

20-5681

ORIGINAL

No.

Supreme Court of the United States

RYAN SUMLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

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

FILED
JUL 17 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

COMES NOW PETITIONER RYAN SUMLIN and respectfully moves this Honorable Court for leave to proceed in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 39 of the Rules of this Court.

The affidavit of Ryan Sumlin in support of this motion is attached hereto.

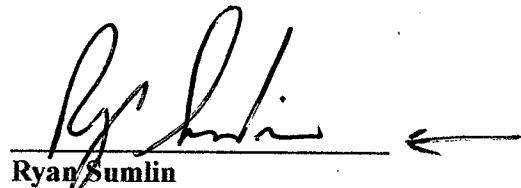
Mr. Sumlin sought leave to proceed in forma pauperis in the court below.

Mr. Sumlin was granted leave to proceed in forma pauperis in the court below.

RECEIVED
JUL 22 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The statute under which Mr. Sumlin was appointed counsel by the Northern District of Ohio was the Criminal Justice Act of 1964, 18 U. S. C. § 3006A. Therefore, in reliance upon Supreme Court Rule 39.1 and 18 U.S.C. § 3006A(d)(7), petitioner has *not* attached the affidavit which would otherwise be required.**

Presented herewith is Mr. Sumlin's Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit.



Ryan Sumlin
Petitioner
62250-060
P.O. Box 2068
Inez, KY 41224

Date: 7-17-2020

** Supreme Court Rule 39.1 provides:

A party seeking to proceed in forma pauperis shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed in forma pauperis was sought in any other court and, if so, whether leave was granted. *If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.*" *Id.* (As Amended Jan. 27, 2003, eff. May 1, 2003.) (emphasis added)

18 U.S.C. § 3006A(d)(7) provides:

(7) Proceedings before appellate courts. If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and *without filing the affidavit required by section 1915(a) of title 28.* *Id* (emphasis added)

General Docket

United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 18-3819

USA v. Ryan Sumlin

* * * * *

01/02/2019 15 Copy of District Court Order filed granting in forma pauperis. 12/17/2018 : Order [non-document] granting 158 Defendant's Motion for Leave to Appeal In Forma Pauperis as to Ryan K. Sumlin (3). Judge Donald C. Nugent on 12/17/18. (RJM) (Entered: 12/17/2018) (CB) [Entered: 01/02/2019 07:58 AM]

20-5681

No.

Supreme Court of the United States

RYAN SUMLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

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

FILED
JUL 17 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

Ryan Sumlin
Petitioner
62250-060
P.O. Box 2068
Inez, KY 41224

QUESTIONS PRESENTED

Police investigating a drug overdose death decided it was likely that Petitioner Ryan Sumlin had provided the drugs to the decedent and obtained a search warrant for a residence where they thought he'd been staying. While "the search warrant affidavit [did] not mention any evidence of illicit activity related to the current charges, occurring at the searched residence", the warrant was executed and upheld on the basis of the supporting affidavit's claim that there was evidence that Mr. Sumlin resided in the property that was searched. This, together with the affiant's statement that "[t]he officer's personal experience shows that individuals involved in drug trafficking use firearms and weapons, keep large quantities of cash, maintain records and documents, and use equipment for the processing and packaging of drugs for sale" was used to support the validity of the search in the lower courts. (Appendix A) (Appendix B). Petitioner's motion to suppress was denied and he was sentenced to life incarceration after trial based on the death and his prior convictions which were NOT found by the jury.

- 1.) Whether the lower courts erred by finding "nexus" to search Petitioner's home based solely on a general presumption that drug dealers keep drug evidence in their home?
- 2.) Where Petitioner's statutory mandatory minimum sentence was enhanced, based on the fact of prior convictions which were not pleaded in indictment, not presented to the jury, and not proven beyond a reasonable doubt, was Petitioner denied his Sixth Amendment constitutional rights?
- 3.) Whether this Court should grant Mr. Sumlin's petition for writ of certiorari to decide the viability Of *Almendarez-Torres v. United States* subsequent to the court's decisions in *United States v. Booker* and *Shepard v. United States*?

