

No: 24-_____

IN THE
Supreme Court of the United States

RICKY JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Honorable Court should grant *certiorari* to review whether the Sixth Circuit's determination that the uncorroborated and unreliable doubled hearsay statements of an unreliable confidential informant was sufficient evidence to support two sentencing enhancements which double Mr. Jackson's sentencing range.

PARTIES TO THE PROCEEDING

The parties to the proceedings, both in the Federal District Court for the Northern District of Ohio as well as in the United States Court of Appeals for the Sixth Circuit, included the United States of America, Respondent herein, and Ricky Jackson, the Petitioner herein. There are no parties to these present proceedings other than those named in the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Ricky Jackson (hereinafter “Mr. Jackson”) hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued April 10, 2024.

OPINIONS BELOW

The Sixth Circuit denied Mr. Jackson’s Petition for En Banc review on April 10, 2024; the Order denying rehearing en banc is reproduced as Petitioner’s Exhibit A. The underlying Decision of the Sixth Circuit in this matter was issued on February 23, 2024. The Decision is unpublished, but can be found at the following citation *United States v. Jackson*, No. 22-3164, 2024 WL 751571, (6th 2023), and is reproduced at Petitioner’s Appendix B.

The relevant District Court Judgment underlying Mr. Jackson’s conviction was not published, but is reproduced at Petitioner’s Appendix C.

STATEMENT OF JURISDICTION

Because the underlying cases involved a federal indictment against Mr. Jackson for violations of federal law, the United States District Court for the Northern District of Ohio, had jurisdiction pursuant to 18 U.S.C. §3231. Because Petitioner Jackson timely filed a notice of appeal from the final judgment of a United States District Court, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Because Petitioner Jackson is timely filing this Petition for Writ of Certiorari within the time allowed by the Supreme Court

Rules from the Sixth Circuit's Decision on April 10, 2024, this honorable Court has jurisdiction pursuant to 28 U.S.C. §1254. *See also*, Supreme Court Rule 13.1.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The relevant Rules and statutory provisions are USSG § 2D1.1 (a)(5), (b)(12) and (c)(4) which are set forth, respectively, in the attached Petitioner's Appendix D.

STATEMENT OF THE CASE

Mr. Jackson is currently serving a one hundred- and eighty-eight-month prison term. Mr. Jackson was one of twenty-two named codefendants in a forty-two count Indictment issued by a federal grand jury in the United States District Court for the Northern District of Ohio. (Indictment, RE 1, PAGEID #1-58). Mr. Jackson was charged in Count 1 with Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances and in Count 36 with Use of a Communication Facility in Furtherance of a Drug Trafficking Crime. *Id.* On September 2, 2020, Mr. Jackson appeared before the Honorable Judge John R. Adams in the Northern District of Ohio and pursuant to the plea agreement, Mr. Jackson entered a plea of guilty to Counts One and Thirty-six. (Plea Agreement, RE 601, PAGEID# 3913-3928; T.p. Plea, RE 43, PAGEID# 125-149).

Mr. Jackson's involvement in this drug conspiracy was minor. Throughout the investigation, Mr. Jackson was never observed with any of the coconspirators. (Transcript 8/2/21, RE 744, PAGEID# 5072). Mr. Jackson was never observed being present at the Huntsmere residence – the alleged drug premises. (Transcript 8/2/21, RE 744, PAGEID #5075-5076; Transcript 2/14/22, RE 745, PAGEID #5147). Law enforcement intercepted over 50,000 phone calls on what they referred to as the "Customer Phone" and only a handful of these calls involved Mr. Jackson. (PSIR, RE 625, PAGEID# 4106-4108; Transcript 8/2/21, RE 744, PAGEID# 5069-5070). Those calls involving Mr. Jackson related to only three separate incidents or transactions, one on October 23, 2018, one on November 27, 2018, and another on

December 2 and December 3, 2018. (Transcript 2/14/21, RE 745, PAGEID #5144-5147).

