington, Kentucky area. The texts seemed to indicate the two would meet at a BP gas station, and that the sale would involve a "G." Deaton texted that he had to hurry up, because he had his child at home.

Deaton withdrew cash from his bank right across the street from a BP gas station in the area soon after the text messaging. The "Josh" number later texted Deaton saying "Don't do usual amount." Deaton responds "1/2?" and the other number states "Of usual I mean"... "maybe a little over half."

A company called Cellebrite extracted the call and text data from Deaton's phone. The contact associated with the phone number, ending in the numbers 8278, for "Josh" was created on December 5, 2015. A second number in the phone associated with a "Josh The Man," was a phone number ending in 5245, created on July 18, 2015. The cellular phone provider for both numbers showed they were registered to Petitioner at a specific address in Lexington. Further research showed that both numbers and same street address had been provided by Mr. Ewing earlier in 2015 in another context that was not disclosed at trial.

Mr. Deaton first texted the 5245 number and did not get a response. Then he texted a request for drugs to a number for a "Pedro," without a response. Then he texted to the 8278 number and received a response. Detective Graul stated that he had discovered who "Pedro" was and decided that he was not the source of the drugs, without explanation. On cross-examination, Detective Graul admitted that Pedro had a criminal record dealing drugs.

Detective Graul could not say that a transaction involving heroin, fentanyl or cocaine ever took place on the night of February 7, 2016, though he suspected

one did. The evidence did not rule out that Deaton had someone visit his residence either before or after his 11:25 p.m. text on either February 7th or 8th, 2016 to deliver drugs to him.

There was no evidence presented that Mr. Ewing was the one using the phone at the time the text messages were sent to Deaton, beyond the phone being registered to Petitioner. No one saw the alleged drug transaction on the night, or early morning, in question. There were no pictures or videos of the transaction, no one testified that they had any knowledge of a drug transaction between Petitioner and Mr. Deaton.

As a result of the cell phone records search, Detective Graul obtained an arrest warrant for Petitioner. He arrested Mr. Ewing on June 29, 2016. Mr. Ewing did not know he was about to be arrested, according to Detective Graul. When arrested, Petitioner had no drugs on him, no drug paraphernalia, no weapons, no large sums of cash, nor he did have a cell phone on him that was associated with any of the phone numbers in the case. Ewing had gotten a new phone and phone number at some unidentified time after Mr. Deaton's death, but before his arrest. Detective Graul could not say that getting the new phone and phone number were related to the criminal case against Mr. Ewing.

Petitioner was indicted on May 5, 2016 on one count of knowingly and intentionally distributing a mixture or substance containing a detectible amount of heroin and a detectible amount of fentanyl, the use of which resulted in the overdose death of another, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C).

Because Petitioner had a prior drug *possession* conviction from 2015, where he was caught with less than two grams of heroin for personal use – he was shooting up in a car in a Wal-Mart parking lot – the government filed a notice of prior conviction under 21 U.S.C. § 851 to enhance Mr. Ewing's punishment, if convicted, from zero to twenty years imprisonment, to LIFE without the possibility of parole.

A jury trial commenced on January 10, 2017. On January 12, 2017, the jury returned a verdict of guilty to the indictment. On April 27, 2017, the district court sentence Petitioner to a mandatory term of LIFE imprisonment under 21 U.S.C. § 841(b)(1)(C) and 21 U.S.C. § 851. (Appx. A-24).

The conviction was timely appealed to the United States Court of Appeals for the Sixth Circuit. Part of one of three issues raised was sufficiency of the evidence, based upon the identity of the user of the phone registered to Petitioner. The Court of Appeals reversed Ewing's conviction for being the "but for" cause of Deaton's death, but affirmed his conviction for the lesser included offense of distribution of a controlled substance under 21 U.S.C. § 841(a)(1), ordering his resentencing in accordance. (Appx. A-22).

REASON FOR GRANTING THE PETITION

I. To Establish A Standard For Determining What Constitutes Sufficient Evidence To Identify The User Of A Cell Phone Or Other Electronic Communication Device Used In A Crime, When No Other Direct or Circumstantial Evidence Exists As To Who The User Was, Beyond Who The Device Is Registered To.

Introduction –

There is an opioid problem in the United States. This is a surprise to no one who watches the news, or literally has family or friends who also know other people. Sadly, the degree of separation between most citizens and someone who knows someone affected by opioid addiction or overdose is just that, two degrees.

There is an overarching desire on the part of concerned citizens, especially those in communities hardest hit by this crisis, to fix the problem and make someone "pay" for it. Unlike the crack epidemic of the 1980's, where a lack of self-control or moral fiber was commonly attributed to addicts, and overdoses were seen as "self-inflicted," the opioid epidemic has engendered more sympathy for users, and perhaps more animus toward sellers.

The desire for someone to "pay" for an addict's overdose is understandable. However, as a nation of laws that require sufficient proof of wrongdoing, before punishment can be imposed, the law acts as a bulwark between a rush to judgment and actual justice. Unfortunately, sometimes justice means that the only persons to "pay" for an overdose death are the user, and the user's family and friends.

Sufficiency Of The Evidence – Text Messages

There was no evidence presented that Petitioner possessed the phone registered in his name on the night in question. There was no evidence presented that Petitioner was using that phone to send text messages to set up a drug deal.

