IN THE

SUPREME COURT OF THE UNITED STATES

FELIX A. OKAFOR,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

FELIX A. OKAFOR, PRO-SE
INMATE ID NO: 56118-056
USP HAZELTON, P.O.BOX 2000
BRUCETON MILLS, W.VA.,26525

DATED: 24 JUNE, 2018 Pro-Se Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. MAY A CONVICTION THAT IS ADMITTEDLY A VIOLATION OF THE CONCURTRENT SENTENCE DOCTRINE BE ALLOWED TO STAND IN LIGHT OF RAY V. UNITED STATES, 481 U.S. 736 (1987)?

II. WHETHER THE SIXTH AMENDMENT IS IMPLICATED WHERE THE DISTRICT COURT ERRONEOUS SENTENCING DETERMINATION UNLAWFULLY INCREASED DEFENDANTS SENTENCING IN LIGHT OF THIS COURT'S DECISION IN GLOVER V UNITED STATES, 531 U.S. 198 (2001)?

III. WHETHER IN LIGHT OF THE REVERED STATUS OF THE BEYOND-A-REASONABLE-DOUBT STANDARD, CAN A CONVICTION WHERE THE ELEMENT OF THE OFFENSE MAY NOT HAVE BEEN FOUND AGAINST THE DEFENDANT BY SUCH STANDARD BE OVERLOOKED IN LIGHT OF IN re.WINSHIP, 397 U.S.358 (1970)?

IV. WHETHER PETITIONER'S CONVICTION AND SENTENCE OF BOTH 21 U.S.C.§§841(a) AND 860 VIOLATED THE DOUBLE JEOPARDY CLAUSE IN LIGHT OF THE "SAME EVIDENCE RULE" ADOPTED IN BLOCKBURGER V.UNITED STATES, 284 U.S.299(1932)?

V. IS DUE PROCESS VIOLATED WHEN A PROSECUTOR HAS AN AFFIRMATIVE DUTY TO DISCLOSE ANY EXCULPATORY AND IMPEACHMENT EVIDENCE KNOWN TO ANY AGENT/OFFICER INVOLVED IN THE ATRIAL, BUT FAILED TO DO SO IN LIGHT OF KYLES V. WHITLEY, 514 U.S.419 (1995)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUES:

OPINION AND ORDERS BELOW

The Orders appealed from is located at the Docket of the United Court Of Appeals for the Fourth Circuit case No: 18-6012.

JURISDICTIONAL STATEMENT

This Petition for Writ Of Certiorari is from the Order and Judgment entered on June 5, 2018, in the above referenced Case by the Fourth Circuit Court Of Appeals. Accordingly, the Court has Jurisdiction over this petition for Writ Of Certiorari matter pursuant to 28 U.S.C.§1254 and 28 U.S.C.§2101. The District Court had original Jurisdiction over the subject matter of this case pursuant to 18 U.S.C.§3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C.1291 and 28 U.S.C.§3742.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be deprived of Life, liberty or property without Due Process Of Law."

U.S.Const.amend. V.

"No person shall...be Subject for the same Offense to be Twice put in Jeopardy of Life or limb."

U.S. Const.amend. V.

The Due Process Clause protects the accused against conviction except upon proof beyond a Reasonable Doubt of the existence of every element of the offense with which he is charged.

U.S.Const.amend. V. and XIV.

STATEMENT OF THE CASE

On February 21, 2012, Petitioner (Okafor) was charged in a Twenty-two Counts indictment with violations of various Federal Narcotics and Firearms Offenses. Eleven Counts of possession to distribute in violation of 21 U.S. §841(a) and Eleven counts of possession of firearms in violation of 18 U.S. §924(c) (J.A.23-30).

On January 22,2013, a Superceding indictment was issued which charged petitioner with Three additional Crimes; Conspiracy to distribute Marijuana and Heroin (Count-one); Maintaining a Dwelling to distribute controlled substances (Count-two); and Distribution of Controlled substances within 1000 feet of a School (Count-three). The other Twenty-two (22) charges remained the same.

Trial commenced on July 9,2013 and concluded on July 11,2013 (J.A.16). Petitioner (Okafor) was convicted on all Counts and petitioner was sentenced on April 22.2014 (J.A.20). Petitioner entered a Timely notice of appeal on April 20,2014.

On March 2,2015, the Fourth Circuit Court Of Appeals affirmed the Conviction and a Rehearing and Rehearing en banc was denied on april 27,2015. the United States supreme Court denied Certiorari on October 5,2015. Petitioner filed a 28 U.S.C.§2255 Motion on June 2, 2016 and was denied on December 18,2017. A Certificate Of Appealability was subsequently filed and was denied on April 3,2018. A rehearing and Rehearing en banc was denied on June 5,2018. Thus this Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

I. THIS PETITION PRESENTS TO THIS COURT A MORE FUNDAMENTAL QUESTION FOR REVIEW: MAY A CONVICTION THAT IS ADMITTEDLY A VIOLATION OF THE CONCURRENT SENTENCE DOCTRINE BE ALLOWED TO STAND IN LIGHT OF RAY V.UNITED STATES, 481 U.S.736(1987)?

