No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

JEFFREY BENTON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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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Issues/Questions Presented

1. Whether in light of *Class v. United States,* 138 S.Ct. 798 (2018), a defendant who enters an unconditional guilty plea and waives appeal, yet wishes to raise a double jeopardy argument on direct appeal, is still prohibited from doing so unless the two indictments at issue are facially duplicative.

2. In determining whether or not a defendant who has pled guilty can raise a double jeopardy challenge on direct appeal, does "face of the record," as that phrase is used in *United States v. Broce*, 488 U.S. 563 (1989), refer only to the indictments?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Benton ("Benton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming Benton's convictions and sentences is styled: *United States v. Jeffrey Benton,* ___ Fed. Appx. ___, 2019 U.S. App. LEXIS 6909 (2d Cir. March 8, 2019).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit, affirming the Petitioner's conviction and sentence was announced on March 8, 2019 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision

U.S. Const. amend. V. cl. 2

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"

Statement of the Case

Benton argued on appeal, *inter alia*, that his Count One conviction in Case No. 3:16-cr-171 (which began in Maine and was transferred to Connecticut) was jeopardy barred in that it charged the same conspiracy for which Benton was previously convicted and sentenced in Case No. 3:12-cr-104 in the U.S. District Court for the District of Connecticut.

First Connecticut case (No. 3:12-cr-104)

Benton was arrested pursuant to a federal arrest warrant on May 17, 2012. No. 1:15-cr-40, Doc. #249-1, pgs. 8-9, #249-3, pg. 30; No. 3:15-cr-174, Doc. #344, pg. 24. Items recovered from the apartment in which he was staying at the time included: a digital scale, one gram of crack cocaine, 100 grams of powder cocaine, four handguns, and ammunition. No. 1:15-cr-40, Doc. #249-1, pg. 11, #249-4, pgs. 28-29, #249-7, pgs. 3-5, 8-10.

Benton was indicted on May 15, 2012, in Case No. 3:12-cr-104 in the District of Connecticut and charged, along with forty-three other individuals, with conspiring to possess with intent to distribute heroin, cocaine, and cocaine base "from approximately January 2011 through

approximately January 2012." App. 37-47. On August 30, 2013, Benton plead guilty, pursuant to a plea agreement, to Count One only of a superseding indictment (filed July 17, 2013), which also alleged a drug conspiracy, but only specifically named Benton in connection with heroin. App. 48-59. It should be noted as to the counts of the superseding indictment, the Government agreed to dismiss as part of the agreement, Count Six which charged Benton with possession with intent to distribute cocaine and cocaine base (which the district court noted on the record at Benton's change of plea hearing[1]), Counts Seven and Eight charged him with being a felon in possession of a firearm[2] (alleging four specific firearms) and ammunition, and Count Nine charged him with possession of firearms in furtherance of a drug-trafficking crime. App. 48-59. The plea agreement also provided:

> The defendant's guilty plea, if accepted by the Court, will satisfy the federal liability of the defendant in the District of Connecticut as a result of his participation in the offense charged *in the Indictment and the Superseding Indictment.*

[1] Case No. 3:15-cr-174, Doc. #262-1, pgs. 4-5.

[2] The plea agreement included a stipulation that Benton had a firearm in connection with the offense. Case No. 3:15-cr-174, Doc. #243-6.

No. 3:15-cr-174, Doc. #243-5, pg. 7.

The factual basis proffered by the Government in support of Benton's plea made specific reference to "firearms, drugs, drug paraphernalia that were seized at the time of his arrest or . . . purchased or seized during the course of the underlying investigation[.]" The Government also proffered: "Through all that evidence, the government would prove that within the time period of approximately January 2011 to approximately January of 2012, the defendant . . . participated in a conspiracy to distribute and to possess with intent to distribute controlled *substances*." App. 60-63.

On November 21, 2014, the district court sentenced Benton to 108 months in prison in Case No. 3:12-cr-104. No. 1:15-cr-40, Doc. #249-9, pg. 1, #249-10, pg. 39.