4.) 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 Ryan Sumlin and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	<u>Page:</u>
Questions Presented.....	i
List of Parties to the Proceedings in the Courts Below.....	ii
Table of Contents.....	iii
Table of Authorities.....	vi
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction.....	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	3
Statement of the Case.....	5
Reasons for Granting the Writ.....	10
1.) THIS COURT SHOULD GRANT MR. SUMLIN'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.....	10
1A.) The Lower Courts Erred By Finding "Nexus" To Search Petitioner's Home Based Solely On A General Presumption That Drug Dealers Keep Drug Evidence In Their Home.	11
1B.) The Lower Courts' Affirmance Of Mr. Sumlin's Sentence Was Violative Of This Court's Decision In <i>Alleyne v. United States</i>, 133 S. Ct. 2151 (6-17-13) And Denied Mr. Sumlin His Sixth Amendment Constitutional Right To Jury Trial	13
1C.) Multiple Errors In The Courts Below Mandate That Mr. Sumlin's Conviction And/Or Sentence Be Vacated	14

2.) THIS COURT SHOULD GRANT MR. SUMLIN'S PETITION FOR WRIT OF CERTIORARI TO DECIDE THE VIABILITY OF <i>ALMENDAREZ-TORRES V. UNITED STATES</i> SUBSEQUENT TO THE COURT'S DECISIONS IN <i>UNITED STATES V. BOOKER</i> AND <i>SHEPARD V. UNITED STATES</i>	17
Conclusion.....	19
Appendix	20
USCA Opinion Dated 4-21-20	A
USDC Judgment & Commitment Order Entered 8-31-18.....	B
USDC Amended Judgment & Commitment Order Entered 9-11-18	C
USDC Order Denying Motion to Suppress Entered 8-30-17.....	D

TABLE OF AUTHORITIES

	<u>Page:</u>
Cases	
<i>Aguilar v. Texas</i> ,	
378 U.S. 108, 111; 84 S. Ct. 1509,	
18 U.S.C. § 1512; 12 L. Ed. 2d 723 (1964).....	11, 13
<i>Alleyne v. United States</i> ,	
133 S. Ct. 2151;	
2013 U.S. LEXIS 4543 (6-17-13).....	13, 14, 18, 19
<i>Apprendi v. New Jersey</i> ,	
530 U.S. ___, 147 L. Ed. 2d 435,	
120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00).....	17
<i>Benanti v. United States</i> ,	
355 U.S. 96 (1957).....	11, 16
<i>Blakely v. Washington</i> ,	
124 S. Ct. 2531; 159 L. Ed. 2d 403;	
2004 U.S. LEXIS 4573 (6-24-04).....	17
<i>Elkins v. United States</i> ,	
364 U.S. 206 (1960).....	11, 16
<i>GACA v. United States</i> ,	
411 U.S. 618 (1973)	11, 16
<i>Lawrence v. Chater</i> ,	
516 U.S. 163, 167-68, 133 L. Ed. 2d 545,	
116 S. Ct. 604 (1996)	19

<i>McNabb v. United States,</i>	
318 U.S. 332 (1943).....	11, 16
<i>Rea v. United States,</i>	
350 U.S. 214 (1956).....	11, 16
<i>Shepard v. United States,</i>	
125 S. Ct. 1254; 161 L. Ed. 2d 205;	
2005 U.S. LEXIS 2205 (2005).....	9, 17, 18
<i>United States v. Behrens,</i>	
375 U.S. 162 (1963).....	11, 16
<i>United States v. Booker,</i>	
543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05).....	9, 17, 18
<i>United States v. Corral-Corral,</i>	
899 F.2d 927, 937 (10 th Cir. 1990).....	11, 12
<i>United States v. Gibson,</i>	
2006 U.S. App. LEXIS 60 (11 th Cir. 1-4-06).....	17
<i>United States v. Greer,</i>	
2006 U.S. App. LEXIS 510 (11 th Cir. 1-10-06)	17
<i>United States v. Jacobs,</i>	
429 U.S. 909 (1976).....	11, 16
<i>United States v. Rowland,</i>	
145 F.3d 1194, 1203-04 (10 th Cir. 1998)	11, 12
<i>United States v. Sumlin,</i>	
2017 U.S. Dist. LEXIS 139906 (ND OH 8-30-17).....	9, 12