Petitioner contends that his Sentences were not Concurrent for the purposes of the Concurrent Sentence, where pursuant to 18 U.S.C.§3103, District Court entered a Separate Special Assessment fee for each of petitioner's Twenty-Five Counts. Specifically, petitioner was convicted on a Twenty-five Counts; Conspiracy Count-One; 21 U.S.C.§856, Count-two; 21 U.S.C.§860, Count-three; Counts 4,6,8,10,12,14,16,18,20,22,24, all Eleven Counts violation of 21 U.S.C.§841(a) possession and distribution of a Controlled Substances and Eleven Counts of 18 U.S.C.§924(c)(5,7,9,11,13,15,17,19,21,23,25) possession of Firearms predicated upon the 21 U.S.C.§841(a) Convictions. District Court grouped petitioners Convictions and Sentences to run concurrent, petitioner was also subjected to a Monetary Assessment Fee Pursuant to 18 U.S.C.§3103 as well as Prison term for each of the Twenty-Five Counts.... 3157 Months.

A Monetary Assessment fee of $100 was imposed on each of the Twenty-Five Counts ($100X25)=$2500.00, so that the petitioner's liability to pay the total Monetary Assessment Fee is dependent on the validity of the Conviction on each Count. Petitioner contends that in light of the supreme Court decision in **Ray V. United States, 481 U.S.736 (1987)**, that he is not actually serving a Concurrent Sentence, but in fact, in addition to the concurrent term of Incarceration, he also received a Cumulative Monetary assessment Pursuant to 18 U.S.C.§3103. This was advanced in both petitioner's 28 U.S.C.§§2255 and 2253 at both the District Court and the Appelate Court respectively and was denied Relief. Again was sent to the Fourth Circuit for a Rehearing and a Rehearing en banc for further review and again was denied relief.

In Ray supra, Petitioner was convicted on Three Counts, One-Count of a Conspiracy, and Two-Counts of possession with intent to distribute. The District Court imposed a $50.00 assessment fee on each of the Three Counts

totaling $150.00. He was Sentenced to concurrent 7-year terms on all three counts, and to a concurrent special parole terms of five years on the two possession counts. the Court of Appeals affirmed petitioner's conspiracy convictions and one of his possession convictions. The Supreme Court concluded that since the petitioner's ability to pay the total depended on the validity of each of the three convictions, the sentences were not concurrent and the Court of Appeals improperly applied the Concurrent sentence in declining to review the petitioner's Second convictions for possession and it VACATED the Sentence and remanded to the Court Of Appeals as directed. Like Ray supra, Petitioner's convictions and sentences were not Concurrent and the Concurrent Sentence Doctrine was improperly applied and violated Due Process. Petitioner was Sentenced on a concurrent terms of 78 Months and a Concurrent Special Parole terms of Five years on the Eleven Possession Counts

Furthermore, the Eleven (11)counts of the 18 U.S.C.§924(c) that was predicated on the Eleven possession convictions were not Vacated, but rather,both special assessment fee and prison term were imposed on those counts in violation of Double Jeopardy and the Justice Dept.Policy to refrain from pursuing Multiple §924(c) in this Circumstances. The Relevant Policy provides that each §924(c) in an Indictment should be based on a Separate Predicate offense. See **Brief Of the United States in Opposition for Writ of Certiorari; Carter V. United States,537 u.s.1187 (2002).** It further stated that the "Imposition Of Consecutive Sentences under Subsection §924(c) in a concurrent sentence would impinge upon the fundamental 'DOUBLE JEOPARDY' principles.'" The rule against Multiplicity is rooted in the Double Jeopardy Clause of the Fifth Amendment, which prohibits successive prosecution for the same offense in a single criminal trial. See, **Petite v. United States, 361 U.S.529, 4 L.Ed 2d 490,80 S.ct. 450 (1960)(same).**

Also both the Justice Department Policy and every Court of Appeals that have addressed the issue have reached the same consensus that only One §924(c) violation may be charged in relation to one Predicated crime, and where as in this Instant offense, the Possession Counts that the §924(c)'s were predicated upon were all Run Concurrent, the Eleven §924(c) all but One must be VACATED. Allowing those to run Consecutively would violate the "Double Jeopardy" principles. Every Court of Appeals that have addressed this issue

