No. 19-5184 ORIGINAL

Supreme Court of the United States

KRISTOPHER COURTNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Kristopher Courtney
Petitioner
64300-060
P.O. Box 8000
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QUESTIONS PRESENTED

Petitioner Kristopher Courtney was seen on several occasions going in and out of a building where drugs and drug related materials were subsequently seized. He was not present when the seizure occurred and numerous other individuals also had access to the building and were observed going in and out of the building. He was subsequently charged, tried and convicted of possession of the unlawful materials seized.

1.) Where an equal or near equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, should a reasonable jury entertain a reasonable doubt?

2.) Where the record fails to demonstrate that the indictment was returned "in open court", should the indictment have been dismissed?

3.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

More specifically, the Petitioner Kristopher Courtney and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Kristopher Courtney, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on 3-15-18.

OPINIONS BELOW

The 3-15-18 opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2018 U.S. App. LEXIS 6397, and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Sixth Circuit on 6-5-18. This opinion is an unpublished decision reported at 2018 U.S. App. LEXIS 15163 and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Northern District of Ohio, was entered on 3-22-17, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior order of the United States Court of Appeals for the Sixth Circuit, granting extension of time for rehearing was entered on 3-28-18, is an unpublished decision reported at 2018 U.S. App. LEXIS 8035 and is reprinted in the separate Appendix D to this Petition.

The prior order of the United States District Court for the Northern District of Ohio denying Mr. Courtney's motion to suppress was entered on 11-23-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 162883 and is reprinted in the separate Appendix E to this Petition.

The prior order of the United States District Court for the Northern District of Ohio denying new trial was entered on 1-18-17, is an unpublished decision, and is reprinted in the separate Appendix F to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 3-15-18. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Sixth Circuit on 6-5-18. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

Fed. R. Crim. P. 52 provides:

> **Rule 52. Harmless Error and Plain Error.**
> (a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On or about 9-28-16 Kristopher Courtney was charged with violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute more than 100 grams of a mixture or substance containing a detectable amount of heroin and fentanyl on or about 9-2-16) (Count 1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 58 grams of a mixture or substance containing a detectable amount of heroin on or about 9-2-16) (Count 2); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 140 grams of a mixture or substance containing a detectable amount of cocaine on or about 9-2-16) (Count 3); 18 U.S.C. § 922(g)(1) (Possession of a firearm by convicted felon on or about 9-2-16) (Count 4); 21 U.S.C. § 856(a)(2) (did manage and control a premises at 2973 E. 130th St., Cleveland for the purpose of unlawfully manufacturing, storing, distributing and using a controlled substance, namely heroin, fentanyl, and cocaine on or about 9-2-16) (Count 5) .

These charges arose from evidence seized from a building where Mr. Courtney, among many other individuals, had been observed entering and leaving.

He was arraigned on or about 10-7-16 at which time he pleaded not guilty to the charged violations.

Notably, there is no indication that the indictment was "returned in open court".

On 10-6-16, counsel filed a motion to suppress. On 11-21-16, a hearing was held on the motion to suppress. On 11-23-16, the District Court denied the motion to suppress. (Appendix E)

On or about 11-28-16 Mr. Courtney proceeded to trial. (Appendix B)

At trial, the evidence demonstrated that Mr. Courtney was seen on several occasions going in and out of a building where drugs and drug related materials were subsequently seized.

He was not present when the seizure occurred and numerous other individuals also had access to the building and were observed going in and out of the building.

On 11-29-16, Mr. Courtney was found guilty by the jury as to violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute more than 100 grams of a mixture or substance containing a detectable amount of heroin and fentanyl on or about 9-2-16) (Count 1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 58 grams of a mixture or substance containing a detectable amount of heroin on or about 9-2-16) (Count 2); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 140 grams of a mixture or substance containing a detectable amount of cocaine on or about 9-2-16) (Count 3); 18 U.S.C. § 922(g)(1) (Possession of a firearm by convicted felon on or about 9-2-16) (Count 4); 21 U.S.C. § 856(a)(2) (did manage and control a premises at 2973 E. 130th St., Cleveland for the purpose of unlawfully manufacturing, storing, distributing and using a controlled substance, namely heroin, fentanyl, and cocaine on or about 9-2-16) (Count 5).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 30 and a Criminal History of VI which resulted in a guideline sentencing range 168-210 months. (Presentence Report, ¶¶31, 50, 68)