United States v. Sumlin,

956 F.3d 879 *;

2020 U.S. App. LEXIS 12744 (6th Cir. 4-21-20) 9, 12

United States v. Valenzuela,

596 F.2d 824, 828 (9th Cir.), cert. denied,

441 U.S. 965, 99 S. Ct. 2415,

60 L. Ed. 2d 1071 (1979) 11, 12

United States v. Zayas-Diaz,

95 F.3d 105, 110-11 (1st Cir. 1996) 11, 12

Zurcher v. Stanford Daily,

436 U.S. 547, 556, 56 L. Ed. 2d 525,

98 S. Ct. 1970 (1978) 11, 12

Statutes

18 U.S.C. § 2 *passim*

21 U.S.C. § 841 3, 4

21 U.S.C. § 841(b)(1)(B) *iii, iv, 5, 7*

21 U.S.C. § 841(b)(1)(C) *passim*

21 U.S.C. § 846 *ii, iii, 5*

28 U.S.C. § 1254(1) 2

Other Authorities

U.S.C.A. Fourth Amendment 3, 12

U.S.C.A. Sixth Amendment 3, 14, 15

Rules

<i>Supreme Court Rule 10</i>	10
------------------------------------	----

PETITION FOR A WRIT OF CERTIORARI

Ryan Sumlin, 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 4-21-20.

OPINIONS BELOW

The 4-21-20 opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed is reported at 956 F.3d 879 *; 2020 U.S. App. LEXIS 12744 and is reprinted in the separate Appendix A 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 8-31-18, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment ("Amended" Judgment & Commitment Order) of the United States District Court for the Northern District of Ohio, was entered on 9-11-18, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States District Court for the Northern District of Ohio denying Mr. Sumlin's motion to suppress was entered on 8-30-17, is an unpublished decision reported at 2017 U.S. Dist. LEXIS 139906, and is reprinted in the separate Appendix D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 4-21-20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,
RULES AND REGULATIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

The Sixth Amendment to the Constitution of the United States 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. *Id.*

21 U.S.C. § 841 provides in relevant part:

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * * * *

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hilary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$ 1,000,000 if the defendant is an individual or \$ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$ 2,000,000 if the defendant is an individual or \$ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(21 U.S.C. § 841 (As amended Aug. 3, 2010, P.L. 111-220, §§ 2(a), 4(a), 124 Stat. 2372.))

STATEMENT OF THE CASE

On or about 8-26-15 Ryan Sumlin was charged with violation of 21 U.S.C. § 846 (conspiracy to distribute and to possess with the intent to distribute a mixture and substance containing a detectable amount of fentanyl from 3-15-15 thru 4-15-15) (Count 1); 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution of a quantity of a mixture and substance containing a detectable amount of acetyl fentanyl knowing that the substance was intended for human consumption and death resulted from the use of such substance on or about March 28, 2015) (Count 2); 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of fentanyl) (Count 3).

These charges arose in material part from evidence seized from a residence used by Mr. Sumlin after execution of a search warrant.

He was arraigned on or about 12-4-15 at which time he pleaded not guilty to the charged violations.

On or about 4-26-17, Ryan Sumlin was charged in a superseding indictment with violation of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution of a quantity of a mixture and substance containing a detectable amount of acetyl fentanyl knowing that the substance was intended for human consumption and death resulted from the use of such substance on or about March 28, 2015) (Count S1); 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 2 (aiding and abetting distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of fentanyl on or about April 28, 2015) (Count S2); 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution and possession

with the intent distribute a quantity of a mixture and substance containing a detectable amount of heroin on or about October 9, 2015) (Count S3).

He was rearraigned on or about 5-4-17 at which time he again pleaded not guilty to the charged violations.

Since the indictment did not charge any specific quantity of drugs, the drug violations fell under 21 U.S.C. § 841(b)(1)(C) with NO mandatory minimum and a statutory maximum limited to 20 years absent proof of a prior felony drug offense.

On 6-18-17, counsel filed a motion to suppress. In this motion, counsel argued, *inter alia*, that no “nexus” had been established between the death of the drug user and the residence of Mr. Sumlin.

On 8-30-17, the District Court denied the motion to suppress. In denying the motion to suppress, the District Court held, *inter alia*, that while “the search warrant affidavit [did] not mention any evidence of illicit activity related to the current charges, occurring at the searched residence”, the warrant was executed and upheld on the basis of the supporting affidavit’s claim that there was evidence that Mr. Sumlin resided in the property that was searched. This, together with the affiant’s statement that “[t]he officer’s personal experience shows that individuals involved in drug trafficking use firearms and weapons, keep large quantities of cash, maintain records and documents, and use equipment for the processing and packaging of drugs for sale” was used to support the validity of the search in the lower courts. (Appendix B). This was upheld by the Court of Appeals. (Appendix A).

On or about 4-12-18 the government filed an “information” alleging that Mr. Sumlin had been previously convicted of a Drug Trafficking Crime. This information was filed ostensibly pursuant to 21 U.S.C. § 851.

