IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DAVID L. PRICE - Petitioner,

V.

UNITED STATES OF AMERICA - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

The petitioner, David L. Price, through PRO SE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in case No. 17-3077, entered on October 19, 2018. Mr. Price did not petition for a rehearing by the panel nor for a rehearing **en banc.**

OPINION BELOW

On October 19, 2018, a panel of the Court of Appeals entered its ruling affirming Mr. Price's 37-year sentence for all 13-counts of his Superseding Indictment. The Court of Appeals' decision is published at 2018 U.S. App. LEXIS 29514. Mr. Price was sentenced in the United States District Court for the Northern District of Illinois, Eastern Division, which did not issue any

published decisions related to his sentence.

JURISDICTION

The Court of Appeals entered its judgment on October 19, 2018. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT RIGHT TO DUE PROCESS

18 U.S.C. § 3663(a)(1)(A)

STATEMENT OF THE CASE

On July 31, 2012, a grand jury for the Northern District of Illinois, indicted Mr. Price with a heroin conspiracy, in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2, two telephone counts, in violation of 21 U.S.C. § 843(b), conspiracy to launder proceeds, in violation of 18 U.S.C. § 1956, eight counts of money laundering, in violation of 18 U.S.C. § 1956, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). On March 12, 2014, following a seven-day jury trial, the jury found Mr. Price guilty of the 13 Counts included in the superseding indictment.

On August 10, 2017, the district court sentenced Mr. Price to concurrent sentences of thirty-seven years' imprisonment on Count 1, four years' imprisonment on Count 2, twenty years' imprisonment on Counts 4-13, ten years' imprisonment on Count 14, ten years' supervised release on Count 1, three years' supervised

release on Count 2 and 4-14, $11,693.00 in restitution, and a special assessment of $ 1300. (Id). The Court entered the judgment on October 6, 2017, and Mr. Price timely filed his notice of appeal on October 3, 2017, which was affirmed by the Honorable Seventh Circuit Court of Appeals.

THE ALLEGED CONSPIRACY

The Government alleged that as early as 2005, Mr. Price conspired with at least eight co-defendants to supply heroin to multiple dealers on the west side of Chicago. Mr. Price employed people to mix, package, and deliver wholesale quantities of heroin to spot supervisors and dealers who sold the heroin to customers. Mr. Price rented multiple apartments on the west side, including one named "Up Top" that they used to mix and bag the heroin. Mr. Price allegedly obtained a significant amount of money from the sales of heroin that he used to purchase multiple homes, cars, clothing, and jewelry. He purchased many of the homes and vehicles through straw purchasers, including his family members and girlfriends, and this formed the basis for the money laundering counts.

Mr. Price sold high quality heroin. He controlled how the heroin was cut and packaged. The heroin was allegedly mixed with Dormin, a sleep aid, to increase the profit. Once cut, the mixers used small pieces of aluminum foil and secured it with a piece of colored tape on the top and clear tape on the bottom. The colored tape was Mr. Price's "trademark" and allowed buyers to know that the heroin came from him.

Mr. Price allegedly fronted the heroin to his workers. In other words, the workers would pay Mr. Price the cost of the heroin from their profits. Mr. Price sometimes made arrangements with some of his dealers where they agreed to rotate the profits. For example, if the dealer regularly sold 100 grams of heroin, once it sold, the first time he would give all profits to Mr. Price and the next time he would keep all the profits.

Conspirators repeatedly tried to avoid detection by the police. To avoid authorities, the conspirators used rental cars. They also used cell phones and spoke in code. Two of these calls formed the basis for the telephone counts, Counts 2 and 4. If they were moving the heroin, they sometimes would have another car trail the car that had the drugs, so the police could not get behind the "dirty" car. The apartments used for mixing were also allegedly switched when there was noticeable police activity near the apartment.