has reached the same conclusion, Only One 18 U.S.C.§924(c) can be charged to one predicate offense. See; **United States v.McArthur, 850 F.3d 925;2017 U.S.App.LEXIS. 3311 (8th Cir.2017); United States v.Cappas, 29 F.3d 1187 (7th Cir 1994); United States v.Sims, 975 F.2d 1225 (6th Cir. 1992); United States v.Moore, 958 F.2d 310 (10th Cir.1992); United States v.Hamilton, 953 F.2d 1344(11th Cir.1992); United States v. Lindsay, 985 F.2d 666 (2nd Cir.1993); United States v.Fontanilla, 849 F.2d 1257 (9th Cir.1988); United States v.Privette, 947 F.2d 1259 (5th Cir.1991); United States v.Anderson, 313 U.S.App.D.C.335; 59 F. 3d 1323 (D.C.Cir.1995); United States v. Guess,482 Fed.Appx.832;2012 U.S.App. LEXIS 11686 (4th Cir.2012).** Thus all of Petitioner's Concurrent Sentences and the 18 U.S.C.§924(c) predicated upon those are impermissible Punishments, it violated the Double Jeopardy Principles and must be Vacated. See **Ball v.United States, 470 U.S.856 (1985)(Even where the District Court imposed Concurrent Sentences for Multiplicituos convictions, such that the defendant suffered no additional period of punishment for the second or other Convictions, one or all of the concurrent convictions must be Vacated because the fact of a separate conviction can carry with it a collateral Cosequences Id at 864-65); Rutledge v.United States, 517 U.S.292 (1996)(As long as 18 U.S.C.§3103 stands a Second Conviction will amount to a second Punishment Id at 517 U.S.at 307 (1996)).**

For the Foregoing reasons, and because the Fourth Circuit decided an important Question Of Federal Law in a way that is in Conflict with the Applicable decisions of this Court and therefore violated binding Supreme Court precedent, It is respectfully Submitted that a Writ Of Certiorari should be Granted to resolve this issue of exceptional importance.

II. **WHETHER THE 6th AMENDMENT IS IMPLICATED WHERE THE DISTRICT COURT ERRONEOUS SENTENCING DETERMINATION UNLAWFULLY INCREASED DEFENDANTS SENTENCING IN LIGHT OF THIS COURT'S DECISION IN GLOVER V.UNITED STATES, 531 U.S. 198 (2001)?**

Petitioner contends that District Court's erroneous Sentencing Determination unlawfully increased his prison sentence, when it failed to Group his Sentence together under Section:3D1.2 of the Guidelines. And the Fourth Circuit Court Of Appeals decision to affirm that decision conflicts with the applicable decisions of this Court. Specifically, in Glover v. United States, 531 U.S.198, 148 L.Ed 2d 604, 121 S.ct 696 (2001).

Section 3D1.2, provides that Counts involving substantially the same harm within the meaning of:

A). Same act of Transaction/Victim;

B). When Counts involve same victim, and two or more acts/transactions connected by common Criminal Objective;

C). When One of the counts embodies conduct that is treated as a Specific Characteristic in or other adjustments to the Guidelines applicable to another of the Counts.

D). When Offense Level is determined Largely on the Basis of the total amount of Harm or Loss.

Specifically, Petitioner was convicted in Eleven (11) counts of 21 U.S.C. §841 (a) Violations, possession with intent to Distribute and was subsequently sentenced on each of the Counts without Grouping the Counts as required under U.S.S.G.§3D1.2 and ultimately increased the Petitioner's Prison sentence. Petitioner challenged this in his 28 U.S.C.§§2255 and 2253 (COA) before both the District Court and the Fourth Circuit Court's Of Appeals respectively, but was denied Certificate Of Appealability.

In the Government Motion in Support of the District Court denial of Petitioner's Certificate of Appealabilty; It stated that all of the Petitioner's

drug counts were grouped as part of Count-One, the Conspiracy conviction. (DE#112 @12). The government argument is without Merit, and, District Court reliance on that argument in reaching its decision to deny Certificate of Appealability is equally erroneous. Importantly, the Fourth Circuit Court of Appeals decision to affirm the District Court's decision and deny Certificate of appealabilty is equally erroneous, It conflicts with the applicable decisions of this court. Specifically, the Court's decisons in **Glover v. United States, 531 U.S. 198 (2001).**

Moreover, the District Court imposed a $100.00 fine for each of the Drug counts of Conviction under 21 U.S.C.§§846 and 841(a), Eleven(11)counts as well as the Eleven(11) counts of the §924(c) that was predicated on those Counts. In fact, in addition to the Concurrent term of Incarceration, Petitioner was also subjected to a Cummulative Monetary assessment fee pursuant to 18 U.S.C. §3103 contrary to this Courts holding in **Ray v. United States, 481 U.S.736 (1987).** Petitioner's Monetary Assessment was $100x25($2500.00). Consequently, District Court cannot Safely argue that petitioner's §841(a) Counts were Grouped as part of the **COUNT-ONE CONSPIRACY COUNT.** Such an argument is respectfully wrong.