On 3-22-17, Mr. Courtney appeared for sentencing. At sentencing, the district court adopted the Presentence Report recommendations (Transcript of Sentencing 3-22-17, page 31) but then made a downward variance based on the facts that Mr. Courtney's prior convictions were long ago and because his Criminal History VI was less serious than the typical Criminal History VI. (Transcript of Sentencing 3-22-17, page 34)

On 3-22-17, Mr. Courtney was sentenced to 140 months incarceration for violations of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute more than 100 grams of a mixture or substance containing a detectable amount of heroin and fentanyl on or about 9-2-16) (Count 1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 58 grams of a mixture or substance containing a detectable amount of heroin on or about 9-2-16) (Count 2); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (Possession with Intent to Distribute approximately 140 grams of a mixture or substance containing a detectable amount of cocaine on or about 9-2-16) (Count 3); 18 U.S.C. § 922(g)(1) (Possession of a firearm by convicted felon on or about 9-2-16) (Count 4); 21 U.S.C. § 856(a)(2) (did manage and control a premises at 2973 E. 130th St., Cleveland for the purpose of unlawfully manufacturing, storing, distributing and using a controlled substance, namely heroin, fentanyl, and cocaine on or about 9-2-16) (Count 5). This sentence represented a Total Offense Level 30 and a Criminal History of VI with a downward variance from 168-210 months. (Appendix B)

The judgment was entered on 3-22-17.

On 3-29-17, a Notice of Appeal was filed. On direct appeal, counsel renewed the argument for suppression of the evidence and also argued that the evidence was insufficient..

On 3-15-18, the Court of Appeals denied Mr. Courtney's appeal. *United States v. Courtney*, 2018 U.S. App. LEXIS 6397 (6th Cir. 3-15-18).

Counsel timely filed a petition for rehearing. On 6-5-18, the Court of Appeals denied rehearing. (Appendix C)

Mr. Courtney demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Sixth Circuit has so far departed from the accepted

and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. COURTNEY'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[1] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies

[1] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) Where An Equal Or Near Equal Theory Of Guilt And A Theory Of Innocence Is Supported By The Evidence Viewed In The Light Most Favorable To The Verdict, A Reasonable Jury Must Entertain A Reasonable Doubt

In *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), the Supreme Court held that the due process clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Beyond the rule that places the burden upon the prosecution of producing evidence to prove the accused guilty, Professor Wigmore states that "the presumption of innocence ... conveys for the jury a special and additional caution ... to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused." 9 Evidence § 2511 (emphasis in original). The essence of any truly civilized criminal justice system is fairness in the individual case. We are reminded that "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent [persons] are being condemned." *In re Winship*, 397 U.S. at 364.[2]

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[2] See *Jones v. United States*, 16 F.3d 487; 1994 U.S. App. LEXIS 2182 (2nd Cir. 1994) (where there is a "slight possibility" defendant is not guilty then proof beyond a reasonable doubt has not been demonstrated); *United States v. Peterson*, 236 F.3d 848; 2001 U.S. App. LEXIS 53 (7th Cir. 2001) (same -- "possibility" that defendant not guilty precluded finding of guilt beyond a reasonable doubt); *United States v. Pena*, 983 F.2d 71, 72-73 (6th Cir. 1993) (holding that even though a passenger in a car carrying seventeen kilograms of cocaine suspected that something illegal was going on, that suspicion did not prove that she actually knew or intended to aid the driver in the distribution of cocaine); *United States v. Craig*, 522 F.2d 29, 31-32 (6th Cir. 1975) (holding that "it would be highly conjectural and speculative indeed to conclude from these facts [where the defendant drove a friend who was carrying a closed box to an apartment for a drug sale, waited for him, fled from the scene when law enforcement agents arrived, abandoned his

Where an equal or near equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, 'a reasonable jury must entertain a reasonable doubt.'" *United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995) (citing *United States v. Sanchez,* 961 F.2d 1169, 1173 (5th Cir. 1992)); *United States v. Glenn,* 312 F.3d 58; 2002 U.S. App. LEXIS 23507 (2nd Cir. 2002).