There was a call on October 23, 2018 in which Mr. Jackson called the Customer Phone and told Joseph Gray he owes him \$500. (Transcript 8/2/21, RE 744, PAGEID #5082, 5085-5086). Agent Tate indicated that \$500 is likely attributable to about 5 grams of heroin, however no drug transactions or quantities were discussed in this call. *Id.* at 5086.

The November 27, 2018 calls involved a conversation between codefendant and lead conspirator Joseph Gray and Mr. Jackson in which Mr. Jackson is requesting Joseph Gray to have his drugs tested. (Transcript 8/2/21, RE 744, PAGEID #5063-5065; Transcript 2/14/22, RE 745, PAGEID #5141-5142, 5145; PSIR, RE 625, PAGEID #4107-4108 at ¶22-24). No specific quantity of drugs was discussed related to this incident or series of calls. *Id.*

There was an additional incident or series of calls involving Mr. Jackson on December 2, 2018 and December 3, 2018. (Transcript 8/2/21, RE 744, PAGEID #5068, 5081; Transcript 2/14/22, RE 745, PAGEID #5142-5144, 5145-5147; PSIR, RE 625, PAGEID #4108 at ¶25). In these calls, Mr. Jackson is looking to purchase a “half” (fourteen grams) from Joseph Gray. *Id.*

Additionally, there was a call from Larry Jackson while he was an inmate at the Cuyahoga County Jail. There were no drug transactions discussed in this call, Larry Jackson was in jail and asked Mr. Jackson to retrieve his car because there was money in. (Transcript 8/2/21, RE 744, PAGEID #5079-5080, 5084-5085).

Mr. Jackson was additionally implicated by a confidential informant (“CS”) to have been involved in two separate transactions in which CS moved drugs from the Huntsmere address to another location. (PSIR, RE 625, PAGEID #4107 at ¶18). The information provided by CS came into evidence at sentencing through the testimony of Agent Ashley Tate. (Transcript 8/2/21, RE 744, PAGEID# 5050-5051) Agent Tate was not present for the debrief of CS and her knowledge came from speaking with other law enforcement officers and reviewing reports; CS did not testify. *Id.* CS was a known opioid addict and drug tester for the Drug Trafficking Organization (“DTO”). (Transcript 8/2/21, RE 744, PAGEID #5056, 5059). As a tester, the CS actually ingested the drugs during the transactions for which CS was providing information, thus, CS was providing information for transactions during which CS was under the influence. *Id.* at PAGEID #5056). CS was later terminated and found to be unreliable after being caught purchasing drugs from the DTO for personal use outside of CS’s work for the government as a confidential informant. (Transcript 8/2/21, RE 744, PAGEID# 5059-5060).

In August, 2018, CS was debriefed and indicated Mr. Jackson’s involvement on two occasions, one in June 2018 and one in July 2018. (Transcript 8/2/21, RE 744, PAGEID# 5052-5056; PSIR, RE 625, PAGEID #4107 at ¶18). In June 2018, CS claimed to have moved three kilograms of crack cocaine, heroin, and fentanyl. *Id.* In July 2018, CS claimed to have moved two kilograms of fentanyl. *Id.* The two kilograms of fentanyl moved in July 2018 was attributed to Mr. Jackson for purposes of calculating the drug quantity for determining his base offense level

when calculating his guidelines sentencing range. (PSIR, RE 625, PAGEID #4108 at ¶27). The quantity and type of drugs was based solely on CS's estimates. *Id.* at PAGEID #4107 at ¶18. The drugs were never seized by law enforcement nor tested or weighed in a lab. *Id.* Notably, CS was also debriefed on September 6, 2018 with no mention of Mr. Jackson. (Transcript 8/2/21, RE 744, PAGEID #5057-5058).

