No. 18 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

EVELYN PERSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit's failure to vacate the verdict of guilt rendered against Petitioner in the narcotics conspiracy count based upon an irreconcilable conflict between that verdict and the jury's answers to special interrogatories relating to that count, was in conflict with decisions of the United States Courts of Appeals for the Fifth, Sixth and Tenth Circuits on the same important matter.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

The official caption of the case in the Court of Appeals for the Second Circuit was:

UNITED STATES OF AMERICA,

Appellee,

- v - 17-2279-cr

EVELYN PERSON,

Defendant-Appellant.

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OPINIONS AND ORDERS BELOW

The District Court's Opinion and Order denying Petitioner's post-verdict Rule 29, Fed.R.Crim.P. motion for a judgment of acquittal, and Rule 33, Fed.R.Crim.P. motion for a new trial (A1-10)[1] is unpublished, but is available at 2017 WL 2455072 (June 6, 2017). The District Court's Opinion and Order denying Petitioner's motion for reconsideration of the Court's Order denying Petitioner's motion for a new trial (A11-12 is unpublished, but is available at 2017 WL 2774232 (June 26, 2017). The Second Circuit's Summary Order affirming the judgment of conviction of the district court (A13-16) is unpublished, but is available at 2018 WL 3860511 (August 14, 2018). The Second Circuit's September 14, 2018 Order denying without opinion Petitioner's petition for panel rehearing (A17) is unpublished.

JURISDICTION

The United States District Court's had jurisdiction under 18 U.S.C. § 3231, and rendered judgment on July 21, 2017. Petitioner filed a timely notice of appeal on July 24, 2017. The Court of Appeals had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and entered judgment on August 14, 2018. Petitioner's timely filed petition for panel rehearing was denied on September 14, 2018. No application has

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[1]Numbers preceded by "A" refer to pages in the Appendix to this Petition. Numbers preceded by "T" refer to pages in the trial transcript.

been filed for an extension of time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . .be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

This case presents an issue on which there is a compelling reason for this Court to grant a petition for a writ of certiorari: may a trial court accept a verdict of guilt when the jury renders a guilty verdict on a count charging the defendant [Petitioner Evelyn Person] with conspiracy to distribute and possession with intent to distribute cocaine base [crack] and heroin, but provides answers special interrogatories relating to that count that were in irreconcilable conflict with her membership in the charged conspiracy. The Second Circuit held that it was proper for the District Court to accept the guilty verdict, finding no irreconcilable conflict, a decision that conflicts with decisions of the Fifth, Sixth and Tenth Circuits.

FACTS RELEVANT TO THIS PETITION

Petitioner Evelyn Person was charged in the Eastern District of New York in an indictment charging her and her codefendant Justin Smith with conspiracy to distribute and possess with intent to distribute narcotics: a substance containing cocaine base [crack] and a substance containing heroin in violation of 21 U.S.C. §§ 846 and 841(b(1)(c); maintaining a stash house in violation of 21 U.S.C. §§ 856(a) and 856(b) and 18 U.S.C. § 2; and possessing a firearm during and in relation to the narcotics conspiracy and stash pad drug trafficking crimes charged, in violation 18

U.S.C. §§ 924(c)(1)(A)(i) and 2. Petitioner was tried before a jury,[2] and she testified in her own defense.

The charges against Petitioner and Justin Smith were based upon two incidents involving Smith's living in Petitioner's apartment, one occurring in June 2014 and an earlier one occurring in January 2014. The government presented evidence that in the early morning of June 18, 2014 police officers came to Petitioner's apartment at 185 Nevins Street, Brooklyn, NY, apartment 6B, to arrest her based upon bench warrants issued to her approximately thirteen months earlier for failing to answer summonses for quality of life offenses (spitting in public and making too much noise), entering her apartment where they purportedly observed several items in plain view in the living room, including a plate on the futon in the living room on which there was a razor blade, a cigarette lighter and, according to the officers, a white residue visible on the plate which the officers believed to be crack cocaine.[3] The

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[2]Justin Smith pleaded guilty immediately prior to trial to the same narcotics conspiracy and stash pad counts in which Petitioner was charged, as well as a count charging him with possession with intent to distribute cocaine base and heroin, an 18 U.S.C. § 924(c) count, and two counts of being a felon in possession of a firearm.

