No. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

Ericka Simmons — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ericka Simmons
(Your Name)

FCI Greenville
(Address)

PO Box 5000
(City, State, Zip Code)

Greenville, IL 62246
(Phone Number)

QUESTION(S) PRESENTED

Whether or Not the Appellate Court Erred in affirming the District Court in its instruction to the jury as to drug quantity by failing to have the jury find the amount that Simmons allegedly conspired to distribute or the amount reasonably foreseeable to her based upon her particular conspiratorial agreement.

Whether or not the Appellate Court Erred in affirming the District Court in its decision to determine drug quantity attributable to Simmons based upon monies received via Western Union without determining the source of those funds.

Whether or not the Appellate Court Erred in affirming the District Court in its decision to find that Simmons had constructive possession of the firearm resulting in a U.S.S.G. Section 2D1.1(b)(1) enhancement.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix __1__ to the petition and is

[ ] reported at ________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix ______ to the petition and is

[ ] reported at ________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ________________________ court appears at Appendix ______ to the petition and is

[ ] reported at ________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 18, 2017.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. ___A______.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. ___A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

1. Indictment and Superseding Indictment. On October 8, 2014, Miss Simmons' co-defendant Mr. Willis was charged with Counts 1-4 of a nine count indictment returned by a grand jury in the Northern District of Indiana. Count 1 charged Mr. Willis with conspiring along with eight other named defendants, Jordan Gutowski, Tyquian Dinkins, Tracy West, Brandon Heuer, Nathan Mougros, Derrick Penwell, Brittany Lemond, and James Jones to distribute over one-hundred (100) grams of heroin beginning around 2009 and through October 2014 in violation of 21 U.S.C. § 841.

Count 2 charged Mr. Willis and two other named defendants with distributing heroin on January 11, 2011 in violation of 21 U.S.C. § 841(a)(1).

Count 3 charged Mr. Willis with distributing heroin on January 18, 2011, in violation of 21 U.S.C. § 841(a)(1). Count 4 charged Mr. Willis with distributing heroin on September 9, 2014, in violation of 21 U.S.C. § 841(a)(1).

On May 14, 2015, a six-count superseding indictment was filed against Mr. Willis. The only named defendants in the superseding indictment were Antwon Willis and Ericka Simmons. Ericka Simmons was not named in the original indictment.

Count 1 reads as follows: From an unknown date in 2009, up to and including October 2014, in the Northern District of Indiana and elsewhere,
ANTWON WILLIS AKA YELLOW AKA BOBBY (01),
defendants herein, knowingly and intentionally combined, conspired,
confederated and agreed with other persons known and unknown to
the grand jury, to commit one or more offenses against the United
States, to wit: to distribute controlled substances including a mixture
or substance which contained heroin, a Schedule I controlled
substance, over 100 grams, in violation of Title 21, United States Code,
Section 841(a)(l).

`Count 2 of the superseding indictment charged Mr. Willis with distributing heroin on January 11, 2011 in violation of 21 U.S.C. § 841(a)(1). Count 2 of the superseding indictment included the same date and allegations as Count 2 of the original indictment, except the superseding indictment did not specifically name any co-defendants.

Count 3 of the superseding indictment charged Mr. Willis with distributing heroin on January 18, 2011, in violation of 21 U.S.C. § 841(a)(1). Count 3 of the superseding indictment mirrored Count 3 of the original indictment.

Count 4 of the superseding indictment charged Mr. Willis with distributing heroin on August 29, 2014, in violation of 21 U.S.C. § 841(a)(1).

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Count 4 of the superseding indictment charged Mr. Willis with distributing heroin on August 29, 2014, in violation of 21 U.S.C. § 841(a)(1).

Count 4 of the superseding indictment was a new allegation and not included in the original indictment.

Count 5 of the superseding indictment charged Mr. Willis with distributing heroin on September 1, 2014, in violation of 21 U.S.C. § 841(a)(1). Count 5 of the superseding indictment was a new allegation and not included in the original indictment.

Count 6 of the superseding indictment charged Mr. Willis with distributing heroin on September 9, 2014, in violation of 21 U.S.C. § 841(a)(1). Count 6 of the superseding indictment mirrored Count 4 in the original indictment.