Also, petitioner was subjected to a sentencing enhancement of all the §924(c) that was predicated upon each of the §841(a) violation. In fact had this counts been grouped under U.S.S.G.§3D1.2 as required, Petitioner's sentence would have been significantly reduced by 255Years. All the 18 U.S.C. §924(c) would have been eliminated except one. "it is the number of the Predicate Offenses, not the number of Guns, that determines whether a separate and successive violations of §924(c) have occured". **United States v Guess, 482 Fed.Appx.832;2012 U.S.App.LEXIS 11686 (4th Cir.2012).**

Petitioner cites this Court decision in Glover. In **Glover v.United States, 531 U.S.198 (2001),** Glover was convicted of Tax evasion, Racketeering and Money Laundering. District Court determined that the Money Laundering Counts

would not be grouped with the other Counts, pursuant to U.S.S.G.§3D1.2, which allowed for the grouping of Counts involving substantially the same harm. As a result, the defendants offense level was increased for purposes of guidelines and so was his Prison sentence...84 Months, Six Months higher than expected. He subsequently, filed a motion under §2255 in the District Court to correct the sentence. The District court expressing the view that 6-21 Months increase in sentence was not significant to amount to Prejudice. The Seventh(7th)Circuit Concurred with the district Court and affirmed his Conviction and Sentence. The Supreme Court reversed the Court Of Appeals judgement, in an Opinion expressing the Views of the Court, It held that "the Trial Court erred in the Guidelines Determination that Unlawfully Increased the Defendants Prison sentence; It Stated that any amount of Prison time has Sixth (6th) Amendment Significance, **Glover, 531 U.S.@203-04.**" In this instance case, District Court erroneous Sentencing Determination unlawfully increased petitioner's Prison Sentence and the Fourth Circuit affirmation of that decision conflicts with the applicable decisions of this Court.

Because the Fourth Circuit has decided this question of Federal Law in a way that is in conflict with the applicable decisions of this Court, It is respectfully submitted that a Writ Of Certiorari would be Appropriate to resolve this issue of Exceptional Importance.

III. WHETHER IN LIGHT OF THE REVERED STATUS OF THE BEYOND-A-REASONABLE DOUBT STANDARD, CAN A CONVICTION WHERE THE ELEMENT OF THE OFFENSE MAY NOT HAVE BEEN FOUND AGAINST THE DEFENDANT BY SUCH A STANDARD BE OVERLOOKED INLIGHT OF In re.WINSHIP 397 U.S. 358 (1970)?

Petitioner was convicted in a superceding indictment, Count-One Conspiracy in violation of 21 U.S.C.§846. For distribution of Marijuana and Heroin devoid of the elements of the Offense. Petitioner appealed the conviction and Sentenc under §2255 and was denied a Certificate Of Appealabilty by the District Court and was affirmed in a §2253(COA) by the Fourth Circuit Court Of Appeals and a Rehearing and Rehearing en banc was also denied. Thus this Writ Of Certiorari.

This Instant case, Petitioner was charged with conspiring to "Possess with intent to distribute a controlled substance." therefore the government is required to prove beyond a reasonable doubt that petitioner entered into an agreement with another person, not just to possess a controlled substance, but to possess "with intent to distribute." This agreement is refered to here as a "DRUG DISTRIBUTION AGREEMENT." for a Conspiracy to exist, the government must satisfy all three elements of Conspiracy..1) An agreement to distribute existed between Two or More people; A government Agent and or Confidential informant not included; 2). The defendant knew of the Conspiracy, and..3). The defendant knowingly and Voluntarily became part of the Conspiracy.

Petitioner states that at Trial, the government introduced Mr.Jerome as only other person involved in this conspiracy. The problem here, is Mr.Jerome is a Government Informant. For this reason, to achieve a conviction for a Conspiracy, the government must first satisfy the FIRST element; An Agreement between Two-people. The element of the Offense is not satisfied unless one conspires with at least one true Co-conspirator, because conspiracy is a Crime in part because of the dangers of concerted action, this risk do not exist when the only Co-conspirator is a government Informant. See, Sears v. United States, 343 F.2d 139 (5th Cir.1965). Also one cannot conspire by himself.

More importantly, at Trial, Jerome (CI) testified as follows (J.A.243-45)

Q: When you had this transaction with Mr.Okafor nobody else was present at the time?

A: NO IT WAS ONLY ME AND HIM AT THE BAR

Q: Infact, during the meeting, he talked to you about all the Heroin, Kilo of Heroin, do you remember that?

A: Yes

Q: You never saw a Kilo of Heroin, Did you?

A: I never seen it.

Q: So this people that he was talking about, you don't believe they existed?

A: I DON'T THINK ANYBODY WAS INVOLVED.

Next was the testimony of Detective Guseman. Guseman was the lead agent of the Investigation, the focus of his testimony was that petitioner was involved in a conspiracy because of his statement to the Confidential Informant Jerome that he had seen a thousand Pounds of Marijuana and that was a clear indication of a very large conspiracy (J.A.109), despite the confidential Informant, Mr. Jerome to the Contrary...I DON'T THINK ANYBODY WAS INVOLVED(J.A.245).

Next was Detective Adam Dunn's Direct testimony (J.A.291-93). Dunn was also part of the Investigation, and below was his testimony:

Q: Before interviewing or speaking to the defendant, did you advise him of his Miranda Rights?