The standard for sufficiency of the evidence is found in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). There, this Court held that a verdict will stand only if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Here, in a cell phone text message case, to find a defendant guilty without more than is present in Petitioner's case, the jury would have to impermissibly stack inferences to create "facts" that were not proven true by the evidence presented. Namely, the jury would have to infer that because the phone used in the crime was registered to the defendant, the owner of the phone must have been the one to commit that crime. More specifically, the jury had to infer #1, that Petitioner was in possession of the phone registered to his name on the night in question; then #2, infer from the prior inference that Petitioner was the one using that phone and not some third party; then, #3, stack upon those two inferences the inference that Petitioner was both using his phone and sending those text messages to Deaton.[1]

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[1] There is a fairly easy technique used by scammers and other criminals used to mask a phone's identity called "phone spoofing." A person's phone number can be used by someone else on a second cell phone, with the help of an "App." The "spoofed" number then shows up on the screen of a third-party recipient's phone, making it look like the call or text is coming from the first phone. To read a description of how this works, see: http://www.businessinsider.com/phone-number-spoofing-2016-2

Counsel for Petitioner could find no case law on point from this Court on the stacking of inferences, though Sixth Circuit has addressed the issue, concluding that the stacking of inferences violates the accused's right to due process under the 5th Amendment's guarantee to a fair trial, and to have guilt proven by sufficient evidence. *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997). Also see, *United States v. Lowe*, 795 F.3d 519, 522-23 (6th Cir. 2010), ruling in a child pornography prosecution that a laptop belonging to the defendant was also accessible to others he lived with, and even though the laptop user name was "Jamie" (the defendant's name was James) and had logged into a Yahoo! Email webpage several times, where child pornography was downloaded, the court of appeals concluded that it would require impermissible stacking of inferences to conclude the illegal images on the computer were the defendant's.

Identity Of Sender –

No government witness said, and no other evidence showed, that Petitioner was using a phone registered in his name on February 7 or 8, 2016. No government witness said that Petitioner met with decedent on either one of those days to consummate a drug transaction. Without such proof, there can be no conviction. The jury should not be permitted to just assume the defendant was the one sending text messages from a phone registered in his name.

There was no testimony, video, photographic or other documentary evidence that Petitioner was using the phone registered in his name on the night Jeremy Deaton apparently purchased drugs. There was no cell-tower location data

indicating that the phone registered to Petitioner was anywhere near where Petitioner lived at the time, or even if the phone was even in the state of Kentucky. Likewise, there was no evidence presented that Petitioner ever met with or was at the home of Deaton on the night in question.

The basic tenant of sufficiency of the evidence in cell phone – and electronic communication device – cases in the United States should be that if there isn't any evidence presented that the person to whom the cell phone was registered was the one using it, without additional circumstantial evidence, then there is insufficient evidence to convict the owner of the phone for crimes committed with that phone.

These cases are similar to hit-and-run car accidents. Where the identity of the driver of the car was never proven, the owner of the car is under no obligation to prove that he or she was not driving their car at the time of the accident. It is the obligation of the government to prove that the owner of the car was the driver, beyond a reasonable doubt. The government would have to provide enough evidence, either through eyewitness testimony, traffic cameras, or other circumstantial evidence, to identify the driver.

What was the approximate age of the driver? Was the driver male or female? If the driver was a male - did the driver have a mustache or beard? What was the driver's hair color? Was the driver Caucasian, African-American, Hispanic or Asian, etc.? Was the driver overweight, or an average build? If enough of those factors closely matched the description of the car's owner, then perhaps a jury

would have enough to convict the owner of the crime. Likewise, did a car matching the description of the one in the accident turn up at an auto-body shop with damage consistent with a hit-and-run accident, where the accused was the one who dropped it off, telling the shop manager that he or she had "hit a deer."

If we are to imprison a person for years or decades, or in the zeal to make someone "pay" for the opioid crisis, for the rest of that person's life, there should be substantial, competent evidence that he or she was the one "driving the car."

The identity of the person texting on the "Josh" phone is a foundational necessity to sustain the conviction and cannot be inferred by the fact finder without more evidence than the phone's registration to the defendant.

In this case, the government did not prove Petitioner was using the phone registered to his name during the relevant time period. Without that evidence, there can be no conviction.

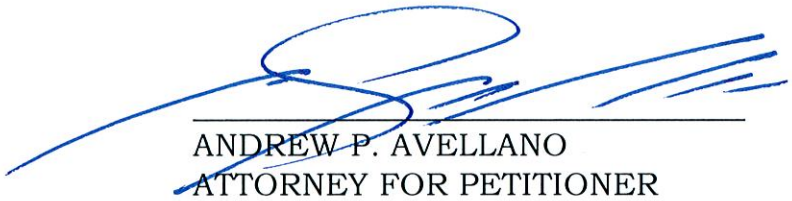
Absence of Other Indicia of Guilt –

Petitioner was arrested while riding in a car. He was not expecting to be arrested. Subsequent to his arrest by Detective Graul in May 2016, a search of the vehicle he was in and his person turned up no illegal drugs, no drug paraphernalia, no large amounts of cash, no guns or other weapons, or any other indicia of guilt to suggest he was a drug dealer.

CONCLUSION

For all the foregoing reasons, Mr. Ewing prays this Court will grant his petition for certiorari and order full briefing and arguments on the merits. Alternatively, he requests the Court to grant the petition outright, vacate the opinion below and remand this case to the court of appeals, for disposition in accord with the following standard: If a defendant's cell phone is used to send text messages evidencing a crime, without other direct or circumstantial evidence that the defendant was the one using the phone or directing it to be used by another for illicit purposes, this is insufficient evidence to convict the owner of the phone for the alleged crime.

Respectfully submitted,



Dated: November 28, 2018

ANDREW P. AVELLANO
ATTORNEY FOR PETITIONER

APPENDIX