This transaction was attributed to Mr. Jackson based on statements of CS alone. (Transcript 8/2/21, RE 744, PAGEID #5055; PSIR, RE 625, PAGEID #4107 at ¶18). CS claimed the transactions involved someone named "Juice." *Id.* Law enforcement has determined that Mr. Jackson is Juice based solely on CS's statement that Juice is Larry Jackson's brother. *Id.* Mr. Jackson is never referred to as Juice in the recorded calls. (Transcript 8/2/21, RE 744, PAGEID #5072-5073, 5080). However, other members of the DTO are referred to by their street names on those calls – Lead conspirator Joseph Gray is referred to as Jay and Larry Jackson is referred to as City. *Id.* Specifically, in the jail call between Mr. Ricky Jackson, Larry Jackson, and Joseph Gray, Mr. Ricky Jackson calls Larry Jackson "City" to confirm it is him on the line, but Larry Jacskson never says "Juice," he only refers to his brother as Ricky. (Transcript 8/2/21, RE 744, PAGEID #5079-5080, 5084-5085).

Throughout the record, the Huntsmere address is referred to as Mr. Jackson's residence. (PSIR, RE 625, PAGEID #4106-4108). However, at sentencing, evidence was presented to the contrary. Agent Tate testified that the

Huntsmere address was “known as a location where in particular Larry Jackson sold drugs.” (Transcript 8/2/21, RE 744, PAGEID #5056). Mr. Jackson was never observed selling drugs at the residence, nor did he appear in any of the surveillance of the residence. *Id.* at PAGEID #5075-5076; Transcript 2/14/22, RE 745, PAGEID #5147). Ultimately, the guns, drugs, and money found at the Hunstmere residence during the March 2019 search were all attributed to Larry Jackson for purposes of this case; none of the contraband found at the Huntsmere residence search was attributed to Mr. Jackson as additional charges, for sentencing purposes, or otherwise. *Id.* Further, records were obtained which showed Mr. Jackson was associated with an address on Grasmere, known to be his girlfriend’s home, beginning October 2017 and that he was on house arrest there until April 2018; this is the same residence where Mr. Jackson was later arrested. (Transcript 2/14/22, RE 745, PAGEID #5138, 5149, 5151). There is not anything in the record to indicate that Mr. Jackson was residing at the Huntsmere residence during the course of the conspiracy.

In calculating Mr. Jackson’s guidelines range, the PSIR attributed to Mr. Jackson the two kilograms of fentanyl CS claimed to receive from Mr. Jackson in July 2018 and fourteen grams of heroin based on his December 3, 2018 call with Joseph Gray. PSIR, RE 625, PAGEID #4108 at ¶27. This gave Mr. Jackson a base offense level of 32. *Id.* at PAGEID #4109 at ¶34. The PSIR also gave Mr. Jackson a two-level enhancement for maintaining a premise for the purpose of manufacturing or distributing drugs. *Id.* at ¶35. Mr. Jackson was also given a

one- and two-level reduction for his acceptance of responsibility for a total offense level of thirty-one. *Id.* at PAGEID #4110 at ¶41-43. Mr. Jackson was found to have a criminal history category of VI. *Id.* at PAGEID at ¶61. Thus, the PSIR, indicated that Mr. Jackson's Guidelines sentencing range was to be one hundred and eighty eight months to two hundred and thirty five months. *Id.* at PAGEID #4121 at ¶86.

In his plea agreement Mr. Jackson agreed he was responsible for at least five grams of a mixture containing heroin, fentanyl, or a fentanyl analogue and a minimum base offense level of 24 before acceptance of responsibility which would have placed him at a total offense level of 21. (Plea Agreement, RE 601, PAGEID #3117 at ¶17, 3918-3919 at ¶20). A total offense level of 21 would have placed Mr. Jackson in a guidelines range of seventy-seven to ninety-six months. U.S.S.G. §5A (Sentencing Table).