A: I did

Q: Did he orally waived his Rights?

A: He orally waived those rights,yes

Q: And he agreed to speak to you about his knowledge of drug activity?

A: Mr.Okafor (petitioner) told me he had a Mexican supplier that was supplying him with Marijuana.

Q: Okay, did he provide any type of other information regarding suppliers,as far as names, phone number or anything?

A: He didn't provide any name, however, he did provide a phone number and he attempted to make a call and he spoke to someone. HOWEVER. I WAS UNABLE TO TELL IF IT WAS A CONVERSATION ABOUT DRUGS.

Q: Okay, did the defendant also make any statements regarding Heroin?

A: He did, while we were talking to Mr.Okafor, he did receive a phone call on one of his Cell-Phones.IT WASN'T WHERE I COULD HEAR THE PARTY'S CONVERSATION.

The fact is that at no time did I speak to Detective Dunn. See his testimony at (J.A.290 &308).I HAD WORDS WITH PETITIONER AND HE INDICATED TO ME THAT HE WANTED TO COOPERATE (J.A.290). HE FURTHER STATED, "I WAS UNDER THE IMPRESSION THAT HE WAS GOING TO COOPERATE. WE FELT LIKE HE WAS GOING TO TALK TO HIS ATTORNEY AND HE WOULD COOPERATE. THERE WAS A LAPSE IN TIME WHERE HE DIDN'T COOPERATE(J.A.308).

Next was the crucial testimony of the Government Counsel. AUSA, Ethan Ontjes (J.A.469-71): The Court asked the Government for evidence to support it's argument as to the existence of Conspiracy. The Government in response CONCEDED that there was no EVIDENCE TO CORROBORATE nor WITNESSES TO SHOW that petitioner was involved in a conspiracy to distribute (100) Grams of Heroin and (100) Kilograms of Marijuana or more in violation of 21 U.S.C. §846. Thereafter, the following exchange between the COURT and the GOVERNMENT ATTORNEY:

COURT: Wait, I cannot do this, you are just asking me...you are arguing conclusively. You and I know that when I get an Objection on Quantity, other than what the Jury found, any Quantity more than the Verdict numbers, Count one Conspiracy that we are going to have evidence, that I am not going to Seat here and recalculate that.

AUSA: I don"t know if we need to present that because the fact that "WE DON'T HAVE WITNESSES." So the question the Court must decide today is by the preponderance of the evidence has the Government..."IS THERE COROBORATION" of these statements. "I DON'T HAVE WITNESSES" that I can put before this Court to say that I dealt with the defendant during this time period, this much amount of Drugs.

COURT: You have been talking for Ten Minutes, You have not given me one Specific yet, you have just rambled around and said the Probation Officer was probably right by a preponderance of the evidence et cetera, et cetera.

Petitioner contends that in light of the evidence adduced at Trial starting with the first Government witness, Mr.Jerome the (CI):

IT WAS ONLY ME AND HIM AT THE BAR: I KNOW HE WAS LYING TO ME, I NEVER SEEN ONE (1) KILO OF HEROIN: I DON"T THINK ANYBODY WAS INVOLVED. (J.A.243-45).

DETECTIVE GUSEMAN: Petitioner's statement to Jerome (CI) that he had seen One (1000) thousand Pounds of Marijuana was not only a sign of conspiracy but an indication of a Large conspiracy (J.A.109).

DETECTIVE DUNN: Petitioner did not provide any name. However, he provided a phone number and he attempted to make a call and he spoke to someone, however, "I WAS UNABLE TO TELL IF IT WAS A CONVERSATION ABOUT DRUGS." AND WHILE WE WERE TALKING TO PETTITIONER, HE DID RECEIVE A PHONE CALL ON ONE OF HIS CELL PHONES. "IT WAS NOT WHERE I COULD HEAR THE CONVERSATION." (J.A.291-292).

AUSA: "I DON'T HAVE WITNESSES" THAT I CAN PUT BEFORE THIS COURT TO SAY THAT I DEALT WITH PETITIONER THIS PERIOD, "THIS AMOUNT OF DRUGS." "I DON'T HAVE WITNESSES TO COROBORATE" THE EXISTENCE OF CONSPIRACY.(J.A.469-71).

In light of the above, clearly, the records admits only to speculation that Petitioner had entered into an agreement with any bona fide Conspirator to distribute Marijuana and Heroin. the only possible conspirators that can be imagined; the Confidential Informant, Mr.Jerome and the unidentified supplier of Marijuana and Heroin. However, Mr. Jerome who was a Government Informant, could not be a bona fide conspirator, because, "there can be no Indictable Conspiracy with a Government Informant whosecretly intends to frustrate the Conspiracy." Sears v United States, 343 F.2d 139 (5th Cir.1965). As to the unidentified supplier, the Government introduced no evidence showing any **Agreement** between petitioner and anybody to violate the Law, possess a controlled substance or possess the substance with the intent to distribute... "A DRUG DISTRIBUTION AGREEMENT."

