

ORIGINAL

No. 18- _____

IN THE
Supreme Court of the United States

TONYA RAISBECK,

Petitioner,

v.

ANTHONY STEWART, WARDEN,

Respondent.

**Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit**

TONYA L. RAISBECK
In Propria Persona
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Zeeland, MI 49464
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QUESTIONS PRESENTED

- I. Whether a certificate of appealability should issue to determine if a defendant would have a valid, successive prosecution, double jeopardy claim, where the government failed in successive CCE prosecution, to present evidence of a subsequent incident of racketeering activity, after an earlier conviction for two predicate offenses?
- II. Whether a certificate of appealability should issue to provide a full and fair review of petitioner's 28 U.S.C. 2254(d)(2) claim, not included in habeas court's opinion and order denying petitioner habeas relief?
- III. Whether a certificate of appealability should issue to review the habeas court's adjudication of petitioner's 28 U.S.C. 2254(d)(1) claim, where habeas court did not review petitioner's 2254(d)(2) claim?

LIST OF PARTIES

All parties *do not* appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition are as follows:

- A. Anthony Stewart, Warden, Women's Huron Valley Correctional Institute
 - Petitioner paroled 10/25/2016

- B. Michigan Attorney General, Bill Schuette, A.G.
 - Attorney representing respondent.
 - Interested in conviction challenged, former prosecuting agency.
 - Petitioner discharged from parole 10/26/2017

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APPENDIX (B) – The opinion of the United States Eastern District Court of Michigan.

APPENDIX (C) – The opinion of the Michigan Court of Appeals.

APPENDIX (D) – CCE verdict form, second trial.

APPENDIX (E) – First trial restitution order.

APPENDIX (F) – A.A.G. email and petitioner’s affidavit regarding.

APPENDIX (G) – Eastern District Court order denying petitioner
Summary Judgment on 2254(d)(2) claim.

TABLE OF CITATIONS

CASES

Blockburger v. United States, 284 U.S. 299 (1932)
Garrett v. United States, 471 U.S. 773 (1985)
Miller-El v. Cockrell, 537 U.S. 322 (2003)
People v. Raisbeck, 882 N.W.2d 161 (2015)
Slack v. McDaniel, 529 U.S. 473, 484 (2000)

STATUTES AND RULES

28 U.S.C. 1254(1)
28 U.S.C. 2254(d)(1)
28 U.S.C. 2254(d)(2)

MCL 7750.159(i)
MCL 750.218(3)(a)
MCL 750.218(4)(a)

CONSTITUTIONAL PROVISIONS

The Double Jeopardy Clause declares: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." U.S. Const., Amdt. 5; applicable to the states through Amdt. 14

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(s) below.

OPINIONS BELOW

1. The opinion of the United States Sixth Circuit Court of Appeals appears at Appendix (A), to the petition, and is unpublished.
2. The opinion of the United States Eastern District Court of Michigan appears at Appendix (B), to the petition, and is unpublished.
3. The opinion of the Michigan Court of Appeals appears at Appendix (C), to the petition, and is published.

JURISDICTION

The date on which the United States Sixth Circuit Court of Appeals decided my case was July 2, 2018. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner provides the statement of facts as provided by the state appellate court in *People v. Raisbeck*, 882 N.W.2d 161 (2015), upon which federal opinions were issued:

In the summer of 2010, Special Agent John C. Mulvaney headed an investigation into Mobile Modification, Inc. (MMI), a business incorporated by Raisbeck in 2008. MMI operated from a location in Fennville. For a fee, MMI promised to obtain mortgage modifications for its customers. Mulvaney's investigation began after several complaints were received that MMI would collect its fees, but provide nothing to its customers. On July 27, 2010, Raisbeck was arrested on misdemeanor charges and presented with a search warrant for the premises where the business operated. Raisbeck allowed agents to search the premises. Through this search, agents discovered 195 customer files. After reviewing these files, it did not appear that a single modification had been successfully completed.

Raisbeck was initially prosecuted in Allegan County in case numbers 10-10719-FH and 10-10720-FH. These cases concerned six victims. Ultimately, Raisbeck was convicted of two counts of false pretenses over \$1,000 but less than \$20,000. She was also convicted of one count of conspiracy to commit false pretenses. While preparing for this first trial, Mulvaney became aware of additional victims of MMI. After these initial cases concluded, Special Agent Pete Ackerly took over the investigation. Ackerly identified several additional victims. In January, 2012, Raisbeck was charged with racketeering in case number 12-107853-FH, the case from which the instant appeal arises. After a lengthy trial, on September 6, 2013, a jury convicted Raisbeck of one count of racketeering. Through a special verdict form, the jury concluded that Raisbeck defrauded nine individual victims of a total of \$7,752. Specifically, the jury found that Raisbeck defrauded three victims of \$994 each, and six of \$795 each. The jury found that Raisbeck had not defrauded three additional victims.