2. Antwon Willis's Motion to Dismiss Counts 2-6 of the superseding indictment.

On October 27, 2015, Mr. Willis filed a motion to dismiss Counts 2-6 based on improper venue. Mr. Willis argued that the heroin transactions that formed the basis of Counts 2-6 occurred in the Illinois, not the Northern District of Indiana. The Government conceded that Counts 2-6 occurred in Illinois and agreed to dismiss Counts 2-6. On November 17, 2015, the Court granted the Government's motion to dismiss.
The defendants were tried together and the jury trial proceeded solely on Count 1 of the superseding indictment.

3. Jury Selection

The trial for Antwon Willis and Ericka Simmons began on February 1, 2016.

4. Trial testimony and evidence.

The Government called 20 witnesses at trial. These witnesses included DEA agents, police officers, detectives, a property rental manager, and various heroin users who testified they purchased heroin from Mr. Willis and Ms. Simmons. None of the witnesses testified that they had any business dealings with Ms Simmons, with the exception of Brittney Lemond, Derrick Penwell, and Matt Fletcher.

Brittney Lemond testified for the Government that she plead guilty to conspiracy to distribute heroin in October 2014. Ms. Lemond began using heroin in late 2009. She was living in Michigan City, Indiana at the time. In late 2009, early 2010, Ms. Lemond began getting heroin from Mr. Willis. Ms. Lemond began traveling to Chicago to buy heroin with her boyfriend, Derrick Penwell, and Brandon Heuer. Ms. Lemond testified that Mr. Heuer did not have a lot of money so they would travel together and Ms. Lemond would give Mr. Heuer some heroin for making the connection to Mr. Willis.

Ms. Lemond testified that she did purchase heroin from Mr. Willis in Hammond, Indiana. She testified that she purchased heroin from Mr. Willis in Hammond, Indiana, Count 4 of the superseding indictment was a new allegation and not included in the original indictment.

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once or twice a week in 2012. Ms. Lemond testified that the quantity of heroin she

purchased fluctuated depending on whether she was working or whether she was picking up heroin for others.

Ms. Lemond testified that she always bought in user quantities. Ms. Lemond testified that she would occasionally work out of state and shewould get heroin delivered to Iowa, Minnesota, and Michigan. When Ms. Lemond was out of state working she would order her drugs from Mr. Willis and was told to send a MoneyGram and give Ms. Simmons's name and information to send the money to Ms. Simmons. There was no testimony that Ms. Lemond had any contact with Ms. Simmons or that Ms. Simmons requested that the MoneyGrams be put into her name, instead of the name of Willis. Willis made the deliveries and Simmons was sometimes in the car with Willis at that time. Simmons picked up $18,000 in MoneyGrams made out to her name.

Matt Fletcher testified that he purchased heroin from Mr. Willis and Ms. Simmons. Mr. Fletcher estimated that it was a 40/60 split between his heroin purchases from Mr. Willis and Ms. Simmons in Indiana and Illinois.

Derrick Penwell testified that he purchased heroin from Mr. Willis and Ms. Simmons. Mr. Penwell pled guilty to conspiracy to distribute heroin and he was sentenced to fifty-one (51) months

5. Directed verdict.

At the close of the Government's case in chief the Defendants moved for a directed verdict pursuant to Fed. Crim. R. 29. Mr. Willis's counsel argued in his motion for directed verdict that there was not sufficient evidence that Mr. Willis conspired with various unnamed conspirators. Mr. Willis argued that the Government did not charge him in the superseding indictment with conspiring with Ericka Simmons. Mr. Willis's trial counsel argued, "I think the way they've charged this case they've charged that these people [Willis and Simmons] conspired with others. And I think this is where the rubber hits the road here. Who did they conspire with?"

The Trial Court issued a written opinion and order denying the defendants' motion for directed verdict. The Court concluded that "there is sufficient evidence to find that a conspiracy existed between Mr. Willis and Ms. Simmons to distribute heroin to others, and that each defendant knowingly became a member of that conspiracy with an intent to advance it." Additionally, the Court stated, "The evidence of the conspiracy as between Mr. Willis and Ms. Simmons is sufficient to support a conviction, and the government need not prove that the conspiracy also encompassed any of the other codefendants."

