No. _____

In The

Supreme Court of the United States

NEKHENT SUPREME ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether in the conversion of currency drug proceeds into drug weight for purposes of sentencing criminal violations of 21 U.S.C. § 841, federal courts are required by due process to use the lowest drug present in the defendant's instant offense.

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ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Ali, Case No. 19-4317, Docket Entry No. 33, entered on January 29, 2020. A copy of the per curiam unpublished opinion of the Fourth Circuit is attached. (Appendix A).

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on January 29, 2020 in a direct appeal of a sentence imposed against Petitioner Nekhent Supreme Ali in the United States District Court in the Middle District of North Carolina for a criminal violation of 21 U.S.C. § 841(a)(1). Thus, the Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

Procedural History

On May 29, 2018, Mr. Ali was named in a five count Indictment. [J.A. at 9-11.] This indictment charged him with four specific counts of distributing a quantity of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) on March 21, 2018, April 5, 2018, April 12, 2018, and April 24, 2018 respectively. The fifth count in the

indictment charged Mr. Ali with maintaining a dwelling for the manufacturing, distributing, and using controlled substances, that is, marijuana and cocaine base, in violation of 21 U.S.C. §§ 856(a)(1) and (b). All five of the offenses were alleged to have occurred in Rowan County, NC. There were no co-defendants charged in the indictment with Mr. Ali. [J.A. at 9-11.]

On November 26, 2018, Mr. Ali pled guilty to Count Four of the Indictment pursuant to a written Plea Agreement, with the other Counts to be dismissed. [J.A. at 12-31.]

After the draft PSR was prepared, the undersigned filed a number of objections on behalf of Mr. Ali, as well as a pleading on the objections. [J.A. at 84-95.] After the pleading on the objections was filed, and prior to the sentencing hearing, the undersigned and counsel for the Government came to a partial agreement on most of the objections which affected Mr. Ali's guideline range. This agreement was memorialized in a position paper filed by the Government on April 16, 2019. [J.A. at 133-37.] The main issue that was not resolved was Mr. Ali's objection to the drug weight based on the calculations presented in paragraph 18 of the Presentence Report, i.e. the treatment of currency found in his ex-girlfriend's apartment. [J.A. at 133-37.]

Also on April 16, 2019, the undersigned filed a Sentencing Memorandum concerning the drug weight, urging the trial court to sentence Mr. Ali in a range of 110-137 months based upon a Criminal History Category of VI and an Offense Level of 25 [J.A. at 138-45.]

On April 17, 2019, the trial court conducted a sentencing hearing and sentenced Mr. Ali to 223 months of imprisonment, to run concurrent with Mr. Ali's sentence under his state charges. [J.A. at 6.] On May 2, 2019, the trial court entered a written Judgment with this sentence. [J.A. at 74-81.]

On May 6, 2019, the undersigned counsel filed a timely notice of appeal to the Fourth Circuit Court of Appeal on behalf of Mr. Ali. [J.A. at 82-83.]

The appeal was briefed, and on January 29, 2020, the Fourth Circuit Court of Appeals entered a judgment and per curiam opinion upholding the sentence of Mr. Ali.

Facts

According to the PSR,

> 4. On February 3, 2018, prior to the CI's cooperation with RCSO officers, the defendant sold approximately **6.3 grams (gross weight) of cocaine base** (paragraph 62). On February 3, 2018, the defendant was charged with Felony Possession with Intent to Manufacture, Sell and Deliver Cocaine and Misdemeanor Possession of Drug Paraphernalia (18CRS50521). On April 25, 2018, he was charged with Felony Habitual Felon (18CRS857). On November 13, 2018, the defendant received a consolidated sentence of 77 to 105 months imprisonment.
>
> 5. On March 21, 2018, the CI arranged to make the first purchase of cocaine base from Defendant Ali. The CI met with officers prior to the transaction to be certain that he/she was not in possession of any contraband and was given departmental funds to pay for the controlled substance. The CI traveled to 1115 Bryce Avenue to meet with the defendant. Undercover officers established surveillance of the area and observed the CI arrive at the residence. The CI was present at the residence for only a short period of time and proceeded directly to a post-buy meeting with officers, where he/she turned over **3.2 grams (net weight) of cocaine base** that was purchased from Defendant Ali. The transaction was captured by an audio recording device worn by the CI.

6. Law enforcement officers utilized the same CI and protocol to make three additional purchases of cocaine base from Defendant Ali. These purchases occurred on April 5, 2018, April 12, 2018, and April 24, 2018, and **19.90 grams (net weight), 13.36 grams (net weight), and approximately 28.9 grams (gross weight) of cocaine base,** respectively, were purchased from Defendant Ali. All of the purchases took place at the 1115 Bryce Avenue address.