[3]Petitioner testified that although she did observe the plate with the razor blade and cigarette lighter she did not see any residue on the plate. The criminalist who examined the residue conducted an initial test that determined that the substance was cocaine, but could not perform a second test to determine whether the substance was cocaine hydrochloride or cocaine base, as there was an insufficient quantity of residue to perform the second test. However, after looking at a photo of the plate taken by one of the officers during the execution of a search warrant later that day, she testified

officers also claimed to have observed a box of ammunition under a table next to the futon and a single .45 bullet next to a laptop on a table against the living room wall.[4]

After removing Petitioner and Mr. Smith[5] from the apartment, the officers secured the premises and returned late that afternoon with a search warrant. They testified that from a bedroom next to the kitchen where Smith kept his belongings they found and seized 53 glassines containing heroin, a few of which contained heroin mixed with cocaine, from a shoe box next to a closet and eight live rounds of .45 ammunition from a plastic bag inside a paper bag on an open cabinet shelf. In the living room they found and seized 212 empty glassines from a storage area under the

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that the amount of white substance in the photo was clearly sufficient for her to have performed the second test had it been submitted to the lab, suggesting that some of the white powder was somehow lost despite the evidence having been sealed at the scene, or that additional white powder had been added by the officers before taking the photograph to bolster their claim that the residue was in plain view, and then removed before sealing the plate and its contents and sending them to the lab.

[4]The officers had given several different prior accounts as to which table in the living room the bullet was purportedly on. Moreover, when first reentering the apartment to execute the search warrant photos were taken by one of the officers to show exactly where everything was located before the search began, and the first photos of the table against the wall with the laptop clearly showed that there was no bullet on the table. Petitioner denied seeing a .45 bullet on a table in the living room, or a box of ammunition under the end table next to the futon that the officers claimed they saw in plain view.

[5]Mr. Smith was arrested based upon the officers' claim that after being seated on the futon by the officers, he tried to remove bags containing heroin and crack from his waistband and hide them in the futon.

futon where Smith slept, 80 plastic bags containing cocaine base from a male boot under a table against the wall with the laptop, $1,008, consisting of seven $100 bills and four $2 bills hidden in a male sneaker, and a grinder of the kind used to grind up both narcotics and marijuana. They also seized a digital scale from the kitchen[6] and a firearm from a laundry bag in the rear bedroom used for storage.

The officers also found and seized a basket purportedly in plain view by the living room window containing three large bags containing 1250 empty mini-Ziploc bags identical to the ones found in the boot and the ones Smith tried to hide in the futon. Neither the officers nor Petitioner had noticed the basket or its contents when they had been in the living room that morning although the basket and its contents were purportedly in plain view during the execution of the search warrant.

Approximately six months earlier in January 2014, police officers found mini-Ziplock bags, a digital scale with crack residue on it, and a small quantity of marijuana, somewhere in Petitioner's apartment. On that earlier occasion Smith had entered the apartment having been chased there by police officers. He told Petitioner, who had been asleep, that he had to hide a gun. Moments later police officers were pounding on her door. After she verified that the people at the door were police

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[6]The scale, which the officer admitted was used to weigh marijuana as well as crack, did not contain any white residue.

officers Petitioner consented to the officers entering and searching the apartment. The officers took Smith into custody and told her that Smith was wanted for a robbery. The officers did not find the gun. The officers kept Petitioner in the kitchen while they conducted their search.

Petitioner, a union carpenter with no prior criminal record who had served as a foster mother for three young children from 2010 to 2013, testified that she had no knowledge that Smith was a drug dealer and no knowledge of any of the heroin, crack or related items seized from her apartment on either occasion, and never agreed with Smith to let him use her apartment in connection with drug trafficking.

