No. 18-7878

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN TIMOTHY CANNON — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit US Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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(Phone Number)

QUESTION(S) PRESENTED

WHETHER the interpretation of conspiracy in the Fourth Circuit is overbroad, violating the Due Process Clause of the Fifth Amendment departing from the accepted and usual jurisprudence of conspiracy law.

LIST OF PARTIES

[xx] 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 _____ 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[☒] is unpublished.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 _____ 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[☒] is unpublished.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**:

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[ ] is unpublished.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[ ] is unpublished.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

[xx] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 10, 2018.

[xx] 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: _____, 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. § 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

Fifth Amendment of the US Constitution

21 USC §846

STATEMENT OF THE CASE

In the late 2000's, Petitioner and several of his friends would get together to do drugs. Over the course of several years, he worked construction to support his habit. Eventually, he put together funds with the help of his family to build a sports bar on some property he owned. This would be a bar and reunion space for his family and a space to rent out for other functions.

The person Petitioner bought his drugs from was Antonio "Dollar Bill" Williams. Dollar Bill was part of a conspiracy trafficking large amounts of cocaine through South Carolina. Petitioner would periodically call him up and buy small amounts of cocaine. Initially, Petitioner would buy only a half ounce at a time. This slowly grew over time to several ounces at a time as his own appetite increased and as his friends needed it.

In 2011, Dollar Bill was arrested and indicted as part of a wide-ranging FBI investigation. Wiretaps from that investigation revealed 11 phone calls between Petitioner and Dollar Bill. All of these calls were short, few more than a minute or 2 in length. In all of these conversations, it was Petitioner calling to ask about buying cocaine. There was no discussion of future plans, intentions about reselling the cocaine, or anything else that would indicate any kind of agreement between the two men.

In 2014 Petitioner was arrested and charged with 1 count of conspiracy and 4 counts of using a communication device to facilitate a narcotics offence. The government alleged Petitioner "took over" the conspiracy of Dollar Bill when he had gone to prison. This was belied by the facts presented at trial. Even when questioned about it directly at trial, Dollar Bill evinced no concrete proof of conspiracy, claiming "I reckon he was just selling it."

Petitioner was found guilty of all 5 counts at trial. He was sentenced to an aggregate 224 months incarceration. His Direct Appeal to the Fourth Circuit was denied on July 10, 2018. This petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE PETITION

The Case of Mr. John T. Cannon:

A Story in Three Parts

Part I - A Parable

Once upon a time, in Anytown, USA, lived Kevin. Kevin liked to build houses, but to do so he needed to buy lots of hammers and nails. In the center of Anytown lived Mr. Lowes. He sold hammers and nails to pretty much everyone. In fact, he sold so many hammers and nails that his prices were hard to beat. Kevin went to him regularly for all his hammer and nail needs, sometimes buying just a few to tide himself over, sometimes buying larger bulk quantities to sell himself. Phil, a stockboy who worked for Mr. Lowes, would sometimes deliver hammers and nails to Kevin. Everything seemed great.

But one day, a great calamity occurred and Mr. Lowes disappeared. His business closed and everybody had to find a new supplier of hammers and nails. Kevin located Mr. Sears. Mr. Sears also sold hammers and nails, himself previously buying them from Mr. Lowes. Mr. Sears did not sell as many hammer and nails as Mr. Lowes, nor was he as well known but most people who had bought from Mr. Lowes now bought from Mr. Sears. Phil even managed to get a job with Sears delivering hammers and nails to Kevin just like he had for Mr. Lowes. Everything seemed great.

But one day, the federal government showed up and charged Mr. Sears with conspiring to sell hammers and nails with Mr. Lowes. They said the object of the conspiracy had been the same, involved the same people, overlapped in time and geography, and accused Sears of simply carrying on the conspiracy after the

disappearance of Mr. Lowes. To save their necks, both Kevin and Phil testified that they had bought nails and hammers first from Lowes and later from Sears after the first had gone out of business. The court found a conspiracy had existed and sentenced Sears to a serious jail term. Nothing seemed very great about that.

Part II - The State of Conspiracy Law in the Fourth Circuit

Almost no drug crimes committed today are committed alone. Because of the complex logistics of producing, packaging, transporting, distributing, protecting, and paying for narcotics, numerous people are often needed to make drug distribution viable.

At its most basic, drug conspiracies are a relatively simple concept. The government must prove only three elements: 1) an agreement between two or more persons "to engage in conduct that violate[s] 21 USC §841(a)(1)..., 2) that [the defendant] had knowledge of that conspiracy, and 3) that [the defendant] knowingly and voluntarily participated in the conspiracy." US v. Howard, 773 F.3d 519, 525 (4th Cir, 2014) quoting US v. Mastrapa, 509 F.3d 652, 657 (4th Cir, 2007).