On or about 4-24-18 Mr. Sumlin proceeded to trial. (Appendix B)

On 4-30-18, Mr. Sumlin was found guilty by the jury as to violation of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution of a quantity of a mixture and substance containing a detectable amount of acetyl fentanyl knowing that the substance was intended for human consumption and death resulted from the use of such substance on or about March 28, 2015) (Count S1); 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 2 (aiding and abetting distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of fentanyl on or about April 28, 2015) (Count S2); 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of heroin on or about October 9, 2015) (Count S3). While the verdict form stated that the jury found that the death was caused by the decedent's ingestion of a combination of heroin and fentanyl, the verdict form did NOT indicate that the jury made any finding as to whether Mr. Sumlin had any prior felony drug conviction.

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 40 and a Criminal History of VI which resulted in a guideline sentencing range 360 months to life with a statutory mandatory minimum of life. (Presentence Report ¶¶80-81).

On 8-23-18, Mr. Sumlin was sentenced to life incarceration for violations of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution of a quantity of a mixture and substance containing a detectable amount of acetyl fentanyl knowing that the substance was intended for human consumption and death resulted from the use of such substance on or about March 28, 2015) (Count S1); 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 2 (aiding and abetting

distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of fentanyl on or about April 28, 2015) (Count S2); 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 (aiding and abetting distribution and possession with the intent distribute a quantity of a mixture and substance containing a detectable amount of heroin on or about October 9, 2015) (Count S3). This sentence represented the statutory mandatory minimum after enhancement for prior convictions and the drug overdose death. The sentencing findings of the Court, including the judicial fact-finding which determined Mr. Sumlin's statutory mandatory minimum based on his priors, were made by the court, not by a jury, and were made under the "preponderance of evidence" standard. (Appendix B)

The judgment was entered on 8-31-18.

On 8-31-18, Mr. Sumlin was resentenced to the same sentence of life incarceration in an amended judgment. (Appendix C)

The amended judgment was entered on 9-11-18.

On 8-26-18, a Notice of Appeal was filed. On direct appeal, counsel argued, *inter alia*, that there was no "nexus" established between the overdose death and Mr. Sumlin's residence. While "the search warrant affidavit [did] not mention any evidence of illicit activity related to the current charges, occurring at the searched residence", the warrant was executed and upheld on the basis of the supporting affidavit's claim that there was evidence that Mr. Sumlin resided in the property that was searched. This, together with the affiant's statement that "[t]he officer's personal experience shows that individuals involved in drug trafficking use firearms and weapons, keep large quantities of cash, maintain records and documents, and use equipment for the processing and packaging of drugs for sale" was used to support the validity of the search in the lower courts. *United States v. Sumlin*, 956 F.3d 879 *; 2020 U.S. App. LEXIS 12744 (6th Cir.



4-21-20) (Appendix A) affirming *United States v. Sumlin*, 2017 U.S. Dist. LEXIS 139906 (ND OH 8-30-17) (Appendix B).

On 4-21-20, the Court of Appeals denied Mr. Sumlin's appeal. *United States v. Sumlin*, 956 F.3d 879 *; 2020 U.S. App. LEXIS 12744 (6th Cir. 4-21-20) (Appendix A) affirming *United States v. Sumlin*, 2017 U.S. Dist. LEXIS 139906 (ND OH 8-30-17) (Appendix B).

Mr. Sumlin demonstrates within that (A) 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; (B) this Court should grant his Petition For Writ Of Certiorari to decide the viability of *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) subsequent to the Court's decisions in *United States v. Booker*, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05) and *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005).



REASONS FOR GRANTING THE WRIT

- 1.) THIS COURT SHOULD GRANT MR. SUMLIN'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;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court... *Id.*

Supreme Court Rule 10(a-c).

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

McNabb, 318 U.S. at 340.

1A.) The Lower Courts Erred By Finding “Nexus” To Search Petitioner’s Home Based Solely On A General Presumption That Drug Dealers Keep Drug Evidence In Their Home.

It is well-settled that for probable cause to exist there must be a “nexus between [the contraband to be seized or] suspected criminal activity and the place to be searched.” *United States v. Rowland*, 145 F.3d 1194, 1203-04 (10th Cir. 1998) (quoting *United States v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990)); *United States v. Zayas-Diaz*, 95 F.3d 105, 110-11 (1st Cir. 1996); *United States v. Valenzuela*, 596 F.2d 824, 828 (9th Cir.), cert. denied, 441 U.S. 965, 99 S. Ct. 2415, 60 L. Ed. 2d 1071 (1979) (“it cannot follow . . . simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence.”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978) (“The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.”); *Aguilar v. Texas*, 378 U.S. 108, 111; 84 S. Ct. 1509, 18 U.S.C. § 1512; 12 L. Ed. 2d 723 (1964).

