No. 18-

In the Supreme Court of the United States

JOSEPH FAULKNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the meaning of the Double Jeopardy Clause's prohibition on multiple punishments. Petitioner Joseph Faulkner was twice punished for the same conduct—once in 2011, when uncharged conduct was used to aggravate a sentence, and again after his conviction of a 2013 indictment for the same conduct.

Before going to trial in 2013, Petitioner filed an interlocutory appeal after the district court denied his motion to dismiss the indictment on jeopardy grounds. The United States Court of Appeals for the Seventh Circuit denied relief because the court read the allegations of the indictment as more expansive than the 2011 sentencing conduct and it concluded *Witte v. United States*, 515 U.S. 389 (1995), allowed for the latter indictment. Petitioner proceeded to trial. After trial, when it was clear that no evidence was introduced other than the same evidence used to enhance Petitioner's punishment in 2011, he again appealed. The Seventh Circuit declined to consider Petitioner's claim, opining that the law of the case doctrine barred rehearing of the issue.

The question presented is:

(1) Whether the use of uncharged conduct to increase a sentence means the conduct was used to punish, and a subsequent prosecution for the same conduct should be barred by the Fifth Amendment's Double Jeopardy Clause.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), Petitioner Joseph Faulkner states that all parties to this proceeding appear in the case caption on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Faulkner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction and sentence.

OPINIONS AND ORDERS BELOW

The final judgment and opinion of the Seventh Circuit (Pet. App. A-29) affirming Petitioner's conviction and sentence can be found at 885 F.3d 488. The Seventh Circuit's order denying rehearing can be found at Pet. App. A-53. The final amended judgment of the United States District Court for the Northern District of Illinois, Eastern Division, can be found at Pet. App. A-20. The judgment and interlocutory opinion of the Seventh Circuit (Pet. App. A-8) can be found at 793 F.3d 752. The District Court's opinion and order (Pet. App. A-1) denying pretrial relief can be found at 2014 U.S. Dist. LEXIS 143689.

JURISDICTION

The final judgment of the Seventh Circuit was entered on March 19, 2018. Petitioner filed a timely petition for rehearing, which was denied on April 2, 2018. On May 23, 2018, Justice Kagan extended the time to file a petition for a writ of certiorari from July 10, 2018, to September 8, 2018. *See* Application No. 17A1291. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides, in relevant part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Joseph Faulkner (hereinafter "Faulkner") was charged on September 26, 2013, in a multi-count indictment that alleged racketeering and narcotics conspiracies, assault with a deadly weapon, and the possession of a weapon. (R. 2.) The indictment charged that Faulkner and 23 others—members of the Imperial Insane Vice Lords, a Chicago-based street gang known as the "Double I's"—had begun a criminal enterprise in 1996, continuing until 2013. His participation in the enterprise, however, ended when he was arrested in 2011 and separately charged with four counts of narcotics trafficking. (R. 685-1.) The cases involved the same criminal conduct.

The 2011 Prosecution

In 2011, Faulkner was arrested and indicted on four counts, all violations of 21 U.S.C. § 841(a)(1), including three counts of heroin distribution and one count of heroin possession. (Case No. 11-CR-120 (N.D. Ill.)) After his arrest, Faulkner provided a detailed statement to authorities. He told federal agents that he was a high-ranking member of the Double I's street gang, divulging the names and ranks of members of his gang, and describing its workings. He explained that as early as 1996, he began controlling the gang drug distribution in the areas of Thomas Street

and Keystone Avenue (hereinafter "the Keystone Drug Market"), and Cicero and Erie Streets. Faulkner detailed the wholesale amounts of heroin and cocaine that he sold during the time he ran the Keystone Drug Market. He also provided the names of drug suppliers and detailed his other drug-dealing activity independent of the Double I's.