But the gate swings wider than that. The conspiracy may be proved "inferentially and by circumstantial evidence." US v. Hickman, 626 F.3d 756, 763 (4th Cir, 2010). This is allowed because of the common understanding that criminal conspiracies are "clandestine and covert" and there is "frequently...little direct evidence of such an agreement." US v. Burgos, 94 F.3d 849, 857 (4th Cir, 1996). And the courts often consider an amazingly wide breadth of factors under the concept of "circumstantial evidence." "Circumstantial evidence tending to prove a conspiracy may consist of a

defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy." Id, 858. Fact finders are even allowed to infer intent to conspire based on the "regularity and volumes of dealings" even if the defendant engages in "similar large-scale distribution functions in separate localities without specific knowledge of the existence or numbers of such other persons or localities." US v. Burman, 584 F.3d 1354, 1356-7 (4th Cir, 1978).

Indeed, this "lack of knowledge" about other people and localities almost always exposes criminal defendants to significantly more serious culpability than they could ever have imagined. More often than not, multiple smaller conspiracies (i.e. - wholly unrelated, separate groups of people with only tenuous connections) are assumed to be simply smaller parts of a larger, more extensive conspiracy. Courts have attempted to pay lip-service to differentiating between these by claiming "whether a single conspiracy or multiple conspiracies exist depends on the overlap of key actors, methods, and goals." US v. Leavis, 853 F.3d 215, 218 (4th Cir, 1988). But again, the scope of what may be considered is so wide that it is now exceedingly easy for disparate groups to be considered parts of a larger single conspiracy. So long as these groups "had the same objective, had the same goal, same nature, the same geographic spread, the same results, and the same product," they can be considered part of the same conspiracy. US v. Jeffers, 570 F.3d 557, 567 (4th Cir, 2009).

Thus, courts in the Fourth Circuit have steadily chipped away at the requirement that prosecutors must prove any kind of agreement in order to prove the existence of a conspiracy.

The same is now true of the "knowledge" requirement. The Fourth Circuit has held "that one may be a member of a conspiracy without knowing its full

scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence." US v. Banks, 10 F.3d 1044, 1054 (4th Cir, 1993). But yet he will still be liable for actions and drugs sold by other members of the conspiracy that the courts consider "reasonably foreseeable [to that defendant] and in furtherance of the conspiracy." US v. Blackmun, 746 F.3d 137, 141 (4th Cir, 2014).

This idea that actions or amounts must be "reasonably foreseeable" seems like it would be limiting. It is not. Since 1946 an act has been "reasonably foreseeable" when it is the "necessary or natural consequence of the unlawful agreement." Pinkerton v. US, 328 US 640, 648 (1946). This "Pinkerton liability is analogous to aiding-and-abetting liability, insofar as it merely represents an alternative form of vicarious liability." Moya v. US, 2017 US Dist 43903 (MDNC, 3/27/17) quoting Blackmun, supra at 141. This kind of liability throws open the gates as to what a defendant may be held accountable for. See e.g. US v. Hare, 820 F.3d 93, 104-5 (4th Cir, 2016) (government can convict under §924 without proof of actual knowledge as long as it can prove the defendant was engaged in a criminal conspiracy and the gun offense was "reasonably foreseeable").

In addition to chipping away at this "knowledge" requirement, the "voluntariness" of a person's participation is a significantly easy burden to meet. Many defendant's defend against charges of conspiracy by attempting to demonstrate their association with co-defendants was nothing more than a "buyer/seller" relationship, that they never intended to participate in anything beyond the scope of that particular transaction. But the Fourth Circuit is having none of it. That court has decreed that such a defense is available only when a defendant can prove "there [was] no agreement to participate in the drug distribution operation" and "the defendant's participation was limited to

fulfilling and facilitating his own personal drug consumption needs." US v. Leonard, 777 F. Supp. 2d 1025, 1034 (WDVA, 2011).

In other words, it is only the junkie from the alleyway that can separate himself from the clutches of conspiracy. The small-time dealer, the person who buys an amount of drugs from a supplier and then distributes them to others on his own cannot separate himself from the "conspiracy" his supplier was a part of. This smaller street corner dealer, whatever his motivations and however limited his knowledge of his suppliers actions, can now be safely declared a cog in the larger machine of drug distribution. Because of the loosening of the requirements of conspiracy law, this small fish meets the qualifications needed to be considered a part of the whole conspiracy. His goal (distribute drugs) is the same. His product is the same. His geographic location is the same. The results of his sales are the same. So, despite the fact that he is in business for himself, and despite the fact that he knows nothing about the scale, size, or reach of his supplier's business, he can still safely be indicted by the government as a knowing member of the supplier's distribution conspiracy.

