NO. _____

In The
Supreme Court of the United States

JABARR RYEHEINE RUDOLPH,

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 THE CIRCUIT COURT OF APPEALS ERRED IN THE ASSESSMENT OF A TWO POINT ENHANCEMENT AGAINST THE APPELLANT JABARR RUDOLPH FOR OBSTRUCTION OF JUSTICE PURSUANT TO § 3C1.1 OF THE UNITED STATES SENTENCING GUIDELINES?

II. THE CIRCUIT COURT OF APPEALS ERRED BY FAILING TO ALLOW A THREE POINT REDUCTION BY ACCEPTANCE OF RESPONSIBILITY PURSUANT TO SECTION 3E1.1 OF THE UNITED STATES SENTENCING GUIDELINES MANUAL.

III. WHETHER THE COURT ERRED IN ITS CALCULATION OF THE DRUG WEIGHT BY FINDING THAT THE PETITIONER WAS RESPONSIBLE FOR COCAINE BASE "CRACK" LEADING TO AN ENHANCED SENTENCE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States v. Jabarr Rudolph, 7:16-cr-00116-D-11, United States District Court, District of Eastern North Carolina (Wilmington Division).

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

INTRODUCTION

Petitioner Jabarr Rudolph was charged in seven (7) counts of a forty-seven (47) count indictment on 10/26/2016, in the Eastern District of North Carolina. Petitioner was charged in Count One with Conspiracy to Distribute and possess with intent to distribute controlled substances, namely cocaine, in violation of 21 U.S. Code Section 841; and Counts 11, 12, and 13 of the Indictment, Distribution of a Quantity of Heroin on October 26, 2015; October 29, 2015; and October 30, 2015, respectively, all in violation of 21 U.S.C. § 841(a)(1); and Counts 14 and 15: Distribution of a Quantity of Heroin and Aiding and Abetting on November 10, 2015, and November 18, 2015, respectively, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and lastly, in Count 16 with possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A). On or about October 26, 2017, Petitioner Rudolph plead guilty to all counts of the charged counts of the Indictment EXCEPT Count 16, in which he plead not guilty. A jury trial for several co-defendants along with the Petitioner was held before the Honorable James Devers on or about May 14, 2018 to May 23, 2018. The jury trial only heard one issue as to Petitioner – Count 16 of the Indictment, Possession of a Firearm in Furtherance of a Felony.

The Petitioner was found not guilty by the jury of the sole count of the Indictment on which they had been empaneled to hear as it relates to Rudolph, namely, Use of Firearm in Furtherance of a Drug-Trafficking Crime. Petitioner was sentenced on January 28, 2019 before the Honorable James C. Dever III to a total Two Hundred Forty (240) of incarceration for each count to run concurrently followed by three (3) years of supervised release.

The Court issued a written Judgment on February 8, 2019. Jabarr Rudolph filed a Notice of Appeal by and through his legal counsel following Petitioner's sentence on February 4, 2019. The Fourth circuit Court of Appeals filed its opinion on March 24, 2020 denying the Petitioner's appeal. Petitioner filed a Motion for Rehearing En Banc on April 17, 2020. The mandate was stayed on April 27, 2020. The Fourth Circuit Court of Appeals denied the Petitioner's Motion for Rehearing on May 12, 2020.

The petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the Appendix, at 8a.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit in United States v. Jabbar Rudolph was entered on March 24, 2020, is unpublished, and is reprinted in the Appendix, at 1a.

JURISDICTION

The final decision of the United States Court of Appeals for the Fourth Circuit was entered on March 24, 2020 and the denial of the Petitioner's Motion for Rehearing

En Banc was filed on May 12, 2019 and the mandate issued on May 20, 2019. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Factual Basis

Petitioner Jabbar Rudolph, filed a Notice of Appeal on February 4, 2019, challenging his sentence entered by the Court. The District Court sentenced the Petitioner to Two Hundred Forty (240) of incarceration for each count to run concurrently followed by three (3) years of supervised release. The Petitioner filed a Notice of Appeal by and through his legal counsel.

