No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD WINN,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT

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

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QUESTIONS PRESENTED

The first question presented is whether or not the Petitioner, **RICHARD WINN**, should have been sentenced as an Armed Career Criminal (ACCA) requiring the imposition of a mandatory sentence of fifteen (15) years in violation of 18 U.S.C.§922(g) and §925(e)(1) wherein the Third Circuit Court of Appeals relied upon **United States v. Daniels**, 915 F.3d 148 (3rd Cir. 2019). It further concluded that although this Court's decision in **Shular v. United States**, 140 S.Ct. 779 (2020), altered the analytical approach of **Daniels**, that it had no impact in the Third Circuit's review and the ultimate decision that it had previously had reached in **Daniels**.

The second question presented is whether or not there was sufficient evidence to convict the Petitioner with the constructive possession of firearms which were located in the premises searched by the authorities.

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PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, RICHARD WINN, respectfully prays that a Writ of Certiorari be issued to review the Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 4, 2022, a copy of the Judgment of the Court of Appeals for the Third Circuit is attached hereto and set forth in Appendix A.

OPINION BELOW

A copy of the Opinion (Jordan, Restrepo and Porter) is attached hereto and made part hereof and marked Appendix B.

JURISDICTION GROUNDS

The District Court had jurisdiction over this Federal criminal case pursuant to 18 U.S.C.§3231. The Third Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C.§1291. This Court's is invoked under 28 U.S.C. §1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the name of all parties, namely, Petitioner, Richard Winn and Respondent, United States of America.

FEDERAL STATUTES INVOLVED

18 U.S.C. §924(e)(1) provides in relevant part: a serious drug offense considered a State law offense involving "manufacturing, distributing, or possessing with the intent to manufacture or distribute a controlled substance" it carries a maximum sentence of at least ten years.

STATEMENT OF THE CASE

A. Proceedings Before the District Court and Third Circuit Court of Appeals

Petitioner, RICHARD WINN (hereinafter referred to as "WINN or PETITIONER"), was charged with one count of violation of 21 U.S.C. §841(a)(1) to wit Possession with the Intent to Distribute cocaine base (crack), heroin and marijuana; Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. §924(c)(1); and one count of Felon in Possession of a Firearm in violation of 18 U.S.C. §§922(g)(1) and 924(e). Winn was charged with Aiding and Abetting in violation of 18 U.S.C. §2 the crimes related to Possession with the Intent to Distribute and Possession of a Firearm in Furtherance of a Drug Trafficking Crime. Specifically, Winn was not charged with the aiding and abetting a felon in Possession of a Firearm. The Indictment in Winn's case was filed on December 20, 2017. On September 4, 2018, Winn proceeded to trial and on September 7, 2018, Winn was convicted by a jury on the Counts relating to Possession with the Intent to Distribute Cocaine Base, Heroin and Marijuana as well as

Possession of a Firearm in Furtherance of a Drug Trafficking Crime and the Aiding and Abetting of both offenses. Winn waived his right to a jury trial in reference to the remaining count, Felon in Possession of a Firearm. Same was heard by the District Court and Winn was found guilty of same after a bench trial.

On July 19, 2019, after having been appointed new counsel and subsequent thereto receiving permission to file a Motion for Post Trial Relief Out of Time, Winn filed a Motion for a New Trial and/or Dismissal of Count Four of the Indictment which related to Winn's charge of being a felon in possession of a firearm in violation of 18 U.S.C. §§922(g)(1) and 924(e). Said request was based on this Court's determination and finding in **Rehaif v. United States**, 139 S.Ct. 2191 (2019).

On January 13, 2020, the District Court entered an Order denying Winn's Motion for a New Trial.

On February 20, 2020, the District Court imposed a sentence upon Winn wherein Winn received a sentence of 240 months on the charge of felon in possession of a firearm and 120 months possession with the intent to distribute cocaine base ("crack"), heroin and marijuana and the aiding and abetting thereof.