Because it is so easy to tie disparate individuals into a conspiracy, it has become correspondingly difficult to ask juries to consider the idea of separate or "multiple" conspiracies. "A multiple conspiracies jury instruction is <u>not</u> required unless the proof at trial demonstrates that [the defendant] was only involved in a separate conspiracy unrelated to the overall conspiracy of the indictment." US v. Parker, 2018 US App. LEXIS 712 (4th Cir, 12/6/17) quoting US v. Nunez, 432 F.3d 573, 578 (4th Cir, 2005) (emphasis in the original). Failure to give that instruction is reversable error only when "the defendant establishes substantial prejudice by showing the evidence of multiple conspiracies was so strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a

cautionary multi-conspiracy instruction." Id, quoting US v. Bartko, 728 F.3d 327, 344 (4th Cir, 2013). But this is an extraordinarily difficult hurdle to clear. As is the case with most appellate law, this bears the hallmarks of the burden shifting that is now commonly employed against defendants. It is the accused, not the government, who must show the error affected "substantial rights" and caused "actual prejudice" (as if there might exist some other kind of ethereal prejudice or "semi-prejudice"). Indeed, Petitioner's research can point to not a single example of when such a reversal has been granted.

The end result of this burden shifting is that prosecutors may now safely expand the basis for conviction to those things not actually charged in the indictment returned by the Grand Jury. Through its presentation of evidence or argument at trial, the government can impermissibly amend the basis for conviction. This is otherwise known as a "fatal variance." See US v. Moore, 810 F.3d 932, 936 (4th Cir, 2016) and US v. Ameyapoh, 2018 US Dist LEXIS 25776 (EDVA, 2/14/18). While this would seem a relatively sound basis for overturning a conviction, the hurdles have (again) been erected incredibly high. The Fourth Circuit requires a defendant to demonstrate that the material variance shows a separate conspiracy that is completely unrelated to the overall conspiracy charged in the indictment. See US v. Kennedy, 32 F.3d 876, 883 (4th Cir, 1994). Given what may be considered to show a single conspiracy, that is a nearly impossible standard to meet. Even if a defendant were able to make such a showing, the Fourth Circuit has held that a reversal of a fatal variance (just like the failure to instruct a jury about multiple conspiracies) is requried only if the variance infringed substantial rights and resulted in actual prejudice. Id. at 883.

Part III - The Case of Mr. Cannon

This matter serves as a perfect example of how this "lowering of the bar" regarding the elements of conspiracy results in a departure from the tenets of justice. Nothing in the record demonstrates the prosecution was required to prove an actual agreement to form a conspiracy. The record completely lacks any evidence that Petitioner had knowledge of the scope of Dollar Bill's conspiracy and never did the prosecution demonstrate anything that proves Petitioner was a voluntary participant in Dollar Bill's drug distribution scheme.

The government acknowledges and Petitioner concedes that he was a buyer of small amounts of cocaine, that "[h]e initially bought half-ounce quantities, but later began purchasing ounces, and, eventually, six to eight ounces a week." (Gov't Response to Appellate Brief, 2/2/18). But this is consistent, not with a conspiracy but, with a man buying small, periodic amounts for him and his friends consumption. At no point was there ever any agreement between Williams and Petitioner beyond buying and selling small amounts of cocaine.

When Williams testified at Petitioner's trial, he identified key elements of the conspiracy that he himself had been involved with. There was Nelson, the stashhouse guy; Holloway, the transporter; Gantt, the bodyman and 'fall guy' should they be apprehended while holding drugs. Where was Petitioner in this hierarchy? Down at the bottom. One of the many people he sold drugs to. This is consistent with both the communication evidence presented at trial and Petitioner's own statements.

During Williams investigation, law enforcement intercepted 11 phone calls between Williams and Petitioner. All were made by Petitioner to Williams for the purpose of purchasing drugs. All calls were exceptionally brief, few lasting more that a minute. There were no discussions as to intent, no alluding

to plans by Petitioner to do anything with the drugs. These were transactions. A seller calling his buyer. The drug world equivalent of passing through a corner Starbucks and buying lattes for the office.