"Due process protects the accused against conviction except upon proof beyond a reasonable doubt of every element/facts necessary to constitute the crime with which he is charged." In re.Winship, 397 U.S.358 (1970). 'It follows that when such a conviction occurs...It cannot Constitutionally stand.'"

The failure of the Government to acknowledge that "An agreement with a Government informant alone is not a conspiracy." This is the Unquestioned Law in all the Circuit that have addressed this issue. See example United States v. Arbane, 446 F.3d 1223 (11th Cir.2006); United States v.Barboa, 777 F.2d 1420

1422 n.1(10th Cir.1985); United States v.Mahkimetas, 991 F.2d 379(7th Cir.1993); United States v.Escobar-debright, 742 F.2d 1196(9th Cir.1984); United States v.Paret-Ruiz,567 F.3d 1,6 (1st. Cir.2009); United States v.Carlton, 442 F.3d 802(2nd Cir.2006); United States v. Nunez,889 F.2d 1564 (6th Cir.1989); United States v. Moss, 591 F.2d 428,434 n.8(8th Cir.1979); Sears v. United States 343 F.2d 139 (5th Cir.1965); United States v. Chase, 372 F.2d 453 (4th Cir.1967).

Accordingly, the government have not proven beyond a reasonable doubt even in light most favourable to the prosecution that petitioner conspired with anybody to possess and distributed any controlled substance and petitioner's conviction is not consistent with the demand of the Due Process. See, In re.Winship v.United States, 397 U.S.358(1970).

For the reasons above, it is respectfully submitted that Affirming a Conviction where the Government has failed to prove the essential element of the Crime Beyond-A-Reasonable-Doubt, affects the Substantial rights and seriously impugns the fairness, integrity and public reputation of the Judicial proceedings. It is therefore, respectfully submitted that a Writ Of Certiorari should be granted to resolve this issue of Exceptional importance that is Fundamental to our Due Process.

IV. WHETHER PETITIONER'S CONVICTION AND SENTENCE OF BOTH 21 U.S.C.§§841(a) AND 860 VIOLATED THE DOUBLE JEOPARDY CLAUSE IN LIGHT OF THE "SAME EVIDENCE RULE" ADOPTED IN BLOCKBURGER V. UNITED STATES, 284 U.S.299 (1932)

Petitioner's right under the Double Jeopardy Clause of the U.S.Const. Amend. V were violated when he was convicted of possession and distribution, under 21 U.S.C.§841(a) and possession and distribution within 1000 feet of a School in violation of 21 U.S.C.§860. 21 U.S.C.§841 is a lesser included Offense of §860. The Due Process Clause of the Fifth Amendment embodies three protections: It protects against second prosecution after acquittal; it protects against second prosecution for the same offense after conviction; and lastly, it protects against multiple punishment for the same Offense.

Petitioner will focus on the later, the Double Jeopardy Clause is to ensure that Sentencing Courts do not exceed " the limits prescribed by Congress in which lies the Substantive Power to define Crimes and prescribe Punishment." The general test for Compliance with the clause looks to "whether each provision requires proof of a fact which the other does not."

The Federal standard has been the "SAME EVIDENCE" test adopted in the **Blockburger v.United States, 284 U.S. 299 (1932)** where the same act or transaction constitutes a violation of Two distinct Statutory provisions, the test to be applied to determine whether there are two Offenses or only one, is whether each provision requires proof of an additional fact which the other does not. The "Blockburger Test" has been repeatedly been reaffirmed by the Supreme Court. It is a Rule of Statutory Construction. Under the same evidence test, 841(a) is a lesser included Offense of 21 U.S.C.§860.

In the Instant case, petitioner was convicted in a Multi-Count Indictments of §841(a) and §860, possession and possession within 1000 feet of a school. Counts 4,6,8,10, for Marijuana and 12,14,16,18,20,22,24 for Heroin, all lesser included offense of 21 U.S.C.§860. Meaning it must be impossible to violate the charged offense without a violation of 21 U.S.C.§841. Petitioner was convicted and Sentenced under both Statue §§841 and 860 for the same acts

Thus, the prosecutor who has established a 21 U.S.C.§860 Violation of a controlled substance within 1000feet of school, has necessarily established a 21 U.S.C.§841(a) violation, because is a lesser included offense of §860. Petitioner contends that Supreme Court cases that have addressed the issues of lesser included offenses have reached the same conclusion. See Brown v. Ohio, 432 U.S.161 (1977)(Joyriding is a lesser included offense of Auto theft); Jeffers v.United States, 423 U.S.137(1977)(Where one offense is included in another, It cannot support a Separate conviction or sentence or Concurrent sentence). Consequently, the Fourth Circuit decision to affirm the District Court's conviction and Sentence on those Counts is an important question of Federal Law that is in conflict with the applicable decisions of this Court.