Maine case (1:15-cr-40) – transferred to Connecticut (3:16-cr-71)

Benton was indicted on February 20, 2015, in the United States Court for the District of Maine in Case No. 1:15-cr-40, and charged with participating in a cocaine base distribution conspiracy, in violation of 21

U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846 (Count One), and a conspiracy to obtain firearms by making false statements and representations, in violation of 18 U.S.C. § 922(a)(5) (Count Three). App. 28-36. On March 23, 2016, Benton requested that the Maine case be transferred to the District of Connecticut, arguing (among other things) that "the District of Connecticut will present the same evidence [in the second Connecticut case] that would be required of the Government in the District of Maine." Case No. 1:15-cr-40, Doc. #403. On March 24, 2016, the motion was granted and the case was transferred and given a Connecticut case number of 3:16-cr-71. No. 3:16-cr-71, Doc. #1-2.

Second Connecticut case (3:15-cr-174)

On September 30, 2015, Benton was indicted in Case No. 3:15-cr-174 in the United States Court for the District of Connecticut and charged with engaging in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (Count One), as well as various substantive racketeering violations that included conspiracy (Count Two), money laundering (Counts 13-22), and murder (Counts Three, Four, Five,

Seven, Ten). Benton was also charged with using a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c) and 924(j)(1) (Count Twenty-Three). No. 3:15-cr-174, Doc. #1.

On March 17, 2017, Benton plead guilty, pursuant to a plea agreement, to three counts: Counts One and Thirteen in Case No. 3:15-cr-174, and Count One in Case No. 3:16-cr-71. No. 3:16-cr-71, Doc #40, pgs. 1-3. The agreement called for the Government to dismiss the remaining counts in both cases at sentencing "because the conduct underlying those counts has been considered as relevant conduct in determining the guideline range in this plea agreement." No. 3:16-cr-71, Doc #40, pg. 11. The plea agreement also included the following waiver of appeal provision:

> The defendant agrees not to appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U,S,C. § 2255 and/or§ 2241, the conviction or sentence imposed by the Court if that sentence does not exceed 480 months' imprisonment, a five-year term of supervised release, and a fine of $250,000, even if the Court imposes such a sentence based on an analysis different from that specified above. . . . The Government and the defendant agree not to appeal or collaterally attack the Court's imposition of a sentence of imprisonment concurrently or consecutively, in whole or in part, with any other sentence, The defendant also agrees not to appeal or collaterally attack the Court's decision

> on whether he should receive credit toward this sentence back to the date of his arrest in the 3:12cr104 . . . case.

No. 3:16-cr-71, Doc #40, pg. 8.

On October 4, 2017, the district court imposed 480 month sentences in 3:16-cr-71 (Count One) and 3:15-cr-174 (Count One), and a 240-month sentence in 3:15-cr-174 (Count Thirteen), to be served concurrently, but the court ordered these three sentences to be consecutive to Benton's 108-month sentence in 3:12-cr-104. App. 115-16, 121-22; No. 3:16-cr-71, Doc. 60.

Benton also argued on appeal that his waiver of appeal did not prevent him from raising a double jeopardy challenge, citing (among other authorities) *Menna v. New York,* 423 U.S. 61, 62 (1975), as well as the Advisory Committee notes to Rule 12.[3]

In the context of successive conspiracy prosecutions, the Second Circuit applies the following factors to determine whether the

[3] The Advisory Committee notes to Rule 12 of the Federal Rules of Criminal Procedure state that a defendant does not waive a former jeopardy argument by failing to raise the issue in a pretrial motion. Fed. R. Crim. P. 12 Advisory Committee Note (1944 Adoption) (Note to Subdivision (b)(1) and (2)).

conspiracies are distinct: (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies. *United States v. Korfant,* 771 F.2d 660, 662 (2d Cir. 1985). In analyzing the relevant considerations, a reviewing court may review "the entire record of the proceedings." *United States v. Olmeda,* 461 F.3d 271, 282 (2d Cir. 2006). Benton's analysis of these factors was as follows.

The criminal offenses charged in successive indictments

Benton's initial indictment in Case No. 3:12-cr-104 in the District of Connecticut alleged a conspiracy to possess with intent to distribute heroin, cocaine, and cocaine base. App. 39-40. The superseding indictment in that cause alleged the same substances. App. 49-52. Cause No. 1:15-cr-40 in the District of Maine alleged a conspiracy to possess with intent to distribute cocaine base. App. 29-31. Thus, both indictments alleged cocaine base.