In addition to contradicting the officers as to whether a bullet, a box of ammunition and a residue of white powder on a plate were all in plain view when the officers first entered her living room, she presented additional evidence suggesting the officers were not credible. She testified that the money the officers claimed they found in Smith's sneaker in June 2014 was actually her money and had been planted in Smith's sneaker by the officers to bolster their case against him. She had introduced into evidence two paychecks totaling $1600 that she had just cashed, and still had a large portion of that money, including seven $100 bills in her closet. She testified that the four $2 bills were souvenirs that she had folded in half and placed between her bedroom mirror and the mirror frame. The creases where the bills had

been folded in half so they would fit between the mirror and frame were still visible at trial. She testified that before being taken from her apartment she asked the Sergeant if she should take her money with her to use as bail, but he told her to leave it. Her testimony was far more credible than the officers as it is extremely unlikely that a street seller of small quantities of crack and heroin would have seven $100 bills or any $2 bills in his possession.

The officers had testified that they did not find the gun in the laundry bag until they were executing the search warrant hours after Mr. Smith and Petitioner were taken to the station house. Petitioner had testified that she heard one of the officers yell "hot lunch" from a back room as they were conducting a search or security sweep of the apartment immediately after entering the apartment that morning, indicating to her that they had found the gun hidden in the laundry bag hours before executing the search warrant. Petitioner's testimony was corroborated by evidence introduced by the government. As part of its case, the government played a portion of a monitored telephone call Smith had made from Rikers Island where he was detained to a friend a few days after the June 18, 2014 arrest, in which he stated that on the morning of his arrest the police went into the back room and found the gun in the laundry bag and that he knew that it was all over because he knew they would find everything else when they came back with a search warrant.

With respect to the January 2014 incident Petitioner testified that she did not see and was not told what the police seized from the apartment or where any of the items had been found. After the officers left the apartment with Smith, she found the gun Smith had hidden under a treadmill in the bedroom where Smith kept his belongings. She dumped the gun down the garbage compactor in the hallway outside her apartment. Her testimony was the only evidence that Smith had possessed a gun in her apartment in January 2014. A few days later Smith was released and persuaded Petitioner to let him continue to live in her apartment after he begged for permission to stay promising that he would never again bring any gun to the apartment.

No evidence was presented indicating that Petitioner had participated in any drug trafficking related conversations with Mr. Smith. Nor were there any admissions of guilt. No fingerprint, DNA or other evidence was presented at trial indicating that Petitioner had ever handled any of the drugs or related items seized from her apartment. No evidence had been presented indicating how long, or how briefly, any of the seized items had been in the apartment, or had purportedly been in plain view prior to being found by the police.

Mr. Smith's Rikers Island call suggested that he was hiding his drug activities from Petitioner as he told his friend that when he heard that police were at the door on the morning of June 18, 2018, he frantically started pulling everything out from

under the futon looking for the gun that he always kept by his side when he slept, not remembering that he had sent someone to bring the gun to the apartment the previous night and that Petitioner had put it somewhere. This suggested that prior to looking for the gun he had hidden all his drug related possessions from Petitioner and that whatever the officers found in plain view near the futon in the living room had not been in plain view prior to Smith's frantically looking for his gun.

Given the evidence that had been presented at trial and the instructions given to the jury, the only possible basis for the jury finding Petitioner guilty of membership in the charged conspiracy was a finding beyond a reasonable doubt that she knowingly permitted her codefendant Justin Smith to possess crack, heroin and related packaging paraphernalia in her apartment.

No evidence was presented showing any agreement to distribute any controlled substance other than cocaine base [crack] and/or heroin. That the government recognized that on the evidence presented it had to prove that Petitioner had agreed to traffic specifically in cocaine base [crack] and/or heroin is evidenced by the fact that it never argued in summation that it was sufficient if the jury found beyond a reasonable doubt that Petitioner agreed to distribute and possess with intent to distribute some unspecified controlled substance. In the government's summation the prosecutor stated the following:

> "Count One charges the defendant with participating in narcotics conspiracy. There are two elements: First, two or more persons entered into an unlawful *agreement to possess heroin or crack cocaine with intent to distribute or to distribute heroin or crack cocaine*. And, second, the defendant knowingly and intelligently became a member of that conspiracy (T731)" (emphasis added).

> "It is that agreement with Justin Smith, the *agreement that the defendant knowingly made to allow him to run this heroin and crack business out of her apartment*, that makes her guilty of conspiracy under Count One (T743)" (emphasis added).

