

No. 18-7522

ORIGINAL

FILED

JAN 04 2019

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

IN THE

SUPREME COURT OF THE UNITED STATES

Freddie B. Kennedy — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.s Court of Appeals - Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Freddie B. Kennedy 17506-032
(Your Name)

PO Box 24550
(Address)

Tucson Arizona 85734
(City, State, Zip Code)

(Phone Number)

QUESTIONS RAISED

Did the lower Court commit error by not adhering to its prior decisions when it denied Petitioner's request for rehearing without discussion of the facts presented by petitioner?

Petitioner argues that he was denied fundamental due process when the Circuit Court failed to rule on the issues raised in a manner consistent with its prior holdings.

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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TABLES OF AUTHORITIES CITED

CASE

US. V. SINITO, 723 F2D 1250 (6CA 1983)

JONES V. THOMAS, 491 US 376 (1989)

BLOCKBURGER V. US, 284 US 299 (1932)

US. V. BENTON, 852 F2D 1456 (6CA 1988)

US. V. CASTRO, 629 F2D 456 (7CA 1980)

US. V. MARABLE, 578 2D 151 (5CA 1978)

US. V. MALLAH, 503 F2D 971 (2CA 1974)

HARRIS V. STOVALL, 212 F3D 940 (6CA 2000)

WILLIAMS V. TAYLOR, 529 US 362 (2000)

US. V. DIXON, 509 US 688 (1993)

US. V. BROCE, 488 US 563 (1989)

SANABRIA V. US, 437 US 54 (1978)

STATUTES AND RULES

21 USC § 841 (a)(1)

21 USC § 846

OTHER

U.S. Constitution, Amendment 5

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**:

(17-5377)

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☐ is unpublished.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 L to the petition and is

☒ reported at (7:15 -cr-00009-2); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

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 7/24/18.

☐ 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: 10/4/18, 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

...Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...U.S. Constitution, Amendment 5 (in pertinent part):

...It shall be unlawful for any person knowingly or intentionally -- (1) to... distribute... a controlled substance. 21 USC § 841 (a)(1)

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. 21 USC § 846

STATEMENT OF THE CASE

After being found guilty of conspiracy to distribute oxycodone, Petitioner was charged in a second case with the same offense, alleging Petitioner had conducted two separate and unrelated conspiracies, separated by only a handful of days. In the new case, the Government alleged one count of conspiracy to distribute oxycodone and 17 counts of sexual abuse of children in relation to the conspiracy count. To support its contention that the one conspiracy count represented a new, separate conspiracy not dependent on the conspiracy for which the Petitioner had already been convicted, the Government alleged "minimal overlap" of participants between what it referred to as the "first" and "second" conspiracies. The Government further alleged a period of mere days separated the two conspiracies, and that because the conspirators traveled to a variety of pain clinics and pharmacies when committing acts in furtherance of their plan, it alleged separate conspiracies had taken place. On appeal, and in a Petition for Rehearing following the denial of his appeal, Petitioner showed conclusively that any tests for multiple conspiracies failed to show more than one conspiracy existed. Petitioner thus argues his second conviction was in violation of his rights under the Double Jeopardy clause and is therefore unlawful.

Accordingly, various circuit courts have developed a totality of the circumstances test by which to determine whether successive conspiracy prosecutions involve the "same offense" for purposes of the Double Jeopardy clause. See US

v. Benton, 852 F2d 1456 (6CA 1988), US v. Thomas, 759 F2d 659 (8CA 1985), US v. Castro, 629 F2d 456 (7CA 1980), US v. Marable, 578 F2d 151 (5CA 1978), US v. Mallah 503 F2d 971 (2CA 1974). The rationale underlying the totality of the circumstances test, as well as the application thereof, is generally acceptable even while it is a product of the federal circuit courts and not of the United States Supreme Court. Therefore, this standard should be the primary test by which Petitioner's claim is to be measured. See Harris v. Stovall, 212 F3d 940, 943-44 (6CA 2000) (Citing Williams v. Taylor, 529 US 362, 120 5Ct1495, 1523 (2000)). The Court employs the same analysis in the successive prosecution context as well. See US v. Dixon, 509 US 688, 696 (1993). Here Petitioner was not convicted under two separate statutes, but twice convicted of violating the same statute. Guidance under these circumstances can be found in US v. Broce, 488 US 563, 570-71 (1989) in which the Court held that a single agreement to commit several crimes constitutes one conspiracy, whereas multiple agreements to commit separate crimes constitute multiple conspiracies. See also Sanabria v. US, 437 US 54, 70 a. 24 (1978) (Blockburger test not applicable when there exists a violation of only one statute).