Both of the imposed sentences would run concurrent. However, Winn was also sentenced to possession of a firearm in furtherance of a drug trafficking crime and the aiding and abetting thereof to a sentence of sixty (60) months which was to run consecutively to the other two terms of imprisonment. The total period of incarceration to which Winn is subjected is three hundred (300) months or in layman's term a period of incarceration of twenty-five (25) years.

On March 3, 2020, Winn filed a timely Notice of Appeal to the Third Circuit Court

of Appeals.

On February 12, 2021, Winn filed his Brief along with Joint Appendix Volume I. Also at that time Winn filed Joint Appendix Volumes II and III.

On or about August 6, 2021, Respondent filed its Brief.

On September 28, 2021, Winn filed a Reply Brief.

Pursuant to a request from the panel assigned to decide Winn's appeal, a Supplemental Joint Appendix was filed of record on January 12, 2022.

The matter was argued before the panel on January 19, 2022, and as previously represented, on March 4, 2022, the Third Circuit Court of Appeals entered a Judgment denying Winn's Appeal and filed an Opinion affirming same. Said Opinion was not precedential.

B. Factual Background

The case against Winn revolved around the execution of a search warrant for a premises in Philadelphia County located at 1208 West Venango Street. The search warrant was based on an investigation related to an incident which did not occur in or around the premises to be searched. Rather it was believed that an item or items related to the other crime would be found at this residence.

The search of the premises took place in the early morning hours of September 15, 2017. Testimony at trial revealed that member of the Philadelphia Swat Team upon gaining access to the W. Venango Street property observed Winn moving towards the dining room area. Prior to the actual entry into the home the officer heard footsteps, but could not definitively say if they were going upstairs or downstairs. Due to the fact that there had been no substantial surveillance undertaken of the premises prior to the

execution of the warrant, no one knew when Winn had arrived at that location. Further, Winn was not identified in the search warrant as even a person of interest.

Upon securing the structure, officers located a Codefendant, Ameen Green, in a second floor bedroom which had a few items of personalty such as a futon, tv/video console device and male clothing. In the other two bedrooms on the second floor no furnishings of any substantial nature were located. None of the items on the second floor could be directly related to Winn.

Another witness during Winn's Trial was a detective who was the actual affiant on the search warrant in question. Upon the securing of the premises by members of the Swat Team, the detective entered the premises and saw Green and Winn secured in the first floor area of the structure. Eight to ten feet from the front door was a table which had what appeared to be controlled substances. During the search, narcotics packaging products and crack cocaine substances as well as paraphernalia were observed in plain view on the dining room table. On the far side of the table was a closed cabinet. A subsequent search of the cabinet resulted in the seizing of a box which inside same was a nine-millimeter Taurus firearm with ammunition. In the same box in a plastic bag was a disassembled Smith & Wesson semi-automatic pistol. Also, in the cabinet along with the firearms was additional drug paraphernalia which consisted of baggies and marijuana as well. The detective acknowledged that upon entry into the house the door to the cabinet was closed and none of the contents were visible to anyone standing in the dining room area unless the door to the cabinet was open. In the kitchen law enforcement recovered baggies, crack cocaine and heroin already bagged. At some point during search process, Winn was taken outside to a police

vehicle for transportation to police headquarters. During that process Winn purportedly asked the detective if he would get Winn's set of keys which were in the kitchen area. This the detective did, but seeing the keys, the detective tried the keys in the front door lock of the West Venango Street property. One of the keys worked that lock. The key was on a ring with other keys which also had a lanyard with the name Richard on it.

It was revealed that in essence there was no real subsequent investigation concerning the premises nor were the firearms seized ever tested for fingerprints or DNA evidence.

