

WESLEY HAMM)
)
 Petitioner)
)
 - VS. -)
)
 UNITED STATES OF AMERICA)
)
 Respondent.)

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

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QUESTION PRESENTED FOR REVIEW

Question I. Shouldn't a judgment of acquittal have been granted where the government failed to prove that Hamm, arrested on August 25, 2016, in jail in an all-male facility and helping the police capture the supplier of the toxic carfentanil, somehow on August 27, 2017 distributed carfentanil that resulted in serious bodily injury of female inmates A.P., B.S.H. and L.S.W. supplied by Tracy Myers (Count 3) where he had withdrawn from any conspiracy and was actively aiding law enforcement to stop further distribution of toxic product?

Question II. Was it error to deny Hamm credit for acceptance of responsibility where he admitted his misconduct and cooperated with law enforcement to stop further distribution of the dangerous substance, including making a monitored meeting with the supplier of the carfentanyl-laced contraband?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Wesley Hamm, Appellant, Petitioner

United States of America, Appellee, Respondent

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OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. Wesley Hamm*, ___ F.3d. ___ (6th Cir. 2020), Case number 17-6383; that opinion affirmed the judgment of the United States District Court for the Eastern District of Kentucky in case number #: 16-cr-00085. but vacated and remanded for resentencing where the original sentence committed Hamm to the custody of the Bureau of Prisons to a total term of 420 months imprisonment.

JURISDICTION

- i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 6, 2020; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.
- ii. A petition for a rehearing was not filed in this matter; no extension of time within which to file a petition for a writ of certiorari has been made.
- iii. This is not a cross-Petition pursuant to Rule 12.5.
- iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

Fifth Amendment - Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Eastern District of Kentucky pursuant to 18 U.S.C. §3231; Hamm was indicted for offenses against the laws of the United States and was convicted after trial of Count 1- 21 U.S.C. § 846 Conspiracy to Distribute a mixture containing a detectable amount of carfentanil, Count 2, distribution of carfentanil resulting in death, 21 U.S.C. § 841 and Count 3, 21 U.S.C. § 841, distribution of carfentanil resulting in serious bodily injury within that district.

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

Robert Shields, an opioid supplier in Cincinnati, sold Wesley Hamm product Hamm thought was fentanyl, which he, in turn, gave to Tracy Myers. That evening Myers sold some to Willoughby, who soon died from what turned out to be carfentanil, taken along with methamphetamine. Myers and Hamm were arrested the next day.

Hamm immediately confessed and, upon learning of the overdoses, helped authorities identify his supplier, fully admitted and disclosed his activities in relation to the transaction and

attempted with the police a controlled buy in northern Kentucky that led to Shields' arrest and the end of Shields' distribution of toxic product. (TR 4, Bradbury, PageID 1253-1254)

But Myers, after her arrest and placement in jail, then proceeded several days later to give her tainted opioids to sister inmates there, leading to massive overdose trauma to three inmates.

Despite Hamm's admission to his conduct and assistance to the police to end the carfentanil distribution, this matter proceeded to trial on the Third Superseding Indictment, (R 86, 3rd Superseding Indictment, PageID 430) which accused Shields, Hamm and Hamm's wife Jennifer of conspiring from a date in August, 2016 to on or about August 27, 2016 of knowingly and intentionally distributing a mixture containing carfentanil and heroin (Count 1), Shields and Hamm on August 24, 2016 knowingly and intentionally distributing a mixture containing carfentanil, the use of which resulted in the overdose death of L.K.W. (Count 2) and Shields and Hamm on August 27, 2017 of knowingly and intentionally distributing a mixture containing carfentanil the use of which resulted in serious bodily injury of A.P., B.S.H., and L.S.W. (Count 3)

