

RECORD NO. _____

IN THE
Supreme Court of the United States

DAMONTAZE MONTRELL TILLERY,

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

Whether the Court of Appeals erred in affirming the District Court's decision to overrule Petitioner's motion for acquittal when the evidence at trial was insufficient to convict Petitioner of possession of a firearm by a convicted felon and discharging a firearm resulting in death during a drug trafficking offense where the evidence at trial demonstrated that Petitioner did not possess or fire a firearm during his brief interaction with the victim.

Whether the Court of Appeals erred in ruling that the District Court did not commit error when sentencing Petitioner by applying the sentencing guideline for § 2A1.1 relating to first degree homicide.

PARTIES TO THE PROCEEDINGS

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

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMONTAZE MONTRELL TILLERY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit
appears in Appendix A to the Petition and is unpublished.

The decision of the district court for the Eastern District of
Virginia appears in Appendix B to the Petition and is unpublished.

JURISDICTION

The district court for the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion on August 17, 2020. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

Federal Rules of Criminal Procedure Rule 29 states:

After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

18 U.S.C. § 1111 provides that:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful,

deliberate, malicious, and premeditated killing; ... or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the decision of the Fourth Circuit Court of Appeal's in affirming the district court's decision overruling Petitioner's Motion for Judgment of Acquittal under Federal Rule of Criminal Procedure 29 and the district court's finding that the evidence was sufficient to support the use of premeditation in determining Petitioner's applicable guideline range for sentencing. Petitioner was originally charged in a four-count superseding indictment with Count One, Use of a Firearm Resulting in Death; Count Two, Drug Conspiracy; Count Three, Attempted Possession with Intent to Distribute Ecstasy; and Count Four, Felon in Possession of a Firearm and Ammunition. Petitioner entered a not guilty plea to all counts, and a jury trial commenced on July 30, 2019

before the Honorable Rebecca Beach Smith, Senior United States District Court Judge for the Eastern District of Virginia.

At the close of the United States' case Counsel for Petitioner made a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. The United States District Court denied this motion. Petitioner elected not to present evidence and rested. At the close of all evidence Counsel for Petitioner again made a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. The United States District Court denied this motion. On August 2, 2019, the jury returned a verdict of guilty on all four counts.

On January 8, 2020, the United States District Court sentenced Petitioner as follows: Count One, Use of a Firearm Resulting in Death, imprisonment for life, to run consecutive to all other counts, supervised release for five (5) years, special assessment of \$100; Count Two, Drug Conspiracy, imprisonment for two hundred forty (240) months to run concurrent to count Three and count Four, supervised release for three (3) years to run concurrently to all other counts, special assessment of \$100; Count Three, Attempted Possession with Intent to Distribute Ecstasy, imprisonment for two hundred forty (240) months to run

concurrently to count Two and count Four, supervised release for three (3) years to run concurrently to all other counts, special assessment of \$100; and Count Four, Felon in Possession of a Firearm and Ammunition, imprisonment for one hundred twenty (120) months to run concurrently to Count Two and Count Three, supervised release for three (3) years to run concurrently to all other counts, special assessment of \$100. The final judgment of the United States District Court was entered on January 8, 2020. Petitioner timely filed his Notice of Appeal on January 17, 2020. The Fourth Circuit Court of Appeals affirmed the decision of the district court in an unpublished opinion on August 17, 2020. Petitioner did not file a petition for rehearing. Petitioner is now seeking this writ of certiorari to review the ruling of the court of appeals.

Events at Issue

The United States presented evidence from 16 witnesses during their case-in-chief. The events described by the witnesses took place over the course of a single day, July 26, 2018. That morning, Anthony Munford was in a text conversation with the victim in this matter, Javon Stephenson. Mr. Stephenson wanted to procure a firearm and

wanted Munford's help in obtaining one, therefore, Munford contacted Petitioner and determined that Petitioner could sell a .9mm firearm to Stephenson. According to Munford, all three men were at one point in time incarcerated together at Greensville Correctional Center where Munford and Stephenson had become close. Stephenson, however, did not know Petitioner that well, and needed a description from Munford to remember him. Munford continued to communicate back and forth between Stephenson and Appellant over the potential sell of a firearm, until Stephenson suggested that Munford ask Appellant if he would be willing to trade the firearm for drugs as Stephenson considered the price of \$400 for the firearm to be too high. At this point, Munford decided to step away from brokering the transaction and sent both Stephenson and Petitioner their respective phone numbers for them to communicate directly with each other further.