REASONS FOR GRANTING THE PETITION

A. Convictions Under the Pennsylvania Controlled Substance Law cannot constitute a Predicate Conviction Under the Armed Career Criminal Act

The Third Circuit Court of Appeals in the matter of **United States v. Daniels**, 915 F.3d 148 (3rd 2019), determined that Pennsylvania felony controlled substance laws, qualified for the determination as a serious drug offense, and for consideration as a conviction to determine whether or not an individual can be determined to be an armed career criminal. Subsequent to the Third Circuit ruling in **Daniels**, Daniels filed a Petition for Writ of Certiorari before this Court. Same was denied in March of 2020. Petitioner herein seeks the Court to reconsider its prior ruling in denial of a review on this issue and grant the Writ.

As part of Petitioner's argument, it is his position that the Pennsylvania Controlled Substance statutes are categorically broader than what the Federal Sentencing Guidelines allow by definition and constitute a violation of the law. Under 18 U.S.C.§924(e)(2)(A)(ii), a serious drug offense requires under state law the manufacturing, distributing or possession with the intent to distribute a controlled

substance. Attempts to complete any of the aforementioned acts are not included. The definitions as set forth is Pennsylvania Statute 35 Pa.C.S.A.§780.102 mirrors Federal Guideline definitions with the exception that in Pennsylvania one can be convicted of this offense for the attempted transfer of a controlled substance from one person to another. Again that is something that is not recognized under the Federal Guidelines.

In his appeal before the Third Circuit, Petitioner brought to the Court's attention the matter of **United States v. Havis**, 927 F.3d 382 (6th Cir. 2019) (en banc). In **Havis** the Sixth Circuit at that time found that under §4B1.2(b) an attempt to distribute a controlled substance is not an offense as outlined by the Guidelines specifically. There, the en banc ruling relied on the fact that commentary portion which is set forth in a Guideline statute is not binding. It ruled so by determining that the commentary to a guideline is not something that has faced the scrutiny of a Congressional review. The Commentary application notes under 1. Definitions suggests that included in a controlled substance offenses were attempts to commit the offense itself. The word attempt (emphasis added) is not set forth in Guideline §4B1.2(b). Since that ruling the Sixth Circuit has somewhat qualified its finding in **Havis** as to the Tennessee Controlled Substance Statutes. In TENN. Code Ann. §39-17-402 (6), which is the specific definition portion, the Court found as to what constitutes the drug crime, also included an attempt to deliver. Hence, it was comparable to the Pennsylvania Statute. However, in the intervening years of the **Havis** decision, there has been argument in the Sixth Circuit that **Havis** in of itself was based on an incorrect stipulation by the parties. Whereby it had been agreed and stipulated to between the defendant and prosecution when arguing the case before the appellate court the parties agreed that an attempt

could be the least culpable conduct of a delivery aspect concerning the Tennessee controlled substance statute. Since the issuance of **Havis** various cases and decisions have argued that **Havis** to an extent was wrong because the en banc Court in making that decision was somewhat misled based on the parties incorrect stipulation as to the law and an attempt was not included in the statue. As recently as two weeks ago, the Sixth Circuit in the case of **United States v. Miller**, No. 21-5598 (Sixth Cir., May 12, 2022) a three-judge panel filed an opinion disavowing itself, and essentially the Sixth Circuit, from the **Havis** Court's en banc decision. Two of the panel members found that **Havis** was incorrectly decided except for the precedent as to the rule that a commentary position cannot amend or expand the actual guideline itself. Two judges of the panel determined that an attempt was in fact a delivery and not in essence an inchoate crime under the Tennessee statute. What makes this new position less authoritative is that the remaining panel member dissented and wrote that the panel was bound by the en banc decision in **Havis** and that a panel of three judges did not have the authority, unlike this Court, to overturn prior precedent, such as the **Havis** ruling. Hence it is Petitioner's position that at the present time **Havis** is still the law of the Sixth Circuit. **Havis** still stands for the principle, that if the Sentencing Commission had wished to expand the definitions of controlled substance offenses to include attempts it can clearly and could have done so with the stroke of a pen and inserted the appropriate language in the guideline itself and then seek appropriate Congressional review and approval. See **United States v. Winstead**, 890 F.3d 1082 (D.C. Cir. 2018). This Court in **Stinson v. United States**, 508 U.S. 36, 113 S.Ct. 913, 123 L.Ed. 2d 598 (1993), early on in the implementation of the Sentencing Guidelines process,

determined that the commentary in and of itself is never an independent legal compelling force. With these differing positions in the Circuits, there is need for this Court's clarification.

