No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

DOUGLAS A. DYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

6th Circuit Case No. 17-6174

MARK E. BROWN (TN. BPR #021851)*
Attorney for the Petitioner Douglas A. Dyer appointed under the provisions of the Criminal Justice Act, 18 U.S.C. §3006A
MENEFEE & BROWN, P.C.
9724 Kingston Pike, Ste. 505
Knoxville, Tennessee 37922
Phone: (865) 357-9800
Fax: (865) 357-9810
e-mail: mbrown@menefeebrown.com

*Counsel of Record (CJA)

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Sixth Circuit erred in determining that the United States Supreme Court case of *Kokesh v. SEC*, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017) was narrowly tailored to a specific situation and holding that Petitioner's Double Jeopardy rights had not been violated?

II.

Whether the United States Court of Appeals for the Sixth Circuit erred in determining that the United States Supreme Court case of *Kokesh v. SEC*, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017) did not overrule cases from other Circuit Courts of Appeal and adopted the reasoning of those cases that SEC disgorgement can only be a civil remedy?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14(1)(b), your Petitioner states that the parties to this Petition are:

Petitioner: Douglas A. Dyer

Respondent: United States of America

The Opinion of the United States Court of Appeals for the Sixth Circuit that is the subject of this appeal also addressed the consolidated appeal of co-defendant James A. Brennan. Dyer is not aware of Brennan filing a separate petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, also seeking review of the Sixth Circuit opinion that is the subject of this appeal.

TABLE OF CONTENTS

Appendix – Order Denying Petition for Rehearing En Banc (December 18, 2018)

TABLE OF AUTHORITIES

CASES CITED:

STATUTES CITED:

RULES CITED:

CONSTITUTION CITED:

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term 2019

DOUGLAS A. DYER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

The Petitioner Douglas A. Dyer respectfully requests prays that a Writ of Certiorari issue to review the Judgment and Published Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on November 13, 2018 and an Order denying petition for rehearing *en banc* entered on December 18, 2018.

OPINIONS BELOW

(1) Judgment in a Criminal Case, *United States of America v. Douglas A. Dyer*, Case No. 1:17-cr-00053, United States District Court for the Eastern District of Tennessee, October 4, 2017. (Appendix 1)

(2) Opinion, *United States of America v. Douglas A. Dyer*, No. 17-6174, United States Court of Appeals for the Sixth Circuit, November 13, 2018. (Appendix 2)

(3) Order Denying Petition for Rehearing with Suggestion of Rehearing En Banc, *United States of America v. Douglas A. Dyer,* Court of Appeals for the Sixth Circuit, December 18, 2018. (Appendix 3).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth (6th) Circuit was entered on November 13, 2018 affirming the Petitioner Douglas A. Dyer's sentence of 60 months following his Plea of Guilty to Conspiracy to Commit Offense or To Defraud the United States in violation of 18 U.S.C. §§1343 and 371, Attempt to Evade or Defeat Tax in violation of 26 U.S.C. §7201, and Violation of Court Order in violation of 18 U.S.C. §401(3). A Final Judgment was entered by the United States District Court for the Eastern District of Tennessee on October 4, 2018. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied by an Order entered by the Sixth Circuit Court of Appeals on December 18, 2018.

The United States Court of Appeals for the Sixth (6th) Circuit had jurisdiction over Dyer's appeal pursuant to *28 U.S.C. §1291*, which confers upon United States Court of Appeals jurisdiction from all final decisions of District Courts of the United States.

Jurisdiction of this Court is invoked pursuant to *28 U.S.C. §1254(1)*, which provides that cases in the Courts of Appeal may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party. Jurisdiction is also invoked by United States Supreme Court Rules 10 and 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth (5th) Amendment to the United States Constitution provides in relevant part that "No person shall be….twice put in jeopardy of life or limb." (U.S. CONST, amend V)

STATUTORY PROVISIONS INVOLVED

None are at issue in this case.

STATEMENT OF THE CASE

A.

1. On May 3, 2017 Douglas A. Dyer pled guilty in the United States District Court for the Eastern District of Tennessee to three (3) counts in a four (4) count Information. Dyer was charged in the Information along with Co-Defendant James Brennan. In Count I Dyer was charged with Conspiracy to Commit Wire and Mail Fraud in violation of 18 U.S.C. §§1343 and 1341. The Government alleged several overt acts in support of Count One (1) including: (1) On February 21, 2013 Dyer solicited funds from an investor in Georgia who wired those funds to Tennessee. Dyer was supposed to invest those funds in several companies named Scenic City F-10, I – VIII, but such funds were in fact diverted for personal use; and (2) In or about July 2013, Dyer solicited another investor to wire $25,000 for Scenic City F-10, I – VIII and again those funds were diverted for personal use. (Appendix 2).