Benton's plea agreement in 3:12-cr-104 stated: "Jeffrey Benton agrees to plead guilty to Count One of the Superseding Indictment." No. 3:15-cr-174, Doc. #243-5, pg. 1. Although this count specifically connects Benton with only heroin, the count also alleges that members of the conspiracy knew or reasonably should have foreseen cocaine and cocaine base conduct. App. 49-52. Additionally, the Government proffered a factual basis in 3:12-cr-104 that specifically mentioned not just heroin but also cocaine and firearms, to-wit:

> Had this case proceeded to trial, the government would prove . . . *such as firearms, drugs*, drug paraphernalia that were seized at the time of his arrest or during purchased or seized during the course of the underlying investigation[.]Through all that evidence, the government would prove that *within the time period of approximately January 2011 to approximately January of 2012*, the defendant . . . participated in a conspiracy to distribute and to possess with intent to distribute *controlled substances.* Specifically, that he entered into an agreement with Kevin Wilson and others to distribute and to possess with intent to distribute heroin. Moreover, that during the course of his drug trafficking offenses, *the defendant possessed a dangerous weapon, that* ***is,*** *a firearm.*
>
> As this Court is aware for the suppression hearing that was held in this matter, at the time of the defendant's arrest, *law enforcement officers recovered four firearms, just over 100 grams of cocaine, about one gram of cocaine base, one digital scale, several sandwich bags, and approximately $5,536 in United States currency from the bedroom,* and the bedroom

> closet in which the defendant was located at the time of his apprehension.

App. 35-43.

The overlap of participants

Benton is the only named individual common to the conspiracy counts in No. 3:12-cr-104 and No. 1:15-cr-40. App. 29-30, 38-39. However, both counts also include the phrase "conspired with each other and others known and unknown." The decision as to which individuals to name in a conspiracy count is simply a product of prosecutorial discretion and may not in any way be dispositive as to the identities of all the actual participants. *See United States v. Mallah,* 503 F.2d 971, 982-83 (2d Cir. 1974). The PSR describes some of the participants thusly:

> Keith Young and Anthony Hartsell brought RSGB from New York to New Haven after the two men had been fellow gang members in a different Bloods set. Young recruited a number of individuals into the gang, including Robert Short and Trevor Murphy. Jeffrey Benton recruited Luis Padilla and Torrence Benton[.]

PSR ¶ 16.

> Following the Lee murder, [Rodrigo] Ramirez went to Maine as directed by Jeffrey Benton and began working with [Jermaine] Mitchell. Ramirez would obtain crack from

> Mitchell (that Mitchell had obtained from Benton), and he would distribute it through his dealers in the Bangor area, including Christie Thetonia, Akeen Ocean, Jeremy Ingersoll, Jeremy Hunter, and others.

PSR ¶ 22.

> Jeffrey Benton sent other RSGB members to Maine to sell drugs with Mitchell, including Willie Garvin, Kavon Rogers, Torrence Benton, Luis Padilla and Christian Turner[.]

PSR ¶ 22.

> During the investigation Kevin Wilson was identified as a principal source of narcotics for the Bloods[.]

PSR ¶ 146. Jermaine Mitchell, Akeen Ocean, Jeremy Ingersoll, Willie Garvin, Torrence Benton, Christian Turner were all named co-conspirators in No. 1:15-cr-40. Kevin Wilson was a named co-conspirator in No. 3:12-cr-104. Short, Murphy, Ramirez, Hunter, Rogers and Padilla were not named in either of these indictments. And yet, the PSR makes it clear that all of these individuals were participants in the same overarching operation.

The overlap of time

Benton's initial indictment in Case No. 3:12-cr-104 in the District of Connecticut alleged a conspiracy with a time frame of "from approximately January 2011 through approximately January 2012." App. 39. The superseding indictment alleged the same time frame. App. 49. Count One of the indictment in Case No. 1:15-cr-40 (later 3:16-cr-71 in the District of Connecticut) in the District of Maine alleged a time frame "not later than January 1, 2010, and continuing until a date unknown, but no earlier than August 30, 2013." App. 29-30. However, the PSR mentions Benton's first involvement as being in late 2010. PSR ¶ 16. And Benton has remained in custody since the date of his arrest, May, 17, 2012. PSR ¶ 146. Therefore, as to Benton, the time frames in 3:12-cr-104 and 1:15-cr-40 were nearly identical.