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)..

In Mr. Sumlin's case, as set forth above, police investigating a drug overdose death decided it was likely that Petitioner Ryan Sumlin had provided the drugs to the decedent and obtained a search warrant for a residence where they thought he'd been staying. While "the search warrant affidavit [did] not mention any evidence of illicit activity related to the current charges, occurring at the searched residence", the warrant was executed and upheld on the basis of the supporting affidavit's claim that there was evidence that Mr. Sumlin resided in the property that was searched. This, together with the affiant's statement that "[t]he officer's personal experience shows that individuals involved in drug trafficking use firearms and weapons, keep large quantities of cash, maintain records and documents, and use equipment for the processing and packaging of drugs for sale" was used to support the validity of the search in the lower courts. *United States v. Sumlin*, 956 F.3d 879 *; 2020 U.S. App. LEXIS 12744 (6th Cir. 4-21-20) (Appendix A) affirming *United States v. Sumlin*, 2017 U.S. Dist. LEXIS 139906 (ND OH 8-30-17) (Appendix B).

Based on the foregoing facts and law, the execution of the search warrant on Mr. Sumlin's residence was violative of the Fourth Amendment and all evidence seized should have been suppressed. *United States v. Rowland*, 145 F.3d 1194, 1203-04 (10th Cir. 1998) (quoting *United States v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990)); *United States v. Zayas-Diaz*, 95 F.3d 105, 110-11 (1st Cir. 1996); *United States v. Valenzuela*, 596 F.2d 824, 828 (9th Cir.), cert. denied, 441 U.S. 965, 99 S. Ct. 2415, 60 L. Ed. 2d 1071 (1979) ("it cannot follow . . . simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence."); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific

'things' to be searched for and seized are located on the property to which entry is sought."); *Aguilar v. Texas*, 378 U.S. 108, 111; 84 S. Ct. 1509, 18 U.S.C. § 1512; 12 L. Ed. 2d 723 (1964).

Based on the foregoing, this Court should vacate the Court of Appeals decision affirming the denial of Mr. Sumlin's motion to suppress and ORDER that his case be REMANDED to the district court with instructions to VACATE his conviction. *Id.*

1B.) The Lower Courts' Affirmance Of Mr. Sumlin's Sentence Was Violative Of This Court's Decision In *Alleyne v. United States*, 133 S. Ct. 2151 (6-17-13) And Denied Mr. Sumlin His Sixth Amendment Constitutional Right To Jury Trial.

In *Apprendi v. New Jersey*, 530 U.S. ___, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00), the Supreme Court held that the Constitution requires that any fact that increases the penalty for a crime beyond a default statutory maximum, other than the fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In *Alleyne v. United States*, 133 S. Ct. 2151; 2013 U.S. LEXIS 4543 (6-17-13), the Supreme Court extended the rule of *Apprendi* to hold that any fact that imposes or increases the statutory mandatory minimum penalty for a crime beyond the default sentence statutory mandatory minimum must also be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In Mr. Sumlin' case, the record demonstrates that he was denied due process of law and his Sixth Amendment constitutional rights to notice and jury trial by the increase in his statutory mandatory minimum sentence by facts not submitted to a jury and not proven beyond a reasonable doubt when the lower court enhanced his sentence to mandatory life incarceration from the otherwise statutory mandatory minimum of 20 years.

Based on the foregoing facts and law, Mr. Sumlin was deprived of his his Sixth Amendment constitutional right to have any increase in his statutory mandatory minimum sentence be based solely upon facts submitted to the jury and his Sixth Amendment constitutional right to have any increase in his statutory mandatory minimum sentence based solely on facts proven beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151; 2013 U.S. LEXIS 4543 (6-17-13)

Based on the foregoing, this Court should VACATE the Court of Appeals decision denying his direct appeal and REMAND to the lower courts for reconsideration in light of *Alleyne*.