Wesley Hamm immediately cooperated and admitted that the day before, August 24, that he had obtained some fentanyl (heroin disagreed with his body) on behalf of Myers, four or five grams, and for himself. Hamm was aware of the overdoses and was fully cooperative, admitting his conduct; he let them search the cell phones seized at his residence, showed them where he had missed some calls from his supplier since his incarceration and agreed to make recorded calls to the phone number for his supplier. Sullivan noted it was complex and a "busy 24 hours" getting him out of jail and getting permission from a judge to take Hamm, an inmate from the Montgomery County Jail, out-of-state, and getting recorded government monies for the potential by four when Hamm met with his source, make the transaction, get Hamm out of the scene and

then to arrest Shields. (TR 2, Sullivan, Page ID 841-842)

Hamm volunteered as a cooperating defendant witness; although such a relationship normally took time to process, the urgency of the overdoses expedited matters, and Hamm “...was willing to cooperate, and he was willing to talk to me, and he was willing to meet the source of supply.” (TR 1, Officer Wattenberger, pageID 787 – 789)

We [Hamm and Officer Wattenberger] started up the interstate, and we've got a recording device going, and I call out, I think, the first part of it is like 2:09 p.m., and I'm saying I'm going up 75 northbound, passing exit 189. And we get off at the Harris -- Harrison Avenue exit, going to Cincinnati, and we were going to meet at a BP. He's on the phone, his phone.

... And he's in the front seat with me in the vehicle we're in, and he's receiving and making phone calls with the source. And we're supposed to meet at a BP there real close, but the guy on the other end of the phone said that he saw police officer there, he didn't want to meet there so he wanted to change locations.

... So we end up at a United Dairy Farmers convenience store gas station, not from the Rutledge/Sunset area, and told him that we were there.

And he says I'm -- to the affect, he's says he's going to come by. We're supposed to follow him away. We wait several minutes after that. I mean, there were several phone calls, but finally there's a black Pacifica with a black male that was like a V-neck T-shirt on with the windows rolled down coming from the left side of us, and go directly in front of our vehicle. And he says, that's him. And then, of course, I put it out to the surveillance team, and they told us to wait right there, and they would conduct surveillance.

Q. Okay. So who said that's him?

A. Wesley Hamm.

Q. Okay. And who was he pointing out?

A. He was pointing out the Shields that was ultimately turned out to be Shields that was driving the Pacifica, and he was by himself, and he was stopped by surveillance units moments after he said that's who -- that it was.

Dr. William Ralston, chief medical examiner for Kentucky, did the post-mortem examination of Willoughby and determined his cause of death to be acute carfentanil and methamphetamine intoxication. Ralston opined "...the carfentanil would be independently sufficient to cause Mr. Willoughby's death. The methamphetamine is at a relatively low level, although, it too could potentially cause death".

But Dr. Ralston admitted that the methamphetamine level in Willoughby could be potentially lethal: "...potential for that to impact." and "Either one [methamphetamine and carfentanil] could cause death. The methamphetamine could have independently caused Willoughby's death in and of itself. Willoughby's number two contributing cause of death was cardiomegaly, an enlargement of the heart.)

After this and other testimony, Hamm was convicted of all three counts.

At sentencing Hamm asserted he was due a reduction in his sentencing level due to his cooperation and acceptance of responsibility, that his criminal history calculation was in error and overstated his culpability and that he was due a downward departure due to his considerable assistance in helping stop the danger of the carfentanil distribution.

Hamm was found guilty of Counts 1, 2 and 3 of the Third Superseding Indictment and sentenced to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 420 months.

Before the Court of Appeals it was argued, *inter alia*, that:

As to Question I that Hamm's relationship with Myers was only buy-sell and nothing more was shown that he was in any conspiracy with her. She bought from him and then sold to her clients.

But critically, even if there had been a conspiracy or agency relationship, Hamm was arrested and fully cooperating with the police in stopping the distribution of carfentanil when Myers, also in jail after having admitted her guilt, passed out carfentanil to her sister jail inmates that led to their overdosing. Hamm, in custody and cooperating with law enforcement to stop further carfentanil distribution, and having withdrawn from any possible conspiracy, could not, on August 27, 2017, have distributed carfentanil that resulted in serious bodily injury to female jail inmates A.P., B.S.H. and L.S.W. His judgment of acquittal on Count three should have been granted.