Moreover, even excluding her prior false pretenses convictions, Raisbeck's racketeering conviction would be supported by the jury's conclusion that she defrauded nine additional victims. The prosecutor aggregated these victims into three violations of MCL 750.218(4)(a).

The amended information was filed post trial, on September 4, 2013, but just prior to jury verdict on September 6, and was the first time throughout CCE proceedings where petitioner was informed of any prosecutorial theory of aggregation, naming specific names.

REASONS FOR GRANTING THE PETITION

This case is the perfect vehicle for this Court's further development of Double Jeopardy and its prohibition against successive prosecutions, in certain circumstances, applicable here. The principles of Double Jeopardy continue to remain an area of confusion for federal and state courts, alike. Especially, when applied in the context of compound crimes, as the present case, Conducting Criminal Enterprise, MCL 7750.159(i), and its predicate based offenses.

The discord among courts, relative to Double Jeopardy and its application in the compound offense context is plainly clear in this case. Petitioner challenged the CCE prosecution in the trial court for being in violation of Double Jeopardy. Prosecution relied upon *Garrett v. United States*, 471 U.S. 773 (1985), for permitting prosecution. Specifically, *Garrett*, 471 U.S. 773 (1985) held: "It did not violate the Double Jeopardy Clause to prosecute the CCE offense after the prior conviction for one of the predicate offenses." The trial court agreed. No opinion issued by the trial court, hearing date was August 8, 2013. Three courts have rendered opinion in this case. The Michigan Court of Appeals opinion was published. Each court provided review of petitioner's challenge to sufficiency of evidence underlying successive CCE conviction.

The federal court opinions are both contrary to the Michigan Court of Appeals published opinion, and, contrary to this Court's ruling in *Garrett v. United States*, where this Court determined, in part, a prior related conviction, could evidence only one incident of racketeering in a successive CCE prosecution.

- The Michigan Court of Appeals found that two prior related convictions for felony false pretense, MCL 750.218(4)(a), could "in part" evidence racketeering activity, one of two required incidents, to uphold successive CCE conviction.

- The Eastern District Court of Michigan on review through 28 U.S.C. 2254(d)(1), determined the two prior related convictions evidenced both of **two** required incidents of racketeering activity.
- The United States Sixth Circuit Court of Appeals, disregarding the standard of review for a Certificate of Appealability, recited the Eastern District Court's finding the two prior related convictions of false pretense, were evidence of **two** incidents of racketeering activity.

In the interest of this Court's request for brevity, petitioner provides the following:

The necessary evidence for this Honorable Court's determination of sufficiency of evidence – double jeopardy claim, can be gathered from the court opinions themselves, and, petitioner's appendices attached.

The statement of facts as found by the Michigan Court of Appeals, referenced in statement of the case here and relied upon by the Eastern District Court of Michigan, establishes prosecution first brought false pretense offenses against petitioner, and upon conviction, prosecuted petitioner for CCE, predicated by the prior convictions, no additional felony acts were evidenced, as found by jury on verdict form, through special questions.

1. The first trial petitioner was tried and convicted upon 2 counts felony false pretense, MCL 750.218(4)(a)
2. The second trial petitioner was tried and convicted upon 1 count Conducting Criminal Enterprise, MCL 750.159i. In addition, the jury found nine uncharged, misdemeanor acts of false pretense, MCL 750.218(3)(a) [ineligible offense under racketeering statute]. No additional evidence presented by prosecution.

The following facts are important, in consideration of double jeopardy, several of the uncharged acts found to be misdemeanors by the jury on the verdict form (5 of the 9 individuals) were also used by prosecution, as other acts, in the first trial. (*2nd trial, CCE, Verdict Form – Appendix (D)*) and (*1st trial, 2 FP, restitution order -Appendix (E)*). Resulting in conflicting verdicts for restitution and increased minimum sentences of incarceration, because these individuals were counted as victims in both trials, but not charged in a separate count, in either trial.

The basis of both prosecutions is petitioner's operation of Mobile Modifications, Inc. MMI provided loan modification assistance to those who were facing foreclosure. Namely through the federal Home Affordable Modification Program [H.A.M.P]. The time-period alleged in both prosecutions is March 2009 through July 27, 2010. Both trials occurred in Allegan County's 48th Circuit Court. Having two circuit court judges, both judges were involved in parts of each trial. The Michigan Attorney Generals office prosecuted both cases in this small town.

Prior to the first trial, prosecution sent an email to petitioner's then attorney Jeffrey Portko, asserting prosecution had intent to bring the CCE offense, simultaneously, with the false pretense offenses and permission to do so (*Affidavit/Email AAG – Appendix F*). The email implied petitioner was to plead guilty to false pretense or petitioner would be charged with CCE and false pretense, in this first trial. Petitioner declined the prosecutions offer, insisting upon a jury trial, fully understanding prosecution for CCE and two false pretense offenses [applicable here] would be brought during the first trial. As evident, this did not occur.