At sentencing defense counsel objected to the drug quantity calculation and argued that Mr. Jackson should be sentenced at a base offense level of 20 prior to acceptance of responsibility and that he should not receive the two-level enhancement for maintaining a premise for the purpose of manufacturing or trafficking drugs, thus arguing that Mr. Jackson's total offense level for sentencing should have been seventeen. (Transcript 8/2/12, RE 745, PAGEID #5131-5137). Ultimately, the district court overruled both of counsel's objections and proceeded to sentence Mr. Jackson under the guidelines calculations in his PSIR. (Transcript 2/14/22, RE 745, PAGEID #5154-5156). Mr. Jackson was sentenced to one hundred

and eighty eight months to be followed by six years of supervised release.

(Judgment, RE 720, PAGEID# 4948-4954).

Mr. Jackson timely appealed the judgment of sentence. (Notice of Appeal, RE 725, PAGEID #4973-4974). The sentence was affirmed on appeal. (Exhibit B). Mr. Jackson then petitioned the Court of Appeals for rehearing on en banc and the same was denied. (Exhibit A).

REASONS FOR GRANTING THE WRIT

This issues Mr. Jackson brings to this Honorable Court's attention are important for ensuring federal sentencing is uniform, to avoid disparate sentences and to resolve lower court conflicts in applying federal sentencing laws.

The original panel's decision in this case was split two to one and contained a strong dissenting opinion. This decision goes against long-standing Sixth Circuit precedent, that drug quantity determinations must be supported by a preponderance of the evidence, the evidence must have a "minimal level of reliability," and sentencing courts must err on the side of caution when calculating drug quantity.

United States v. Sandridge, 385 F.3d 1032, 1037 (6th Cir. 2004); *See also U.S. v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990); *U.S. v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008). Further, the majority's decision to affirm the application of the drug-premises enhancement is opposition to cases where the Sixth Circuit has upheld this enhancement. *See United States v. Hernandez*, 721 F. App'x 479, 484 (6th Cir. 2018); *United States v. Broadnax*, 777 F. App'x 137, 141 (6th Cir. 2019), *United States v. Walker*, No. 22-3124, 2022 WL 17351944, At *2 (6th Cir. Dec. 1, 2022), *United States v. Russel*, 595 F.3d 633, 645 (6th Cir. 2010), *United States v. Whiteside*, 747 Fed. Appx. 387, 395 (6th Cir. 2018).

In this case, the district court relied entirely on uncorroborated statements of a confidential informant nearly doubling Mr. Jackson's guidelines sentencing range. As discussed below, the Sixth Circuit and other Circuits, have recognized the need for higher level of scrutiny when analyzing and relying on the hearsay statements of

a confidential informant. If the majority's decision stands, the result will be that any evidence however unreliable will stand to significantly increase a defendant's sentence. Review by this Honorable Court is necessary to resolve these lower court conflicts and provide uniformity in the law, avoid disparate sentences, and ensure federal defendants are not receiving excessive sentences based on insufficient evidence.

I. *Certiorari* is requested to review whether the Sixth Circuit's determination that the uncorroborated and unreliable double hearsay statements of an unreliable confidential informant was sufficient evidence to support two sentencing enhancements which doubled Mr. Jackson's sentencing range.

A. Drug Quantity Calculation.

The baser offense level for a violation of 21 U.S.C. §841(a)(1) is determined based upon the quantity of drugs involved in the offense pursuant to USSG §2D1.1 (a)(5) and (c)(4). Drug quantity determinations must be supported by a preponderance of the evidence and the evidence must have a "minimal level of reliability." *United States v. Sandridge*, 385 F.3d 1032, 1037 (6th Cir. 2004); *See also U.S. v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990). The Sixth Circuit has repeatedly held that when estimating drug quantities, the sentencing court must err on the side of caution. *See U.S. v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008); *U.S. v. Webber*, 396 F. App'x 271, 279 (6th Cir. 2010); *U.S. v. Brothers*, 209 F. App'x 460, 465-466, (6th Cir. 2006); *U.S. v. Darwich*, 337 F.3d 645, 661 (6th Cir. 2003); *Walton*, 908 F.2d at 1302. It is necessary for a court to err on the side of caution to prevent excessive sentences and preserve the defendant's constitutionally protected

due process rights. *Walton*, 908 F.2d at 1302. A criminal defendant has a due process right to be sentenced based on accurate information. *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589 (1972).

