No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SYDNI FRAZIER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPLICATION TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Sydni Frazier, by and through undersigned counsel and pursuant to Supreme Court Rule 39, respectfully requests leave to file in this Court without payment of costs and to proceed *in forma pauperis*. Mr. Frazier was determined to be indigent and undersigned counsel was appointed both at trial and on appeal. Counsel was appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. Because counsel was appointed due to Mr. Frazier's indigency, under Supreme Court Rule 39, no affidavit is needed.

Respectfully submitted,

Christopher M. Davis
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(202) 234-7300

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT OF THE UNITED STATES

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I. **QUESTION PRESENTED** (Rule 14.1(a))

Whether a criminal defendant's right to a jury trial under the Sixth Amendment is violated when the trial judge does not instruct the jury that it must be unanimous as to which form of First Degree Murder served as the predicate offense in the § 924(j) charge.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SYDNI FRAZIER, Petitioner

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UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FOURTH CIRCUIT

Sydni Frazier, Petitioner, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals, No. 22-4368, filed on September 11, 2024.

OPINION BELOW

The opinion of the Fourth Circuit, which was unpublished, was issued on September 11, 2024, and is attached as Appendix A. The Fourth Circuit's one-page order denying further review is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit decision for which petitioner now seeks review was issued on September 11, 2024. The Fourth Circuit denial of petitioner's timely petition for discretionary review was filed on October 21, 2024. This petition is filed within 90 days of the Fourth Circuit's denial of discretionary review.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Andres v. United States*, 333 U.S. 740,748, 68 S.Ct. 880, 884 (1948).

United States Constitution, Amendment 6 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 defence."

Title 18 U.S.C. § 924(j) provides:

"A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

"(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

"(2) if the killing is manslaughter (as defined in section 1112 punished as provided in that section."

Title 18 U.S.C.A. § 1111 provides:

"(a) 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 committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; 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 CASE

Petitioner was charged is a Second Superseding Indictment along with 13 codefendants. He was charged in Count One Racketeering Conspiracy, Count Two Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance, Count 22 Felon in Possession of Firearm and Ammunition, and Count 29 Possession with Intent to distribute Heroin and Fentanyl.

Trial began on March 18, 2019. On April 15, 2019, the district court entered an Order declaring a mistrial for manifest necessity as to Petitioner, severing the charges against him, and scheduling a trial for a later date.

On July 30, 2019, Petitioner was charged in 4-count Third Superseding Indictment. Count One charged Conspiracy to Distribute Controlled Substances in violation of 21 U.S.C. § 846; Count Two charged that Petitioner Possessed, Brandished, and Discharged a Firearm in Furtherance of a Drug Trafficking Crime Resulting in Death in violation of 18 U.S.C. § 924(c), 18 U.S.C. § 924(j), 18 U.S.C. §1111, and 18 U.S.C. § 2; Count Three Charged Petitioner with Felon in Possession of Firearms in violation of 18 U.S.C § 922(g); Count Four charged Possession with Intent to Distribute Heroin and Fentanyl in violation of 21 U.S.C. § 841.

On August 14, 2019, Petitioner filed a Motion to Suppress Tangible Evidence recovered as a result of a warrantless entry and search of 961 Bennett Place, Baltimore, Maryland. A Response was filed on February 21, 2020 and a Reply was

filed on February 13, 2020. An evidentiary hearing was held on February 18, 2020, and the motion was denied on February 21, 2020.

A jury trial commenced on February 24, 2020. A discussion regarding jury instructions was held in Chambers. Relying on *Schad v. Arizona*, 501 U.S. 624 (1991), the government submitted that the jury's decision whether to convict of premeditated murder versus felony murder need not be unanimous. The court agreed. [JA525-526] As a result, the jury was not instructed that the basis of the conviction on Count Two must be unanimous. Following a note from the jury requesting clarification regarding unanimity, the defense argued again for a unanimity instruction. The request was denied.

On March 6, 2020, the jury returned verdicts of guilty as to each count.

On June 1, 2022, Petitioner was sentenced to 60 months on Counts One, Three, and Four, to run concurrent, and life as to Count Two, to run consecutive to Counts One, Three, and Four. A Notice of Appeal was filed on June 1, 2022. In his appeal to the Fourth Circuit, Petitioner argued that the failure of the trial court to instruct the jury that it must be unanimous as to the type of murder charged in the 18 U.S.C. § 924(j) count required that the conviction on that count be vacated. The opinion of the Fourth Circuit, which was unpublished, affirming the conviction was issued on September 11, 2024, and is attached as Appendix A. The Fourth Circuit's one-page order denying further review is attached as Appendix B.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision was not only at odds with Supreme Court and other circuit opinions, it is also in disagreement with Fourth Circuit precedent.

