

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Mr. Mark A. Berger — PETITIONER
(Your Name) Pro-Se

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Mr. Mark A. Berger #18866-084

(Your Name)

201 FCI Ln./P.O. Box 6000

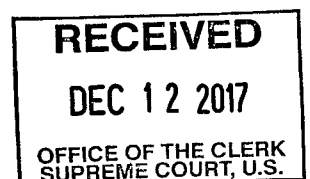
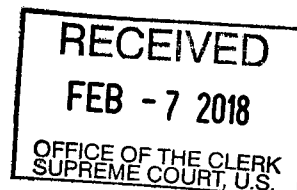
(Address)

Glenville, WV. 26351

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

Whether the fault, admittance or conduct of another should be accredited to an individual with little to no knowledge of said conduct.

LIST OF PARTIES

☒ 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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no. 16-4572 Judgment Order Denying Petitioner.

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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

☒ For cases from **federal courts**:

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

☒ reported at United States Court of appeals for the Fourth Circuit; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

☒ reported at United States Dist. Court Western Dist. Virginia; 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☐ is unpublished.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☐ is unpublished.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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 12, 2017.

☒ 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline §1B1.3(a)(1)(B)

...in the case of a jointly undertaken criminal activity...
all acts and omissions of other that were-

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

TABLE OF AUTHORITIES CITED

CASES

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STATEMENT OF THE CASE

Mark Andrew Berger was labeled a co-conspirator in a powder and crack distribution network that operated in the Roanoke area between 2000 and February 2015. This conspiracy encompassed several members of Mr. Berger's family to include Mr. Berger's brother Clay and three of his nephews: Dillon, Arthur and Justin.

All three nephews began dealing powder cocaine (or crack cocaine) sometime prior to 2008. Dillon began selling crack cocaine at some point in 2007, Arthur, likewise began selling at some point in 2006, and Justin began dealing at the start of eighth or ninth grade. Mr. Berger's home was one of the primary locations where this process of cooking narcotics took place. Dillon testified at trial that he learned to cook crack cocaine by observing his brother Justin and uncle Clay cooking it at Mr. Berger's home. Arthur testified that the cooking process was occurring at Mr. Berger's house "the majority of the time". Justin testified that he cooked crack cocaine at Mr. Berger's home "once a week, at least". Mr. Berger was, for a majority of the time, away on either business or a trip. Allowing his brother and/or nephew(s) to stay in his home as a security measure as well as preventing them from being in the streets.

After cooking, the narcotics would be given to middlemen who would then deliver drugs to the end user. The transaction between Clay and these middlemen often occurred at Mr. Berger's home. Arthur testified that Mr. Berger's home was the location where he would meet with Clay to get his drug supply.

It was assumed that Mr. Berger allowed his home to be used as a storage location for excess drugs and money that the nephews

wished to secure. Justin testified that he kept contraband such as drugs and money at Mr. Berger's home.

REASONS FOR GRANTING WRIT

The question presented here in this Writ is the extent to which Mr. Berger can be held responsible for the actions of his nephews and brother while away on business. This question is not new. The answer is well settled. "unlike criminal liability for the acts of co-conspirators, a defendant is not always accountable under the sentencing Guidelines for all the acts of his co-conspirators." (United States v. Garcia-Sanchez, 189 F.3d 1143, 1147 (9th Cir. 1999); United States v. Soto-Piedra 525 F.3d 527, 531 (7th Cir. 2008) ("Conspiracy liability...is generally much broader than jointly undertaken criminal activity under 1B1.3."); United States v. Spotted Elk, 548 F.3d 641, 673-74 (8th Cir. 2008) ("...[T]he commentary to USSG §1B1.3 explains that the concepts of relevant conduct under the Guidelines, on the one hand, and conspiracy liability, on the other, are not the same.... The commentary to §1B1.3 shows that while the emphasis in substantive conspiracy liability is the scope of the "entire conspiracy" and foreseeability in light of that scope, the emphasis under §1B1.3 is the scope of the "individual defendant's" undertaking and foreseeability in light of the undertaking, rather than the scope of the conspiracy as a whole") [emphasis omitted]; U.S.S.G. §1B1.3 and comment 1.