Petitioner has shown that he was engaged in activities in furtherance of maintaining a scheme to obtain and distribute oxycodone. This scheme involved various doctors and pharmacists. Both the involvement of the same persons as well as changes in the persons involved was necessary from the very beginning of the conspiracy in order to sustain the conspiracy. Similarly, the use of the same doctors and

pharmacies, as well as changes in the doctors and pharmacies, was necessary in order to avoid detection and sustain the conspiracy. See Plaintiff-Appellee's Petition for Rehearing, case no. 17-5377, Sixth Circuit Court of Appeals, at 2-5, also at 6-11. The facts submitted to the Court of Appeals clearly shows one conspiracy rather than two. The evidence, at most, shows only one agreement existed. Even if some conspirators were not members from the inception of the conspiracy, all were nonetheless bound by the acts done in furtherance of the conspiracy. A close examination of the facts of the case leads inexorably to the conclusion that Petitioner was involved in but one conspiracy to distribute oxycodone in violation of 21 USC § 841 (a) (1), 846.

REASONS FOR GRANTING PETITION

Petitioner was charged in two separate federal cases with two separate conspiracies to distribute oxycodone. Where the Government alleged minimal overlap between the participating co-conspirators, Petitioner submitted ample proof showing no separation between the two charged conspiracies. Petitioner argues only one conspiracy can be charged. Because Petitioner was charged with two conspiracies for drug distribution, petitioner's second conviction violates the Double Jeopardy Clause found in Amendment 5 of the US Constitution. In his appeal and petition for rehearing, Petitioner relied on the Sixth Circuit's holding in United States Vs. Sinito, 723 F2d 1250 (6CA 1983) to show only one conspiracy existed during the timeframe connecting the two cases. Sinito relied on the showing of certain specific elements of a conspiracy to determine whether multiple conspiracies existed. Those elements are: Time of the offense conduct, Participating co-conspirators, offences charged, nature of the activity, and locations where acts committed in furtherance of the conspiracy took place. In its initial holding, the Sixth Circuit Court of Appeals found only one element - The offence conduct - weighed in petitioner's favor. In a petition for rehearing, Petitioner argued all of the Sinito elements weighed in favor for finding only one conspiracy took place, and submitted facts sufficient to show the court had mistakenly held otherwise. Petitioner seeks a Writ of Certiorari to review the Circuit Court's holding. The Double Jeopardy Clause affords three district protections to

all criminal defendants. See Jones vs Thomas, 491 US 376, 380-81 (1989). The clause protects against a second prosecution for the same offense following an acquittal, as well as a second prosecution for the same offense following a conviction. ID @ 381. Finally, the Double Jeopardy clause protects against "multiple punishments for the same offense. Id.

Courts considering double jeopardy claims generally apply the "same elements" test in Blockburger vs. US, 284 US 299, 304 (1932). Pursuant to this standard, the relevant inquiry is whether "each provision requires proof of an additional fact which the other does not. Id. If so, there is no double jeopardy violation.

However, because a conspiracy generally requires an overt act in furtherance thereof, and several overt acts may be undertaken in furtherance of a single conspiracy, the same elements test fails to prevent prosecutors from artificially transforming a single conspriacy into several different conspicaies simply by charging certain overt acts in one prosecution and different overt acts in another. See, US vs Sinito, 723 F2d 1250 (6CA 1983).

CONCLUSION

Because it has been shown the Court of Appeals for the Sixth Circuit ignored its previous holdings where Double Jeopardy was at issue, and because the U.S. Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," where Petitioner has sufficiently shown by evidence extant in the record that he was denied this right, this Honorable Court should grant this Petition for Writ of Certiorari to correct the manifest injustice perpetrated in the lower courts.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Freddie B. Kennedy

Freddie Kennedy #17506-032

Date: 12/29/18