B. The Evidence was Insufficient to Determine Possession of a Firearm- let alone Constructive Possession

Even considering the evidence in the light most favorable to the Respondent as required, there was substantial lack of substantive evidence from which a rational fact finder could determine guilt beyond a reasonable doubt. The Petitioner was charged with the possession of the firearms in question resulting in two separate criminal offenses. The first in Count Two was possession of a Taurus International 9 mm semi-automatic in furtherance of a drug trafficking crime as well as aiding and abetting the possession of the same weapon in furtherance thereof. It would have to be believed that aiding and abetting portion related to the possession of the Taurus by Codefendant Green who was found on the second floor of the West Venango Street property. In Count Four the Petitioner was charged again with possession of the Taurus 9 mm as well as a Smith & Wesson 9mm semi-automatic handgun. There was no aiding and abetting charge in that Count and the crime itself was that Petitioner, a convicted felon, was prohibited from possessing either weapon.

The facts are fairly straightforward. The Petitioner was found in the early morning hours inside a property to be searched. In a closed cabinet in an area near where the Petitioner was first seen, were the two firearms in question. No physical evidence such as DNA evidence or fingerprints were found on the weapons attributable to the Petitioner. Nor for that matter was any gun powder residue found on the Petitioner's person. The weapons were not in plain view and there is no evidence as to

how long the weapons themselves were in the premises. There is no evidence produced to how long Green was in the residence or for that matter the Petitioner. However, there was a key on a lanyard which allowed Petitioner to have apparent access to the premises.

There was evidence introduced of a conversation that the Petitioner had three days later after he was arrested while still incarcerated wherein he indicated in a tape recorded phone call that he was not charged with possession of the firearms. The conclusion and argument made by the Respondent was the fact that the Petitioner had to have known the weapons were there or else how could he make that statement. Even with that conclusion, that does not necessarily breach the hurdle of or the aiding and abetting of the constructive possession of the Taurus firearm in Count Two or the constructive possession of both firearms in Count Four. For an aiding and abetting finding, the jury must have reasonably come to a conclusion that the Petitioner knew that the crime of having the firearm in furtherance of a drug trafficking offense had been committed by somebody else other than him, to wit, in the least Green. Not only did he know of the crime by another, but attempted in some way to facilitate the crime. See **United States v. Dickson**, 658 F.2d 181, 189 n.17 (3rd Cir. 1981). To aid and abet there has to be some type of affirmative participation which encourages the main offender in the commission of the offense in question. **United States v. Raper**, 676 F.2d 841 (D.C. Cir. 1982). An additional factor to be considered is the fact that a police officer testified to the fact that the Codefendant Green via the representations in the search warrant had an affiliation with one of the firearms in question.

For obvious strategical purposes, Petitioner had Count Four severed and did not have that charge brought before the jury which would have then introduced for their consideration the fact that he was a convicted felon. The case being bifurcated, and Trial Court hearing the evidence as it pertained to Count Four found Petitioner guilty of the possession of at least one firearm being a convicted felon. Upon an inquiry made by Respondent's representative as to whether the Trial Court would make a finding that the Petitioner possessed both weapons in question, the Trial Court responded that it did not see the necessity to make that specific finding especially in light of the fact that the jury had already found Petitioner guilty of Count Two. That response created more of an issue for the record and substantiates Petitioner's position. It is apparent that the Trial Court as fact finder in Count Four, could have misinterpreted the jury's determination in its verdict in Count Two because of the added exposure to the Petitioner with an aiding and abetting charge. There being no such charge in Count Four, the Trial Court may have misinterpreted the jury's finding in the other count related to the Taurus firearm.