James Brown "Hershey" testified that he brought Mr. Price $20,000 in cash on a weekly basis, and others were returning similar amounts. Mr. Brown's relatiionship with Mr. Price changed in late 2007 when Mr. Brown was gambling and lost some of Mr. Price's money. Mr. Brown stated that Mr. Price would no longer give him heroin to sell and told him that he would have to get his heroin through "Bleek," another conspirator. In January 2008, Mr. Brown told Bleek that he did not want any more heroin from him. On January 25, 2008, two masked men approached Mr. Brown and shot him twice in the leg. The government presented evidence

that Mr. Price had something to do with the shooting, **although it was clear that he was not a shooter.** Following this shooting, the conspirators stopped mixing and bagging in a singular location in order to appear "less suspicious."

In a search of one of Mr. Price's homes, agents found a gun. Government witnesses, including Joenathan Penson and Latonia Shaw, testified that Mr. Price owned the gun. This formed the basis for the conviction on Count 14, felon in possession of a gun.

SENTENCING

The U.S. Probation Office presented the PSR to all the parties. After receiving additional information, Probation submitted supplemental reports that revised the recommended advisory guideline range. Based on the 2015 Guidelines, Count 1 & 2 were grouped. U.S.S.G. 3D1.2(d). The base offense level for 90 kilograms of heroin was 38, pursuant to U.S.S.G. §§ 2D1.1 (a)(5) and (c)(1). The following **enhancements** were added to the base offense level:

* 2 levels for Possession of a dangerous weapon (U.S.S.G. § 2D1.1(b)(1));
* 2 levels for directing and using violence (U.S.S.G. § 2D1.1(b)(2));
* 2 levels for using and maintaining a premises for illegally mixing, packaging, and distributing heroin (U.S.S.G. § 2D1.1(b)(12));
* 2 levels for committing the instant offense as a part of a pattern of criminal conduct which he engaged as a livelihood (U.S.S.G. § 2D1.1(b)(15)(E));
* 4 levels for being an organizer or leader of a criminal activity involving five or more participants and was otherwise extensive (U.S.S.G. § 3B1.1(a));
* 2 levels for obstruction of justice (U.S.S.G. § 3C1.1).

This resulted in an adjusted offense level of 52. For Counts 4-13, an additional two levels were added, because Mr. Price was convicted pursuant to 18 U.S.C. § 1956, bringing the adjusted offense level to 54.

To arrive at a Criminal History Category II, Mr. Price received one point each for two convictions for driving on a suspended or revoked license, pursuant to U.S.S.G. § 4A1.1(c). These two points resulted in the designation of Category II.

In the Government's Initial Version of the Offense submitted to Probation, the government **did not** include any information about Mr. Price's **alleged** murder of Gregory Holden **or** threat of murder of Mokece Lee. On June 10, 2016, the government submitted a Supplement to the Government's Version of the Offense that introduced the Holden murder **for the first time.** Prior to sentencing, the government filed its sentencing memorandum that explicitly detailed the murder of Holden and the threatened murder of Lee. **HOWEVER, MR. PRICE [WAS NEVER CHARGED] OR CONVICTED FOR MURDER OR ATTEMPTED MURDER IN THE CASE AT BAR.**

At sentencing, Mr. Price renewed his objections to all of the enhancements. The court overruled his objections and concluded that all of the **enhancements** applied. Right as the government announced it was ready to call its first witness, Mr. Price asked to make one comment. Counsel stated:

> "While obviously the government can submit any evidence that they choose at a **sentencing hearing,** from the beginning of all this, I would like the Court to be cognizant of the fact of our view that what this constitutes is basically the presentation of [the

> **Holden**] murder case **as an end run around the BURDEN OF PROOF BEYOND A REASONABLE DOUBT.** If they thought that Mr. Price should be --could be convicted of this murder and get a life sentence... they could have brought this case against him in court, and we could have had a charge if they thought they could support it. They can't. This is a weak case." Id. (R. 157: 22).