Pursuant to a plea agreement, Faulkner pled guilty in an agreed information charging two counts of the use of a communication facility to commit a drug-related felony, in violation of 21 U.S.C. § 843(b). (R. 685-2.) The plea agreement included a detailed factual basis. (R. 685-2.) Additionally, within the plea agreement, the government asserted that Faulkner had engaged in extensive relevant conduct under Guideline 1B1.3:

> Beginning no later than 1998 and continuing to February 23, 2011, Faulkner, on multiple occasions, knowingly and intentionally possessed with the intent to distribute and distributed, a controlled substance, namely, heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1). During this time period, Faulkner regularly obtained wholesale quantities of heroin from various suppliers, including the heroin supplier referred to in paragraph 7(a), above. . . . Once Faulkner "mixed" and re-packaged the heroin into user amounts, he caused the heroin to be re-sold at various locations which he controlled on the west side of Chicago. In total, the amount of heroin that Faulkner possessed with intent to distribute and distributed during this time period was approximately 1 to 3 kilograms.

To support a request for an enhanced sentence, the government relied upon Faulkner's history of gang membership and drug dealing:

> (1) He was a leader of the Insane Imperial Vice Lords (Double IIs) street gang (the enterprise) with the rank of "Prince;"

(2) He was in control of narcotics distribution on Thomas Street (1100 N), in the area of Pulaski (4000 W) and Keystone (4100 W) Streets in Chicago, since 1996 or 1997;
(3) He directed members of the gang to sell his drugs at that location;
(4) He sold heroin in the area of Cicero (4800 W) and Erie (660 N) Streets in Chicago, likewise a Double II spot;
(5) He possessed black tar and china white heroin in his residence at the time of his arrest on February 23, 2011, which he obtained from the source named "Henry";
(6) He purchased 25 grams of heroin from Henry, who also fronted 25 grams of heroin to him, every two to three weeks since approximately 2005 or 2006;

(R. 685-3.)

The sentencing court expressed a reluctance to accept a government proffer of relevant conduct. Instead, the court relied upon the conduct to conclude that Faulkner's criminal history was underrepresented. Then, trusting Faulkner's admissions to extensive heroin dealing, his involvement in a gang, and his regular use of handguns—activities that "went on for many years"—the court imposed an above-guideline sentence of 91 months. The court focused on his unchanging pattern of criminal behavior, noting that his criminal history belied the fact that he was a gang leader and significant drug dealer, and that his criminal history category was not "accurately reflective of the person that he actually was . . . ."

(R. 685-4.)

The 2013 Prosecution

While Faulkner was serving his sentence for the 2011 prosecution, the government again indicted him, charging the same conduct from the 2011 prosecution. (R. 2.) Count I of the indictment alleged that, beginning no later than 1996 and continuing to September 2013, Faulkner and his co-defendants violated 18

U.S.C. § 1962(d) by conspiring to participate in a racketeering enterprise which distributed heroin and cocaine, in violation of 21 U.S.C §§ 841(a)(1) and 846. (R. 2:8-14.) Counts II and III, which charged only Faulkner, alleged conspiracy to commit assault with a dangerous weapon, a gang-related shooting (II), and that he violated 18 U.S.C. § 924(c)(1)(A) (III). (R. 2:15-17.) Last, Count IX charged all 24 defendants with conspiring to distribute marijuana, cocaine, and heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (R. 2:23-25.)

The Interlocutory Appeal

Faulkner sought to dismiss the 2013 indictment, arguing that all of the conduct involved was included in the 2011 prosecution, either as part of the charges or as part of the proofs that increased his sentence. (R. 599.) In its response, the government argued that *Witte v. United States*, 515 U.S. 389 (1995), allowed them to bring a subsequent prosecution for conduct previously used at sentencing. It did not dispute that the criminal conduct was the same but claimed that since the conduct was used as a sentencing factor under 18 U.S.C. § 3553(a), rather than as relevant conduct, a second indictment was permitted. The district court agreed, reasoning in its denial of Faulkner's motion to dismiss that the "double jeopardy argument runs headlong into *Witte*." (Pet. App. A-5.) Faulkner appealed, and the Seventh Circuit Court of Appeals affirmed the district court's denial of Faulkner's motion to dismiss. *United States v. Faulkner*, 793 F.3d 752 (7th Cir. 2015); *see* Pet. App. A-8.