The similarity of operation/ degree of interdependence between alleged distinct conspiracies/ Common objectives

The "operations" as to 3:12-cr-104 and 1:15-cr-40 were not merely similar; they were essentially the same operation. In fact, the PSR is

replete with evidence of the intertwined nature of the operations in Maine and Connecticut. For example:

> The RSGB [Red Side Guerilla Brims] became powerful in New Haven in and around 2011, when several members and associates, who were led by Jeffrey Benton, began traveling to Bangor, Maine and its surrounding communities. Soon after arriving in Bangor, members discovered that there was a significant profit margin on narcotics sales. They decided to bring narcotics up from New Haven. They began selling crack cocaine and heroin, and would often trade narcotics for firearms. The members would then bring those firearms back to New Haven and distribute them to members of the gang, resulting in a well-funded and well-armed organization.

PSR ¶ 19.

> Jeffrey Benton and Mitchell had a thriving drug business in the Bangor area. Mr. Benton supplied the drugs from New Haven, and Mitchell coordinated their sale in the Bangor area. After taking their respective shares of the profits, Jeffrey Benton and Mitchell used the drug proceeds to replenish the gang's "kitty" - which was a cash fund used to purchase drugs and guns and to bail RSGB members out of jail.

PSR ¶ 21.

> Following the Lee murder, Ramirez went to Maine as directed by Jeffrey Benton and began working with Mitchell. Ramirez would obtain crack from Mitchell (that Mitchell had obtained from Benton), and he would distribute it through his dealers in the Bangor area, including Christie Thetonia, Akeen Ocean, Jeremy Ingersoll, Jeremy Hunter, and others. He was responsible for collecting proceeds from his dealers and paying the money to Mitchell, who would then pay the money

> to Jeffrey Benton. Mr. Benton obtained his cocaine in powder form in New Haven and converted it into crack cocaine himself. Though he did sell crack cocaine to associates and fellow gang members in New Haven, he transported most of it to Bangor for sale at a huge profit.

PSR ¶ 22.

The following statements appear under the "Manner and Means of the Conspiracy" alleged in No. 1:15-cr-40:

> It was part of the conspiracy that certain of the defendants caused other conspirators (hereinafter collectively referred to as "straw purchasers") to obtain firearms at pawnshops in Brewer and Bangor operating with federal firearms licenses. . . . [T]he straw purchasers were compensated with currency and controlled substances for engaging in the transaction. . . . [D]efendants Turner and Garvin and the other coconspirators transported the firearms so obtained from the State of Maine to the State of Connecticut where they would be provided to defendant Jeffrey Benton and others.

App. 32-33.

The geographic scope of the alleged conspiracies

Case No. 3:12-cr-104 alleges "in the District of Connecticut and elsewhere." App. 39. Case No. 1:15-cr-40 alleges "in the District of Maine and elsewhere." App. 29. Benton's plea agreement states: "The

government also agrees that the defendant's conduct underlying the *charges in the Connecticut and Maine* indictments ended with his federal arrest on May 17, 2012[.]" No. 3:16-cr-71, Doc #40. Additionally, the following exchange from a March 8, 2017 pre-trial hearing makes it clear that the Government's theory of prosecution involved only events in Maine and Connecticut:

> District Court: I'm only asking you about the conspiracy to distribute drugs. In the original indictment in 2012, it says from approximately January to approximately January 12 . . . in the District of Connecticut and elsewhere. So why isn't that the same conspiracy as in the current indictment alleged as a racketeering act but also alleged as a conspiracy in the District of Connecticut and the District of Maine and elsewhere. Where I think the District of Maine is elsewhere. These two defendants along with others, intentionally and knowingly combined and conspired to distribute drugs.
>
> AUSA: The 2012 indictment[,] the conspiracy charges involve Benton, a number of other individuals not part of Redside, who are distributing crack and other drugs in New Haven. *I know it says elsewhere*, but the conspiracy that the Government charges in this current case involves gang activity, it's conspiracy to distribute drugs and conspiracy to commit money laundering so it's tied to the money laundering of the drug profits *from Maine back to Connecticut.*

App. 128.

