

No. ____ - _____

IN THE
SUPREME COURT OF THE UNITED STATES

HARRY CRAWFORD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR EXTENSION OF TIME IN WHICH TO
FILE PETITION FOR WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit
Justice for the Fourth Circuit:

Petitioner, by his attorney, respectfully makes an application pursuant to Supreme
Court Rule 13.5 and Rule 22 to extend the time by 60 days in which to file a petition for writ
of certiorari from the judgment entered by the United States Court of Appeals for the Fourth
Circuit. In support thereof, counsel states the following:

1. On November 22, 2016, after his trial ended in a hung jury, Mr. Crawford pleaded guilty to the following three offenses: (I) conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349; (ii) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; and (iii) collection of extensions of credit by extortionate means, in violation of 18 U.S.C. § 894. As described in a written plea agreement,¹ the first two offenses arose from Mr. Crawford's conduct as the owner and operator of RX Resources and Solutions, a company that rented durable medical equipment and sold disposable medical supplies. The third offense related to verbal threats made by Mr. Crawford and a co-defendant, Matthew Hightower, to David Wutoh, a longtime friend of Mr. Crawford to whom the men had loaned money. (Mr. Hightower loaned Mr. Wutoh \$15,000, and Mr. Crawford loaned Mr. Wutoh \$6,000.)

2. In September 2013, Mr. Wutoh was killed by gunfire as he slept on the couch of his girlfriend's apartment. In September 2016, a jury found Mr. Hightower guilty of two offenses underlying the murder of Mr. Wutoh: (I) use of a facility in interstate commerce for extortion resulting in death, in violation of 18 U.S.C. § 1952(a); and (ii) collection of extension of credit by extortion, in violation of 18 U.S.C. § 894. The court sentenced Mr. Hightower to 380 months' imprisonment.

3. The government did not charge Mr. Crawford with any offense directly related to Mr. Wutoh's death. In the written plea agreement for the fraud and extortion counts, Mr.

¹ The written plea agreement is attached as Exhibit 1.

Crawford admitted only that he had made verbal threats to Mr. Wutoh in an attempt to coerce repayment of the loans. The agreement clearly reflected the parties' disagreement as to whether Mr. Crawford could be held culpable for Mr. Wutoh's death at the hands of Mr. Hightower. The applicable guideline for extortion, U.S.S.G. § 2E2.1, directed the court to apply one of two possible base offense levels: a base offense level 20, as provided in subsection (a)(1); or, in the event the court determined that a victim was killed under circumstances that constituted murder under 18 U.S.C. § 1111, it could cross-reference the guideline for first-degree murder at U.S.S.G. § 2A1.1, which calls for a base offense level 43. The defense urged the court to set the base offense level at 20 under subsection (a)(1); the government urged the court to set the base offense level at 43 under subsection (c)(1).

4. The parties' written plea agreement contained a waiver provision that reflected their divergent positions over attributing Mr. Wutoh's death to Mr. Crawford. Although the provision stated that Mr. Crawford waived his right to challenge the conviction and sentence, it carved out two specific exceptions. *First*, Mr. Crawford retained the right to appeal the sentence if the court applied the murder cross-reference under U.S.S.G. § 2E2.1(c)(1) to set the base offense level for his extortion offense at 43. *Second*, Mr. Crawford retained the right to appeal the sentence if the court applied an upward departure pursuant to U.S.S.G. § 5K2.1 (the resulting in death enhancement).

5. At sentencing, the district court calculated Mr. Crawford's guideline range in two alternative ways, both of which held him responsible for Mr. Wutoh's death. First, the

court applied subsection (c)(1) of the extortion guideline, § 2E2.1. That subsection cross-referenced the first-degree murder guideline at § 2A1.1, which set the base offense level at 43. Then, the court granted a five-level downward departure to level 38 based on its finding that Mr. Crawford “did not cause [Mr. Wutoh’s] death intentionally or knowingly.” U.S.S.G. § 2A1.1, cmt. n.2(B). The court applied a two-level reduction for acceptance of responsibility and another five-level downward departure to reach a final offense level 31. Alternatively, the court stated, it would calculate the guideline range by selecting a base offense level 20 under subsection (a) of the extortion guideline, *see* § 2E2.1; applying a nine-level enhancement because the offense involved the discharge of a firearm resulting in injury, *see* U.S.S.G. § 2E2.1(b); applying a two-level reduction for acceptance of responsibility; and, finally, imposing a five-level upward departure because the offense resulted in a person’s death, *see* U.S.S.G. § 5K2.1. Under either scenario, the court pointed out, Mr. Crawford’s final offense level was 31. When combined with his criminal history category, II, the advisory guideline range was 121-151 months. The court imposed a sentence of 144 months’ imprisonment.

6. Mr. Crawford filed a timely notice of appeal on April 7, 2017. In an opening brief filed on August 11, 2017, Mr. Crawford raised two challenges to the district court’s reliance on Mr. Wutoh’s death to calculate his sentencing guidelines. First, Mr. Crawford argued that the court failed to make the necessary factual finding as to the scope of the jointly undertaken criminal activity with Mr. Hightower, as required under U.S.S.G.

§ 1B1.3(a)(1)(B) to attribute the shooting to him. Second, Mr. Crawford argued that the court lacked any factual basis to support a finding that Mr. Wutoh's death was within the scope of his jointly undertaken criminal activity, which involved only verbal threats intended to coerce repayment of the loans.