Here, the majority opinion relied on *United States v. Armstrong*, however, *Armstrong* is distinguishable. The information provided by the *Armstrong* confidential informant was corroborated by controlled buys in which law enforcement was able to intercept, weigh, and analyze the drugs involved. *Armstrong* at 397-398. Further, there was no indication in *Armstrong*, as is the case here, that the confidential informant was using the substances during the alleged transactions nor that the same officers later determined the confidential informant to be unreliable. *Id.* compare Transcript 8/2/21, RE 744, PAGEID# 5056, 5059-5060.

The only evidence in the record which may prove Mr. Jackson is responsible for the July 2018 two kilograms of fentanyl was CS's unreliable statements. (PSIR, RE 625, PAGEID #4107 at ¶18; Transcript 8/2/21, RE 744, PAGEID #5050-5051, 5053, 5055-5056, 5072-5073).

CS's statements lack corroboration and the minimum level of reliability thus falling below the standard required by *Sandridge* and *Walton* for proof of drug quantity. Furthermore, as recognized by the Sixth Circuit, significant corroborating evidence is necessary when the Court is relying on the statements of a known drug addict informant. See *United States v. Robison*, 904 F.2d 365, 371-372 (6th Cir. 1990)(Vacating the sentence where drug quantity estimates were based on

the testimony of a known drug user and lacked sufficient indicia of reliability); *United States v. Brown*, 946 F.2d 1191, 1195 (6th Cir. 1991)(recognizing the need for significant corroborating evidence and an addict informant jury instruction); *United States v. Combs*, 369 F.3d 925, 939 (6th Cir. 2004). Other Circuit Courts of Appeals have also required a higher level of scrutiny and corroborating evidence when considering the drug quantity estimate of a drug addict informant. *United States v. McEntire*, 153 F.3d 424, 436-437 (7th Cir. 1998)(requiring a heightened standard of scrutiny where a drug quantity estimate is provided a confidential informant with a history of drug abuse); *United States v. Miele*, 989 F.2d 659, 666-667 (3rd Cir. 1993)(same); *United States v. Simmons*, 964 F.2d 763, 776 (8th Cir. 1992)(rejecting the testimony of an unreliable informant with a history of drug addiction who also lied under oath); *United States v. Helding*, 948 F.3d 864, 871-872 (7th Cir. 2020)(vacating sentence where drug quantity was based solely on uncorroborated statements of a confidential informant).

The statements of CS in this case do not meet this threshold and further, CS was not present for the Court to evaluate the credibility of the statements further bringing into question their reliability.

In overruling Mr. Jackson's drug quantity objection, the district court found that the PSIR conservatively estimated the drug quantity. (Transcript 2/14/22, RE 745, PAGEID #5155). The district court further noted this conservative calculation was because the agents were unable to identify specific details of CS's statement.

Id. Herein lies the problem. This calculation is based the estimates of an

unreliable source. (PSIR, RE 625, PAGEID #4108, ¶18). It was CS who determined and reported the type of drug involved in this transaction, not a lab report. *Id.*

Further, this confidential informant was a known drug abuser, terminated for purchasing drugs for personal use, and thus deemed unreliable. Transcript 8/2/21, RE 744, PAGEID # 5050-5051, 5053, 5055-5056, 5059-5060, 5072-5073, 5079-5080, 5084-5085. Further, the government's own evidence refutes CS's statements and showed Mr. Jackson played a minor role in the drug conspiracy. Agent Tate testified at sentencing and admitted Mr. Jackson was never observed at the Huntsmere residence and he was never seen with any of the members of the conspiracy. (Transcript 8/2/21, RE 744, PAGEID# 5072, 5075-5076). In over 50,000 intercepted calls, Mr. Jackson is involved in five of them. (Transcript 8/2/21, RE 744, PAGEID# 5069-5070). The largest quantity of drugs mentioned in any of those intercepted phone calls with Mr. Jackson was fourteen grams of heroin. (Transcript 8/2/21, RE 744, PAGEID #5068, 5081; Transcript 2/14/22, RE 745, PAGEID #5142-5144, 5145-5147; PSIR, RE 625, PAGEID #4108 at ¶25).