Count III charged Dyer with willfully attempting to avoid paying income tax in the amount of Seventy-Five Thousand Nine Hundred Ten Dollars ($75,910.00) for the year 2012; and by intentionally failing to report income that had been embezzled through his Limited Liability Company, Broad Street Ventures, LLC. Count IV charged Dyer with knowingly disobeying an Order entered by the Honorable United States District Court Judge Travis R. McDonough in the civil case of *SEC v. Brennan et al.*, 1:16-cv-00307 which prohibited Dyer from transferring or disposing of any assets under his control. The Government alleged that Dyer transferred assets by disposing of stock in Fision Corporation, post a District Court Injunction issued in a parallel SEC civil action. (Appendix 2).

2. Dyer initially entered into a Plea Agreement on April 12, 2017 but his plea agreement was amended on May 3, 2017. As part of the Plea Agreement, Dyer agreed and

stipulated to certain facts including (1) From 2006 to 2016, Dyer and Brennan owned and managed Broad Street Ventures, LLC with the goal of creating and incorporating eight Tennessee Corporations called Scenic City F-10, I – VIII; (2) Dyer and Brennan induced investors by insuring them that once the Scenic City companies were capitalized, they'd register the common stock with the Securities and Exchange Commission ("SEC"); (3) Dyer and Brennan would then publicly trade Scenic City and would use the company to acquire small private businesses in a process called "reverse merger.", which is not illegal; (4) Dyer and Brennan funneled the funds through a bank account held by Broad Street Ventures, LLC, and then spent them on personal expenses; (5) Dyer and Brennan did not register the common stock with the SEC and did not complete any reverse mergers; and (6) the total loss amount was greater than Three Million Five Hundred Thousand Dollars ($3,500,000.00). (Appendix 2).

Dyer also agreed on the Tax Evasion charge that: (1) he reported embezzled investor funds received through Broad Street Ventures, LLC as Long-Term Capital Gains reducing his personal tax liability; (2) the embezzled funds should have been reported as regular income; (3) he received payments from Broad Street Ventures, LLC which were wholly funded by investor funds and were improperly reported as non-taxable distributions rather than individual guaranteed payments through the partnership; and (4) he evaded the true assessment tax owing on his tax returns from 2010 – 2014. The total amount of additional tax due and owing is Three Hundred Twelve Thousand Seven Hundred Ninety-Nine Dollars ($312,799.00). (Appendix 2).

3. Prior to the criminal case being filed against Dyer and Brennan, the SEC filed a civil action on July 20, 2016. (*SEC v. Brennan, et al.*, Case No. 1:16-cv-00307) also in the United States District Court for the Eastern District of Tennessee. The Civil case was assigned to the same judge presiding over the Criminal Case. The Complaint sought injunctive and other relief.

The SEC charged Dyer and Brennan with three (3) counts of Fraud under various provisions of the Securities and Exchange Act. The allegations were in substance identical to those in the Criminal Information. The SEC alleged (1) Dyer and Brennan began an "offering fraud" in 2018 by soliciting investors in Scenic City F-10, I – VIII; (2) offering documents to investors stated only Eight Hundred Thousand Dollars ($800,000.00) would be raised for the Scenic City Companies; (3) Dyer and Brennan offered and sold over 45 million shares in the eight related companies raising over $5 million from 240 investors; (4) investors were told that their investments would be used to capitalize the Scenic City Companies and that Scenic City would register its common stock with the SEC so that the companies would then be traded publicly and acquire small private businesses in a "reverse merger"; and (5) Dyer and Brennan did not file an SEC Form 10 to register their common stock, made no investments in other businesses and used virtually all of the funds for other purposes including personal expenses. (Appendix 2).

4. Dyer and the SEC entered into a Final Judgment of Permanent Injunction, Officer and Director Bar, and Penny Stock Bar on August 1, 2017. The Final Judgment was the result of a consent signed by Dyer on May 30, 2017 which provided that Dyer agreed to disgorgement of ill-gotten gains, pre-judgment interest and a civil penalty pursuant to the Securities and Exchange Act. Dyer proceeded *pro se* in the SEC case. The Final Judgment provided –

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant shall pay disgorgement of ill-gotten gains, pre-judgment interest thereon, and a civil penalty pursuant to Section 20(d) of the Securities and Exchange Act [15 U.S.C. §78 u(d)(3)]. The Court shall determine the amounts of disgorgement and civil penalty upon motion of the Commission. Prejudgment interest shall be calculated from February 2, 2016, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. §6621(a)(2). In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Final Judgment; (c) solely for the purposes of such motion, the allegations in

> the Complaint shall be accepted as and deemed true by the Court; (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from the appropriate non-parties."