Because the Petitioner did not have the firearms physically in his control or on his person, the theory for conviction had to be one at best of that he constructively possessed the firearms. In constructively possessing a firearm, an individual has to meet two factors. One that the individual has the power to constructively possess, and secondly the intention at the given time to exercise that dominion and control over the item. There is no proof that the time of the arrest that the Petitioner knew the guns were present at 1208 West Venango Street. The statement made three days later after one has been formally arraigned and given a preliminary hearing date, doesn't necessarily

convert the fact to what knowledge existed three days previously. **United States v. Iafelice**, 978 F.2d 92 (3rd Cir. 1992), affords a microscopic review of a much narrower space of control. The Court there found in using common sense would at least present that an owner and operator of a vehicle usually has dominion in control over objects in his or her vehicle. That basic conclusion is premised on the limited space and access to the confining domain, to wit an automobile. A house is something entirely different. Although, not exactly on all points, **United States v. Brown**, 3 F.3d 673 (3rd Cir. 1993) is insightful. In that particular case the codefendant was charged with possession of a controlled substance found in a residence. As a search was being executed on the premises, the codefendant arrived on the scene using a key to gain access. Woman's clothing was found in a room where no drugs were located. The codefendant acknowledged the clothing was hers and as the police were securing her, she objected to the fact that she was being arrested in her own home. The house, as in the house on West Venango Street, was described as a cut house. There, despite the Respondent's representation that the codefendant exercised dominion and control over the controlled substances found therein, the Third Circuit determined that even if the codefendant had been residing in the premises and even if she knew drugs were in the residence, the evidence as presented would not support an inference that she had exercised the required dominion and control over same. The Petitioner has great difficulty in understanding the differences and nuance of his situation as compared to the codefendant in **Brown**.

The Third Circuit in its opinion sub judice and more specifically in Judge Porter's concurring opinion shows concern of the "outside influence of **United States v. Brown**",

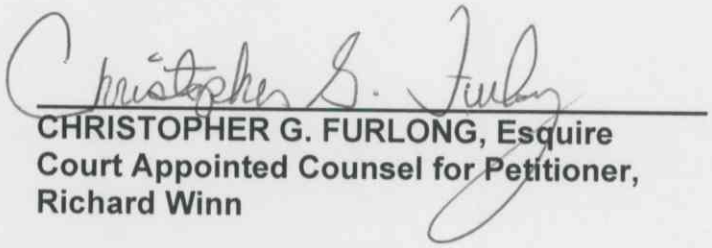
pg. 1, concurring opinion. Judge Porter goes on to present a litany of cases under varying circumstances where proximity can create the rationality needed for a conclusion that an object is under one's control especially if one could gain immediate possession. See **United States v. Xavier**, 2 F.3d 1281 (3rd Cir. 1993) and **United States v. Caraballo- Rodriguez**, 726 F.3d 418 (3rd Cir. 2013) (en banc). Petitioner disagrees that **Brown** is as narrow as Judge Porter seems to conclude. Certainly proximity is a major factor, but only a single factor and other factors indeed should be considered in determining whether or not a reasonable fact finder can make a determination as to constructive possession. The panel concluded and acknowledged that Petitioner's case was a close one (Pg. 9), but it obviously felt obligated to afford the jury conclusions a controlling aspect. Despite that conclusion and determination, the Petitioner urges the Court to review this case in detail and potentially set parameters which would assist future courts in determining and outlining what required factors must be present to come to a conclusion as far as constructive possession is concerned. Petitioner submits that under his circumstances, even in affording the jurors deference, that the bar was not met or cleared.

CONCLUSION

For all the above stated reasons, Petitioner, RICHARD WINN, prays this Honorable Court to grant his Petition for Writ of Certiorari to review the Opinion and

Judgment entered by the United States Court of Appeals for the Third Circuit and requests that this Petition be granted.

Respectfully submitted,



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