This is simply not enough and the evidence is unreliable. The government failed to meet their burden by a preponderance of the evidence with sufficient indicia of reliability. This matter must be remanded.

B. Drug premises enhancement.

"The drug premises enhancement has three elements: The defendant must (1) knowingly (2) open or maintain any place (3) for purposes of distributing a

controlled substance.” *United States v. Hernandez*, 721 Fed.Appx 479, 484 (6th Cir. 2018) *citing United States v. Johnson*, 737 F.3d 444, 447 (6th Cir. 2013).

When analyzing the application of the drug premises enhancement, the court must look at two things – first “whether the defendant held a possessory interest in ... the premises” and second “the extent to which the defendant controlled access to, or activities at the premises.” *Hernandez* at 484 *citing USSG §2D1.1, Application Note 17.* Even if a defendant does not have a possessory interest, the enhancement may still apply if the government proves de facto control. *Id. citing United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010). The act of distribution alone, is not enough to show control, to do otherwise would double punish a defendant for the same act. *Id. citing United States v. Clavis*, 956 F.2d 1079, 1090-91 (11th Cir. 1992).

The majority opinion states that Mr. Jackson was residing at the Huntsmere residence. Maj. Op. at p. 6. However, at sentencing, evidence was presented to the contrary. The Huntsmere address was “known as a location where in particular Larry Jackson sold drugs” and Mr. Jackson was never observed selling drugs at the residence, nor did he appear in any of the surveillance of the residence. (Transcript 8/2/21, RE 744, PAGEID #5056; Transcript 2/14/22, RE 745, PAGEID #5147). Mr. Jackson was not present when the Huntsmere address was searched. *Id.* All the contraband found at the Hunstmere residence during the March 2019 search was attributed to Larry Jackson for purposes of this case; none of the contraband was attributed to Mr. Jackson. *Id.* Further Mr. Jackson was associated with an address

on Grasmere, known to be his girlfriend's home, beginning October 2017 and that he was on house arrest there until April 2018 and this is the same residence where Mr. Jackson was later arrested for this case. (Transcript 2/14/22, RE 745, PAGEID #5138, 5149, 5151). There is not anything in the record to indicate that Mr. Jackson was residing at the Huntsmere residence during the course of the conspiracy other than his driver's license and statements made by CS. As discussed above, CS was an unreliable source.

The government did not present any evidence that Mr. Jackson had control of the residence in anyway; Mr. Jackson was not even seen there during the investigation. (Transcript 8/2/21, RE 744, PAGEID #5075-5076; Transcript 2/14/22, RE 745, PAGEID #5147). There was not any evidence presented that Mr. Jackson controlled the home, acquired the home, rented or furnished the home, supervised anyone, protected the residence, supplied food to anyone, or did anything to maintain continuity.

Even if Mr. Jackson were the person CS referred to as "Juice" the two described transactions would not be sufficient to apply the enhancement in this case. In *United States v. Whiteside*, this Sixth Circuit found one transaction inside the home and another outside were not sufficient to apply the enhancement. *United States v. Whiteside*, 747 Fed. Appx. 387, 395 (6th Cir. 2018).

The Sixth Circuit erred in upholding the district court's application of both the drug quantity calculation and the drug premises enhancement. This matter must be remanded.

CONCLUSION

Wherefore, and for all of the foregoing reasons, Petitioner Jackson respectfully requests that this honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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