(Appendix 2).

5. On July 26, 2017 the United States Probation Office released Dyer's Pre-Sentence Investigation Report (hereinafter referred to as "PSR"). Dyer's base offense level was Level Six (6) based on the applicable guideline for the underlying offense, U.S.S.G. §2B1.1. Eighteen (18) levels were then added based on a loss/fraud amount in excess of Three Million Five Hundred Thousand Dollars ($3,500.000.00). Two (2) levels were added as the result of a crime involving more than 200 victims; two (2) levels were added based on Dyer's violation of prior Court Order which was the basis for Count IV in the information; and four (4) levels were added as the offense involved a violation of Securities laws, and Dyer was a broker or financial advisor. The sentencing enhancements resulted in an Adjusted Offense Level of Thirty-Two (32) and with a three (3) level reduction for Acceptance of Responsibility, Dyer's Final Offense Level was set at Twenty-Nine (29). (Appendix 2).

Dyer had no criminal history points resulting in a Criminal History Category of I. Based on a Total Offense Level of 29 and a Criminal History Category of I, Dyer's guideline imprisonment range was 87 – 108 months. Counts I and III carried a maximum term of sixty (60) months while the maximum on Count IV was six (6) months. (Appendix 2).

6. Dyer filed objections to the PSR on August 4, 2017. Specifically, Dyer objected to paragraphs 23, 24, 25 and 26 and the loss amount being set in excess of Three Million Five

Hundred Thousand Dollars ($3,500,000.00). On August 25, 2017 Dyer filed an additional objection to the loss amount in Paragraph 23 of the PSR:

> "…Specifically, the Defendant raises an objection to the loss amount in paragraph 23 of the PSR. The Defendant states that the base offense level of six (6) in paragraph 22 is correct; however, any increase of the Specific Offense Characteristics under USSG §2B1.1(b) in paragraph 23 is incorrect in light of the Supreme Court's June decision in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017).
>
> The Defendant asserts that enhancement under USSG §2B1.1(b) is of course punishment and as applied violates the double jeopardy clause to the United States Constitution, Dyer is subject to punishment for this same offense in a civil action: *Securities and Exchange Commission v. Douglas Dyer*, 1:16-cv-00307. Among the penalties Dyer received in the Order of Final Judgment is disgorgement as punishment. The Fifth Amendment to the United States Constitution provides in pertinent part…'No person shall…be subject for the same offense or be twice put in jeopardy of life or limb.'"
>
> ***
>
> "This Court has authority to punish the Defendant for a violation of 18 U.S.C. §371 under USSG §2X1.1 and for a violation of a 18 U.S.C. §1343 under USSG §2B1.1. The base offense level is six (6). USSG §2B1.1(a)(2). The Defendant objects to an 18-level increase pursuant to §2B1.1(b)(1)(J) because this additional punishment attributed to him pursuant to the USSG violates the double jeopardy clause. It is this increased punishment in the PSR, for the same offense that is punished in *Securities and Exchange Commission v. Douglas Dyer*, 1:16-cv-00307, that triggers double jeopardy considerations."

(Appendix 2).

7. Probation filed an Addendum and a Revised PSR on September 19, 2017. In the Addendum probation noted that the financial section of the PSR had been modified and the parties agreed to fraud/loss restitution in the amount of Four Million Nine Hundred Forty-Two Thousand Seventy Dollars and Eighteen Cents ($4,942,070.18). The Revised PSR omitted the enhancement for Dyer acting as a broker or financial advisor.

The Revised PSR set Dyer's base offense level at six (6), and again added an Eighteen (18) level enhancement based on loss amount, the two (2) level enhancement for more than 200 victims,

and two (2) levels for violating a prior court order.[1] With a three (3) level reduction for Acceptance of Responsibility, Dyer's total Offense Level was twenty-five (25) and with a Criminal History Category of I, his total Guideline Imprisonment Range was set at 57 – 71 months. The maximum penalty remained capped at 60 months for Counts I and Three III, and Six Months for Count IV. (Appendix 2).