As to Question II, Wesley Hamm deserved credit for acceptance of responsibility as he immediately cooperated and admitted that the day before, August 24, that he had obtained some fentanyl (heroin disagreed with his body) on behalf of Myers, four or five grams, and for himself. Hamm was aware of the overdoses and was cooperative, admitting his conduct; he let them search the cell phones seized at his residence, showed them where he had missed some calls from his supplier since his incarceration and agreed to make recorded calls to the phone number for his supplier.

The Sixth Circuit found all without merit, holding that as Hamm made Rule 29 motion on specific grounds at trial, and did not include these arguments on appeal, he forfeited these other arguments, and the appeals court would not consider them, and not addressing acceptance of responsibility.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Question I. Shouldn't a judgment of acquittal have been granted where the government failed to prove that Hamm, arrested on August 25, 2016, in jail in an all-male facility and helping the police capture the supplier of the toxic carfentanil, somehow on August 27, 2017 distributed carfentanil that resulted in serious bodily injury of female inmates A.P., B.S.H. and L.S.W. supplied by Tracy Myers (Count 3) where he had withdrawn from any conspiracy and was actively aiding law enforcement to stop further distribution of toxic product?

Due Process under the Fifth Amendment and Fourteenth Amendment requires proof beyond a reasonable doubt and is part of the "essentials of due process and fair treatment" *In Re Winship*, 397 US 358 (1970)

But Hamm was arrested and fully cooperating with the police in stopping the distribution of carfentanil before Myers, in jail, passed out carfentanil to her sister jail inmates that led to their overdosing and the allegations of Count 3 against Hamm. Hamm, in custody and cooperating with law enforcement to stop further carfentanil distribution, and having withdrawn from any possible conspiracy, could not, on August 27, 2017, have distributed carfentanil that resulted in serious bodily injury to female jail inmates A.P., B.S.H. and L.S.W. under any theory of criminal liability.

Withdrawal from a conspiracy was outlined by the Sixth Circuit Court of Appeals in *United States v. Hereford*, Nos. 04-6060; 04-6098 (unpublished)

"Where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." *United States v. Rios*, 842 F.2d 868, 873 (6th Cir. 1988) (internal quotation omitted). Withdrawal is difficult to prove: "A defendant is found to have withdrawn from a conspiracy where he or she made a full confession to authorities or communicated to his coconspirators that he has abandoned the enterprise and its goals. Merely ceasing activities on behalf of the conspiracy does not constitute withdrawal." *United States v. Fantroy*, Nos. 03-2264, 03-2290, 2005 U.S. App. LEXIS 19105 (6th Cir.

Aug. 30, 2005) (internal quotation and citation omitted); see also *Brown*, 332 F.3d at 374 (“Mere cessation of activity is not sufficient” to “show affirmative action” to “defeat or disavow the conspiracy” which is necessary in “proving withdrawal.”). Not even an arrest, we have held, necessarily constitutes withdrawal from a conspiracy. See *United States v. Robinson*, 390 F.3d 853, 882 (6th Cir. 2004).

See also *United States v. Walker*, 721 F.3d 828 (7th Cir. 2013)

Commented [ML1]:

The 10th Circuit in *United States v. Gonzalez*, 797 F.2d 915 (10th Cir. 1986) discussed the defense of withdrawal after an overt act has been committed and noted “Effective withdrawal is limited to future crimes the remaining conspirators might commit. *Glazerman v. United States*, 421 F.2d 547, 551-52 (10th Cir.1970); see also *United States v. Read*, 658 F.2d 1225, 1232 (7th Cir.1981); W. LaFave & A. Scott, *Handbook on Criminal Law* Sec. 62, at 486 (1972); Note, *Withdrawal from Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 *Fordham L.Rev.* 438, 441-45 (1982)”

On August 25, 2016 Hamm confessed to all that he had done, admitting obtaining what he believed to be half-heroin and half-fentanyl mixture and began dangerous work with law enforcement to end the distribution of the carfentanil-tainted product.

