

**In The
Supreme Court of The United States**

VINCENT CRAIG MOSLEY,

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

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QUESTION PRESENTED

The question presented is: Whether a criminal defendant in a drug conspiracy trial is entitled to see the plea agreements of non-testifying co-defendants in the same conspiracy and admit them into evidence and argue their import, particularly when a co-defendant has agreed to testify for the government and does not testify for the government.

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Vincent Craig Mosley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's unpublished *per curium* opinion in this case is found at App. 2-6. The district court's judgment is found at App. 26-31.

JURISDICTION

The Court of Appeals entered its judgment on March 2, 2018; and it denied Mosley's petition for panel or *en banc* rehearing on April 17, 2018. App. 23.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following is a relevant constitutional provision:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The following are relevant provisions of the Federal Rules of Evidence:

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

STATEMENT OF THE CASE

Petitioner, Vincent Craig Mosley, hereinafter, “Mosley”, was convicted by jury of, *inter alia*, conspiracy to possess with intent to distribute a detectable amount of cocaine and cocaine base in violation of Title 12 U.S.C. §841(a)(1). There were seven co-defendants charged in the same conspiracy count in which Mosley was charged. The only witnesses adduced by the government at trial were Chadd Murray, hereinafter “Murray”, and James McKinney, hereinafter “McKinney”. Murray was a law enforcement officer who arranged for McKinney to make some controlled drug buys. McKinney in fact made controlled buys from various of Mosley's co-defendants. In furtherance of this cooperation McKinney agreed to make a call to Craig Mosley to purchase drugs. Craig Mosley is Mosley's son. McKinney made the call and made arrangements for the purchase of drugs from Craig Mosley. Murray gave

McKinney \$1,200 in U.S. Currency to pay Craig Mosley for an ounce of crack cocaine. Further, Murray equipped McKinney with a video recording device. McKinney subsequently returned to Murray with 18.15 grams of cocaine. Murray testified that the bag of cocaine cannot actually be seen on the video taken of the controlled buy. Murray never had an association or conversations with Mosley.

When McKinney arrived at the place where the buy was to occur, Craig Mosley was not there. McKinney testified that soon thereafter Mosley drove up in a car and ultimately handed him the cocaine, and McKinney handed Mosley the money. McKinney testified that he had no conversation with Mosley about the transaction. McKinney also testified that he had no conversation with Mosley about Craig Mosley. McKinney testified that he then drove away to meet Murray. He gave Murray the drugs and the surveillance devices. McKinney testified that he subsequently examined the video and did not see Mosley on it. Further, he said that nothing on the video showed drugs being transferred to McKinney from Mosley or the currency being conveyed from McKinney to Mosley.

Mosley testified in his own behalf and denied being involved in a drug conspiracy and denied giving drugs to McKinney. He denied having any conversation with Craig Mosley concerning drugs. Mosley's counsel made a Rule 29 motion at the close of the government's case and renewed it at the

conclusion of all evidence, but it was denied on both occasions. Mosley's undersigned counsel made repeated efforts both before trial and during trial to secure the plea agreements of Mosley's co-defendants and to argue their import to the jury but was repeatedly rebuffed by the trial court in this regard.

REASON FOR GRANTING THE WRIT

The question presented is important and potentially frequently recurring, and this case presents an excellent vehicle to resolve it.

Federal trial courts deal on a regular basis with a very large volume of drug conspiracy cases, many of which result in some defendants entering into plea agreements while other defendants in the same conspiracy deny their guilt and go to trial. Consequently, the question of the use of plea agreements of non-testifying co-defendants is a frequently recurring question—particularly in cases such as this where the evidence of the conspiracy as to a defendant going to trial is very thin.

In this case, Mosley's counsel knew that all his co-defendants had entered guilty pleas and all had entered plea agreements and that none of the co-defendants were on the government's witness list. Mosley's counsel did not know, however, which, if any, of the co-defendants had agreed to cooperate with the government in their plea agreements. Mosley's counsel had been unable to access the plea agreements; therefore, a motion was filed by Mosley's counsel with the trial court prior to the commencement of the jury trial seeking

to be allowed to review the plea agreements of the co-defendants in order to determine the need to request the court to take judicial notice of some or all the agreements so that they could be considered by the jury. The motion was filed the day before the beginning of his jury trial. CA JA 224.¹ The motion specifically denominated the docket entry numbers of the requested plea agreements.