The Trial on the 2013 Indictment

Faulkner proceeded to a bench trial. The government's theory of the case was that Faulkner conspired with both members and non-members of the gang to sell drugs at the Keystone Drug Market. (Tr. 7.) The government argued that Faulkner was a leader, running the Keystone Drug Market from 1996 until his arrest in 2011.

The district court found Faulkner guilty on all four counts of the indictment. (Tr. 913-16.) On June 23, 2016, the court entered judgment, sentencing Faulkner to a total of 40 years' imprisonment: 30 years for the RICO and drug conspiracy counts, 36 months concurrent for the assault charge in Count II, and 10 years consecutive to all other counts for the gun charge in Count III. (Pet. App. A-20.)

Faulkner filed a timely notice of appeal on July 3, 2016. The Seventh Circuit affirmed Faulkner's conviction on March 19, 2018. (Pet. App. A-29.) The court denied his Petition for Rehearing on April 2, 2018, refusing to consider his double jeopardy claim under the law of the case doctrine.[1]

[1] The law of the case doctrine does not prevent this Court from reviewing the merits of a lower court decision. *Barclay v. Florida*, 463 U.S. 939, 946 (1983). "[S]ince the Florida Supreme Court held that it had considered Barclays's claims in his first appeal, and simply refused to reconsider its previous decision in the second appeal [pursuant to the 'law of the case' doctrine], those claims are properly before us." *Barclay*, 463 U.S. at 946.

REASONS FOR GRANTING THE PETITION

I. WHETHER THE USE OF UNCHARGED CONDUCT TO INCREASE A SENTENCE MEANS THE CONDUCT WAS USED TO PUNISH, AND A SUBSEQUENT PROSECUTION FOR THE SAME CONDUCT IS BARRED BY THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE.

The Double Jeopardy Clause of the Fifth Amendment protects against both successive prosecution for the same offense after acquittal and multiple criminal punishments for the same offense. *Monge v. California*, 524 U.S. 721, 727-28 (1998) (citing *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969)). That was the intent of the Framers.

This Court opined long ago in *Ex parte Lange*, 85 U.S. 163, 170 (1874), that "[i]t is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." The double jeopardy bar manifestly does not protect against a second conviction but instead protects against "the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Id.* at 173.

Unfortunately, over the years, the punishment prong of the jeopardy protection has been eroded. Clearly, by the choice of the word "jeopardy," the Framers sought to eliminate even the possibility of multiple punishments. The jeopardy bar foresees not merely the risk of multiple prosecutions and the dangers associated, but even more critically, it anticipates the dangers associated with multiple punishments.

Instead, this Court has found the jeopardy protections to be largely inapplicable to sentencing proceedings. *Monge*, 524 U.S. at 728 (citing *Bullington v. Missouri*, 451 U.S. 430, 438 (1981)); *Nichols v. United States,* 511 U.S. 738, 747 (1994) (noting that repeat-offender laws "'penalize only the last offense committed by the defendant'"). This Court has instructed that an enhanced sentence imposed on a repeat offender "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 68 S. Ct. 1256 (1948); *Monge*, 524 U.S. at 728.

Likewise, fact-based sentence enhancements have not been construed as additional punishment for an offense but rather to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." *United States v. Watts*, 519 U.S. 148, 154 (1997). Such an application is prudent because a sentence for a crime should take into account the facts of the criminal conduct in that case.

The situation at bar is fundamentally different than these enhancements permitted by the clause. Here, the exact same conduct was substantively charged after it was used to justify an increase in punishment, with the sentencing court determining a greater sentence was necessary because the conduct was part of the "history and characteristics of the defendant." "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United*

States, 437 U.S. 1, 11 (1978). The clause should likewise prohibit a second trial so that a second punishment can be obtained.