Wesley Hamm immediately cooperated and admitted that the day before, August 24, that he had obtained some fentanyl (heroin disagreed with his body) on behalf of Myers, four or five grams, and for himself. Hamm was aware of the overdoses and was cooperative, admitting his conduct; he let them search the cell phones seized at his residence, showed them where he had missed some calls from his supplier since his incarceration and agreed to make recorded calls to the phone number for his supplier. Sullivan noted it was complex and a “busy 24 hours” getting him out of jail and getting permission from a judge to take Hamm, an inmate from the Montgomery County Jail, out-of-state, and getting recorded government monies for the potential

by four when Hamm met with his source, make the transaction, get Hamm out of the scene and then to arrest Shields.

Hamm volunteered as a cooperating defendant witness; although such a relationship normally took time to process, the urgency of the overdoses expedited matters, and Hamm "...was willing to cooperate, and he was willing to talk to me, and he was willing to meet the source of supply

We [Hamm and Wattenberger] started up the interstate, and we've got a recording device going, and I call out, I think, the first part of it is like 2:09 p.m., and I'm saying I'm going up 75 northbound, passing exit 189. And we get off at the Harris -- Harrison Avenue exit, going to Cincinnati, and we were going to meet at a BP. He's on the phone, his phone.

... And he's in the front seat with me in the vehicle we're in, and he's receiving and making phone calls with the source. And we're supposed to meet at a BP there real close, but the guy on the other end of the phone said that he saw police officer there, he didn't want to meet there so he wanted to change locations.

... So we end up at a United Dairy Farmers convenience store gas station, not from the Rutledge/Sunset area, and told him that we were there.

And he says I'm -- to the affect, he's says he's going to come by. We're supposed to follow him away. We wait several minutes after that. I mean, there were several phone calls, but finally there's a black Pacifica with a black male that was like a V-neck T-shirt on with the windows rolled down coming from the left side of us, and go directly in front of our vehicle. And he says, that's him. And then, of course, I put it out to the surveillance team, and they told us to wait right there, and they would conduct surveillance.

Q. Okay. So who said that's him?

A. Wesley Hamm.

Q. Okay. And who was he pointing out?

A. He was pointing out the Shields that was ultimately turned out to be Shields that was driving the Pacifica, and he was by himself, and he was stopped by surveillance units moments after he said that's who -- that it was.

There were recorded phone calls to Shields setting up the deal, and Hamm was on the phone multiple times while was with him and when Hamm pointed out Shields; at that point Hamm was in custody. Hamm had been up all night, and was “dope sick,” –“Sick at their stomach, dizzy, sweaty, just achy, just feel like bad, just feel bad” though he helped with the identification of the source of the carfentanil, Sosa/Shields, beginning with telephone calls to him the day before. The plan was to have Mr. Hamm in an undercover confidential position, meet the source of supply, and see if he could make an exchange of dope for money. Shields was detained as a result of this.

Hamm described Shields, a black male of a certain height and weight with tattoos covering almost his entire arms, and detailed the locations of past transactions and day white Chrysler Pacifica that the source would drive; they were waiting for the source to give them a specific location. The riskiness of the operation continued to escalate as they did not have a fixed location in advance for the meeting; it was “a bad scenario for us”

It took about an hour to set up the transaction, with them arriving in Cincinnati roughly around 2 o'clock with the time of the arrest at about 3:10 PM; there were negotiations for about an hour and 10 minutes, with phone calls back and forth “let's meet over here, I don't want to meet over here, I see police officers.” The source and Hamm finally agreed to rendezvous at the United Dairy Farmers or Hamm would then follow the source, with Cincinnati and Lexington officers nearby, a DEA surveillance plane in the air and undercover on the street.

Shields' black Pacifica came onto the scene and Hamm yelled out “that's him, that's

him.” There was a variety of efforts to coordinate between ground units and the surveillance plane; shields parked in a school parking lot and was apprehended by DEA. They then verified that Hamm was southbound and headed back into Lexington safely, although they took a quick photo of Shields and had Hamm confirm that Shields was, in fact, the person he had been dealing with.