Benton's argument to the Second Circuit obviously relied not only on the indictments but also on (1) other documents filed of record, (2) open court exchanges, and (3) the PSR. However, the Second Circuit held

that because Benton waived appeal, the Court could not look beyond the face of the indictments in addressing his double jeopardy argument:

> Benton first argues that the drug conspiracy charge to which he pled guilty is jeopardy-barred as it punishes the same conduct to which he previously pled guilty in 2012. . . . Although a "double jeopardy claim may be asserted on appeal notwithstanding the plea of guilty," *United States v. Sykes*, 697 F.2d 87, 89 (2d Cir. 1983) (citing *Menna v. New York*, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975)), we have determined that this exception to the waiver rule applies only "when a double jeopardy claim is so apparent either on the *face of the indictment* or on the record existing at the time of the plea that the presiding judge should have noticed it and rejected the defendant's offer to plead guilty to both charges." *United States v. Kurti*, 427 F.3d 159, 162 (2d Cir. 2005); *see also United States v. Broce*, 488 U.S. 563, 574-75, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). (emphasis added)
>
> Even assuming *arguendo* that Benton's appeal waiver does not foreclose him from pressing the instant claim on appeal, we agree with the government that Benton's case does not fall within either of the exceptions to the rule that "a defendant who pleads guilty to two counts with *facial allegations* of distinct offenses concede[s] that he has committed two separate crimes." *Broce*, 488 U.S. at 570. *The indictments are far from facially duplicative*: the indictment for the 2012 case described Benton as a participant in a heroin conspiracy in New Haven, while the more recent indictment described Benton's part in a conspiracy distributing cocaine base and gun-running between Maine and Connecticut. The only overlap between the 2012 case and the instant case is temporal. When entering his guilty plea, Benton was advised that all his pending motions—including his double jeopardy motion—would be denied as moot. Benton responded that he

> understood that his pending motions would be denied as moot and that he would not receive a ruling. We thus conclude that "the narrow exception to the waiver rule does not apply in this case" and that the judgment of conviction should be affirmed. *Kurti*, 427 F.3d at 162. (emphasis added)

Benton, 2019 U.S. App. LEXIS 6909, at *2-4.

First Reason for Granting the Writ: The Second Circuit's holding that when a defendant waives appeal, a reviewing court cannot look past the face of the indictment in addressing a double jeopardy challenge, appears to be at odds with *Class v. United States,* 138 S.Ct. 798 (2018).

A Supreme Court consideration in granting a petition for writ of certiorari includes when "a United States court of appeals has . . . decided an important federal question that conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10(c). In *United States v. Class,* wherein the defendant pled guilty to possession of a firearm on Capitol grounds, his plea agreement "included an explicit waiver of appeal rights as to sentencing errors and collateral attacks on the conviction[.]" 2016 U.S. App. LEXIS 12620, at *4 (D.C. Cir. 2016). He appealed nonetheless, raising three constitutional arguments. The D.C. Circuit dismissed the

appeal on the basis that unconditional guilty pleas waived claims of error on appeal, "even constitutional claims." *Id.* at *3. The U.S. Supreme Court granted cert., and while countenancing the waiver of appeal language, noted "the agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional." *Class*, 138 S. Ct. at 802. While the main holding in *Class* was that an unconditional guilty plea does not waive the right to raise a constitutional argument on appeal, the Court also addressed the waiver of appeal language in the defendant's plea agreement:

> [T]he Government argues that Class "expressly waived" his right to appeal his constitutional claim. . . . The Government concedes that the written plea agreement, which sets forth the "Complete Agreement" between Class and the Government . . . does not contain this waiver. . . Rather, the Government relies on the fact that during the Rule 11 plea colloquy, the District Court Judge stated that, under the written plea agreement, Class was "giving up [his] right to appeal [his] conviction." . . . And Class agreed. We do not see why the District Court Judge's statement should bar Class' constitutional claims. *It was made to ensure Class understood "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." . . . It does not expressly refer to a waiver of the appeal right here at issue.* And if it is interpreted as expressly including that appeal right, it was wrong, as the Government acknowledged at oral argument. . . . these circumstances, Class' acquiescence

> neither expressly nor implicitly waived his right to appeal his constitutional claims. (emphasis added)

Id. at 806-07.

Petitioner Benton, unlike the defendant in *Class*, did not challenge the constitutionality of the statutes under which he was convicted. But *Class* specifically mentions double jeopardy challenges and language from the opinion appears to suggest, not only that these challenges may be raised on appeal notwithstanding a waiver of appeal, but also that the entire record may be consulted in determining whether a double jeopardy violation has taken place:

> [A] defendant's (internal quotation marks and brackets omitted) plea of guilty did not . . . waive his previous constitutional claim.

Class 138 S. Ct. at 804.