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

Allen Charge

District courts are accorded substantial discretion in the control of jury deliberations. See, e.g., *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946). Nevertheless, because the right to a trial by jury as fact-finder in serious criminal cases is "fundamental to the American scheme of justice," *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (citation and internal quotation marks omitted), it is a "cardinal principle that the deliberations of the jury shall remain private and secret" in order to protect the jury from improper outside influence, *United States v. Olano*, 507 U.S. 725, 737, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (citation and internal quotation marks omitted). See generally Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. Rev. 203 (Autumn 2005). The judge's traditional role in a jury trial is thus limited to arbiter of the law and manager of the trial process, *Quercia v. United States*, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933); the jury remains the primary finder of fact and

essential check on arbitrary government, see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); see also Sixth Amendment; *Duncan v. Louisiana*, 391 U.S. 145, 151-54, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (discussing historical development of jury trial as fundamental right in America). For these reasons, "[t]he trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused," *Martin Linen Supply Co.*, 430 U.S. at 573, and "it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made," *Remmer v. United States*, 350 U.S. 377, 382, 76 S. Ct. 425, 100 L. Ed. 435, 1956-1 C.B. 641 (1956).

In Mr. Sumlin's case, the jury sent two notes to the court, one of which indicated that the jury was unable to reach a verdict on Count 1A². The other question indicated confusion as to how to decide what drug was involved.³ (See Transcript of Trial, page 655)

In response to the jury questions, the district court's answer was coercive and boxed the jury into a decision that the only drugs to be considered were heroin and fentanyl instead of considering other drugs in the decedent's system. This answer was violative of Mr. Sumlin's Sixth Amendment right to jury trial.

Additional Grounds

Mr. Sumlin's conviction and sentence are violative of the First, , Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Sumlin's conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of

² "Question 1(a). With respect to Count 1, do you unanimously find that the government proved beyond a reasonable doubt that death resulted from the use of the heroin and fentanyl distributed by the Defendant, Ryan K. Snmlin. (indicate answer by checking one line below)"

³ "Can we get an explanation of the but-for causation and how incremental effects should be thought of, and example of how it would be applied?"

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. Sumlin's sentence.

These claims in Argument 1C are submitted to preserve Mr. Sumlin'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. Sumlin's case.

2.) **THIS COURT SHOULD GRANT MR. SUMLIN'S PETITION FOR WRIT OF CERTIORARI TO DECIDE THE VIABILITY OF *ALMENDAREZ-TORRES V. UNITED STATES* SUBSEQUENT TO THE COURT'S DECISIONS IN *UNITED STATES V. BOOKER* AND *SHEPARD V. UNITED STATES*.**

United States v. Booker, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05), like *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) and *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04) hold that a “statutory maximum” sentence cannot be enhanced by facts not charged in indictment, not submitted to a jury, and not proven beyond a reasonable doubt, or admitted by a defendant. The cases, however, expressly create an exception from their Sixth Amendment holding for facts of prior conviction. As stated in *Booker*, “Any fact (*other than a prior conviction*) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 125 S. Ct. at 756. (emphasis added) But this exception is not consistent with the broad reasoning of these three cases, which would seem to require that any fact increasing the sentence range must be either admitted or proven to the jury. See *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

In *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005), decided after *Booker*, the Court strongly suggested that the prior conviction exception should be viewed narrowly and that *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), on which this exception is based, may soon be overturned.⁴

⁴ See also *United States v. Gibson*, 2006 U.S. App. LEXIS 60 (11th Cir. 1-4-06); *United States v. Greer*, 2006 U.S. App. LEXIS 510 (11th Cir. 1-10-06)

In *Alleyne v. United States*, 133 S. Ct. 2151; 2013 U.S. LEXIS 4543 (6-17-13), the Supreme Court extended the rule of *Apprendi* to hold that any fact that imposes or increases the statutory mandatory minimum penalty for a crime beyond the default sentence statutory mandatory minimum must also be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In Mr. Sumlin's case, both his statutory mandatory minimum and his statutory maximum sentence was enhanced for prior convictions which were not charged in indictment, presented to a jury and proven beyond a reasonable doubt.

In Mr. Sumlin's case, his statutory maximum sentence was enhanced for prior convictions which were not charged in indictment, presented to a jury and proven beyond a reasonable doubt.

His case would be an ideal case for the Court to use to determine the continuing viability of *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) subsequent to *United States v. Booker*, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05) and *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005). This is particularly true because the constitutional violation has resulted in a sentence of life incarceration for Mr. Sumlin.

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. Sumlin's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Ryan Sumlin 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**⁵ to the court of appeals for reconsideration in light of *Alleyne v. United States*, 133 S. Ct. 2151; 2013 U.S. LEXIS 4543 (6-17-13).



Ryan Sumlin
Petitioner
62250-060
P.O. Box 2068
Inez, KY 41224

Date: 7.17.2020

⁵ 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).