8. The Court held a Sentencing Hearing on September 29, 2017. The Court heard arguments on the *Kokesh* issue and then rejected Dyer's objection to the Eighteen (18) level enhancement and his assertion that it violates the Fifth Amendment's Double Jeopardy Clause. The Court stated:

> "THE COURT: So on that first objection, I'm going to overrule your objection, I think it's well presented and thoughtful and certainly interesting , but when I read the *Kokesh* decision, I don't - - I don't read them telling me to agree with you. Maybe you - - you win this later, but as the precedent stands now, I don't think you do. I think the opinion just didn't have - - didn't appear to address your double jeopardy argument…
>
> ***
>
> …[B]ut because the guidelines are advisory, and for the other reasons as stated, and for the governing precedent that I have today, I'm going to overrule your objection."

Dyer, through trial counsel, also argued that no relevant conduct should be considered outside of the five (5) year statute of limitations and loss amount should only be calculated based on that same five (5) year look back period. The Court rejected that position as well:

> "THE COURT: Okay. All right on this objection, I'm going to overrule as well. Much as in the prior objection the precedent I have today tells me that conduct may be relevant for the purposes of sentencing even if the statute of limitations on that - - on that conduct has expired. That was made clear in *U.S. v. Pearce*, Sixth Circuit case from 1994, and others. So, your objections are overruled on that."

[1] The four (4) level enhancement was deleted from the Revised PSR.

(Appendix 2).

9. The Court sentenced Dyer to Sixty (60) months on Counts I and III, and three (3) months on Count IV, all to run concurrently. The Court ordered Dyer to pay restitution to victims of Four Million Nine Hundred Forty-Two Thousand Seventy Dollars and Eighteen Cents ($4,942,070.18) and restitution to the IRS of Three Hundred Fifty-Four Thousand Two Hundred Fifty-One Dollars and Fifty-Eight Cents ($354,251.58). (Appendix 2).

B.

1. In his brief to the Sixth (6th) Circuit Court of Appeals, Dyer argued that his sentence of Sixty (60) months must be REVERSED and REMANDED as the sentence was improperly enhanced by 18-levels based on the loss amount suffered by victims, as he had already been punished for that loss amount in a parallel SEC case with a disgorgement order equal to that amount of loss. Under *Kokesh v. SEC*, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017) – where this court unambiguously held that SEC disgorgement is a penalty - the 18-level enhancement violated the 5th Amendment's Double Jeopardy Clause. (Appendix 2).

2. On direct appeal, a three (3) judge panel of the United States Court of Appeals affirmed Dyer's sentence in an opinion dated November 13, 2018. The Court held that SEC disgorgement is not a civil penalty after this Court's *Kokesh* decision. (Appendix 2).

C.

The Petitioner now seeks review by the United States Supreme Court for the following reasons:

1. Pursuant to United States Supreme Court Rule 10, Petitioner submits that the United States Court of Appeals for the Sixth Circuit has decided an important question of Federal law that has not been and should be settled by this Court following its decision in *Kokesh v. SEC*,

137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017). The *Kokesh* decision could not have been clearer that SEC disgorgement is a "penalty" as commonly understood. However, the Sixth Circuit Court of Appeals held that SEC disgorgement is not a "criminal penalty" and this Court should grant review to resolve this important issue to Dyer and other criminal defendants facing both criminal prosecution and a parallel SEC disgorgement case.

2. In affirming the Petitioner's sentence of 60 months, the Sixth Circuit Court of Appeals adopted the reasoning of other Circuit Courts of Appeal and held that (1) SEC disgorgement is labeled as a civil penalty, and (2) under the factors articulated in this Court's decisions in *Ward v. United States*, 448 U.S. 242 (1980) and *Hudson v. United States*, 522 U.S. 93 (1997) SEC disgorgement is not a criminal penalty for Double Jeopardy purposes. Petitioner asserts that this Court should also grant review to determine whether these holdings are still binding precedent after this Court's decision in *Kokesh*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS LEAVES OPEN AN EXTREMELY IMPORTANT QUESTION OF FEDERAL LAW FOLLOWING THE UNITED STATES SUPREME COURT'S DECISION IN *KOKESH V. SEC* THAT IS RELEVANT TO ALL CRIMINAL DEFENDANTS FACING PROSECUTION FOLLOWING AN SEC DISGORGEMENT PENALTY

In its opinion, the Sixth Circuit Court of Appeals held:

> "In *Kokesh*, the Supreme Court held that SEC disgorgement is a penalty subject to the five-year statute of limitations in 28 U.S.C. §2462. *Kokesh*, 137 S. Ct. at 1645. The Court reached this conclusion for three main reasons. First, SEC disgorgement is imposed for a violation of public laws. *Id*. at 1643. Therefore, the remedy is designed to protect the public at large, rather than one individual injured party. *Id*. Second, SEC disgorgement is imposed for punitive purposes; it has a deterrent effect, and since deterrence [is] not [a] legitimate nonpuntive governmental objective[e], disgorgement must be punitive. *Id*. (alterations in original) (citations omitted). Third, disgorgement is not compensatory because courts are not required to distribute the funds to the victims. *Id*. at 1644.