Every Court of Appeals that have addressed the issue have reached the same conclusion. 21 U.S.C.§841(a) is a lesser included offense of §860. See United States v.White, 2001 U.S.App.LEXIS 28426 (2nd Cir.2001). The Court in White held that petitioner was convicted in a Multi-count violations of §841(a) distribution of drugs and §860 distribution of drugs within 1000 ft of a School. The Government conceded that Whites §841(a) convictions were a Lesser included Offense of his §860 Convictions. The only difference between his counts of §841(a) convictions and the §860 conviction is that §860 contains an additional element that a statement that the defendant "Committed the Alleged Acts" within 1000 feet of a School. District Court dismissed all the 21 U.S.C.§841(a) counts of Conviction, because it is a lesser included Offense of §860 in its ruling, it stated that White cannot be convicted or sentenced on both counts, because the Legislature has not Authorized Cummulative Punishments for both offenses. See also other Court of Appeals: United States v.Kakatin, 214 F.3d 1049 (9th Cir.2000); United States v.Jones,489 F.3d 243 (6th Cir.2007); United States v.Scott, 987 F.2d 261 (5th Cir.1993); United States v.Carpenter, 422 F.3d 738 (8th Cir.2005); United States v. Fenton, 367 F.3d 14 (1st Cir. 2004); United States v.Jackson,

443 F.3d 293 (3rd Cir.2006); United States v. Freyre-Lazaro, 3 F.3d 1496(11th Cir. 1993).

In addition, all the 924(c) convictions predicated upon those §841(a) convictions must also be Vacated, they are duplicative and violated petitioner' right under the Double jeopardy Clause of the Fifth Amendment.Double Jeopardy Clause of the Fifth amendment Prohibits successive prosecutions for the same offense as well as the imposition of cumulative punishments for the same offense in a single criminal trial. The multiple convictions of the §924(c)(1), eleven to be exact in the same trial is Multiplicituos and a cumulative punishment and must be Vacated. See United States v.Lindsay, 985 F.2d 666 (2nd Cir.1992)(A defendant cannot be sentenced for Multiple violations based on both the Greater and lesser included Offense); United States v. Privette, 947 F.2d 1259 (5th Cir.1991)(To avoid violating Double Jeopardy principles, each Firearms offense must be sufficiently linked to a Separate drug trafficking offense to prevent two convictions of §924(c) on the same drug offense); United States V. Moore, 958 F.2 310 (10th Cir. 1992)(same).

Importantly, It violated the Justice Dept. Policy. The relevant policy provides that each §924(c) charge in an indictment should be based on a separate predicate offense, See, **Brief of United States in opposition for Writ of Certiorari, Carter v.United States, 537 U.S. 1187 (2002)(The imposition of consecutive sentence under 18 U.S.C.§924(c) in a concurrent sentence would impinge upon the fundamental "DOUBLE JEOPARDY" principles).**

For the reasons above, because the Fourth Circuit decided an important Question of federal Law in a way that is in conflict with the applicable decisions of this Court and other Courts Of Appeal. Specifically, "SAME EVIDENCE RULE" adopted in Blockburger v. United States, 284 U.S.299 (1932) in violation of the Double Jeopardy Clause of the Fifth amendment. It is respectfully submitted that a Writ Of Certiorari would be appropriate to resolve this issue of Exceptional Importance.

V. **IS DUE PROCESS VIOLATED WHEN A PROSECUTOR HAS AN AFFIRMATIVE DUTY TO DISCLOSE ANY EXCULPATORY AND IMPEACHMENT EVIDENCE KNOWN TO ANY AGENT/OFFICER INVOLVED IN THE TRIAL, BUT FAILED TO DO SO INLIGHT OF KYLES V.WHITLEY, 514 U.S.419 (1995)?**

Petitioner contends that a Prosecuttor has a duty to learn of any favorable evidence known to others acting on government behalf in the case including the Police. Kyles v.Whitley,514 U.S.419 (1995). Meaning that it is the obligation of each AUSA to seek all exculpatory and Impeachment Information from all members of the AUSA's Prosecution Team. Members of the team include Federal, State, and Local Law enforcement officers and other government officials participating in the investigation and prosecution of a criminal case against a defendant. Due Process Clause also requires the Prosecutor to disclose material that could be used to challenge or impeach the Credibility of the government's case. See Giglio V.United States, 405 U.S. 150 (1972).