A defendant found guilty of conspiracy is responsible for his confederates' "relevant conduct" as that critical term is

forth is subdivisions (i) through (iii) (i.e., 'within the scope' 'in furtherance' and 'reasonable foreseeable') is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision"). See United States v. Flores-Alvarado, 779 F.3d 250, 255 (4th Cir. 2015) (accordingly, in order to attribute to a defendant for sentencing purposes the acts of others in jointly-undertaken criminal activity, those acts must have been within the scope of the defendant's agreement and must have been reasonably foreseeable to the defendant.") (quoting United States v. Gilliam, 987 F.2d 1009, 1012-13 (4th Cir. 1993)).

Foreseeability of others' drug dealings does not establish that those transactions were within the scope of the defendant's jointly taken criminal activity, the Fourth Circuit emphasized see Flores-Alvarado, id. @256 ("foreseeability is not enough; the act of others may be attributed to a defendant only if those acts were foreseeable to the defendant and were within scope of the defendant's agreement to jointly undertake criminal activity.")

United States v. Egbuomwan, 992 F.2d 70, 74 (5th Cir. 1993) ("If the defendant has not joined the criminal activity, it does not matter that he could have foreseen the criminal act. The reasonably foreseeable standard applies only AFTER it is shown that a jointly undertaken activity has taken place.") [emphasis in original]; United States v. Anderson, et al., 39 F.3d 331, 352 (D.C. Cir. 1994) ("The extent of a defendant's vicarious liability under conspiracy law is always determined

used by the United States Sentencing Commission in the Guidelines
Relevant conduct means:

...in the case of a jointly undertaken criminal activity...
all acts and omissions of others that were-
(i) within the scope of the jointly undertaken criminal
activity,
(ii) in furtherance of that criminal activity, and
(iii) reasonably foreseeable in connection with that
criminal activity; that occurred during the commission
of the offense of conviction, in preparation for that
offense, or in the course of attempting to avoid detection
or responsibility for that offense;

Under this Guideline, whether sales of drug by co-
conspirators are attributable to a defendant for sentencing
purposes turns into a three-part test. First, his colleagues'
transactions must have been reasonably foreseeable to the
defendant. There would be no possible way for the defendant
to foresee that his own family would make these transactions
while he was away on business, allowing his own trusted family
to watch his home while conducting positive endeavors. Second,
those transactions in addition to being foreseeable to the
defendant must also have been within the scope of the defendant's
agreement to participate in criminal activity jointly with other
members of the conspiracy. The defendant never agreed to
participate nor was he making any profit from the transaction
of these other co-conspirators, besides an uncle/brother trusting
his own family, there was no "joint activity". And third, sales
by co-conspirators must have been in furtherance of the jointly
undertaken criminal activity. The government must prove all
three prongs before a defendant can be held responsible at
for his co-conspirators' drug sales. U.S.S.G. §1B1.3 and comment
3(A) ("The conduct of others that meets all three criteria set

by the scope of his agreement with his co-conspirators. Mere foreseeability is not enough: someone who belongs to a drug conspiracy may well be able to foresee that his co-ventures, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side deals.") (quoting United States v. Saro, 24 F.3d 283, 288 (D.C. Cir. 1994)).

The district court's wholesale attribution to Berger of all the drugs sold by his three nephews was erroneous. The trial court failed to make the particularized findings necessary to hold Mr. Berger responsible for his nephew's dealings. This error of law requires remand for resentencing, especially since Mr. Berger's involvement in the charged conspiracy differed markedly in involvement and scope from his nephews' narcotic trafficking.

In summarily attributing to Mr. Berger all the drugs distributed by his three nephews, the court implied that those quantities were foreseeable to the Petitioner because the nephews operated out of his home while he was away on business.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully Submitted;

Mark Berger

Mr. Mark A. Berger

Date: 12-5-17