7. On April 25, 2018, law enforcement officers executed a search warrant at the 1115 Bryce Avenue residence. During the search of the residence, officers located several documents bearing the defendant's name, approximately **18 grams (gross weight) of marijuana**, an orange pill bottle containing a white paper with residue, five digital scales, and a food saver machine with food saver bags in the kitchen area. In the master bedroom, officers located more documents bearing the defendant's name and a black Samsung cell phone.

8. On the same day, officers also conducted a consent search of the residence . . . which belonged to the defendant's ex-girlfriend . . . who indicated she had been dating the defendant for about 15 months and that the defendant stayed with her but not on a full-time basis. . . . [She] advised there are two safes under her bed in the master bedroom that were obtained before her involvement with the defendant. She estimated that she had about $40,000 in United States currency in the safes. She indicated the money came from her savings, inheritance from her grandfather, tax money, and insurance payouts. She reported that about $10,000 to $11,000 of the money belonged to her and the remainder belonged to her cousin, M.G., who owns a lawn care service in Harrisburg, NC.

9. As a result of the search, in a spare bedroom officers located a .40 caliber Taurus Millennium semi-automatic pistol (serial number SVE91076). This firearm had a loaded magazine (nine rounds of ammunition) but there was no round in the chamber. Officers also located a Rock River 5.56 assault rifle (serial number CM268239). This firearm had a loaded magazine (20 rounds of ammunition) but there was no round in the chamber. Also located in the spare room were two boxes of 5.56 caliber ammunition and a partial box of .38 caliber rounds of ammunition. A search of the master bedroom revealed a large amount of United States currency in the top drawer of a nightstand, documents bearing the name of the defendant, and two locked safes under the bed. As a result of the investigation, the total amount of United States currency located in the residence was $51,686. . . . During the investigation, it was discovered that $1,040 from narcotic purchases

> from the defendant on April 5, 2018 and April 12, 2018, were amongst the money found in the safes and $1,100 from narcotic purchases from the defendant on April 24, 2018, were amongst the money located in the top drawer of a nightstand in the master bedroom.

[J.A. at 99-100.]

Subsequently, Mr. Ali's ex-girlfriend changed her story and stated that the United States currency seized from her residence on April 25, 2018 and the two safes were Mr. Ali's property. [J.A. at 101.]

In calculating Mr. Ali's guideline range, the PSR stated:

> 18. A total amount of $51,686 was seized from the defendant. However, to avoid double counting, the $2,140 of departmental funds found amongst the $51,686 will not be used. Hence, $49,546 will be converted to cocaine base. According to a Drug Enforcement Agency (DEA) drug price chart, the average cost of an ounce of cocaine base is $1,050. Thus, $49,546/$1,050 is 47.19 ounces of cocaine base. One ounce is 28.35 grams, thus, 47.19 ounces (28.35 x 47.19) is 1,337.84 grams of cocaine base.
>
> 19. For guideline computation purposes, Nekhent Supreme Ali is responsible for 1,409.50 grams of cocaine base and 18 grams of marijuana. To calculate the base offense level, drug amounts are converted to a converted drug weight using the "Drug Conversion Tables" in USSG §2D1.1. The conversion is reflected in the table below.

[J.A. at 102.]

Mr. Ali's sentencing hearing was conducted on April 17, 2019. [J.A. at 32-73.] As shown in the filings by the parties the day before the sentencing hearing, all of the objections to the PSR were resolved except as to Mr. Ali's attributable drug weight, which was calculated in large part on the basis of $51,686 found in his ex-girlfriend's apartment. With respect to the drug weight, counsel for the Government had agreed that based on the case reports, $1200 per ounce was the appropriate conversion rate for crack cocaine with respect to Mr. Ali's activity. [J.A. at 136, 140.]

Mr. Ali objected to the method of calculation of 1,337.84 grams of cocaine base, arguing that there was no evidence in the record that he exclusively sold cocaine base and not marijuana or other types of drugs, and that the money placed at Ms. Allen's residence was in fact the result of sales of cocaine base specifically. [J.A. at 142-44.] Thus, Mr. Ali argued, there was not an appropriate indicium of the reliability of this calculation, because it made a critical assumption which did not have evidentiary support. Specifically, despite the fact that Mr. Ali was indicted for maintaining a dwelling for the purposes of selling marijuana as well as cocaine, and despite the fact that marijuana was seized from his residence and no statements were provided in the discovery or referenced in the PSR that limited Mr. Ali's activity to cocaine base only, the PSR calculation assumed that all the funds seized from his girlfriend's apartments were proceeds from selling crack cocaine. [J.A. at 142-44.]