B. Decisions Below

Petitioner Jabbar Rudolph, pled guilty to the Counts of the Indictment against him on October 26, 2017 EXCEPT Count 16, in which he plead not guilty. A jury found the Petitioner Rudolph not guilt on the sole count of the trial. The District Court entered judgment against Rudolph orally on January 28, 2019 and filed a written judgment on February 8, 2019. The Fourth Circuit Court of Appeal did not hear this case, but rather, ruled without oral argument on March 24, 2020.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question regarding the rights of defendants in the Federal criminal matter at the time of sentencing that should be settled by this Court: namely, whether the Court can enhance a sentencing guideline range for obstruction of justice pursuant to § 3C1.1 of the United States Sentencing Guidelines without a specific finding and specific evidence that identified the defendant and evidence that he threatened or intimidated a witness and that the specific witness actually felt threatened by that defendant. In the instant case, the District Court unfairly enhanced the Petitioner's sentencing guideline range in just this type of case. The Court enhanced the Petitioner despite the fact that at the sentencing hearing, the primary officer of the case failed to identify which defendant made specific statements to him, what the specific statement was that could be interpreted as threatening, and without evidence that the officers felt threatened in any manner. This ruling further affected the District Court and the Circuit Court's decision as to the availability of a decrease in the Petitioner's sentence due to acceptance of responsibility. Finally, Finally, the Foufth Circuit's holding is simply incorrect.

i. THE COURT OF APPEALS ERRED IN NOT REMANDING THE MATTER BACK TO DISTRICT COURT FOR ITS ASSESSMENT OF A TWO POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE PURSUANT TO § 3C1.1 OF THE UNITED STATES SENTENCING GUIDELINES?

The District Court sentenced the Petitioner pursuant to a two point upward enhancement for obstruction of justice pursuant to § 3C1.1 of the United States Sentencing Guidelines. This section provides that if

> A defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

U.S.S.G. § 3C1.1. At the time of the original trial, the Petitioner and his co-defendants would enter and leave the courtroom by passing the prosecution table. On one occasion, while the Petitioner and his co-defendants were leaving the courtroom to return to the holding cells, one of the defendants made a comment and some (unidentified) co-defendants laughed. The District Court, upon hearing the evidence at the sentencing hearing, incorrectly enhanced the Appellant's sentence by two point by finding that the Appellant at the hearing attempted to threaten the primary officer of the case pending against him.

The facts, as they are set out in the sentencing hearing, do not rise to the level of a threat. In order to qualify for this enhancement, the a defendant's statement would need to be "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;" U.S.S.G. § 3C1.1, note 4. The allegations of statements by the defendants, even if true, do not rise to the level needed to enhance the sentencing guideline range. The Second Circuit Court of Appeals clearly identifies that a defendant would need to make "clear and direct threats against cooperating witnesses or government agents" in order to receive this enhancement. United States.v. Archer, 671 F.3d 149 (2d Cir. 2011). Statements can not be said in vacuum without having some direct relationship to the investigation and attempts to intimidate a witness. The Second Circuit Court of Appeals went even

further in United States v. Hernandez, 83 F.3d 582 (2d Cir. 1996), and determined that statements that were not clearly identified as directed to a witness with an intent to circumvent that witness' testimony and which was not a direct threat could not be used as evidence for an enhancement.

Cases where the Courts have upheld enhancements due to threatening actions by a defendant have involved specific statements by an identified defendant that the witness would be harmed, killed or kidnapped. *See* United States v. Hertular, 562 F.3d 433, 443 (2d Cir. 2009) and United States v. Agudelo, 414 F.3d 345, 348, 351 (2d Cir. 2005). Here, the Court of Appeals accepted the trial court's findings that a co-defendant locked eyes in the courtroom with the Law Enforcement officer that was investigating the defendants. It further found that the Petitioner made a comment that was believed to be aimed at the officer to "sleep tight tonight" and after laughter was heard from the other defendants, another unidentified voice said an undecipherable statement that included "daughter" in the statement. These statements were not clearly noted as they were not entirely heard by the witness/law enforcement officer. The Court of Appeals further accepted that the officer did not feel threatened by the way the Petitioner looked as him in the court nor did he feel threatened by any alleged and undecipherable statement.

Nonetheless, the court reasoned that even if these facts were true and a specific threat could not be identified and the defendant could not be directly identified as the person that said the statement, Mr. Rudolph was not entitled to relief because these statements were a threat without any further communication with the officers. The

decision by the Court of Appeals is plainly incorrect, as it both contradicts the bright-line holding and the express purpose of the rule. In addition, this clearly is a different ruling than found in other courts, as can be seen through the rationale of the Second Circuit Court of Appeals' decision in Hernandez. There the Second Circuit Court of Appeals found that statements made directly by a Defendant toward a witness such as "die, die, die" and calling her the "devil" or staring the witness down, was not enough to provide an upward adjustment to the sentencing guideline range pursuant to Section 3C1.1. United States v. Hernandez, 83 F.3d 582 (2d Cir. 1996). Furthermore, the ruling creates a conflict between and amount circuits as to the necessity of increasing a persons' guideline range in instances where the facts are not determinative of an existing threat by a particular defendant.

ii. THE CIRCUIT COURT OF APPEALS ERRED BY FAILING TO ALLOW A THREE POINT REDUCTION BY ACCEPTANCE OF RESPONSIBILITY PURSUANT TO SECTION 3E1.1 OF THE UNITED STATES SENTENCING GUIDELINES MANUAL.