The trial testimony did not establish particular quantities of heroin Simmons was supposed to have delivered. Nor did the evidence establish how much the $18,000 in MoneyGrams bought, or what drug quantity that it would be appropriately converted to.

REASONS FOR GRANTING THE PETITION

The holding of the Appellate court affirming the conviction of Ericka Simmons was contrary to Supreme Court precedent, and there is a conflict in the circuits as to this issue that this Honorable Court could resolve with this petition.

Petitioner previously argued to the appellate court that the district court jury was incorrectly instructed that her offense included 'the amount of heroin that the defendant's co-conspirators distribute" rather than the amount that the defendant conspired to distribute or the amount reasonably foreseeable to the defendant because of her particular conspiratorial agreement. She also argued that the district court's ruling was contrary to current law of this court in the area of drug quantity.

Petitioner does not disagree that she was one of the many girlfriends of her co-defendant Antwon Willis, and testified as such at her trial at the district court. She testified under oath that Willis told her that he purchased and rehabbed homes for resale and owned multiple rental properties, and bragged that he collected large amounts of cash rental payments from his tenants. He did not confide in Petitioner that the money collected was part of an illegal drug business.

Petitioner testified under oath at trial that she periodically used drugs recreationally, but also was adamant that she had not been directly involved in the preparation and manufacture of any illegal substances, although she was present in Willis' vehicle when items in packaging and cash were exchanged. (She also testified that she never owned, used, or was even aware of any firearm located in the residence that she occasionally shared with Willis, and no one testified in opposition to that position. In fact, trial testimony established that it was the top shelf of a bedroom closet beyond the reach of the diminutive Petitioner.)

Petitioner argued that her position on drug quantity was based upon United States v. Edwards, 945 F.2d 1387 (7th Cur. 1991). Simmons testified on her own behalf in support of the fact that she did not participate in any active drug trafficking, and despite being subjected herself to rigorous government cross-examination at trial, that position was never contradicted. Simmons made timely objection to her conspiracy conviction under United States v. Claybrooks, 729 F.3d 699 (7th Cir. 2013).

Since Petitioner was never tied directly to the drug conspiracy, so the government relied upon the amount of money orders put her in her name to establish a drug quantity in excess of 100 grams alleged in the indictment, although no trial testimony established that she requested that the money be put in her name, and that she had knowledge of the fact the money was being sent to her for the purpose of paying for drugs customers ordered from Willis.

In Alleyne v. United States, 570 U.S.--, 133 S.Ct. 2151, 2161, the Supreme Court held that where a drug quantity depends upon a drug quantity, that fact or element must be determined by a jury. Petitioner argues that the lack of a proper instruction as to the alleged conspiratorial agreement between her and Willis was, and the flawed method by which the drug quantity was determined, was violative not only of Alleyne, but Supreme Court precedent, and the precedent of the other appellate circuits based upon facts similar to this case.

The Second Circuit has held that there must be adequate and convincing proof to establish that money involved in the case was actually from the sale of illegal drugs. U.S. v. Jacobs, 955 F.2d 7 (2nd Cir. 1992.). Similarly, the Seventh Circuit itself has previously rejected speculative findings of drug quantity based upon money involved without adequate evidence. U.S v. Span, 170 F. 3d 798 (7th Cir. 1999).

The U.S. Supreme Court's decision in Henderson v. United States,, 135 S. Ct. 1780 (2015), change[d] the law of constructive possession in our circuit" so that "constructive possession requires both the power to control an object and intent to exercise that control." 829 F.3d at 1182 (emphasis added). There was no testimony or proof that Simmons intended to exercise any control over the firearm, or for that matter, even knew of its existence. Thus the holding of the Seventh Circuit in this case is contrary to the holding of this Honorable Court and must be set aside.

The Second Circuit has held that there must be adequate and convincing proof to establish that money involved in the case was actually from the sale of illegal drugs. <u>U.S. v. Jacoby</u>, 955 F.2d 9 (2nd Cir. 1992). Similarly, the Seventh Circuit itself has previously rejected speculative findings of drug quantity based upon money involved without adequate evidence. <u>U.S. v. Span</u>, 170 F.3d 798 (7th Cir. 1999).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: NOVEMBER 16, 2017