Hamm had withdrawn and renounced any conspiracy and was working to remediate any damage from Shields’ fatally product. He was then not a part of any conspiracy when, later, Myers sold to her sister jail inmates. It was error to hold Hamm liable for a conspiracy that, if it did exist, had died with his arrest, renunciation and cooperation.

Question II. Was it error to deny Hamm credit for acceptance of responsibility where he admitted his misconduct and cooperated with law enforcement to stop further distribution of the dangerous substance, including making a monitored meeting with the supplier of the carfentanyl-laced contraband?

Wesley Hamm immediately cooperated and admitted that the day before, August 24, that he had obtained some fentanyl (heroin disagreed with his body) on behalf of Myers, four or five grams, and for himself. Hamm was aware of the overdoses and was cooperative, admitting his conduct; he let them search the cell phones seized at his residence, showed them where he had missed some calls from his supplier since his incarceration and agreed to make recorded calls to the phone number for his supplier. Sullivan noted it was complex and a “busy 24 hours” getting him out of jail and getting permission from a judge to take Hamm, an inmate from the Montgomery County Jail, out-of-state, and getting recorded government monies for when Hamm met with his source, make the transaction, get Hamm out of the scene and then to arrest Shields.

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Shields was detained as a result of this.

Hamm had given a description of Shields, a black male of a certain height and weight with tattoos covering almost his entire arms, and detailed the locations of past transactions and

day white Chrysler Pacifica that the source would drive; they were waiting for the source to give them a specific location. The riskiness of the operation continued to escalate as they did not have a fixed location in advance for the meeting; it was “a bad scenario for us”

It took about an hour to set up the transaction, with them arriving in Cincinnati roughly around 2 o'clock with the time of the arrest at about 3:10 PM; there were negotiations for about an hour and 10 minutes, with phone calls back and forth “let's meet over here, I don't want to meet over here, I see police officers.” The source and Hamm finally agreed to rendezvous at the United Dairy Farmers or Hamm would then follow the source, with Cincinnati and Lexington officers nearby, a DEA surveillance plane in the air and undercover on the street.

Shields' black Pacifica came onto the scene and Hamm yelled out “that's him, that's him.” There was a variety of efforts to coordinate between ground units and the surveillance plane; shields parked in a school parking lot and was apprehended by DEA. They then verified that Hamm was southbound and headed back into Lexington safely, although they took a quick photo of Shields and had Hamm confirm that Shields was, in fact, the person he had been dealing with.

Application Note 5 to U.S.S. G. § 3 E 1.1 asserts that the sentencing judge is entitled to great deference on review. It is plain error for the sentencing court to consider an erroneous sentencing guideline range in setting a sentence. *United States v. Story*, 503 F.3d 436 (6th Cir. 2007). See also *United States v. Davidson*, 409 F.3d 304, 310 (6th Cir. 2005) . Per *Gall v. United States*, 128 S. Ct. 558 (2007) , the sentencing process begins with the district court where a *district court should begin by correctly calculating the applicable Guidelines range. (emphasis added)* The appeals court must ensure that the district court made no significant procedural errors *Gall*, pp. 11–14.

Findings of fact by the trial court are set aside only if "clearly erroneous."

A district court's decision on this matter may be entitled to deference. *See Buford v. United States*, 532 U.S. 59, 64-65, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001). *see also* U.S.S.G. § 3E1.1 cmt. n.5. The defendant bears the burden of showing that he has accepted responsibility. *United States v. Roberts*, 243 F.3d 235, 240-41 (6th Cir. 2001). at 241 (citing *United States v. Williams*, 940 F.2d 176, 181 (6th Cir. 1991)). *United States v. Paulette*, 457 F.3d 601 (6th Cir. 2006)

Hamm showed significant acceptance of responsibility such that he should have received the three point reduction in the calculation of his sentencing range. This was error and Mr. Hamm's sentence should be vacated and this matter remanded to the district court for resentencing per the ruling of this Court.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Hamm given the relief he has argued for herein.

Respectfully submitted,

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Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 5200 words nor 40 pages in length, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

/s Michael Losavio

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Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Noel Francisco, Solicitor General of the United States, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

This 8th day of March, 2020

/s Michael Losavio

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