According to the judge's instructions to the jury at trial, "a conspiracy is an agreement or kind of partnership in criminal purposes in which each member becomes a partner of every other member." (Tr. Trans., 777:18-21). The problem becomes the first step of the conspiracy analysis, that "two or more persons directly or indirectly reached an agreement." (Id. at 777: 25, 778:1). The agreement is an essential element of the conspiracy, as it should be. However, here there was no evidence of an agreement, only a sale. At no time does Petitioner agree to or acknowledge intent to further the operation in any way beyond that particular transaction. When Williams was asked what Petitioner was doing with the drugs he bought, he gave an ambiguous, uncertain response:

> Q: Do you know what he [Petitioner] was doing with all the cocaine he was buying from you?
>
> A: I reckon just selling it. (JA-2 at 776)

"Reckon" here does not mean knowing. Dialectically, it means to think or suppose. Because Williams did not know. No agreement existed.

After Williams was arrested, Petitioner was able to secure drugs from a different supplier. He made no arrangements with Williams about taking over the organization. He was never contacted by Williams at any point after his arrest. Petitioner did not step in to 'take over' operations. He simply found a new supplier and continued to help support his habit by selling small amounts to a small circle of friends.

And yet, this was precisely what the appellate court claims happened. It succinctly asserts "the record amply supports [Petitioner's] involvement in a structured conspiracy involving...'Dollar Bill'...and the close associates who

performed roles in Dollar Bill's organization." Appx. p. ___. It further justifies its ruling by stating that "several witnesses testified that [Petitioner] effectively took over Dollar Bill's role in the community as the primary cocaine cupplier to various members of the original conspiracy, using at least one of the same middlemen that Dollar Bill previously employed. But that alone is not proof of conspiracy. It is basic economics.

When any business gets shut down unexpectedly, its customers don't disappear, especially if that business had been particularly successful at the time. Instead, they seek out another business in the same area that can adequately cater to their needs. So when Dollar Bill went to jail, his customers were still around. Because Petitioner was able to find a new source of cocaine afterwards means only that he became the next best place to "get your fix." It belies common sense to claim that this proves conspiracy. In fact, it is nothing more that precisely the same thing done by Wal-Mart, McDonald's, and United Airlines; simply absorb the customers of competitors who go under.

Therefore, it matters not if the goal of Petitioner (supplying himself and his friends with cocaine) seems to fit the "original goal of [Dollar Bill's] conspiracy - catering to the demands of drug users in his specific geographic area." Appx., p. ___. Hence, the ridiculous parable in Part I of this petition. Both Lowes and Sears cater to the needs of the DIY 'fix-it man.' That does not mean the two have entered into a conspiracy together, or that one "steps into the role" of the other if one goes out of business at a certain location. Each is its own entity and even if they occasionally share or trade employees and customers, that alone does not demonstrate they have enetered into any kind of agreement to conspire.

This amply demonstrates how the Fourth Circuit has moved away from the requirements and elements of proving conspiracy. This rationalization that

circumstantial evidence about the overlap of actors, ideas, and products is enough to "prove" conspiracy has effectively moved the law of this circuit out from under the protections of the Due Process Clause of the Fifth Amendment. No longer is it necessary to prove an "overall agreement." Assumption alone is enough. No longer must a prosecutor demonstrate a defendant actually had knowledge about any conspiracy or voluntarily joined and participated in it. All that must now be shown, especially in the Fourth Circuit, is that defendant sold drugs, and did so in the same area as others who sold drugs.

CONCLUSION

The current state of conspiracy law in America, and especially the Fourth Circuit, is broken. The circumstances under which the government has the power to convict an individual of conspiracy is so broad as to be completely unreasonable and outside the bounds set forth by the Due Process clause of the Fifth Amendment.

Even the most low-level and tangential players in the narcotics trade can and often are painted as members of a nefarious and elaborate web of conspiracy, not as the bit players they really are. The small-time drug dealer thus finds himself a participant in La Cosa Nostra. Knowing any of the other players is not required. Agreeing to join this web of conspiracy is no longer necessary. All that is required is a handful of transactions, the desire to sell drugs, and some physical proximity to practically anybody else doing the same.

The courts must stop, step back, and reexamine how conspiracy law has so terribly degenerated. Courts must recognize that sometimes a low-level drug dealer is simply that and nothing more. Drugs are an economy, albeit an illegal one, but an economy nonetheless. As the parable at the beginning of this petition attempts to relate, when one seller goes "out of business", another will simply step-in to fill the void. This is a natural phenomena, not definitive evidence of conspiracy. To be held accountable for such without burdening the prosecution with the requirement for definitive proof of the conspiracy they allege violates the norms of Due Process. This is wrong and now is the time to fix it.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: October 9, 2018

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