The government responded that the sentencing hearing was "absolutely the correct proceeding, because it obstructed justice in this very case." (R. 157:23). The government noted that the evidence was not weak and it intended to present live testimony **on that murder so the court could find that murder after hearing the evidence.** Despite having already concluded that the enhancements applied, the court acknowledged that there was an enhancement for violence that Mr. Price objected to, so the government had the right to present evidence of such. The government added that even without the Holden murder, Mr. Price was already off the charts and subject to an advisory guideline sentence of life imprisonment.

The government called three witnesses regarding the Holden murder. First, it called Roshunda King, Holden's fiancé and children's mother. She testified that she and Holden had been together for almost 20 years. In late 2011, Holden came home on bond after being charged with a federal crime, and he told her that Mr. Price wanted him dead. On December 8, 2011, she left for work while Holden stayed home with two of their three girls. Mid-morning, she called her mom and learned that something was wrong with Holden. She arrived at the house 15 minutes later, and learned that he had been murdered. She testified that she immediately suspected Mr. Price.

Second, the government called Joenathan Penson to testify. Penson testified that after Mr. Price's home was searched in October 2011, Mr. Price allegedly became very paranoid. Penson stated that both before and after the search, he heard Mr. Price say that he believed Holden was working with the police, and "they need to get rid of everybody that can possibly tell on us." A couple of days after Holden's murder, Mr. Price and Chris Barbee came to pick Penson up. Penson testified that Mr. Price told him that they killed Holden, specifically that they had been out all night, saw Holden kiss his fiancé for the last time, there were mattresses on the wall in the apartment, Holden had screamed, and they had to leave quickly because the girls were in the house. Penson also testified that around the time his house was searched, Mr. Price had also been concerned that Lee was working with the police. **All these, were allegations made by Peson during the Sentencing Phase.**

Third, the government called Agent William Desmond. He testified that Holden had been indicted and agreed to cooperate. He also testified regarding the Illinois Tollway data collected for an I-Pass registered to Mr. Price's girlfriend and attached to her White Jeep Cherokee. Following the transponder, Agent Desmond plotted all the points from the I-Pass from 2:17 a.m. to 10:56 a.m. on the morning Holden was killed. These points allegedly placed the Jeep near Holden's apartment near the time he was killed.

Agent Desmond further testified that Marcus Scott testified before the grand jury that he had picked up Chris Barbee the day

of or the day after Holden's murder, and Barbee had a brown bag. Scott told the grand jury that he saw two semi-automatic handguns, a pair of gloves, and masks; Barbee stated that "we" had to take care of something. Scott stated "we" referred to Mr. Price. **NEVERTHELESS, THIS TESTIMONY WAS ONLY PRESENTED AT THE SENTENCING PHASE, WHILE PETITIONER WAS [NEVER] CHARGED, NOR CONVICTED OF SUCH CRIME.**

After hearing from the witnesses, the district court ruled on each of the enhancements. The court concluded that the base offense level started at 38, because the conspiracy involved at least 90 kilograms of heroin and added all of the **enhancements** recommended by in the PSR and Supplemental Reports. This included two levels for directing and using violence. The Court stated:

> "The ordering of the murder of co-conspirator James Brown and the murder of Greg Holden, I've listened to two days of evidence and the cross-examination, and **what I have concluded is that the witnesses are NOT necessarily consistent.** However, I believe that **on a 'PREPONDERANCE OF EVIDENCE'** scale that the evidence was sufficient to establish that the defendant was responsible for the attempted murder of James Brown and the murder of Greg Holden. Whether he actually pulled the trigger, we, of course **DON'T KNOW because nobody actually witnessed the incident.** I think there is sufficient evidence, however, to show that he was responsible in the sense that he made it known that a person who would have --would be likely to testify against him would be subject to assassination. So I add two levels for that.