> It is important to recognize what the Court *did* not say in *Kokesh*. The Court did not say that SEC civil disgorgement is a criminal punishment. Nor did it say anything about Double Jeopardy. Defendants ask us to read between the lines in the *Kokesh* opinion. They assert it should be read broadly to mean that every penalty is a punishment, and in turn that every punishment necessarily implicates the Double Jeopardy Clause. This is based on the general language from Kokesh defining penalty as a punishment whether corporal or pecuniary imposed and enforced by the State, for a crime or offen[s]e against its laws. *Id*. at 1642 (alteration in original) (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)). But even if a civil penalty is a punishment, the Double Jeopardy Clause still allows the successive imposition of some sanctions that could…be described as punishment. *Hudson v. United States*, 522 U.S. 93, 98 – 99 (1997) (citation omitted). Rather, only multiple *criminal* punishments are prohibited. *Id*. And apart from a single mention of the word crime, nothing in *Kokesh* suggests that the Court considered SEC disgorgement to be a criminal punishment."

(Appendix 2).

The Sixth Circuit followed the District Court and essentially punted this issue to a higher court. This is the last chance for review, and the perfect opportunity for this Court to review the scope of its 2017 *Kokesh* decision. It is well-settled that the United States Supreme Court considers only the case before it at the time. *Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 615 (2017). *See also, Cities United v. FEC*, 558 U.S. 310, 373 (2010) (holding that the Supreme Court's standard practice is to refrain from addressing constitutional questions except when necessary to rule on the particular claims before the Court).

It is critical to not just this case, but similar and future cases for this Court to determine if its *Kokesh* decision that SEC disgorgement is a penalty applies to factual situations like this case. Dyer asserted that his double jeopardy rights had been violated and neither the District Court nor the Court of Appeals had the desire to actually analyze the language of *Kokesh* and make a decision. Instead, they simply brushed it off by holding that *Kokesh* doesn't permit the sustaining of the Dyer's argument.

In *Kokesh* the Defendant was the owner of two (2) investment-advisor firms and provided investment advice to companies interested in business development. *Kokesh v. SEC*, 137 S. Ct. 1635, 1641, 198 L. Ed. 2d 86 (2018). The SEC filed an action against the Defendant in 2009 alleging that between 1995 and 2000, the Defendant, through his investment firm, misappropriated $34.9 million from several of the companies to which he was providing advice. *Id*. The SEC further alleged that the Defendant filed false and misleading SEC reports and proxy statements. The SEC sought disgorgement among other remedies. *Id.*

The Defendant was found liable for violations of the Investment Company Act of 1940, the Investment Advisors Act of 1940, and the Securities and Exchange Act of 1934. *Id.* The District Court held that the SEC could not collect civil monetary penalties for any actions occurring prior to October 27, 2004, which was the date the SEC filed its Complaint, as those were barred by the applicable Statute of Limitations. *Id*. However, the District Court also held that disgorgement was not a penalty within the meaning of 28 U.S.C. §2462 and ordered the Defendant to pay $34.9 million plus an additional $18.1 million in pre-judgment interest. *Id.*

The Supreme Court reversed and Justice Sotomayor, writing for a unanimous court couldn't have been clearer:

> "A penalty is a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offene(s) against its laws. This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on whether the wrong sought to be addressed is a wrong to the public or a wrong to the individual."

Id. at 1642.

> ***

> "…SEC disgorgement constitutes a penalty within the meaning of §2642. First, SEC disgorgement is imposed by the courts as a consequence for violating…public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual – this is why, for example, a securities

enforcement action may proceed even if victims do not support or are not parties to the prosecution. As the Government concedes, when the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties."

***

"Second, SEC disgorgement is imposed for punitive purposes. In *Texas Gulf* – one of the first cases requiring disgorgement in SEC proceedings – the court emphasized the need to deprive the defendants of their profits in order to…protect the investing public by providing an effective deterrent for future violations, 312 F. Supp. at 92. In the years since, it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that the primary purpose of disgorgement orders is to deter violators of their ill-gotten gains."

Id.

***

"Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence [is] not [a] legitimate nonpunitive governmental objective."

Id.