The United States then relied on the text communications between Stephenson and Petitioner, which were admitted without objection, through Detective Trevor Buchanan, to establish that Stephenson and Petitioner eventually agreed to meet at a location on 19th Street in Newport News, Virginia. The entire physical interaction

between Stephenson and Petitioner was captured on a security camera located at the home of Ernest Thompson at 645 19th Street. The United States introduced this video, without objection, through Detective Joseph Torres as government exhibit 43. Soon after Stephenson pulls away from in front of 645 19th Street, and Petitioner is seen on video moving in the opposite direction, Stephenson's car wrecks into a house located at 653 19th Street. An off-duty firefighter/paramedic, Von Lester, happened to be near the location and was alerted through an app on his phone of a nearby vehicle, or structure fire. While Lester was not the first person on the scene, he did testify that he approached Stephenson's vehicle, checked for a pulse and determined that Stephenson was not breathing and did not have a pulse. As other emergency personnel began to arrive, Sergeant Steven Smithley of the Newport News Police Department began walking down 19th street where he located three shell casings in the roadway, which he marked with a three-by-five index card and identified on a photograph, introduced as government's exhibit 8, and on an overhead map of the scene introduced as government's exhibit 9.

Senior Forensic Technician Kelly Wells then arrived on the scene and began taking photographs and examining the crime scene including the vehicle where Stephenson had been determined deceased. Wells authenticated several photos admitted into evidence including, exhibits 10, 10A, and 11, pictures of where the shell casings were located, as well as exhibit 34, a picture of the door frame on Stephenson's vehicle where Wells found a bullet. After removing the bullet fragment from the door frame, Wells testified she was able to determine the path of the bullet as coming from the driver's side in a right to left direction. Additionally, Wells testified that as she was assisting the medical examiner in removing the deceased from the vehicle she located a bag of suspected MDMA, which was later confirmed by forensic testing to be ecstasy. The amount of ecstasy in the bag found in Stephenson's vehicle according to Sergeant Randy Ronnenberg would have a street value of approximately \$600, or "roughly two 8 balls."

Dr. Wendy M. Gunther, an assistant chief medical examiner with the Virginia Commonwealth Medical Examiner's System, performed an autopsy of Javon Stephenson and her report was admitted, without objection, as exhibit 46. Dr. Gunther's report and testimony indicated

that Stephenson died as a result of gunshot wounds to the arm and chest from two to four bullets. According to Dr. Gunther the direction of fire would have come from Stephenson's left side to his right, downward, and from his back to his front. Furthermore, Dr. Gunther testified that she was unable to find any gunshot residue on the victim, indicating that she believed the shooter was not close range, and explained that "most handguns will throw gunpowder a foot, maybe two feet, foot and a half, if you get outside that range where they throw gunpowder I can't tell if that gun was 2'2" away or 200 feet away."

Detective Thomas Comer testified that on August 22, 2018 he received a call from his supervisor that Petitioner was waiting at the Newport News Police Department headquarters to talk with him to clear his name. This interview was transcribed and recorded, and both were submitted as exhibits 64 and 65. Petitioner explained to Detective Comer that on the morning of July 26, 2018 he was contacted by Munford and that he was originally going to sell a firearm to Stephenson, but by the time Stephenson was ready to come over to meet him, the person that Appellant was going to get the firearm from had already sold it, but Stephenson was still going to "throw me some drugs

to sell for him.” Petitioner went on to explain that since Stephenson could not meet up with him until much later in the day, the gun was no longer available, but he still wanted to see if Stephenson would “front” the drugs. Petitioner stated that Stephenson agreed to bring him two 8 balls of ecstasy and that Petitioner would owe Stephenson \$400 back. When Stephenson began to go through the tunnel (Monitor-Merrimac Bridge Tunnel) he texted Petitioner, and Petitioner had Stephenson meet him at 19th and Ivy in Newport News. While Petitioner was standing at Stephenson’s driver side talking to him, Petitioner stated that he saw two guys coming from the opposite end of the street, from the area of Madison Avenue where Stephenson’s vehicle was facing, and that he “saw two guys come from that way wearing all black and start proceed to shooting.” Petitioner further stated, “I heard his car skirt off and I look back and he had crashed into the thing, I didn’t know if, you know, he was hit or what was going on.” When asked if he saw where the two individuals went, Petitioner responded, “I think they ran back towards the house, the direction, cause like I told you, I had fled back that way and when I turned around it’s like matter of fact, yeah, they did run back towards Madison...”