At the time of the petitioner's sentencing hearing, the District Court failed to permit a three point acceptance of responsibility pursuant to Section 3E1.1 of the United States Sentencing Guidelines Manual despite the fact that prior to any trial, the Petitioner plead guilty to all charges except on count of the indictment. The Court held a jury trial as to this one count of the indictment for which the jury returned a verdict of "Not Guilty". Following an evidentiary hearing on the facts, the District Court ruled that the because the Court had enhanced the guideline range as a result of its finding the Petitioner had obstructed justice, the Court could now not reduce that

sentence and provide for an acceptance of responsibility. This thinking is clearly in error and in direct contradiction to the justification for acceptance of responsibility.

Section 3E1.1 of the United States Sentencing Guidelines Manual provides for Acceptance of Responsibility in those instances when and

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct ….

§ 3E1.1, United Sentencing Guidelines Manual. The facts in this matter as seen throughout the sentencing hearing indicate that the Petitioner was incorrectly denied his acceptance of responsibility adjustment. The Petitioner ensured that the Government did not have to get prepared for a trial on most of the issues. In fact, the Petitioner only went to trial on one issue, and on that issue he was found by a jury to be "Not Guilty." The Government was unable to prove at the sentencing enough facts to take away this type of adjustment from the Petitioner. There was no evidence of the Petitioner making any statement to a witness. The statement "sleep tight" was not enough nor was it directed to any one person. There was not a statement identified as being made by the Petitioner that was suggesting any harm to the witness or his family. The Witness actually testified that he was not concerned and did not feel threatened at the time any statements were made nor was he able to adequately hear conversations by the Petitioner. Thus, this is a situation where the Petitioner can receive an adjustment for acceptance of responsibility even if the Court were to

upwardly increase his sentence due to an obstruction claim by the Government. Failure to provide this acceptance adjustment was done in error.

iii. THE COURT ERRED IN ITS CALCULATION OF THE DRUG WEIGHT BY FINDING THAT THE PETITIONER WAS RESPONSIBLE FOR COCAINE BASE "CRACK" LEADING TO AN ENHANCED SENTENCE?

The District Court and, by its acceptance of the sentencing hearing findings, the Circuit Court erred at the time of the Petitioner's sentencing in making a determination of the drug weight based upon inaccurate drugs. The Courts had the drugs based upon crack cocaine and not cocaine only. The facts that were set up by the court at the trial and the sentencing hearing contradicted the facts as set forth in the PSI report and which was identified by the Court as the justification for the sentencing level of the Petitioner. At the time of the sentencing hearing, the attorney for the Petitioner objected to the facts found in the PSI Report and the designation of the drug type and weight. The Court based its determination upon the statement of an unnamed individual to a third party. The Confidential informant was not present and did not testify to any information nor was the Informant, upon whom the Court relied all of its determination as to the drug weight, a party that the police had used for a long period of time. In addition, this informant worked only one month following this transaction to not be used again.

The Officer's own notes that were prepared contemporaneously with interview of the CI and the activities on December 17, 2013, the officer noted that the Appellant was getting cocaine for the CI and the then McCoy would drop off cocaine. Every single notation by the office noted that it was cocaine. These types of facts should be used at

the sentencing hearing and "considered "elements" of the offense, not sentencing facts, and proof of them must satisfy the requirements of the Sixth Amendment." United States v. Milam, 443 F.3d 382, 386 (4th Cir. 2005), citing to Apprendi v. New Jersey, 530 U.S at 478, 120 S. Ct. 2348; Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); United States v. Gaudin, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The government had a North Carolina State Laboratory analyze the drug obtained by the Confidential Informant in Couny One of the Indictment. The laboratory's report set forth the chemical formula as cocaine hydrochloride. By not even considering the fact that the laboratory did not find any evidence of crack involved in the direct evidence presented at trial and at the sentencing hearing a direct violation of Mr. Rudolph's rights through the Sixth Amendment of the U.S. Constitution. United States v. Booker, 125 S. Ct. 738 (2005); Blakely v. Washington, 124 S. Ct. 2531 (2004).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 2020.