

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Beverly Allen Baker — PETITIONER
(Your Name)

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

Beverly Allen Baker 55561-056
(Your Name)

P.O. Box 4000
(Address)

Aliceville, Al 35442
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Should this court exercise its supervisory authority to reverse Ms Baker's conspiracy conviction?

By the end of trial, the government concluded that "five" agreements existed, rather than the single agreement charged in the indictment, constructively amending the indictment.

a) Did the government commit a Kotteakos error in using evidence of multiple conspiracies to support an indictment for a single conspiracy? Kotteakos v. United States 328 U.S. 750, 767-77, 66 S.Ct. 1239 (1946); United States v. Lapiere 796 F.3d 1090 (9th cir, 2015).

b) Did the finding of "five" agreements warrant a specific unanimity instruction; if so, did the court's failure to sua sponte give such instruction create the risk of a nonunanimous verdict as granted by Article III an 2, and the Sixth Amendment of the United States Constitution. United States v. Gilley 836 F.2d 1206, 1212-13 (9th cir, 1987).

2. Under Roe v. Flores Ortega 528 U.S. 470, 478-80, 120 S.Ct. 1029 (2000) Appellate counsel was not at liberty to disregard the appellate wishes of Ms Baker, did Mr. Vitranzo violate her Sixth Amendment right to effective assistance of counsel by abandoning her wishes on direct appeal?

~~If so, is Ms Baker entitled to a new appeal without showing that her appeal would likely have merit? Rodriguez v. United States 395 U.S. 327, 330, 89 S.Ct. 1715 (1969)~~

3. Rutledge v. United States 517 U.S. 292, 116 S.Ct. 1241 (1996), holds that cumulative punishment is unauthorized by Congress, Mrs Baker received an aggregated sentence including all counts, in addition to such sentence the court also sentenced her to concurrent terms of 240 months on the same counts two-eleven, violation of the double jeopardy clause. Did the Fourth Circuit commit a Rutledge error?

4. Was the district Court required to hypothetical specify drug quantity at sentencing hearing? United States v. Patterson 2017 U.S. App LEXIS 18013 (7th cir.)

If so did this failure to specify allow the district court to consider on the record the applicable guideline range, under U.S.S.G. 2D1.1 (c)?

5. Does the remedy in *Martinez v. Ryan* 566 U.S. 1, 16-17, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler* 133 S. Ct. 1911, 1921 (May 28, 2013), excuse any procedural defaults barring Ms Baker's ineffective assistance of counsel claims from being heard, on whether counsel was ineffective at sentencing stage? If so, is Ms Baker entitled to have full scope of her ineffective assistance of counsel claims considered that were presented in her 2255.
6. Did the joinder of unrelated charges allow an impermissible grouping of U.S.S.G. 3D1.2(d). (The guidelines limit relevant conduct to acts "that occurred during the commission of the offense of conviction including all reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, (U.S.S.G. 1B1.1). Did the misjoinder allow MS Baker to be punished twice for counts two through eleven?
7. Did the Fourth circuit violate MS Baker's due process right, where it failed to comply with the requirements of 18 USSC 3553(a), (b), and (c)?
8. Should Ms. Baker's criminal judgment be reenter to permit the Fed. R. App. 4(b) appeal period to run anew, as other circuits follow this usual course of judicial proceedings to allow defendants their right to a meaningful appeal?
9. Did counsel's failure to challenge the sufficiency of the evidence inherently waive Baker's right to challenge the constitutionality of her conspiracy conviction?
10. Should this court overturn *United States v. Baker* 5:11-cr-237-D and require the government to prove the "acted in concert" element or can the court disregard the holding in *Kotteakos v. United States* 328 U.S. 750, 773 (1946) and allow Baker to be convicted for a single conspiracy based on evidence of multiple conspiracies?
11. Did the Fourth Circuit err when it disregarded the holding in *Rutledge v. United States* 517 U.S. 292 (1996) and concluded that Baker receive a 240 month sentence in addition to the aggregated sentence?

12. Did *Apprendi v. New Jersey* 530 U.S. 466 holding in *Alleyne v. United States* 133 S. Ct. 2151, 2162 (2013), require the jury to determine drug quantity on an individual basis (per agreement, rather than drug quantity attributed to the conspiracy as a whole), in order to trigger the mandatory minimum and maximum range.