Near the close of the government's evidence, the United States called Courtney Etzelmiller, a forensic scientist in the field of firearm and toolmark identification to testify to the shell casings found on 19th Street. Etzelmiller testified that nearly all semi-automatic firearms have the ejection port on the right side of the slide, so if the firearm is held in the correct or normal shooting position, the cartridge cases would be ejected to the right and to the rear.

After the jury returned a verdict of guilt on all counts, Petitioner was sentenced on January 8, 2020 by Senior United States District Judge Rebecca Beach Smith. During the sentencing hearing the Court found by a preponderance of the evidence that the enhancement for premeditation under United States Sentencing Guideline 2A1.1 was appropriate in determining the correct sentencing guidelines.

REASONS FOR GRANTING THE PETITION

The district court committed error when it overruled Petitioner's motion for judgment of acquittal as the video evidence produced at trial demonstrated that Petitioner could not have discharged a firearm, and the court of appeals erred when it affirmed this decision. Although Petitioner was convicted of both possession of a firearm by a convicted felon and discharging a firearm resulting in death in furtherance of a drug trafficking crime, the entire encounter between the victim and Petitioner in this case was captured on video. At no point on the video does Petitioner make any action that would be consistent with shooting Stephenson, there is no muzzle flash, no step back to account for the bullet fragment found in Stephenson's door frame, no gunshot residue on Stephenson's body consistent with a close proximity gun shot, and the shell casings found at the scene are in a different location than where Petitioner was clearly standing when observing the video. The video itself creates a reasonable doubt, and the evidence is therefore insufficient to sustain Petitioner's convictions for the discharge of a firearm resulting in death, and for possession of a firearm by a convicted felon.

Furthermore, the district court committed additional error when applying § 2A1.1 of the Sentencing Guidelines for first degree homicide. When sentencing Petitioner the district court found that premeditation had been established and therefore USSG § 2A1.1 was the appropriate section for purposes of guideline calculation, however, the evidence produced at trial established no known hostilities between either Stephenson or Petitioner, the government did not produce any established rival affiliations with either person, no jealous lover, no outstanding debts owed between the two, no retribution for a perceived wrong, no motivation whatsoever. The reason behind the act in this matter was completely left to speculation and therefore the application of § 2A1.1 was inappropriate.

LAW AND ARGUMENT

ISSUE 1

THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT PETITIONER OF POSSESSION OF A FIREARM BY A CONVICTED FELON AND DISCHARGING A FIREARM RESULTING IN DEATH DURING A DRUG TRAFFICKING OFFENSE WHERE THE EVIDENCE AT TRIAL DEMONSTRATED THAT PETITIONER DID NOT POSSESS OR FIRE A FIREARM DURING HIS BRIEF INTERACTION WITH THE VICTIM.

Standard of Review:

Sufficiency of the trial evidence is reviewed *de novo*, and the question is whether no rational trier of fact could find guilt beyond a reasonable doubt on an element of the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979). In a challenge to the sufficiency of the jury's guilty verdict, an appellant "bears a heavy burden." *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). This burden is not however "insurmountable." *United States v. Habegger*, 379 F.3d 441, 444-45 (4th Cir. 2004). This Court reviews the evidence in a light most favorable to the prevailing party below drawing all reasonable inferences. *See United States v. Williams*, 41 F.3d 192, 199 (4th Cir. 1994). *Cert. denied*, 514 U.S. 1056 (1995). A jury is however, "entitled to make only reasonable inferences from the evidence." *United States v. Samad*, 754

F.2d 1091, 1097 (4th Cir. 1984), quoting *United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). Finally, a jury's verdict can only be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942). Substantial evidence is, "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

Argument:

In the case at bar, the United States failed to prove their case to the exclusion of a reasonable doubt because the security camera footage captured on the home monitoring system of Ernest Thompson provided the complete and total interaction between Petitioner and Stephenson. During the brief encounter between the two, it is plainly obvious that Petitioner makes no movement or action consistent with shooting the driver. Furthermore, in order for the bullet fragment located in the door frame as seen in trial exhibit 34, as well as the lack of close proximity gunshot residue and the path of travel of the bullets as

established by medical examiner Dr. Wendy Gunther, there is simply no way that Petitioner could have discharged a firearm without being seen on camera. The physical evidence and the video surveillance, taken together, cannot support the conclusion that Petitioner was the shooter.