In the Instant case, Petitioner was indicted in a Conspiracy to distribute 100(g) of Heroin and 100(Kg) of Marijuana on a Twenty-Five-Counts. At Trial the Two Government witnesses, Detectives Guseman and Dunn both testified that petitioner was involved in a conspiracy and based on their tandem proffered false testimonies, petitioner was convicted. However, petitioner discovered post trial that the Government had not disclosed, the Press Release by same Agents, that was a subject of a Newspaper Article that stated that based on their Ten(10)Months investigation, that petitioner was actually the only person involved and nobody else and furthermore, the Quantity of drugs that was involved was **1008 Grams Of Marijuana and 14 Grams of Heroin.**

Petitioner advanced this argument in his 28 U.S.C.§2255 Motion and in its response in support of the District Court to deny Petitioner's Motion, the Government Stated "the Newspaper Article evidence does not bind the Government when it comes to Trial Proof." petitioner disagreed, because the Press Release is

certainly an evidence. See Fed.R.Evid. 902(6), the newspaper article is a self authenticating evidence; it required no extrinsic evidence of authenticity in order to be admitted. Section-6 listed Newspaper and the periodicals as qualifying as evidence. So the issue should not be whether the government is bound by the information, rather, the failure to disclose an information that is potential impeachment issue that could have been used to impeach the testimonies of the government witnesses; Detectives Guseman and Dunn. Because the government's case "depended almost entirely" on their testimony. The evidence is relevant to their Credibility and the jury was entitled to know of it. See Giglio v.United States, 405 U.S.@154-55 (1972).

Because evidence is material as in this case, when there is a reasonable probability that the withheld evidence would have at least altered at least One Jurors assessment of the case, Kyles, 514 U.S. at 434-35 (1995). "The question is not whether the defendant could have received a different verdict with the Undisclosed evidence, but whether in its absence he received a fair Trial, understood as a trial resulting in a verdict of Confidence." 514 U.S. at 434(1995).

In fact long before trial, On March 8,2012, Petitioner requested the disclosure of all records, documents or physical evidence, expert conclusions and analysis that has been seized or obtained by the prosecution in connection with its investigation of this case (J.A.35). the Government responded on June 21,2013, without any reference or information about the Press Release detailing the result of their Ten(10)Month investigation that petitioner was the only person involved and the quantity of the controlled substance at issue was 1008-Grams of Marijuana and 14-Grams of Heroin as opposed to the Conspiracy to distribute 100-Grams of Heroin and 100-Kilograms of Marijuana.

Clearly. whether or not the government was aware of the "Press release" is irrelevant, because they failed to release such evidence that is both Exculpatory and Impeachment information that is relevant to Petitioners Guilt

or innocence. and because the Officers were also part of the Prosecution team, their action is imputed to the Prosecutor. See Barbie v. Warden,331 F.2d 842 (4th Cir.1964). If the Police as here, the detectives of the Johnston County Sherriff Dept., North Carolina (detectives Guseman and Dunn) allows the AUSA to produce evidence pointing to guilt without informing him of the evidence in their possession which contradicts his inference, State Officers are practicing Deception, not only to the AUSA, but the Court, the Defendant and his Counsel. The deception is no less if they, rather than the AUSA is Guilty of non disclosure

Petitioner contends that had the Information been disclosed, the evidence would not only have undermined their credibility, but would have undermined the Prosecutors theory that petitioner was involved in any Conspiracy. The Supreme Court case Law is repleted with cases addressing non-disclosure of exculpatory and impeachment evidence. See Strickler v.Green,527 U.S.263 (1990). When a State holds from a Criminal defendant evidence that is Material to his Guilt or Punishment, It violates his right to Due Process; Cone V.Bell, 129 S.ct.1769 (2009)(Same); Giglio V. United States, 405 U.S.150 (1972)(same). Also every Court of Appeals that have addressed this Issue have reached the same Conclusion. United States v.Avile-Colon,536 F.3d 1 (1st Cir.2008)(DEA reports favorable to an accused because they contradicted the testimony of Government witness); McMillian V.Johnson, 88 F. 3d 1554 (11th Cir.1996)(Brady violation when Police concealed evidence favorable to a defendant from the Prosecutor); Mitchell V.Gibson, 262 F.3d 1036 (10th Cir.2001)(Witholding exculpatory evidence that could have affected Sentence); United States V.Bodkins, 274 F. Appx' 294 (4th Cir. 2008) (The Government witness's prior statements to police favorable to an accussed because inconsistent with Trial testimony); In re Sealed case, No: 99-3096, 185 F.3d 887 (D.C.Cir.1999)(Brady violation when the U.S. Attorney' Office failed to conduct a complete search of Federal and Local Law Enforcement Agencies for Brady material).

For the reasons above, the Fourth Circuit decision to deny Certificate of Appealabilty and Rehearing and Rehearing en banc conflicts with the applicable decisions of this Court and other Court's of Appeal that have addressed this issue of disclosure. Specifically, Kyles v.Whitley, 514 U.S.419 (1995).It is therefore respectfully submitted that a Writ of Certiorari should be Granted to resolve this issue of exceptional importance.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner requests this Court Grant this Petition for Writ Of Certiorari and reverse the Fourth Circuit Court Of Appeals, because the Fourth Circuit has decided important Questions Of Federal Law that is in Conflict with this Court and other Court's Of Appeal.

Respectfully submitted this 24 day of June, 2018

/s/ Felix Okafor

FELIX A. OKAFOR, ID-NO: 56118-056
USP HAZELTON, P.O.BOX 2000
BRUCETON MILLS, W.VA, 26525