In *Ramos* this Court cemented the constitutional requirement, applicable to all courts, that a conviction can only stand if the jury's verdict is unanimous: "The Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense." *Ramos v. Louisiana*, 590 U.S. 83 (2020). That *Ramos* abrogated *Schad v. Arizona,* 501 U.S. 624 (1991) (upon which the trial court and government relied in Petitioner's case) was recognized in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1556 (2021). The trial court's failure to instruct the jury that it must be unanimous as to which type of first degree murder Petitioner committed renders the conviction on the § 924(j) count null and void.

But even prior to *Ramos,* circuits have confirmed that § 1111 defines two types of first degree murder and have held that jury unanimity is required when there is more than one way to commit a criminal offense.

The Seventh Circuit has recognized that § 1111 states two ways to carry out first degree murder:

> The only difference between the two degrees of murder, sharing as they do the requirement that the murderer have acted with 'malice aforethought,' is, as stated in section 1111(a) of the federal criminal

> code, that a first-degree murder, unless committed in the course of perpetrating one (or more) of the crimes, such as arson or robbery (but confusingly including murder), that are specified in the statute, must be 'premeditated.' The exception for killing in the course of perpetrating one of the specified crimes (that is, the exception for felony murder, which is first-degree murder even though there is no intent to kill) is limited to 'deaths resulting from acts of violence committed in the furtherance of particularly dangerous felonies.' Guyora Binder, "The Culpability of Felony Murder, 83 *Notre Dame L.Rev.* 965, 978 (2008)."'

United States v. Delaney, 717 F.3d 553, 556 (7th Cir. 2013).

In *McLemore v. Bell*, 503 F. App'x 398, 406 (2012), the Sixth Circuit approved the jury instruction on unanimity as to the type of first degree murder committed:

> Also included in the jury instructions given at the petitioner's trial was the following directive:
> "A verdict in a criminal case must be unanimous[;] to be unanimous each of you must agree upon which type or types of First Degree Murder have been proved. If you return a verdict of guilty of First Degree Murder your unanimous verdict must specify whether all of you have found the defendant guilty of Premeditated First Degree Murder or Felony Murder or both, and that will be set forth on the verdict form for your use in the jury room."

The Third Circuit has held that an appellate court cannot affirm a nonunanimous verdict based the fact the evidence against the defendant was overwhelming:

> Edmonds asserts, and the panel agreed, that the jury instruction in this case allowed the jury to return a non-unanimous verdict on an element of the offense, and thus there is no actual jury finding of guilty upon which harmless error analysis may operate. Edmonds

> and the panel are correct in a sense. Just as the Sixth Amendment precludes the court from affirming on the ground that the jury *would* have found the defendant guilty beyond a reasonable doubt had it been properly instructed, we cannot affirm a nonunanimous verdict simply because the evidence is so overwhelming that the jury surely would have been unanimous had it been properly instructed on unanimity.

United States v. Edmonds, 80 F.3d 810, 824 (3d Cir. 1996).

The D.C. Circuit has long recognized that the elements for first degree premeditated murder are different from the elements of felony murder:

> In appellant's case, we are dealing with criminal homicides. We begin our analysis with consideration of the case as of the time of the indictment. There was no anomaly in indicting appellant for both first degree premeditated murder and first degree felonymurder. The offenses are distinct in the sense that they have different elements. One requires that the slaying be done with 'deliberate and premeditated malice,' the other requires that the killing occur in the course of certain enumerated felonies.

Fuller v. United States, 407 F.2d 1199, 1223–24 (D.C. Cir. 1967).

Even the Fourth Circuit has recognized, but failed to consider when deciding Petitioner's argument on appeal, that § 1111 defines separate offenses and the jury verdict on which offense the defendant is guilty must be unanimous:

> Section 1111(a) is phrased alternatively. The second sentence contains four separate components, the first two of which are relevant here. Each component is separated by a semicolon followed by the word "or." The first component of § 1111(a) sets out premeditated murder as a type of first-degree murder, while the second component sets out felony murder as a type of firstdegree murder. *Each of these components requires the Government to prove a unique element that the jury must find unanimously*; the first

> component requires proof of premeditation, and the second requires proof of the accomplishment (or attempted accomplishment) of a listed felony. Therefore, these two components list alternative versions of first-degree murder, which makes the statute divisible.