In its instructions to the jury with respect to Count One, the conspiracy count, the Court also acknowledged that on the evidence presented the government had to prove that Petitioner had agreed to traffic specifically in cocaine base [crack] and/or heroin, not merely agreed to traffic in some unspecified controlled substance, stating the following:

> "A conspiracy is simply defined as an agreement between two or more persons to commit a crime. That's what a conspiracy is. It's an agreement between two or more persons to commit a crime. In this case, it's alleged to be *an agreement* between Evelyn Person and others *to knowingly and intentionally distribute and possess with intent to distribute cocaine base and heroin* (T813)" (emphasis added).

It then continued:

> "So it would be enough if the government proved that two or more persons, one of whom was Evelyn Person, in any way expressly or impliedly, came to a common understanding, came to *a meeting of the*

> *minds* to violate the law, *to distribute and possess with intent to distribute cocaine base and heroin* (T814)" (emphasis added).

Immediately before the Court gave the charge to the jury, it asked the parties if they had discussed the verdict sheet. The verdict sheet had been prepared by the government and included in its requests to charge. Although the government stated that it briefly looked into it, and the limited case law it had found suggested that there was no requirement that the jury had to identify the type of controlled substance, so that "guilty" or "not guilty" was sufficient (T798), it did not ask the court to revise its jury charge, nor did it submit a revised verdict sheet, nor ask if the verdict sheet could be revised.

As to Count One [Conspiracy to Distribute and Possess with Intent to Distribute Narcotics], the verdict sheet read:

> "How do you find the defendant?
>
> Guilty ____ Not Guilty _____
>
> If you find the defendant guilty as to Count One, answer the following questions:
>
> Did the government prove that the defendant was responsible for a substance containing cocaine base?
>
> Yes _____ No _____

> Did the government prove that the defendant was responsible for a substance containing heroin?
>
> Yes _____ No _____"

Although the court did not specifically instruct the jury as to what the government had to prove in order for it to find Petitioner responsible for either a substance containing cocaine base or a substance containing heroin, it did give the following instruction:

> "A conspiracy is sometimes referred to as a partnership in crime in which each partner, *each member of the conspiracy, becomes the agent of every other member of the conspiracy* (T813)" (emphasis added).

In addition, it gave the following instruction:

> "*Even if one participated in a conspiracy to a degree more limited than that of the other co-conspirators, she is equally culpable* so long as you find that she deliberately and intentionally became a member of the conspiracy and participated in it (T818)"(emphasis added).

Moreover, in the government's rebuttal summation, the prosecutor argued the following:

> "*[T]he defendant* is *responsible for the sale of crack and cocaine [sic]*[7] *by Justin Smith in her neighborhood* . . . because she made choices, conscious, conscious choices. *She chose to let Justin live in her apartment* . . . . As she told you, she knew he didn't have a place of his own in that community and he wouldn't have been able to live there without her help. And, therefore, *he wouldn't have been able to store*

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[7]He clearly meant to say "heroin."

> *and sell drugs there without her help* . . . . She claimed after that first instance in January she was going to kick him out. That was the choice she was going to make. Kick him out. She now knows what he does, what he's about. What choice does she make? She doesn't choose to kick him out. She feels sorry, and she chooses to let him stay. *And despite being put on notice of his drug possession, she chose to ignore the obvious signs that he was using her home for drug sales* . . . . These are choices that demonstrate active involvement in a narcotics conspiracy (T795-96)(emphasis added).

The jury acquitted Petitioner of the stash pad count, but found her guilty of the narcotics conspiracy and the 924(c) counts. With respect to the conspiracy count the signed verdict sheet (A18) was checked "guilty," but the answer to each of the two interrogatories on the verdict sheet was "No," the government had failed to prove that the defendant was responsible for either a substance containing cocaine base or a substance containing heroin. In rendering its verdict the foreperson orally responded to the questions asked by the Court's clerk, which were the same questions as appeared on the verdict sheet, and responded exactly as what appeared written on the verdict sheet (T870). When polled, the clerk asked each juror:

> Ladies and gentlemen of the jury, you have heard the verdict as the Court has received it. Is that your verdict? Yes or no?