Ref. The District Court itself made the individualized findings as to drug quantities involved in each agreement. PSR's findings is based on court found facts, rather than by the jury - against this court's holding in *United States v. Booker* 543 U.S. 220, 125 S. Ct. 738 (2005).

13. Are there exceptions to this court's ruling in *United States v. Kissel* 218 U.S. 601, 54 LEd 1168 (1910), that would allow an omnibus indictment to charge a number of different conspiracies committed at different times, under the guise of a single continuing offense? Does *Kissel* allow the "continuando" to be disregarded and the indictment treated as charging no more than the commission of the offense on the first day, whereas the crime here in Baker's case was not essentially continuous?

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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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 _____; 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 _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**: N/A

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 November 28, 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: February 05, 2018, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

21 U.S.C. 841 (a)(1) , 846

18 U.S.C. 3553 (a) , (b), (c)

Article III and 2

Sixth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

Baker's indictment describes a particular conspiracy, and is broadly worded to have been a continuous single enterprise:

Count one: From in or about 2003, the exact date being unknown to the Grand Jury, and continuing until or about April 14, 2011, in the Eastern District of North Carolina and elsewhere, the defendant Beverly Allen Baker did knowingly and intentionally conspire, confederate, agree, and have a tacit understanding with other persons, known and unknown to the Grand Jury, to distribute and possess with the intent to distribute two hundred eighty (280) grams or more of cocaine base (crack), a schedule II controlled substance, in violation of Title 21, United States Code, Sections 841 (a)(1). All in violation of Title 21, United States Code, Section 846.

Trial evidence showed the following series of criminal activity:

In late 2002, Malcolm Dowdy supplied Baker with crack cocaine up until his 2004 arrest by federal agents. After Dowdy's arrest, Wayne Vick became an alternate supplier for Baker. Wayne Vick's memory was very vague and he struggled to recant the events from 2002 through 2007, possibly 2006. W. Vick testifies to withdrawing from criminal activities with Baker prior his arrest, but did not state an actual date, just that he knew it to be prior his arrest. This ends the appearance of both Malcolm Dowdy and Wayne Vick, they never again appear in the evidence. A span from 2006, 2007 through mid 2008 the government did not offer any evidence of any criminal - conspiratorial conduct. In May 2008, Baker entered a four month relationship with Shawn Barber and Sabrina Allen (Baker's deceased sister). Barber testifies that Baker supplied Allen with crack from May 2008 through September 2008 when Barber was arrested. In a final episode the government presented only a "buyer-seller" relationship between government's informant Michael Burrell and Baker. Burrell purchased user amount of crack from Baker in a sting operation during March and April 2011. By the end of trial, the government concluded that five agreements existed, rather than a single "over-all" unified agreement: Mr Huff remark: "... and you don't have to rely on just one. You are

going to be able to corroborate it with five." Another government remark in closing: "... and then it's worth noting, we are talking about agreements, how many witnesses talked ...". The government itself recognized that five agreements existed, for this reason, the courts should have *sua sponte* given a "specific unanimity" instruction, requiring the jury to agree on which conspiracy formed the basis of conviction. The district court failed to "compartmentalize" each agreement, knowing that the events were discrete, separated by time, distance, and participants. This court has held that government cannot use evidence of multiple conspiracies as evidence to support an indictment for a single conspiracy. *Kotteakos v. United States* 328 U.S. 750, 66 S.Ct. 1239 (1946). The government may not string together for common trial separate and distinct crimes. *McElroy v. United States* 41 L.Ed 355 [No. 402] (1896). The indictment alleged that Baker participated with "unnamed" others in a single conspiracy "beginning in or about 2003, and continuing through at least April 14, 2011, however the evidence at trial, according to the government presented at least five agreements - "you are going to be able to corroborate it with five." The Ninth Circuit's decision in *United States v. Lapier* 796 F.3d 1090 conflicts with the decision of the fourth circuit. *Lapier* is very similar to Baker, in fact they are exact in nature. The Ninth circuit has adapted the judicial proceedings on the same matter of law that the Fourth circuit has abandoned, or departed from the usual and accepted course of judicial proceedings.

Other circuits, has adapted the impositions of this court as well, reversing conspiracy conviction where there's no overlap in participants. Baker respectfully ask this court to exercise its supervisory power or defer case to the Fourth Circuit to clean up this division, to ensure others in similar situation the right to due process. It is well-established, that the finding of multiple conspiracies warrants reversal where a single conspiracy was charge. Baker respectfully ask this court to resolve the split among the circuits.