***

"Finally, in many cases, SEC disgorgement is not compensatory. As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is within the court's discretion to determine how and to whom the money will be distributed. Courts have required disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution. Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury. Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so. When an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation the payment operates as a penalty."

Id. at 1644.

In making its unanimous decision, the Supreme Court specifically rejected the Government's position that SEC disgorgement is not punitive, but remedial in that it lessens the effects of a violation by restoring the *status quo*:

> "As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply return the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation."

Id.

> "And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit."

Id.

> ***

> "In such cases, disgorgement does not simply restore the *status quo*; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial sanction."

Id. at 1645.

> "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also servicing either retributive or deterrent purposes, is punishment, as we have come to understand the term."

Id.

As Dyer argued to both the District Court and the Sixth Circuit Court of Appeals, there can be no question based on the *Kokesh* case that he was punished with a penalty in the form of SEC disgorgement. He was then punished a second time for the same conduct when the District Court imposed an 18 Level Enhancement based on the amount of loss, which took his total offense level not only out of Zone A on the sentencing guidelines where probation is a sentencing option but into Zone D where a prison sentence is required. This is a clear Double Jeopardy violation.

"The Double Jeopardy Clause provides three protections: 1) protection against a second prosecution for the same offense after acquittal; 2) protection against a second prosecution for the same offense after conviction; 3) **protection against multiple punishments for the same offense**." (emphasis added) *United States v. Mask*, 101 F. Supp. 2d 673, 678 (W.D. Tenn. 2000). "The underlying purpose of the Double Jeopardy Clause is to protect the individual from repeated attempts by the government to obtain a conviction or multiple punishments and to prevent the State, with all of its power and resources to subject the person to the embarrassment, expense, and ordeal of repeated attempts to convict as well as preventing the enhanced possibility that even though innocent, the accused may eventually be found guilty." *Id*. "In the context of punishment, the Double Jeopardy Clause prevents the Court, through the use of multiple punishments from exceeding the punishments prescribed by the legislature." *Id.*

Dyer, as well as potential future defendants have a firmly established Fifth (5^{th}) Amendment right to be free from multiple punishments for the same offense. This Court has the opportunity to clarify this issue and the scope of its holding in *Kokesh* and Dyer submits that a Writ of Certiorari must issue in this case.

II. THIS COURT SHOULD UNDERTAKE REVIEW OF THIS CASE TO DETERMINE IF THE PRECEDENT RELIED ON BY THE SIXTH CIRCUIT COURT OF APPEALS FROM OTHER CIRCUIT COURTS OF APPEAL IS STILL CONTROLLING IN LIGHT OF KOKESH

In its Opinion, the Sixth Circuit stated:

> "…Even so, Defendants urge us to apply the two-part test for determining whether a penalty is criminal punishment explained in *Ward v. United States*, 448 U.S. 242 (1980) and *Hudson v. United States*, 522 U.S. 93 (1997). But applying this test reveals that SEC disgorgement is not a criminal punishment. Under that test, we ask first whether the legislature indicated either expressly or impliedly a preference for the punishment to be labeled civil or criminal. *Hudson*, 522 U.S. at 99 (quoting *Ward*, 448 U.S. 248). Second, even if Congress has indicated a preference for a civil penalty, we ask whether the statutory scheme was so punitive either in purpose

> or effect as to negate that intention and transfor[m] what was clearly intended as a civil remedy into a criminal penalty. *Id*. (alteration in original) (citations omitted).
>
> The Court noted that on the first question Congress expressly established a preference for disgorgement to be a civil remedy. On the second question: "…We cannot override congressional intent to establish a civil remedy unless we have the clearest proof that the penalty is criminal in nature. *Hudson*, 522 U.S. at 100 (citation omitted). *Hudson* lists seven factors to consider:
> (1) [w]hether the sanction involves an affirmative disability or restraint;
> (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose.
> *Id*. at 99 – 100 (quoting, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 – 69 (1963) (alteration in original) (internal quotation marks omitted). This list is neither exhaustive or dispositive. *Ward*, 448 U.S. at 249 and the factors apply only to the statute on its face. *Hudson*, 522 U.S. at 100 (citation omitted).
>
> Although this Circuit has not ruled on the issue, at least five other Circuits have determined that SEC disgorgement is not a criminal penalty for Double Jeopardy purposes. The Second Circuit's analysis of the *Hudson* factors and conclusion that disgorgement is not a criminal penalty are persuasive, and we adopt them here. *See, SEC v. Palmisano*, 135 F. 3d 860, 865 – 66 (2d. Cir. 1998). The Second Circuit recognized that disgorgement shares traits common to criminal laws, such as the scienter requirement and deterrent effect. *Id*. at 866. Further, disgorgement applies to conduct that may also be prosecuted criminally. *Id*. However, disgorgement is not an affirmative disability or restraint. *Id*. (citation and internal quotation marks omitted). And there are clear rational purpose[s] for disgorgement other than punishment, including ensuring that defendants do not profit from their illegal acts, encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry. When assessing those factors in the context of Congress's decisions to allow both civil and criminal penalties for securities law violations, there is little indication, and certainly not the clearest proof…that disgorgement…[is a] criminal punishment[.]. *Id*. (quoting, *Hudson*, 522 U.S. at 100)."