Defenses that normally can be claimed by prosecution in a successive prosecution situation, are not available here. Respondent attorney, also prosecuting agency, is unable to claim petitioner requested separate trials or that it did not possess sufficient evidence at the time of the first trial, to proceed with CCE. Prosecution admitted, prior to the first trial, (*Affidavit/Email - Appendix F*) that it did have

permission to proceed with CCE and possessed the necessary evidence to charge CCE offense. Additionally, petitioner chose to be tried in a single trial when she did not accept prosecutions offer to pleading guilty to false pretense, or, be prosecuted for CCE, during the first trial. Petitioner chose to be tried for CCE during the first trial. Prosecution instead waited to obtain false pretense convictions then the *day prior* to sentencing on those offenses, charged petitioner with two counts CCE. Prosecution nolle prosqued one of two CCE counts charged in state district court. Arrest upon CCE, occurred, January 12, 2012, and sentencing for false pretense convictions occurred the very next day, January 13, 2012. Petitioner was sentenced to one year of incarceration in the Allegan County Jail for the false pretense convictions. The one year was not credited against the 3 to 20 years petitioner was sentenced to for the CCE conviction. The CCE conviction occurred, September 6, 2013. With Sentencing on, October 24 and 25, 2013. Each of the provided dates can be confirmed through the trial court record.

Honorable Justice O'Connor in *Garrett v. United States*, 471 U.S. 773 (1985), provided "... whether a defendant would have a valid double jeopardy claim if the Government failed in a later prosecution to allege and to present evidence of a [separate] violation... after an earlier conviction for a predicate offense. Certainly, the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution."

Now is the right time for this Honorable Court to answer Honorable Justice O'Conner's question. In the context of this case.

The successive prosecution and conviction upon CCE, predicated by the two prior felony false pretense convictions also fails the Blockburger test, *Blockburger v. United States*, 284 U.S. 299 (1932). Each offense does not contain an element, not within the other as required. The two prior false pretense convictions are wholly subsumed within the CCE offense.

Further development in the context of certificate of appealability and its structure of review is an area of law in need of this Court's guidance. Here, the Sixth Circuit Court recited the Eastern District Courts opinion, in denial of a certificate of appealability. Upon appropriate review, the Sixth Circuit would have seen petitioner's 28 U.S.C. 2254(d)(2) claim had not been included in the Eastern District Courts opinion, denying petitioner habeas corpus relief. This claim was also the subject of petitioner's motion for summary judgment. The District Court stated in its order denying motion, the habeas petition would not be decided in a piece-meal fashion and the court would address petitioner's 2254(d)(2) claim at the same time as reviewing petitioner's 2254(d)(1) claim (*Order denying summary judgment - Appendix (G)*)

When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims, *Slack*, 529 U. S., at 481. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." §2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. *Id.*, at 484. [as cited by *Miller-El v. Cockrell*, 537 U.S. 322 (2003)]

"When a petition has been denied on the merits, the Supreme Court has held, a C.O.A. must be granted where "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." See: *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would find the district court's assessment of petitioner's constitutional claims wrong, where the District Court failed to provide an assessment of 2254(d)(2) claim and or where the District

Court assessed petitioner's 2254(d)(1) claim against the state courts unreasonable determination of the facts.

Petitioner believes, the 2254(d)(2) claim is an unreasonable determination of the facts in light of the evidence presented where the state appellate court found jury determinations on the verdict form of nine misdemeanors, were thereafter, post-conviction, aggregated by prosecution into three greater felony level offenses. The state courts determination is unreasonable for finding alleged facts outside the record, and fact finding outside the jury verdict would seem an invasion of petitioner's constitutional right to a jury determination of every fact necessary to constitute guilt of CCE, beyond a reasonable doubt. This determination can be made without regard for whether the offenses can or cannot be aggregated during trial, as the state and district court assess as an argument of state law. The constitution is involved when fact finding is occurring outside the record and post-trial, by an action of the prosecution, which can only present evidence to support its allegations.

A certificate of appealability should also issue in a situation where a petitioner's 28 U.S.C. 2254(d)(1) claim is decided prior to review of a 2254(d)(2) claim. It cannot be said a proper resolution of a constitutional claim challenging sufficiency of the evidence, if the habeas court provides review and denial using state courts factual determination, under constitutional challenge. A resolution of a sufficiency of evidence claim, upon unreasonable facts, is no resolution at all. The repeated review of claims, by the same court because of error, bears stress upon the already limited judicial resources.

This matter is the perfect vehicle for this Court's development in multiple, important, areas of law, Double Jeopardy and Certificate of Appealability.

CONCLUSION

Honorable, United States Supreme Court Justices, thank-you in advance for your time.

1. I sincerely pray you will grant writ of certiorari review in this matter.
2. And, appointment of counsel, if this Court deems appropriate.

Respectfully submitted,



Tonya Raisbeck

Date Signed: September 27, 2018