Did the Fourth Circuit err, in conflict with the Ninth Circuit and this court's decision in *Kotteakos v. United States* 328 U.S. 750 (1946), by treating evidence of "multiple conspiracies" sufficient to support an indictment for a single conspiracy.

As to counts two through eleven:

The indictment did not charge a specific quantity, nor was the jury instructed to determine drug quantity. The indictment described a particular transaction occurring on a specific date (included in the indictment). Trial evidence established eleven controlled buys by government's informant Michael Burrell, each transaction involved less than one gram of cocaine base crack. This finding is supported by SBI Lab reports and Presentence Report prepared by the probation officer.

Subsection 2D1.1 (c)(13) of U.S.S.G. governs quantities of 2.8 grams or less, yielding a base offense level 12, recommending an advisory range of 15-21 months for Baker's criminal history category. To this end the 240 month imposed is unreasonable, clearly erroneous. There's no record of the sentencing worksheet or discussion of the sentencing range at the hearing, nothing on the record that remotely suggests that the sentencing court ever considered the advisory guidelines under U.S.S.G. 2D1.1, or the 3553 factors. This court's mandate in *United States v. Booker* 543 U.S. 220, 125 S.Ct. 738 (2005), that the federal sentencing guidelines mandatory scheme, which provides for sentencing enhancements based on court-found facts, violates the Sixth Amendment. The Supreme court remedied the constitutional violation by making the guidelines advisory. The district court failed to first calculate Baker's range prescribed by the guidelines, then consider that range as well as relevant factors before imposing the sentence. The court failed to explain its reason for imposing a substantial above the sentence range. This court granted "writ of certiorari" for further consideration regarding the Seventh circuit's application of the guidelines and the mandatory scheme, in *Booker*.

In another essence the 240 month sentence is also in conflict with this court's decision in *Rutledge v. United States* 517 U.S. 282 (1996), holding Congress did not intend to punish a person twice for the same offense. The probation officer grouped counts one through eleven under U.S.S.G. 3D1.2 (d) for an aggregated sentence, in addition to the aggregated sentence the courts imposed a 240 month concurrent sentence to each count two through eleven, the double jeopardy clause prohibits the government from subjecting a person to multiple punishments for the same offense. Section 3D1.2 of the U.S.S.G. provides that the offenses of multiple count indictments may be

grouped for Sentencing purposes in order to prevent the multiple punishment Baker now suffers. The grouping is impermissible in the first instance, because the conduct in count one is substantially different from the conduct in counts two through eleven.

There's no evidence or reason to believe that count one involved the same victim or transaction as the remaining counts.

Count one charged a conspiracy to distribute 280 grams or more whereas counts two through eleven charges distribution of "a quantity" which SBI Lab Reports revealed to be less than one (1) gram each count, sold in 11 controlled-buys to government's informant Michael Burrell. These 2011 events has no evident relation to count one 2002-2007 events, and conduct is not compatible. (Misjoinder under Rule 8(b)).

Baker argues that the district court should have grouped counts two through eleven under U.S.S.G. 3D1.2(b), because the acts of distribution had the same harm and same victim in each of the counts - (two through eleven), rather than U.S.S.G. 3D1.2(d).

The Fourth Circuit's resolution and judicial proceeding is in conflict with this court, and the Sixth Circuit's decision in *United States v. Mosley* 550 Fed. Appx 277 (6th cir., 2014). In *Mosley*, the Sixth Circuit adapts the provisions of the guidelines manual, whereas the Fourth Circuit has abandoned the usual and accepted course of judicial proceedings.

Had the Fourth Circuit adapted the imposition of the guidelines, Baker's sentencing range on the distribution counts (2-11), according to the facts in PSR, would of been 15-21 months not the imposed 240 months. The district court's failure to apply the correct guidelines range constitutes plain error. Therefore Baker respectfully seeks this Court to exercise its authority over this matter, or defer to the Fourth Circuit for clean-up and for clarification of the district court's reasoning with respect to it's calculation of her guidelines.

The Probation officer generated the PSR, which provides an initial Guideline calculation of 15-21 months. The PSR calculation is based solely upon indictment's allegation, conduct, evidence supporting conviction, at Sentencing hearing there is no mentioning of the conduct of the offenses, no mentioning of drug quantity. Baker raised this issue on direct appeal and in her 2255 and no court has yet to address the issue.