Every juror responded that the verdict as the Court has received it was his or her verdict (T871-72), after which the Court immediately thanked and discharged the jury (T872-73).

Defense counsel immediately noted that the there was an irreconcilable conflict between the verdict and the answers to the interrogatories, and subsequently filed motions for a judgment of acquittal pursuant to Rule 29, Fed.R.Crim.P., claiming that the answers to the special interrogatories demonstrated that the jury found that the government failed to prove Petitioner's membership in the charged conspiracy, and a motion pursuant to Rule 33, Fed.R.Crim.P. for a new trial, to be considered only if the Rule 29 motion was denied, claiming that the court, if not required to enter a judgment of acquittal, should have ordered a new trial, as it was no longer possible to instruct the jury that its answers to the interrogatories were irreconcilable with its verdict of guilt and to have the jury continue its deliberations. Both motions were denied in a Memorandum and Order dated June 6, 2017(A1), and a motion for reconsideration of its Order denying the Rule 33 motion for a new trial was denied in a Memorandum and Order dated June 26, 2017 (A11). Petitioner received consecutive sentences of one day on the conspiracy count and five years' on the 924(c) counts, followed by concurrent three year terms of supervised release.

The issues were again raised on appeal, but the United States Court of Appeals for the Second Circuit in a summary order rejected the claim that there was an irreconcilable conflict between the verdict and the answers to the special interrogatories (A13), and summarily denied a petition for panel rehearing (A17).

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT'S FAILURE TO VACATE THE VERDICT OF GUILT RENDERED AGAINST PETITIONER IN THE NARCOTICS CONSPIRACY COUNT BASED UPON AN IRRECONCILABLE CONFLICT BETWEEN THAT VERDICT AND THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES RELATING TO THAT COUNT, WAS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH, SIXTH AND TENTH CIRCUITS ON THE SAME IMPORTANT MATTER

Contrary to the decision of the United States Court of Appeals for the Second Circuit below, the verdict of guilt rendered against Petitioner at her trial should have been vacated as there was an irreconcilable conflict between the verdict of guilty on the narcotics conspiracy count and the answers to the special interrogatories with respect to that count. In similar situations the Fifth, Sixth and Tenth Circuits have found irreconcilable conflicts between the guilty verdicts and answers to special interrogatories and held that the trial court could not accept the guilty verdicts.

In its decision affirming Petitioner's conviction the Second Circuit noted that the district court had instructed the jury as to the required proof for the government to show that Person [Petitioner] participated in a drug conspiracy, and Person does not assert that those instructions were erroneous in any way. 2108 WL 3860511 at * 3. It also noted that it assumes the jury followed the instructions of the district court. 2108 WL 3860511 at *4 (A16).

Although the circuit is correct that drug type [and quantity] are not elements that have to be proved in order to convict a defendant of membership in a narcotics conspiracy, 2108 WL 3860511 at *3 (A15), the district court did not instruct the jury that all that was required was proof that Petitioner agreed to distribute or possess with intent to distribute a controlled substance, without regard for the type of controlled substance. Rather, without objection from the government, it told the jury that to convict the government had to prove an agreement to distribute and possess with intent to distribute cocaine base and heroin. It instructed the jury as follows:

> In this case, it's alleged to be *an agreement* between Evelyn Person and others *to knowingly and intentionally distribute and possess with intent to distribute cocaine base and heroin* (T813)" (emphasis added).

It then continued:

> "So it would be enough if the government proved that two or more persons, one of whom was Evelyn Person, in any way expressly or impliedly, came to a common understanding, came to *a meeting of the minds* to violate the law, *to distribute and possess with intent to distribute cocaine base and heroin* (T 814)" (emphasis added).

Here the only evidence presented at trial from which a conspiracy might be proven was the physical evidence found in Petitioner's apartment. There was evidence seized that proved that, in addition to living there, Justin Smith was using Petitioner's apartment as a stash pad for his trafficking crack and heroin. That evidence consisted of crack cocaine and heroin and related packaging paraphernalia:

glassine envelopes used to package heroin, mini-Ziploc bags used to package crack, a grinder, and a digital scale. No evidence was presented, nor argument made by the government in summation, suggesting that Smith was distributing or intending to distribute any other controlled substance.