The undersigned also argued that this procedure was contrary to the normal practice of the Probation Office of the Middle District of North Carolina. [J.A. at 143-44.]

At sentencing, the trial court asked the Probation Officer to explain his office's policy and its application to Mr. Ali's case. He testified:

> **THE PROBATION OFFICER:** Like I told you when you called and asked for clarification, when we have drug transactions like this where -- and I explained to him when we have a drug transaction where there are multiple drugs involved, then we go with the least punitive, which would be marijuana, but in this case, we only have one drug transaction. I mean, we have a drug transaction with just one drug, which is cocaine base. That was why we converted the drug and the money involved to cocaine base.

[J.A. at 42.]

The undersigned then replied as follows:

> **MR. NEYHART:** And to that, Your Honor, I would point to the fact that the indictment does contain marijuana and crack in the maintaining a dwelling, which is, again, part of the instant offense. So I believe that in this situation, because of the Government's charging decision, that this would be the applicable policy.

[J.A. at 42-43.]

The trial court, relying primarily on the drug buys that the law enforcement had set up through the confidential informant, stated as follows:

> So there is every indication that the $49,546 is the result of cocaine base transactions, and it's more likely than not that that is what it is. There's a reasonable basis to reach that conclusion in my mind because of the nature of all the drug transactions that were recorded here through the confidential informant. So there's at least a reasonable basis to reach that determination.
>
> There was also very little marijuana that was discovered, and the street value of the marijuana was on order of magnitude less almost than the street value of the crack cocaine.
>
> I don't have any evidence before me that the Defendant was selling marijuana from the home. I know there was a count in the indictment related to maintaining a dwelling for that purpose, along with the other controlled substances. He pled guilty to Count Four, not Count Five.

[J.A. at 44-45.]

After the trial court made this ruling, and recalculated the funds at $1,200 per ounce of crack cocaine, the undersigned asked the trial court to reconsider its ruling and also consider going down two levels to account for the possibility that, even if the majority of the funds were derived from crack cocaine, that there would still be a considerable percentage of the funds that may have been derived from the sale of marijuana. [J.A. at 46.] The undersigned pointed out that there were

only 70 grams of crack cocaine physically recovered in this case and 18 grams of marijuana. [J.A. at 52.] The trial court also rejected this argument. [J.A. at 53.]

The trial court then, based upon its ruling and the previous agreement of the parties, found a total criminal history category of VI and a total offense level of 33, with a guideline range of 235 to 240 months. [J.A. at 55-56.]

In respect to the Section 3553(a) factors, the undersigned asked the trial court to consider the guideline range with respect to the time served for related state charges, and overall vary downward to a 200 month sentence. [J.A. at 57-61.] The undersigned pointed to Mr. Ali's extremely difficult childhood as laid out in the PSR, the significant increase in the time he would be serving on this charge versus the amount of time he had served in the past, his age, the support of his fiancé, and his Type 1 diabetes condition. [J.A. at 57-58.]

During the undersigned's argument, the trial court calculated a jail credit of 12 months for time served on the state charges related to the instant offense. [J.A. at 61.]

After coming to this calculation, the government asked the trial court to concur with the recommendation of the Probation Office primarily on the basis of the seriousness of the offense conduct and the need to deter the Defendant, including the presence of firearms, in conjunction with the Defendant's criminal history. [J.A. at 62.]

After Mr. Ali's allocution, the trial court specifically rejected the sentence of 200 months requested by the undersigned "for the reasons of protection of the public

and deterrence." [J.A. at 67.] The trial court imposed a sentence of 223 months, which is a sentence of 235 months concurrent with Mr. Ali's state sentence, with credit for the 12 months that Mr. Ali had been already incarcerated. [J.A. at 68.]

Mr. Ali's written judgment was filed on May 1, 2019. [J.A. at 74-81.] On May 6, 2019, Mr. Ali appealed to the Fourth Circuit Court of Appeals. [J.A. at 82-83.] On January 29, 2020, the Fourth Circuit affirmed the sentence of the Middle District of North Carolina in an unpublished *per curiam* opinion.

This petition follows.

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Clarify Under What Circumstances Federal Courts Should Use the Lowest Drug Present in the Defendant's Instant Offense in Converting Currency Drug Proceeds into Drug Weight In Sentencing Criminal Violations of 21 U.S.C. § 841.