7. The government filed a motion to dismiss Mr. Crawford's appeal on August 24, 2017. The government argued that Mr. Crawford had waived his right to challenge the court's use of the murder cross-reference to determine the base offense level for the extortion conviction.² The motion to dismiss rested on the government's claim that the district court did not use the base offense level for *first*-degree murder, which was 43, to calculate Mr. Crawford's guideline range, as required for the waiver exception to apply. Instead, the government asserted, the court used the base offense level for *second*-degree murder, which was 38 – a finding that did not fall within the waiver exception. In a single-paragraph order dated January 19, 2018, a panel of the Fourth Circuit Court of Appeals granted the government's motion to dismiss Mr. Crawford's appeal.³ The panel determined that Mr. Crawford's challenge to the cross-reference for murder fell within the scope of the waiver provision of his plea agreement.⁴

² The government further argued that Mr. Crawford abandoned his right to challenge the upward departure under U.S.S.G. § 5K2.1

³ The Fourth Circuit order is attached as Exhibit 2.

⁴ The panel further determined that Mr. Crawford abandoned his right to challenge the court's use of an upward departure under § 2K2.1, which constituted the court's alternative finding, because the issue was not adequately presented in the opening brief.

8. Contrary to the panel’s decision, Mr. Crawford’s appeal fits squarely within the exception to the waiver provision contained in the written plea agreement. The primary issue in dispute was whether Mr. Crawford was responsible for the shooting death of Mr. Wutoh at the hands of Mr. Hightower. The government urged the court to hold Mr. Crawford responsible and apply the base offense level for first-degree murder, 43, under subsection (c)(1) of the extortion guideline. The defense urged the court to find the shooting was not within the scope of the jointly-undertaken criminal activity and, therefore, to apply a base offense level 20 under subsection (a)(1) of the guideline. Those were the only two options available to the court under § 2E2.1. And, it is undisputed, the government’s argument prevailed. The court determined that Mr. Wutoh’s death constituted murder under 18 U.S.C. § 1111 and, thus, it turned to subsection (c)(1) of the extortion guideline. That subsection directed the court to the guideline for first-degree murder at § 2A1.1, which set the base offense level at 43. *See* § 2A1.1(a)(1). Then the court determined that Mr. Crawford “did not cause [Mr. Wutoh’s] death intentionally or knowingly,” which justified a five-level downward departure, as recommended by the commentary accompanying § 2A1.1. *See* U.S.S.G. § 2A1.1, cmt. n. 2(B). After applying the downward departure under § 2A1.1 (which resulted, temporarily, at an adjusted offense level 38), the court made further adjustments – a two-level reduction for acceptance of responsibility and an additional five-level downward departure – resulting in a final offense level 31.

9. The government’s narrative – which the Fourth Circuit apparently accepted by virtue of its decision to dismiss the appeal – assumes that the district court applied a base offense level 38 to the extortion offense. As support, the government pointed to the court’s comment at sentencing that it was “not departing downward from the 43 of a first-degree murder,” but was “departing downward from the second-degree murder, 38.” *See* Ex. 2. Notwithstanding this statement, the text of the guideline makes clear that the court did not, because it *could not*, apply a base offense level 38. The extortion guideline at § 2E2.1 only has two available options for setting the base offense level. *Either* a court can assign a base offense level 20, per subsection (a), *or* it can assign a base offense level 43, per subsection (c)(1). There is no other option. In the event a court selects the latter option, it *then* has the option of making further downward departures under § 2A1.1, including a departure if the defendant did not intentionally or knowingly cause a victim’s death. If a court grants a five-level departure, which is the recommended limit in the ordinary case, the resulting offense level (without further departures) would be 38 – which is also the base offense level for second-degree murder under U.S.S.G. § 2A1.2(a).

10. The record in Mr. Crawford’s case makes clear that the district court followed the latter route described above. The court: (I) started with a base offense level 43, as required under subsection (c)(1) of the extortion guideline at § 2E2.1; (ii) applied a five-level downward departure, as permitted in the application notes to the first-degree murder guideline at § 2A1.1; (iii) applied a two-level reduction for acceptance of responsibility, and

(iv) applied an additional five-level downward departure, which resulted in a final offense level 31. The fact that the court took an intermediate step between (I) and (iii) – applying a five-level downward departure, from 43 to 38, under § 2A1.1 – does not magically transform the calculation into one that used a “base offense level” of 38. Contrary to the government’s claim, the extortion guideline simply does not provide any option for a court to assign a base offense level 38 – regardless of the circumstances presented.

11. Since the date of the order dismissing Mr. Crawford’s appeal, undersigned counsel has been busy with several appellate and district court assignments. In particular, counsel has been handling more than 200 petitions seeking retroactive habeas relief under *Johnson v. United States*, 576 U.S. __ (2015), and *Sessions v. Dimaya*, 584 U.S. __ (2018), which the Supreme Court decided this week. Additionally, counsel is responsible for a variety of national trainings relating to federal sentencing criminal history issues. Finally, counsel is responsible for supervising the appellate attorneys in the federal public defender’s office in Maryland as well as pro bono attorneys who work with the office on criminal matters. In light of undersigned counsel’s workload, he respectfully requests an extension of 60 days, from April 19, 2018 until June 18, 2018, on which to file the petition for writ of certiorari on Mr. Crawford’s behalf. This case presents an important issue relating to the proper scope of appellate waiver provisions in written plea agreements. Additional time will allow counsel to adequately research this matter and prepare an effective petition for certiorari.

Wherefore, Petitioner prays that this application be granted.

Respectfully submitted,

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