This court granted a "writ of certiorari for further consideration in the sixth circuit, where there was no record evidence that sentencing court regarded the application of the 3553 (a) factors. *United States v. Thomas* 498 F.3d 336, 340 (6th cir., 2007).

REASONS FOR GRANTING THE PETITION

Petitioner Beverly Allen Baker comes Pro Se in this petition with questions of importance and setting forth facts and evidence on a matter of law that entitles her to relief. Ms. Baker expresses a sincere belief that her sentence is "illegal". Turning now to this court for relief, relying on the already settled law by this court in *Kotteakos v. United States* 328 U.S. 750, 66 S.Ct. 1239 (1946) and *McElroy v. United States* 41 L.Ed 355 [No. 402] (1896). *Kotteakos* held that the government cannot use 'multiple Conspiracies' as evidence to support an indictment for a single conspiracy. *McElroy* goes further holding where there is nothing to show a conspiracy or connect the transactions together, the conviction is erroneous. Other federal circuits have adapted this imposition, reversing conspiracy conviction for a "lack of an unitary scheme". See: *United States v. Lapiere* No. 13-30279 (9th cir., 2015); *United States v. Morrow* 177 F.3d 272 (5th cir, 1999); *United States v. Varella* 407 F.2d 735, 742 (7th cir, 1969); *United States v. Chandler* 388 F.3d 796 (11th cir, 2004). These circuits and several others have reversed conspiracy convictions where the indictment charged a 'single' conspiracy, but trial evidence varied from this allegation, proving not one but several unrelated conspiracies - establishing a "material variance" between the indictment and trial evidence. The Fourth Circuit however, has abandoned this imposition - departing from the accepted, well-established course of judicial proceedings. This division is significant to Baker who is serving a prison term of 360 months. Baker's indictment was worded, very broadly to have charged a "single" conspiracy, continuous in nature: Indictment charge: "From in or about 2003, the exact date being unknown to the Grand Jury, and continuing until or about April 14, 2011,..." There was no evidence that any of the alleged co-conspirators were ever tied together as stages in formation of a larger 'all inconclusive' combination. By the end of trial, prosecution concluded that at least five agreements existed. (Mr. Huff commented in closing "... and you don't have to rely on just one, you are going to be able to corroborate it with five". If that evidence is conspiratorial - at its best would be a series of uncharged separate conspiracies. With this finding and upholding Baker's conviction means only one resolution, the Fourth Circuit has departed from the usual and accepted course of judicial proceedings, abandoning the well established principle of

Single versus multiple conspiracies. The Supreme Court has already resolved this matter of law, as exercised in other circuits for petitioners in situations similar to Baker. Baker comes now asking this court to exercise its supervisory power in this matter or defer this matter to the Fourth Circuit to clean up this division, ensuring others in similar situations the same protection.

The District Court's resolution (Fourth Circuit) in Baker's case is in conflict with the ninth circuit's decision in Lapier. Not only does Malcolm Dowdy and Wayne Vick's arrests prove an interruption, but there's a period between 2006, 07 and Mid 2008 where the government offered no proof of any conspiratorial conduct. The evidence does not support a 'continuous in nature' conspiracy.

As to counts 2-11:

Questions of importance - Was the district court required to specify hypothetical drug quantity? 2) Was the district court required to make an explicit finding as to drug quantity and offense level supporting sentence? 3) Does the impermissible grouping of all ten counts under U.S.S.G. 3D1.2(d) violate the Double Jeopardy Clause of the Fifth and Fourteenth Amendment, resulting in cumulative punishment?

Specify hypothetical drug quantity:

In *United States v. Patterson* No. 16-2119, 2017 U.S. App. LEXIS 18013 (BL 328137), the seventh circuit held the district court must specify hypothetical drug quantity, (that calculation must be factual in nature). *United States v. Clark* 538 F.3d 803, 812 (7th Cir, 2008). It is the government's responsibility at sentencing to prove the quantity of drugs attributable. The district court's decision in Baker's case conflicts with the Seventh Circuit. First, the district court rejected the drug quantity in PSR without any explanation why. The PSR was capable of fulfilling the government's obligation to make a specific finding as to drug quantity, it set forth a specific drug quantity as to counts 2-5 and 7-11, but the courts without any analysis or discussion on drug quantity imposed a 240 month sentence, whereas the PSR findings recommend an advisory range of 15-21 months. The Fourth circuit departed from the usual course of judicial proceedings, which calls for this court to exercise its supervisory power.