(Appendix 2).

The Sixth Circuit then noted in its opinion that the Defendants (Dyer and Brennan) do not dispute the weight of authority from other Circuits, only that *Kokesh* changed the analysis. The Court then stated: "The holding in *Kokesh* is narrow and limited solely to the statute of limitations

in 28 U.S.C. §2462. Nothing serves as the clearest proof we require to transform a civil remedy into a criminal punishment for Double Jeopardy purposes. If anything, *Kokesh* reinforces the long-held understanding SEC disgorgement is civil in nature." (Appendix 2).

The authority that the Sixth Circuit references was cited by the Government in its various filings in the District Court. However, *Kokesh* changes the analysis and the continued viability of those cases is questionable at best, and a further basis for this Court's review of this important legal question.

In *SEC v. Palmisano*, 135 F.3d 860 (2d Cir. 1998), the defendant asserted -unsuccessfully - a similar double jeopardy argument to that presented by Dyer. The Defendant Palmisano worked as an attorney who specialized in bankruptcy law. He also specialized in stealing money. From December 1987 until November 1992, the Defendant operated a fraudulent Ponzi scheme and conned 90 individuals into investing approximately $7.9 million into a scheme where he would purportedly purchase the property of bankrupt or distressed companies, and then sell the property for a profit. Palmisano represented to his investors that they'd receive tax-free returns on their investment of Twenty to thirty percent (20-30%) per year. *Id*. at 863.

Investors did not receive any return much less the percentage represented as Palmisano used investor funds for his personal expenses and used some of the money from later investors to pay earlier investors in the classic "ponzi scheme". In 1994, the United States Attorney's Office filed a 40-Count Indictment, and on the same day the SEC filed a civil action. The Defendant eventually pled guilty to 44 counts of a 45-Count Superseding Indictment, was sentenced to 188 months and ordered to pay restitution of Three Million Seven Hundred Seventy-Nine Thousand Eight Hundred Sixty-Eight Dollars and Forty-Nine Cents ($3,779,868.49). The SEC meanwhile obtained a judgment enjoining the Defendant from future securities violations, disgorgement of

approximately $9.2 million and a Five Hundred Thousand Dollar ($500,000.00) civil penalty. *Id.* at 862 – 863.

On appeal the Defendant argued that his right to be free from double jeopardy had been violated. The Second Circuit rejected that argument. In doing so, the Circuit Court highlighted the fact that under *Hudson v. United States*, multiple sanctions for the same offense violate double jeopardy only if those sanctions are criminal punishments. "[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could in common parlance be described as punishment; rather it protects only against imposition of multiple criminal punishments for the same offense in successive proceedings." *Id.* at 864. The Second Circuit then engaged in the traditional analysis set forth in *Hudson* and considered the seven (7) factors from *Kennedy v. Mendoza-Martinez*. While noting that no single factor is dispositive, the Second Circuit found Congress's intent clearly favors classifying disgorgement and the fines at issue as civil. "The disgorgement remedy, which has long been upheld as within the general equity powers granted to the District Court has not been considered a criminal sanction." *Id. at 865*. That, of course, has changed with *Kokesh* and as the Defendant Dyer's trial counsel pointed out at sentencing it is a "sea change" and thus it is now unambiguously described as a penalty.

Likewise, the Supreme Court's own decision in the 1996 case of *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135 (1996) is called into question. In *Ursery*, the Supreme Court noted that in separate cases, both the Sixth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals held that the Double Jeopardy Clause prohibits the Government from both punishing a defendant for a criminal offense, then forfeiting his property for that same offense in a separate civil proceeding. In overturning those rulings, the Supreme Court noted that civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause. However, the Supreme

Court drew a distinction, which was not applicable in Dyer's case. The Court noted a distinction between *in rem* civil forfeitures and in *personam* civil penalties such as fines: "Though the later could, in some circumstances be punitive, the former could not." "Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." In this case, the penalty assessed against the Defendant Dyer is clearly an "*in-personam*" sanction. It is against Defendant Dyer personally and requires him to personally make payments, rather than subject a certain piece of property to forfeiture. Even under the Supreme Court's *Ursery* opinion, if something is intended as punishment, it implicates the Fifth Amendment's Double Jeopardy Clause. Under *Kokesh*, disgorgement is clearly punishment.