As the indictment did not charge a conspiracy to distribute or possess with intent to distribute a specific quantity (28 grams or more, or 280 grams or more) of cocaine base [crack], or a specific quantity (100 grams or more, of one kilogram or more) of heroin, asking the jury to answer special interrogatories was not necessary, as the sentencing range was the same irrespective of whether the jury found a conspiracy to distribute and intent to distribute, cocaine base, heroin, or both, and irrespective of the weight of the drug involved.

However, once asked, the answers to the special interrogatories must be considered when evaluating the sufficiency of the evidence. *See United States v. Gonzalez*, 841 F.3d 339, 342 (5th Cir. 2016)("Although the law may be murky concerning when it is proper to give the jury special interrogatories, it is not when it comes to the effect of those interrogatories once answered. Courts consistently vacate convictions when the answers to special interrogatories undermine a finding of guilt the jury made on the general question," *citing and quoting* Lafave, 6 Crim. Proc. § 24:10(a) ("A jury's special verdict finding may also negate an essential

element of an offense of which the jury returned a general verdict. Unlike the situation where a verdict on one count is inconsistent with a verdict on another count, a special finding negating an element of a single count will be treated as an acquittal of that count, not as an inconsistent verdict.") 641 F.3d at 348.

In *Gonzalez*, although the interrogatories did not ask about an element of the offense, but rather the theory of liability, the court held that the answers must be given effect and can negate a general verdict of guilt. *Id*. at 349. The jury was asked in special interrogatories whether its verdict with respect to a 924(j) murder count and a 924(c) count, was each based upon personal liability, *Pinkerton* conspirator liability, or liability as an aider and abettor. As to those defendants where the jury found verdicts of guilt based upon a theory of personal liability, the guilty verdicts were set aside and the cases remanded for the entry of judgments of acquittal, where the evidence was sufficient to find liability based upon *Pinkerton,* but insufficient to find guilt based upon the personal liability theory specifically relied upon by the jury according to its answers to the special interrogatories.

Although the Circuit is correct that the District Court did not specifically address the special interrogatories in its jury instructions in that it never defined what it meant for Petitioner to be "responsible for" drugs such that the special interrogatories should be answered in the affirmative, 2108 WL 3860511 at *3 (A15), the

District Court did give an instruction that could only have been relevant to the special interrogatories, as Petitioner was not charged with any substantive count of possession of either cocaine base or heroin. The court instructed the jury:

> "A conspiracy is sometimes referred to as a partnership in crime in which each partner, *each member of the conspiracy, becomes the agent of every other member of the conspiracy* (T813)" (emphasis added).

As the jury did not ask for an explanation of that instruction, one cannot assume that the jury did not understand and follow it. Nor can one assume that the court was giving the jury an instruction having no bearing upon its deliberations, nor that the jury believed that it could disregard that instruction. Although the court did not define what it meant for a conspirator to be an agent of every other co-conspirator, that instruction clearly meant that a member of a conspiracy was responsible for any reasonably foreseeable actions of any other member of the conspiracy in furtherance of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946).

If Petitioner conspired with Smith to distribute and possess with intent to distribute cocaine base and/or heroin, she was responsible for any cocaine base and/or heroin that he possessed with intent to distribute unless such possession was unforeseeable to her, as he was acting as her agent. Had she been charged with substantive possession offenses, the government would have sought and the court would have given a *Pinkerton* instruction. As there was no substantive charge against

Petitioner, the instruction could only have been significant if it gave guidance to the jury as to how to answer the special interrogatories.

If the jury had found that Petitioner knew that Smith possessed cocaine base and/or heroin in her apartment it would have answered one or both of the special interrogatories differently, depending upon whether it found her guilty of conspiring to distribute and possess with intent to distribute cocaine base, heroin, or both. The jury's response to the special interrogatories that the government failed to prove that Petitioner was responsible for either cocaine base or heroin conflicted irreconcilably[8] with the guilty verdict on the conspiracy count, as it was inconsistent with a finding beyond a reasonable doubt that she had knowledge of the presence in her apartment of the crack, the heroin or related paraphernalia prior to her arrest, on the facts of this case knowledge necessary to a finding her guilty of the charged conspiracy.