Explicit finding of drug quantity:

To determine the guidelines - recommended sentence, the Fourth Circuit needed to determine the quantity of drugs involved. The District court committed 3 significant procedural errors: 1) failing to calculate the

U.S.S.G. range, treating the guidelines as mandatory; 2) failing to consider the 18 USC 3553 factors; 3) failing to adequately explain the chosen sentence. 18 USC 3553(c).

In *Booker*, the Supreme Court held that when a defendant is sentenced under a mandatory scheme, any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. In drug cases, this means making a finding about the quantity of drugs for which a defendant is being held accountable. The sentence depends in large part on drug quantity, however, quantities were never mentioned at Baker's sentencing hearing, by anyone - as to counts 2-5 and counts 7-11. As it stands the sentence imposed of 240 months is an incorrect application of the guidelines. Baker was subject to a lower advisory range of 15-21 months, under U.S.S.G. 2D1.1(c)(13) - applying to crack quantities less than 2 grams. Baker's PSR set forth a specific quantity - satisfying the court's obligation for an estimate having some minimum indicium of reliability. Baker argues that approximations should be limited to quantities alleged in the offense. In the Sixth Circuit Court of Appeals, the courts held that the guidelines do not permit the district court to hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible. *United States v. Walton* 908 F.2d 1289, 1302 (6th Cir., 1990). The Fourth Circuit decision conflicts with the Sixth Circuit's *Walton* case that holds - where a fact is crucial to determination of a defendant's guideline base offense level or criminal history category, then it must be proven to such a degree. The court did not determine or discuss a specific quantity at sentencing, nor did the jury determine a quantity. The Fourth Circuit decided Baker's in a manner that conflicts with the Sixth circuit and other federal courts. The Fourth Circuit's method violates Baker's and others in similar situations due process right, having adverse collateral consequences. The Fourth Circuit does not adopt the position of other Federal courts who holds that when the district court fail to explain why it imposed an above-guidelines sentence or properly calculates the applicable guidelines range amount to plain error. *United States v. Blackie* 548 F.3d 395, 401 (6th Cir., 2008); *United States v. Cole* 721 F.3d 1016, 1024 (8th Cir., 2017); *United States v. Kristi* 437 F.3d 1050, 1055 (10th Cir., 2006).

Cumulative Punishment:

The United States Supreme Court holds that the Double Jeopardy Clause forbids successive prosecution and cumulative punishment for the same offense. *Rutledge v. United States* 517 U.S. 292, 116 (S. Ct. 1241 (1996)). Double Jeopardy analysis provides "that Congress does not intend for multiple punishments for the same offense."

In Baker's case the United States Probation officer impermissibly grouped all counts together under U.S.S.-G. 3D1.2 (d) in PSR for an aggregated sentence, in addition to the aggregated sentence the court imposed a 240 month concurrent sentence to each count (2-11). There's no doubt that these are the exact same offense included in the aggregated sentence grouped under 3D1.2(d). The Fifth Amendment's Due Process clause assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. *Jones v. Thomas* 491 U.S. 376, 381, 109 S.Ct. 2522 (1989). *United States v. Hodges* 628 F.2d 350, 353 (5th Cir 1980).

Although the indictment is not multiplicitous, however at sentencing Baker was punished twice for the same acts in counts 2 - 11. The Fourth Circuit has failed to adapt the usual and accepted course of judicial proceedings, and has decided an important federal question of law in a way that conflicts with relevant decisions of this court.

Baker raised these conflicts between courts on direct appeal, and in her 2255 motion, each time the courts has failed to address her arguments. She now seeks this court to exercise its authority over this matter, so that the Fourth circuit's defendants can enjoy the same protection from cumulative punishment as defendants in other federal circuits.

Conclusion

Baker's sentence is unconstitutional under the Fifth, Sixth, and Fourteenth, She has acted with due diligence challenging both her conviction and sentence, since its imposition. Ms. Baker has been unsuccessful in obtaining relief due to the Fourth circuit's departure of the usual and accepted course of judicial proceedings.

Ms. Baker respectfully ask this court to grant writ of certiorari, to resolve the intra circuits divisions.

Respectfully Submitted,
Beverly Allen Baker
date March 19, 2018