While the government did offer several pieces of circumstantial evidence to support their theory, including that the shots that were fired into the vehicle necessarily came from the driver's side, and that Stephenson was there to meet with Appellant for an admitted drug transaction at a location chosen by Petitioner, however, the government's evidence stands in conflict with, not in support of the actions as detailed in the video. “[W]here an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, a reasonable jury must necessarily entertain a reasonable doubt.” *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992). This is true in this case because the existence of the video tape, where Petitioner makes no action consistent with shooting, where there is no visible firearm held in a position consistent with the physical evidence, and there is no indication of even a muzzle flash fired, then the tape itself is the reasonable doubt.

Petitioner is well aware that this Court will disturb a jury verdict only on the rare occasion where insufficient evidence exists as a matter of law to support the finding. Petitioner respectfully submits that when a videotape clearly contradicts the jury's finding, in this case that the video tape evidence, an unbiased account of the events as they happened, clearly establishes that Petitioner could not have been the person who discharged a weapon, the evidence submitted to the jury was insufficient to convict him of the possession of a firearm and discharge of a firearm counts. This Court should be open to a review of the video tape evidence in this matter as it so drastically undercuts the government's case to a degree that the jury could not have come to the conclusion that Petitioner discharged a firearm without completely disregarding the only direct evidence of the interaction between Petitioner and Stephenson. (*See Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (review of summary judgment in § 1983 case where a videotape contradicts the version of the story adopted by lower court.); *see also United States v. Kehoe*, 893 F.3d 232 (4th Cir. 2018) (officer's body camera can "provide important advantages to reviewing courts" in appellate review of motion to suppress.)

ISSUE 2

THE DISTRICT COURT COMMITTED ERROR WHEN SENTENCING PETITIONER BY APPLYING THE SENTENCING GUIDELINE FOR § 2A1.1 RELATING TO FIRST DEGREE HOMICIDE.

Standard of Review:

In assessing whether a district court properly calculated the Guidelines range, "including application of any sentencing enhancements, we review the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Layton*, 564 F.3d 330, 334 (4th Cir. 2009). "Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict."

United States v. Alvarado Perez, 609 F.3d 609, 614 (4th Cir. 2010). Murder is defined under 18 U.S.C. §1111 as "the unlawful killing of another with malice aforethought." 18 U.S.C. §1111. It further provides, in relevant part: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing..., is murder in the first degree. Any other murder is murder in the second degree." *Id.* "First-degree premeditated

murder requires a showing of premeditation in addition to proof of malice.” *United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003). “Second-degree murder requires only a showing of malice.” *Id.*

Argument

In the present matter, the District Court made a finding that premeditation existed based on the jury’s finding that Petitioner discharged a firearm. However, the government could not offer any evidence to support a showing of premeditation. The evidence produced at trial was silent as to any known hostilities between either Stephenson or Petitioner. While there was evidence that Stephenson and Petitioner had met each other at Greenville Correctional in the past, they were unfamiliar with each other on the date of this incident without prompting from a mutual friend, Anthony Munford. There were no established rival affiliations with either person, no jealous lover, no outstanding debts owed between the two, no retribution for a perceived wrong, no motivation whatsoever. The District Court therefore had to speculate as to the rationale behind the act in this matter as it was a complete guess as to why Petitioner would have any motivation whatsoever to want to kill Stephenson.

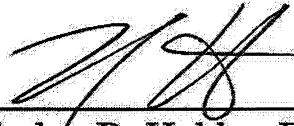
Petitioner openly admitted that the original reason Stephenson drove to meet with him in Newport News was in order to exchange a firearm for \$400 worth of ecstasy. However, Petitioner explained that as the firearm originally discussed between Stephenson and Petitioner was no longer available, the purpose of the rendezvous turned into a “front” exchange where Stephenson would supply Petitioner with 2 eight balls worth of ecstasy in exchange for \$400 after Petitioner had sold the drugs, netting Petitioner an estimated \$200 profit. There was never any indication according to the evidence that this meet up was some type of set up carried out in advance by Petitioner to lure Stephenson to a certain location. There is also nothing in the record to support any type of failed robbery, or other enumerated crime that would give rise to a felony murder application negating the need for premeditation. The application of USSG §2A1.1 in this case is therefore incorrect because there is nothing in the record to support the premeditation element in 18 USC § 1111.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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