The Government must prove the drug quantity attributable to a defendant by a preponderance of the evidence. United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); United States v. Cook, 76 F.3d 596, 604 (4th Cir. 1996). The Fourth Circuit has held that drug related money may be used to calculate an attributable drug weight. "A district court may properly convert cash amounts linked credibly to the defendant's purchase or sale of narcotics so long as the court does not engage in double counting of both the proceeds and the narcotics themselves." United States v. Sampson, 140 F.3d 585, 592 (4th Cir. 1998). See also U.S. v. Hicks, 948 F.2d 877, 883 (4th Cir. 1991). However, "For the requirements of due process to be met, the factual

evidence relied upon must "have some minimal indicium of reliability beyond mere allegation." Id. (quoting United States v. Smith, 887 F.2d 104, 108 (6th Cir. 1989)).

The Fourth Circuit's precedent in this respect is similar to most, if not all, of other circuits. See United States v. Ferguson, 35 F.3d 327, 333 (7th Cir. 1994) (no error in estimating the amount of cocaine needed to generate the amount of cash laundered); United States v. Rios, 22 F.3d 1024, 1027-28 (10th Cir. 1994) (when cash seized and either no drug is seized or the amount seized does not reflect the scale of the offense, conversion of cash to quantity of drugs appropriate so long as cash is attributable to drug sales that are a part of same course of conduct or common scheme of conviction); United States v. Rivera, 6 F.3d 431, 446 (7th Cir. 1993) (approving conversion of seized currency to cocaine equivalent as long as there is proof of the connection between the money seized and the drug-related activity); United States v. Jackson, 3 F.3d 506, 511 (1st Cir. 1993) (same); United States v. Stephenson, 924 F.2d 753, 764-65 (8th Cir. 1991) (converting seized cash to equivalent drug amount); United States v. Gonzalez-Sanchez, 953 F.2d 1184, 1187 (9th Cir. 1992) (conversion improper in case where no factual finding that money was connected to the drug business); United States v. Tokars, 95 F.3d 1520, 1542 (11th Cir. 1996).

None of the above cases, however, have upheld a lower court that disregarded the presence of one drug in a case and converted all of the funds to the highest level drug available for purpose of calculating a drug weight under U.S.S.G. § 2D1.1.

In the case below, the trial court, following the recommendation of the probation office, took the highest level drug, crack cocaine, and used that to calculate

the drug weight, resulting in a level of 32. This was despite the fact that Mr. Ali was charged in the Indictment with maintaining a premise for the purpose of manufacturing, selling, and consuming crack cocaine and marijuana. This is also despite the fact that marijuana was found at Mr. Ali's residence and is part of the total drug weight calculated in paragraph 19 of the Pre-Sentence Report. Altogether, the entire amount of actual physical drugs found present in Mr. Ali's case was 18 grams of marijuana and 70 grams of crack cocaine. In addition, the entire amount of crack cocaine was sold to a government confidential informant who requested that Mr. Ali provide her with the same. The only drug found in the search of Mr. Ali's premises was marijuana.

For this reason, the trial court clearly erred in calculating the entire amount of drug proceeds as based on crack cocaine when Mr. Ali was selling marijuana as well as crack cocaine. Respectfully, the failure to account for any substantial marijuana proceeds in Mr. Ali's drug weight results in a lack of any minimal indicium of reliability for this calculation, and thereby violated his due process rights under the Fifth Amendment to the Constitution of the United States.

The undersigned has not found any case similar to this one in which the defendant's drug weight was calculated by conversion of cash entirely into one category of drug when two or more drugs were involved in the instant offense and attributable drug weight. Perhaps that is because most district courts, like the Middle District of North Carolina's usual procedure, would have calculated all the funds according to the lower drug weight. Here, the Government charged Mr. Ali

with respect to the marijuana found in his residence and it was included in the calculation of his drug weight. The Government's later contention that Mr. Ali never sold anyone any marijuana is inconsistent with its Indictment, with the marijuana found at Mr. Ali's residence, and inconsistent with the inclusion of this marijuana in the calculation of his drug weight.

The Court should grant certiorari in order to provide guidance to the lower courts for this type of situation. In order to treat Mr. Ali fairly, and to avoid unwarranted sentence disparities between his case and other similarly situated defendants, the trial court should have had the funds recalculated into drug weight that took into account the marijuana as well as cocaine that was the basis for the funds that were seized from Mr. Ali. Because they failed to do so, the courts below committed procedural error. The error significantly prejudiced Mr. Ali, whose sentence was at the lower end of the improperly enhanced Advisory Sentencing Guidelines range.

Accordingly, the Court should grant this petition for certiorari, reverse the Fourth Circuit and the Middle District of North Carolina below, and reverse and remand for resentencing.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 17th day of April, 2020.

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