In 2011, Faulkner was convicted of and punished for criminal conduct identical to that with which he was subsequently charged. If the jeopardy "protection applies both to successive punishments and to successive prosecutions for the same criminal offense," as held in *United States v. Dixon,* 509 U.S. 688, 696 (1993), then it must also operate here. There is "no real difference" between "punishing twice for the same offense" and "punishing twice as much for one offense" solely because the defendant also committed another offense for which the defendant will also be punished. *Witte*, 515 U.S. at 407 (Scalia, J., concurring). After all, if criminal conduct is used to "support" increased punishment, then it it is plainly being used to punish. If the criminal defendant receives a greater penalty because of his conduct, he is receiving a greater punishment. If one is later indicted for that same conduct and sentenced anew, they are again being punished.

The test for double jeopardy is whether the government twice punishes or prosecutes the defendant for the same offense. *Dixon*, 509 U.S. at 696. If the two cases involve a "pattern of activity [that] is the same, even if there are some differences in detail, this points to finding the same 'offense'" for purposes of double jeopardy. *United States v. Schiro*, 679 F.3d 521, 540 (2012) (Wood, J., dissenting).

Nonetheless, in *Witte,* this Court found double jeopardy was not offended "by convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous

conviction." *Witte*, 515 U.S. at 391. Witte pled guilty to a marijuana offense. *Id.* at 391-93. At sentencing, his extensive contemporaneous cocaine dealing was introduced. *Id.* at 393-94. He was later charged with the cocaine referenced during his sentencing. *Id.* at 394-95. This Court affirmed Witte's conviction and sentence, finding the then-mandatory guidelines and the fact Witte was to receive credit for the former sentence to adequately protect against the imposition of multiple punishments prohibited by the Double Jeopardy Clause. *Id*. at 406. The Court's decision relies upon the false premise that "the offender is still punished only for the fact that the present offense was carried out in a manner that warrants increased punishment, not for a different offense . . . ." *Id.* at 403.

This case differs. Here the conduct, unlike Witte's, is four-square, spot on. It is the exact same. Faulkner was charged with the same drug dealing conduct in each indictment. Both courts heard the same confession, considered the same violence, and punished for the same drug quantities. There is no difference between evidence of his crimes introduced to increase the time he was sentenced to in 2011 and the charges in the 2013 indictment.

Since deciding *Witte*, this Court has enacted a sea change in the manner in which courts approach sentencing: the wholesale consideration of uncharged facts to enhance a sentence is no longer permitted. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013). In *Apprendi*, this Court held that a jury must find, beyond a reasonable doubt, a fact that increases the penalty for a crime beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. In

Alleyne, the Court held that a jury must find, beyond a reasonable doubt, any fact that triggers a statutory mandatory minimum sentence. *Alleyne*, 570 U.S. at 103.

In both, this Court reasoned that facts used to increase a penalty were elements of the crime. *Witte*'s holding, that using criminal conduct to enhance a defendant's sentence "*within the authorized statutory limits*" is not "punishment" for double jeopardy purposes, 515 U.S. at 399 (emphasis added), is outdated. Does this Court mean to have different rules for reaching the minimum and maximum penalties? That seems to offend the current thinking:

> At least as a matter of policy, if not also as a matter of constitutional law, I would have little problem with a new federal sentencing regime along those lines. Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?

United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (*per curiam*) (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

In the past, this Court has allowed a defendant to be punished for crimes for which he has not been convicted because he is "'punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . . .'" *United States v. Watts*, 519 U.S. 148, 155 (1997). While this may be true even to this day, (*see United States v. Waltower*, 643 F.3d 572 (7th Cir. 2011)), the fact is that after uncharged conduct is considered, whatever punishment is imposed is still punishment, and that uncharged conduct has now become part

and parcel of the punishment imposed. "In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another." *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012). Mr. Faulkner was twice punished.

CONCLUSION

Based on the foregoing, Petitioner Joseph Faulkner respectfully requests that this Court grant a writ of certiorari and allow briefing and argument on the issues presented in this Petition.

Respectfully submitted,

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