United States v. Jackson, 32 F.4th 278, 285–86 (4th Cir. 2022) (emphasis added). In all, there is no legal support for the Fourth Circuit's decision to not require that the jury's findings on first degree murder be unanimous.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: November 16, 2024

Respectfully submitted,

/s/ Christopher M. Davis
Lead Counsel for Petitioner

/s/ Mary E. Davis

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APPENDIX

A. Fourth Circuit Opinion in Case No. 22-4368 issued on September 11, 2024

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4368

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

SYDNI FRAZIER, a/k/a Sid, a/k/a Perry,
Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Catherine C. Blake, Senior District Judge. (1:16-cr-00267-CCB-25)

Submitted: July 17, 2024 Decided: September 11, 2024

Before AGEE, WYNN, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Christopher M. Davis, Mary E. Davis, DAVIS & DAVIS, Washington, D.C.,
for Appellant. Erek L. Barron, United States Attorney, Brandon K. Moore, Assistant
United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore,
Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Sydni Frazier of conspiracy to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 846; possession of a firearm in furtherance of a drug trafficking crime resulting in death, in violation of 18 U.S.C. § 924(j); possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); and possession with intent to distribute heroin and fentanyl, in violation of 21 U.S.C. § 841(a)(1). Frazier now appeals, challenging the district court's denial of his motion to suppress, the court's response to a note from the jury, and the court's decision not to grant a new trial or to reopen the suppression hearing. Frazier also contends that post-verdict changes in the law require reversal of his § 924(j) conviction. For the reasons that follow, we affirm. Before trial, Frazier moved to suppress evidence obtained in November 2017 from a warrantless search of a house in Baltimore, Maryland. The owner purportedly gifted the house to Frazier's mother so that she could open an assisted living facility. In turn, Frazier's mother invited Frazier to the house to help with renovations. Based on several events occurring prior to the search, the district court determined that Frazier lacked a reasonable expectation of privacy in the house. First, the court found that the owner never legally transferred the house to Frazier's mother and, further, that the owner's interest in the property terminated in May 2016, when the City of Baltimore sold the house in a tax sale following nonpayment of property taxes. Thus, at the time of the November 2017 search, the owner had no right to allow Frazier's mother to occupy the house and, in turn, she had no right to authorize Frazier to perform renovation work. Second, in July 2016, prior to the foreclosure on the house, Frazier's mother rescinded her invitation to Frazier, telling him not to go to the house and to remove any belongings therein. And third, Frazier was incarcerated from January 2017 through the time of the search, meaning that any renovation work he was doing necessarily ceased upon his arrest. "We review a district court's denial of a motion to suppress by considering conclusions of law de novo and underlying factual findings for clear error." United States v. Rose, 3 F.4th 722, 727 (4th Cir. 2021) (internal quotation marks omitted). "Absent an objectively reasonable expectation of privacy in the [place or] items searched, an individual cannot claim protection under the Fourth Amendment." Id. "[T]o establish a reasonable expectation of privacy, a defendant must identify evidence objectively establishing his ownership, possession, or control of the property at issue . . . at the time the search was conducted." Id. at 727-28 (citations omitted). On appeal, Frazier argues that he had a reasonable expectation of privacy in the house, noting that he had been invited to the house by his mother; that his bank card was recovered from the property; that only he and his mother had keys to the house; and that he had taken precautions to exclude others from the property. But these arguments largely ignore the temporal component of the expectation-of-privacy inquiry. As the district court thoroughly explained, any