The Circuit's attempt to reconcile the verdict with the answers to the interrogatories: "that the jury may have concluded that Person's actions, while sufficient for conviction of the charged crime of conspiracy, did not rise to the (undefined and ambiguous) level of her being held 'responsible for' the drugs in comparison to her co-conspirator's actions," assumes that the jury ignored both the

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[8]This case is clearly distinguishable from cases were the jury convicts on one count and acquits on another where it is alleged that there was an irreconcilable conflict between the two verdicts, as the acquittal may have been an act of lenity.

instruction given by the district court (T818), cited by the Circuit, that a participant in a conspiracy is equally culpable even if she participated to a degree more limited than that of the other co-conspirators, and the instruction given by the court that each conspirator acts as the agent of each other member of the conspiracy. If she was a member of the conspiracy she was responsible for the drugs seized. It she was not responsible for those drugs she was not guilty of the conspiracy charge.

This case is virtually identical to both *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015) and *United States v. Shippley*, 690 F.3d 1192 (10th Cir. 2012), to the extent that both cases recognized that the guilty verdicts rendered with respect to the narcotics conspiracy count were irreconcilably inconsistent with both jury's answers to special interrogatories, and could not stand. In *Randolph*, the jury was asked in special interrogatories to determine the amount of cocaine, crack cocaine and marijuana "involved in" the conspiracy. In response to each of the three controlled substances, the jury checked "None." The Sixth Circuit, concluding that these answers reflected a finding that the conspiracy did not involve any of the charged drugs, concluded that the jury's verdict, read in its entirety, revealed that the government failed to prove an essential element of the charged conspiracy, reversed the judgment of conviction and remanded and directed the district court to enter a judgment of acquittal on the conspiracy count. To order a new trial would constitute

double jeopardy. 794 F.3d at 612. Here, the answers that Petitioner was not responsible for either cocaine base or heroin, reveal that the government failed to prove an essential element of the charge conspiracy, that she knew that the object of the conspiracy was to traffic heroin, crack or both.

In *Shippley*, the jury initially rendered a verdict of guilty on the narcotics conspiracy count, but answered the special interrogatories by indicating that the defendant had not conspired to distribute or possess with intent to distribute *any* of the drugs listed in the indictment. The Tenth Circuit, recognizing that these answers required an acquittal, concluded that "[i]n effect, the jury both convicted and acquitted Mr. Shippley of the charged conspiracy." 690 F.3d at 1193. Given this inconsistency, the district court was not permitted to accept the jury verdict of guilty as that would have required it to overlook the special verdict findings. *Id*. at 1195. Although not specifically citing any constitutional provisions that prevented the court from accepting the guilty verdict, it is clear that both the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial would have been violated by the court accepting the guilty verdict irreconcilably in conflict with the special interrogatory answers. The Circuit ruled, however, that it was not error for the district court to instruct the jury to continue deliberating, implicitly finding that the Double Jeopardy Clause was not implicated.

Here the finding by the jury that the government had failed to prove that Petitioner was responsible for either crack or heroin, amounts to a finding that she did not agree to traffic in any controlled substance as the distribution and possession with intent to distribute those two specific controlled substances were charged as the object of the charged conspiracy and, based upon the evidence presented, summations and jury instructions, were the only controlled substances that the jury could have possibly found her to have had knowledge and intent to distribute.

It is respectfully submitted that here, just as in *Randolph* and *Shippley*, the district court should not have accepted the verdict of guilty as that verdict was inconsistent with the answers to the special interrogatories. By accepting the verdict of guilt despite the answers to the special interrogatories in irreconcilable conflict with that verdict, the district court violated Petitioner's Fifth Amendment right to due process and her Sixth Amendment right to a jury trial. Petitioner had the right to have the jury decide whether she was guilty, not the court.

This Court should vacate Petitioner's convictions on both the conspiracy and 924(c) counts, remand the case to the Second Circuit directing it to either direct the district court to enter judgments of acquittal or order a new trial on both those counts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 13, 2018

Respectfully submitted,

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