At the beginning of the trial the motion was argued strenuously in behalf of Mosley. The government objected to the motion, and the court ruled “as to the unsealing of the plea agreements, that's denied.” Mosley's counsel sought to have the court change its ruling, but the court maintained its position and said “(t)hose plea agreements are not going to be unsealed.” CA JA 230-236. The issue arose later during the cross examination of Murray. CA JA 373-380, 383-384. The court again stated: “I've made my ruling on that and that's what it's going to be.” CA JA 378-379. Further, the trial court opined that the plea agreements could be made available to the Court of Appeals in that they can be submitted to that court under seal. CA JA 412.

As shown to the Fourth Circuit in this appeal the co-defendants had all pled to the conspiracy count and had all agreed to provide assistance to the government. The plea agreements all contain the following language:

¹CA JA is reference to the Joint Appendix filed in the Court of Appeals.

VI. Assistance to United States

25. If requested by the United States, but only if so requested, the defendant agrees to cooperate with the United States, including but not limited to the following:

a. The defendant will provide truthful information about the subject charges and about any other criminal activity within the defendant's knowledge to any United States agent or agency that the United States designates.

b. The defendant will testify truthfully in any trial, hearing, or grand jury proceeding, including, but not limited to, testimony against any co-defendants, as the United States designates. Should the defendant testify at the request of the United States, the defendant hereby waives payment of any witness fees or expenses.

c. The defendant will be reasonably available for debriefing and pre-trial conferences as the United States may require.

d. The defendant will provide to the United States all documents or materials of any kind in the defendant's possession or under the defendant's care, custody, or control relating directly or indirectly to all areas of inquiry an investigation.

e. The defendant understands that the United States desires only truthful and accurate information and testimony and, in fact, that knowingly giving false information or testimony can be prosecuted as an additional criminal offense.

f. The defendant's obligation under this section is a continuing one, and will continue after sentencing until all investigations and/or prosecutions to which the defendant's cooperation may be relevant have been completed.

CA JA 722-723.

It is the contention of Mosley that had the jury been informed as to these plea agreements in which all of his co-defendants agreed that they would

testify against any of the co-defendants at the request of the United States, their failure to be called as witnesses for the government to testify against Mosley in this trial would have been powerfully impactful on the jury. The impact is a great deal more when the jury knows that they agreed to provide truthful information and to testify than merely arguing without that fact the failure of the government to call them as witnesses. This is particularly so in a case such as this in which the evidence against Mosley on the conspiracy count is so very thin and in light of Mosley's nearly flawless criminal record.

From the outset Mosley's counsel informed the court of the need for this to be presented to the jury but was rebuffed. Mosley, consequently, was denied a fair trial. Of greater import to this Court in exercising its *certiorari* jurisdiction is the fact that in view of the great number of drug conspiracies and the heavy use of plea agreements in those federal cases, this issue is likely to recur. There is no real judicial guidance as to whether under such circumstances a plea agreement of a non-testifying co-defendant in a drug conspiracy trial is admissible. While it is not likely that there would be other cases in which all of the other co-defendants had pled guilty to the conspiracy, had agreed to cooperate with the government and testify and yet none was called by the government to testify; it is very likely there will be many situations in which some of the co-defendants have entered into such

agreements and yet not testified. Even in those instances it is highly relevant and a great deal more powerful than merely observing that they did not testify.

The undersigned counsel for Mosley has failed to find a case on point. Likewise, the government's brief before the Fourth Circuit only cited two cases, both of which upheld an order sealing the plea agreement –in one to protect a confidential informant in an ongoing investigation and in one to protect the location of the cooperating witness. *United States v. Wright*, 343 F.3d 849, 856 (6th Cir. 2003) and *United States v. Hickey*, 767 F.2d 705, 708-09 (10th Cir. 1985). Nothing similar to those factors appear in this case. Likewise, the Court of Appeal's unpublished *per curium* decision merely cites Rules 401 and 403 of the Federal Rules of Evidence and deals with whether the ruling is arbitrary and irrational and that evidentiary rulings are subject to harmless error review. It concluded that in view of defense counsel's closing argument to the jury which pointed out that their testimony could have been compelled that even if the court erred it was harmless. Mosley's undersigned counsel respectfully contends that the error was central to Mosley's defense of the conspiracy charge and so argued throughout the trial and even before the trial began and even without knowing (although suspecting) that the plea agreements contained the full cooperation language. How could it be harmless to exclude from the jury the fact that all of the other alleged members of the conspiracy admitted to their involvement in the conspiracy and agreed to

provide truthful information to the government including their testimony yet none of them were called to testify?

While this issue is unquestionably important to Mosley's case, it is the contention of this petition that this Court's ruling on the ability of a defense counsel to access and use plea agreements of non-testifying co-defendants in federal drug conspiracy cases is much needed by the trial bench and the trial bar. The lack of cases dealing with this issue illustrates the need, and this case presents an excellent vehicle for that purpose.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

July 16, 2018

Respectfully submitted,

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