In Mr. Courtney's case, as set forth above, at trial, the evidence demonstrated that Mr. Courtney was seen on several occasions going in and out of a building where drugs and drug related materials were subsequently seized. He was not present when the seizure occurred and numerous other individuals also had access to the building and were observed going in and out of the building. In other words, an equal or near equal theory of guilt and a theory of innocence was supported by the evidence viewed in the light most favorable to the verdict. Based on the foregoing the overwhelming weight of applicable case law holds that, as a matter of law, the jury in Mr. Courtney's case should have had a reasonable doubt as to the charges against him and his motion for new trial should have been granted. *Id.*

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truck and shotgun, and eluded police officers for two years] that Craig had knowledge of the presence of drugs in the closed box..."); *United States v. Hayter Oil Co., Inc. of Greenville, Tennessee,* 51 F.3d 1265, 1271 n. 5 (6th Cir. 1995) (quoting *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976) (holding that "'evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal.'"); *United States v. Cartwright*, 359 F.3d 281; 2004 U.S. App. LEXIS 3904 (3rd Cir. 2004) ("we have consistently held in cases of this genre that, even in situations where the defendant knew that he was engaged in illicit activity, and knew that 'some form of contraband' was involved in the scheme in which he was participating, the government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of the particular illegal objective contemplated by the conspiracy") (citing *United States v. Idowu*, 157 F.3d 265, 266-67 (3rd Cir. 1998) (citing *United States v. Thomas*, 114 F.3d 403, 405 (3rd Cir. 1997) and *United States v. Mastrangelo*, 172 F.3d 288, 293 (3rd Cir. 1999)). *Cf. United States v. Radomski*, 2007 U.S. App. LEXIS 364 (7th Cir. 1-9-07) (Although a conspiracy to sell a counterfeit drug is a federal crime, 21 U.S.C.S. §§ 841(a)(2), 846, a conspiracy to pretend to be offering to sell an illegal drug is not).

1B.) Where The Record Fails To Demonstrate That The Indictment Was Returned "In Open Court", The Indictment Should Have Been Dismissed

The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[3] The grand jury serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."[4] Where the Grand Jury process has been abused and the defendant prejudiced thereby, a federal court can dismiss the indictment. *United States v. Sigma Int'l*, 244 F.3d 841, 859 (11th Cir. 2001).

The finding by a grand jury of a true bill and endorsement thereon to such effect are not alone sufficient to render it valid as an indictment, but it is found necessary that the bill should be presented or returned by the grand jury in open court. *Renigar v. United States,* 172 F. 646; 1909 U.S. App. LEXIS 5021 (4th Cir. 1909). It is essential to the validity of an indictment that it be presented in open court and in the presence of the grand jury. *Id.*[5]

In Mr. Courtney's case, as set forth above, there is no indication that the indictment was "returned in open court".

Based on the foregoing, Mr. Courtney's indictment should have been dismissed. *Id.*

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[3] U.S.C.A. Fifth Amendment.

[4] *United States v. Suarez*, 263 F.3d 468, 481 (6th Cir. 2001) (institution of grand jury protects defendant from prosecutorial vindictiveness); *United States v. Sigma Int'l*, 196 F.3d 1314, 1320 (11th Cir. 1999) (grand jury process provides protection for the ordinary citizen from overzealous prosecutor)

[5] Moreover, Rule 6(f) requires indictments be physically handed to a magistrate judge when court is in session. See *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir.1994); *United States v. Thompson,* 287 F.3d 1244, 1250 n.2 (10th Cir. 2002).

1C.) Multiple Errors In The Courts Below Mandate That Mr. Courtney's Conviction And/Or Sentence Be Vacated.

Mr. Courtney's conviction and sentence are violative of the First, Second, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Courtney's conviction and sentence are violative of his right to freedom of speech and to petition and his right to keep and bear arms and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Courtney's sentence.

These claims in Argument 1C are submitted to preserve Mr. Courtney's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Sixth Circuit in Mr. Courtney's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Kristopher Courtney respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[6] to the court of appeals for reconsideration in light of the Fifth Amendment.

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[6] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).