Id. at (R. 173:308). An adjusted offense level of 54 (even though the maximum level on the table was 42) with a Criminal History Category II resulted in an advisory guideline sentence of life.

Both the government and the defense then argued for Mr. Price's respective sentence. In arguing for a life sentence, the government asserted that aside from the seriousness of the drug case, Mr. Price murdered Holden, ordered the shooting of Brown, and actively searched for Lee, who was placed in witness protection after the Holden murder. The government noted that the court's finding regarding the murder of Holden being connected to the drug conspiracy, **"WILL ENTITLE THE FAMILY TO RESTITUTION FOR THINGS SUCH AS THE FUNERAL EXPENSES."** (R. 173: 313). The government repeatedly pointed to the Holden murder in arguing for a life sentence.

HOWEVER, Mr. Price asserted that a life sentence WAS NOT warranted. Mr. Price stated that the government **NEVER CHARGED HIM WITH ANY SORT OF CRIME ESPOUSING THE MURDER, [F]AILED TO PROVE THAT HE COMMITTED THE MURDER [B]EYOND A REASONABLE DOUBT,** and to base a life sentence on that disrespects the BURDEN requirement of our criminal justice system. (R. 173:319-27).

After hearing from both parties, the court **CLARIFIED** its ruling regarding the violence, to wit:

> **COURT:** My ruling was that **I think by a PREPONDERANCE OF THE EVIDENCE that he actually killed Greg Holden, [B]UT I DON'T FIND BEYOND A REASONABLE DOUBT that he did so...**

Id. at [R. 173-328]. In announcing its sentence, the court further stated that no one saw Holden get murdered, so we do not know who pulled the trigger. However, the court noted that even if he did not do it, he "certainly encouraged whoever did it to do it. And to my mind, this is just about as guilt [sic]

as the person who actually pulls the trigger." (R. 173:330).

Thus, **without** Mr. Price having been convicted for murder, the Court sentence him as if he had in fact been found guilty by the jury through Beyond a Reasonable Doubt. Nevertheless, the court discussed the factors found in 18 U.S.C. § 3553(a), and concluded that a life sentence was a little to much under all the facts and circumstances of the case. The court wanted Mr. Price to be off the street until he was late middle age, specifically around 75-years old. (R. 173:333). Therefore, the district court sentenced Mr. Price to **thirty-seven years'** imprisonment on Count 1, **four years'** imprisonment on Count 2, **twenty years'** imprisonment on Counts 4-13, and **ten years'** imprisonment on Count 14, to run concurrently on all counts, 10 years' supervised release on Count 1, and a special assessment of $1300. There were no objections to the conditions of supervised release. **The court left open any determination of RESTITUTION [u]ntil the government presented its calculations.** (R. 173:334).

Just OVER A MONTH later, [AFTER] Mr. Price had been sentenced, the district court held a hearing on restitution. (R. 167). For UNKNOWN REASONS, Mr. Price's counsel, Mr. Brindley, **[D]ID NOT ATTEND.** (R. 167:2). However, Mr. Price did attend the Court hearing WITHOUT HIS TRIAL COUNSEL, but he personally told the court that he did not know anything about the government's motion for restitution. (R. 167:3). The government informed the court that it sought restitution only for funeral expenses for Mr. Holden in the amount of $11,000.

The court granted the government's motion and stated that if Trial Counsel "Brindley" would object to it (although he was never present during this Court hearing), **that all he had to do was file a motion to reconsider.** Id. However, Trial Counsel **[NEVER]** filed a RESPONSE, and the Court proceeded [without] Trial Counsel being present during the **restitution hearing.**

Mr. Price appealed the district court's determination through Appointed Counsel. The primary issue on appeal was whether the statutory provision that prohibits ordering restitution to a participant in the defendant's offense also prohibits ordering restitution to the participant's family members. The Seventh Circuit held that the statute does not prohibit such a restitution order in cases in which the family members are victims in their own right, whose losses are not merely derivative of the participant's losses. See, **UNITED STATES v. PRICE**, No. 17-3077 (7th Cir. Oct. 19, 2018).