Likewise, in *United States v. Gartner*, 93 F.3d 633, 634 (9th Cir. 1996), the Ninth Circuit Court of Appeals stated that "*in – rem* civil forfeitures…do not constitute punishment for the purposes of the Double Jeopardy Clause." The *Gartner* court held that an administrative forfeiture by the United States Postal Service is not punishment for the purposes of Double Jeopardy. But, "the Double Jeopardy Clause does…apply to civil penalties if they are so extreme and so divorced from the Government's damages and expenses as to constitute punishment." "A civil penalty that bears no rational relationship to actual damages may not fairly be characterized as remedial, but only as a deterrence or retribution and thus constitutes punishment for double jeopardy purposes."

Notably, the *Gartner* Court stated that a disgorgement in an SEC proceeding is not a fine levied against the petitioner as punishment for his conduct. "The purpose of disgorgement is to deprive a person of ill-gotten gains and prevent unjust enrichment." *Id*.

Kokesh has unambiguously held that SEC disgorgement is punishment. And, more significantly is that *Gartner* held that the 1993 SEC judgment had a rational relationship to the Government's actual damages and costs. In this case, there was no such finding by the District

Court. Funds from an SEC disgorgement are not automatically given to victims, but instead may be retained by the Government.

In the Eight Circuit case of *United States v. Perry*, 152 F.3d 900 (8th Cir. 1998), the Defendant Perry appealed an order from the District Court which, in part, held him liable for disgorgement of Three Hundred Forty-Seven Thousand One Hundred Seventeen Dollars and Six Cents ($347,117.06). The Defendant, on appeal, contended that the order was punitive, and argued that his subsequent criminal conviction was a violation of the Double Jeopardy Clause. The court rejected the Defendant's view and held that SEC disgorgement remedies are not criminal punishments. This holding was prior to the *Kokesh* decision.

And, the United States Court of Appeals for the District of Columbia reached a similar pre-*Kokesh* decision in the case of *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir 1994). In *Bilzerian*, prior to an SEC civil action, the Defendant was convicted in the District Court on violations of federal securities laws. The Defendant was sentenced to 4 years in prison and fined $1.5 million.

The criminal charges were then used as the basis of an SEC case, in which the Defendant was ordered to disgorge all ill-gotten gains. On appeal, the Defendant argued that the disgorgement order violated the Double Jeopardy Clause because it punished him for the same conduct that led to his criminal convictions. In denying the Defendant's appeal, the Court of Appeals noted "imprisonment resulting from his convictions unquestionably constitutes punishment so that the only issue is whether the disgorgement order constitutes renewed punishment for the same conduct." The Court held that it did not.

This Court's *Kokesh* decision changed the playing field. SEC disgorgement is now clearly punishment and thus any reliance by the Government and adoption by the Sixth (6th) Circuit on this authority is misplaced and the sentence handed to Defendant Dyer based on the same loss

amount and punishment, violates his right to be free from Double Jeopardy under the Fifth Amendment. Given the state of the law, the Petitioner asserts that review of the scope of *Kokesh* is critical and respectfully requests this Court grant a Writ of Certiorari.

CONCLUSION

As this case implicates the critical application of this Court's precedent in *Kokesh v. SEC*, to Dyer and all current future Defendants facing a criminal prosecution and an SEC civil case, the Petitioner respectfully requests that this Court grant a Writ of Certiorari

Respectfully submitted this 15th day of March 2019.

/s/ Mark E. Brown
Mark E. Brown (TN. BPR #021851)
MENEFEE & BROWN, P.C.
9724 Kingston Pike, Ste. 505
Knoxville, Tennessee 37922
Phone: (865) 357-9800
Fax: (865) 357-9810
e-mail: mbrown@menefeebrown.com

Attorney for the Petitioner Douglas A. Dyer, appointed pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. §3006A

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2019 a true and exact copy of this document has been filed via this Court's electronic filing system and served on the OFFICE OF THE SOLICITOR GENERAL, DEPARTMENT OF JUSTICE, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 by placing the same in the United States Mail, first class postage pre-paid.

/s/ Mark E. Brown
Mark E. Brown