legitimate expectation was extinguished either in May 2016, when the tax sale occurred, or in July 2016, when Frazier's mother told Frazier to remove his belongings and to stop going to the house. We therefore discern no error in the court's denial of Frazier's motion to suppress the evidence obtained from the house. Next, when instructing the jury on the 18 U.S.C. § 924(j) charge, the district court explained that the operative indictment alleged that Fraizer possessed, brandished, and discharged a firearm. Then, in going through the elements of the offense, the court explained that the Government had to prove that Frazier knowingly possessed, brandished, or discharged a firearm. During deliberations, the jury returned a note referencing the discrepancy between the "and" in the indictment and the "or" in the charge, then asked: "Is the charge that the defendant did all three or just one as part of [the § 924(j) offense]?" (J.A.1 515). The Government argued that, because it charges in the conjunctive but proves in the disjunctive, the proper answer was that the jury needed to find only one of the three acts. Frazier, on the other hand, asserted that the answer depended on whether the jury found him liable as a principal, as an aider and abettor, or under a felony murder theory. To convict on the first theory, Frazier believed that the jury had to find that he possessed, brandished, and discharged the firearm. But to convict on either of the other two theories, Frazier reasoned that the jury did not need to find that he personally did anything with a firearm. The district court sided with the Government and advised the jury that it needed to find just one of the three alleged acts. "[W]hen the jury asks a clarifying question, the court's duty is simply to respond to the jury's apparent source of confusion fairly and accurately without creating prejudice." United States v. Alvarado, 816 F.3d 242, 248 (4th Cir. 2016) (internal quotation marks omitted). "We review the form and content of the district court's response to the jury's 1 "J.A." refers to the joint appendix filed by the parties in this appeal. question for abuse of discretion." United States v. Burgess, 684 F.3d 445, 453 (4th Cir. 2012). Here, the source of the jury's confusion was clear and obvious: the indictment charged the § 924(j) offense in the conjunctive, while the district court laid out the crime's actus reus in the disjunctive. So the jury wanted to know which controlled—that is, whether the Government had to prove that Frazier possessed, brandished, and discharged a firearm, or just one of those three prohibited acts. And the court correctly replied that finding just one act was sufficient. See United States v. Perry, 560 F.3d 246, 256 (4th Cir. 2009) ("It is well established that when the Government charges in the conjunctive, and the statute is worded in the disjunctive, the district court can instruct the jury in the disjunctive."). Though Frazier insists that a far more complicated response was required, we conclude that the court ably exercised its discretion by providing a simple answer to a simple question.

In a separate claim arising out of the jury instructions, Frazier contends that his § 924(j) conviction must be reversed because the district court did not require the jury to reach a unanimous decision as to the specific theory of liability. As Frazier recognizes, in United States v. Horton, 921 F.2d 540 (4th Cir. 1990), we held that a defendant's right to a unanimous verdict was not violated merely because it was unclear whether the jurors convicted him as a principal or as an aider and abettor. Id. at 545 ("When alternative acts are so closely related, however, so as not to be conceptually distinct, a jury need not be unanimous as to which factual predicate or specification supports the defendant's guilt." (internal quotation marks omitted)). Nevertheless, Frazier maintains that Ramos v. Louisiana, 590 U.S. 83 (2020), which issued after the verdict in this case, abrogated the rule in Horton. We disagree. Ramos, which held that the Sixth Amendment requires unanimous verdicts in state criminal cases, id. at 93, is inapposite and in no way alters our decision in Horton. Thus, we reject Frazier's challenge to his § 924(j) conviction. Finally, days after the jury's verdict, Frazier learned that Ivo Louvado, a Baltimore police officer who had submitted three warrant affidavits in Frazier's case, had been charged with lying to federal officials about his involvement in a scheme to sell cocaine more than a decade earlier. As a result, Frazier filed a motion to reopen the suppression hearing and for a new trial under Fed. R. Crim. P. 33. The district court denied the motion. We review that decision for abuse of discretion. United States v. Ali, 991 F.3d 561, 570 (4th Cir. 2021) (stating standard of review for Rule 33 motion); United States v. Dickerson, 166 F.3d 667, 677-78 (4th Cir. 1999) (stating standard of review for motion to reopen suppression hearing), rev'd on other grounds, 530 U.S. 428 (2000). Recently, in United States v. Banks, 104 F.4th 496 (4th Cir. 2024), we considered an appeal brought by several of Frazier's codefendants. Like Frazier, his codefendants argued that Louvado's misconduct required a new trial. Id. at 509. They also argued that, if "Louvado's misconduct [had] been disclosed earlier, they would have sought a Franks[2] hearing to challenge the admissibility of the evidence obtained as a result of the search warrants and wiretap authorizations that he played a role in obtaining." Id. at 510 n.4. We rejected both claims, explaining that Louvado's misconduct was not material to the 2 Franks v. Delaware, 438 U.S. 154 (1978). findings of guilt and probable cause. Id. at 509-12 & n.4. For the same reasons, we discern no abuse of discretion in the district court's denial of Frazier's motion. Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

B. Fourth Circuit Denial of Further Review issued on October 21, 2024

FILED: October 21, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4368
(1:16-cr-00267-CCB-25)

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
SYDNI FRAZIER, a/k/a Sid, a/k/a Perry
Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Richardson.

For the Court
/s/ Nwamaka Anowi, Clerk