HOWEVER, the Seventh Circuit [failed] to acknowledge that Mr. Price **[HAD NEVER] BEEN CONVICTED** of Murder, in order to be held accountable for the Funeral expenses. Thus, this Petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

[1] WHETHER THE SEVENTH CIRCUIT ERRED IN NOT APPLYING THIS HONORABLE COURT'S AUTHORITY IN HUGHEY v. UNITED STATES, 495 U.S. 411 (1990), WHEN MR. PRICE HAD [NEVER] BEEN CONVICTED OF MURDER, IN ORDER FOR THE DISTRICT COURT TO HOLD HIM ACCOUNTABLE FOR THE FUNERAL EXPENSES.

Not only did the district court erred when it ordered Mr. Price to pay restitution to a named co-defendant, **but, it furthered erred in ordering that Mr. Price pay restitution for Funeral Expenses, WHEN MR. PRICE HAD [NEVER] BEEN CONVICTED OF MURDER.** The statute does not authorize restitution to a participant of the drug conspiracy, even if he ended up being a victim, **nor does it authorize courts to impose restitution upon defendants whom [have not] been convicted by a jury of murder.** Case law is consistent in holding that a loss for RESTITUTION PURPOSES must be causally tied to the **OFFENSE OF CONVICTION.**

"Federal Courts possess no inherent authority to order restitution, and may do so only as explicitly empowered by Statute." **UNITED STATES v. RANDLE**, 324 F.3d 550, 555 (7th Cir. 2003). There must be a "direct nexus between the **offense of conviction** and the loss being remedied." Id. at 556. Only those losses caused by "the specific conduct that is the basis of the **offense of conviction**" are authorized by statute to be the subject of any order of restitution. **HUGHEY v. UNITED STATES**, 495 U.S. 411, 413, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990).

In **HUGHEY v. UNITED STATES**, **supra**, the Supreme Court held "the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the **OFFENSE OF CONVICTION.**" 495 U.S. 411, 413, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). "Thus, a § 3663(a)(1) restitution order

that encompasses losses stemming from charges NOT resulting in convictions is unauthorized by the restitution statute." **UNITED STATES v. WAINWRIGHT**, 938 F.2d 1096, 1098 (10th Cir. 1991). Here, Mr. Price **was [NOT] convicted of having committed a [MURDER].** No jury found that Mr. Price was actually responsible for the death of Greg Holden.

Therefore, it was improper for the court to order restitution to Mr. Holden's family members --in order for them to pay the funeral expenses--, based on its belief that Mr. Price was responsible for Mr. Holden's death.

Mr. Price herein, recognizes that the guidelines permit a district court to consider a defendant's **[UNCHARGED CONDUCT]**, as well as conduct for which a defendant has been acquitted, in calculating a defendant's sentence. **UNITED STATES v. WATTS**, 519 U.S. 148, 154, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); Although, it has recently been challenge by **NELSON v. COLORADO**, 137 S.Ct. 1249 (2017). Nevertheless, restitution is governed by the VWPA, **not the guidelines.** See, **UNITED STATES v. BLAKE**, 81 F.3d 498, 506 n.5 (4th Cir. 1996).

Hence, not only did the district court erred when it ordered Mr. Price to pay restitution to a named co-defendant, but, it furthered erred in ordering that Mr. Price pay restitution for Funeral expenses, when Mr. Price had NEVER been convicted of murder.

[B] THE DISTRICT COURT COMMITTED FURTHER ERROR WHEN IT ORDERED RESTITUTION IN [DIRECT] VIOLATION OF 18 U.S.C. § 3663(a)(1)(A)

Mr. Holden was a participant in the alleged drug conspiracy and could not be considered a victim for purposes for restitution, because 18 U.S.C. § 3663(a)(1)(A) states that "in no case shall a participant in an offense under [21 U.S.C. § 841] be considered a victim of such offense." Thus, the district court plainly erred when it ordered Mr. Price to pay over $11,000 in restitution to Mr. Holden's family for **funeral expenses.**

Not only was Mr. Price [never] convicted of Murder, but Section 3663(a)(1)(A) **prohibits** a participant in an offense under 21 U.S.C. § 841(a) to be awarded restitution. 18 U.S.C. § 3663(a)(1)(A). Under § 3663, a district court may order restitution to a victim of an offense, "or if the victim is deceased, to the victim's estate," unless the person was a participant in the offense. Id. The **statutory exclusion** of offense participants from restitution applies when the defendant has been convicted of one of the offenses enumerated in the statute, **and the victim committed the same offense.** See 18 U.S.C. § 3663(a)(1)(A) (authorizing orders of restitution for **certain offenses** and stating that "but IN NO CASE shall a participant in an offense under such sections be considered a victim of such offense under this section"); **UNITED STATES v. MOUSSEAU**, 517 F.3d 1044, 1048 (8th Cir. 2008).

At sentencing, the government urged the district court to order restitution to Holden's family. After this court found

that Holden's murder was connected to the underlying drug conspiracy, the government stated that the court's finding **entitled the family to restitution for such things as funeral expenses**. Ultimately, the district court adopted the government's position and ordered Mr. Price to pay $11,693.00 toward the **funeral expenses** of Mr. Holden. Although Mr. Price never objected to restitution **--because the Court proceeded with the Restitution Hearing WITHOUT TRIAL COUNSEL BEING PRESENT--**, the district court had NO STATUTORY BASIS to order it; especially when Mr. Price had **NEVER BEEN CONVICTED OF MURDER.**

Section 3663(a)(1)(A)'s prohibition of ordering restitution to a participant in a § 841(a) offense applies to this case. Count 1 of the superseding indictment specifically listed Greg Holden as a member of the conspiracy with Mr. Price to possess with the intent to distribute 1 kilogram or more of heroin, in violation of 21 U.S.C. § 841(a)(1). The superseding indictment outlines how Mr. Holden played an integral part in the conspiracy up until his death. (R.46). At sentencing, Agent William Desmond testified that in September 2011, Mr. Holden was arrested on a sealed complaint and agreed to cooperate. (R. 158:176-80). Mr. Holden was killed on December 2011.

Hence, because Mr. Holden was a co-conspirator, and because Mr. Price was [never] convicted of Murder or Resultant of Death from the Drug Conspiracy, the district court had NO statutory

authority to order restitution for a participant in the conspiracy who committed the same crime. Thus, the error was plain. See, **BURNS**, 843 F.3d at 689; **KIEFFER**, 794 F.3d at 853. The error affected Mr. Price's substantial rights. See, **BURNS**, 843 F.3d at 689 ("substantial rights are affected when he may have been required to pay more in restitution than he owes"); **UNITED STATES v. RANDLE**, 324 F.3d 550, 558 (7th Cir. 2003) ("In requiring [the defendant] to pay several thousand dollars in restitution, without a statutory basis for doing so, the error affects [the defendant's] substantial rights.")).

Therefore, the restitution order was illegal, because: (1) Mr. Price was NEVER convicted of Murder or of Death Results from the Drug Conspiracy; and (2) because evidence demonstrated that Mr. Holden participated in the conspiracy up until his arrest. (R. 158:176-80). **Hence, the fairness, integrity, and public reputation of judicial proceedings are harmed when the district court acts without statutory authority.** **BURNS**, 843 F.3d at 690. Thus, this Honorable Court should GRANT Certiorari, and Vacate Mr. Price's sentence and Remand for resentencing **without** an order of restitution.

CONCLUSION

For the foregoing reasons, Mr. Price respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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