> [T]he claims at issue here . . . call into question the Government's power to "constitutionally prosecute" him. . . . A guilty plea does not bar a direct appeal in these circumstances.

Class 138 S. Ct. at 805.

> Class' challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he seeks to raise a

> claim which, "judged on its face" *based on the existing record*, would extinguish the government's power to "constitutionally prosecute" the defendant if the claim were successful. (emphasis added)

Class 138 S. Ct. at 805-06.

Benton's situation appears to come within the purview of these statements. His double jeopardy claim is a challenge to the Government's power to constitutionally prosecute him. And based on the existing record – assuming the existing record includes filed pleadings, open court proceedings and the PSR – Benton has established, using the five Second Circuit factors, that his Count One conviction in Case No. 3:16-cr-171 was based on the same conspiratorial agreement for which he was previously convicted and sentenced in Case No. 3:12-cr-104.

Second Reason for Granting the Writ: This Court needs to specifically address whether *United States v. Broce*, 488 U.S. 563 (1989) stands for the proposition that when a defendant enters an unconditional guilty plea and then raises a double jeopardy challenge, the indictments alone constitute "the face of the record" for determining the merits of such a challenge.

The Second Circuit's opinion in the instant case relies heavily on *Broce* in declining to look past the indictments in determining whether the face of the record established a double jeopardy violation:

> "[A] defendant who pleads guilty to two counts with *facial allegations* of distinct offenses concede[s] that he has committed two separate crimes." *Broce*, 488 U.S. at 570. *The indictments are far from facially duplicative*: the indictment for the 2012 case described Benton as a participant in a heroin conspiracy in New Haven, while the more recent indictment described Benton's part in a conspiracy distributing cocaine base and gun-running between Maine and Connecticut. The only overlap between the 2012 case and the instant case is temporal.

Benton, 2019 U.S. App. LEXIS 6909, at *3.

The defendants in *Broce* were charged in separate indictments with bid rigging on separate highway projects. *Broce,* 488 U.S. at 565. They pled guilty to both indictments at the same time, acknowledging in their plea agreements "that they were subject to separate sentences on each conspiracy charged." *Id.* at 565-66. Neither defendant appealed. *Id.* at 566. However, after noting that another contractor ("Beachner") had gone to trial and been acquitted on the same sort of charge, and then obtained a dismissal of a subsequent indictment on double jeopardy grounds, the *Broce* defendants decided to try the same argument by way

of collateral attack, a Rule 35(a) motion to vacate, filed in the district court. The parties stipulated that the transcript from the evidentiary hearing in *Beachner* was to be incorporated into the record,[4] a fact of paramount importance. The district court denied the motion to vacate, distinguishing the cases as follows:

> Judge Saffels' finding of a single conspiracy in Beachner . . . was a factual determination made in light of the evidence *produced at an evidentiary hearing* in that particular case. It is well settled that the question whether a single conspiracy or multiple conspiracies exist is a question of fact. . . . Accordingly, we do not believe that at this late date the defendants should be permitted to take advantage of a factual determination *that is inconsistent with the facts the defendants admitted in pleading guilty to the indictments alleging two separate conspiracies.* (emphasis added)

United States v. Broce Constr. Co., 1983 U.S. Dist. LEXIS 11536, at *16-17 (D. Kan. 1983). The Tenth Circuit, sitting en banc, reversed, but in so doing, relied heavily on the *Beachner* evidentiary hearing transcript:

> [T]he stipulation to include consideration of the *Beachner* transcript presents a unique case and permits inquiry behind the indictment. Having conceded the applicability of the facts developed in that hearing, *the government is not in the position to argue our examination of the issue must be confined to the pleadings.*
> . . .

[4] *United States v. Broce,* 781 F.2d 792, 797 (10th Cir. 1986).

> We now have before us a case which is factually linked to another in which we have already found testimony that established a "continuous, cooperative effort among Kansas asphalt contractors to rig bids" for "more than twenty-five years." . . . Moreover, that testimony established the existence of a "common method" of bid-rigging that was "well-known" and open among all the contractors. . . . We found evidence that "mutual and interdependent obligations were created between participating contractors" and that "the bid-rigging scheme was self-perpetuating in nature." . . . We then added: "The evidence showed that asphalt contractors in Kansas understood for over twenty-five years that the ability to rig bids was available using the aforementioned method. There was, therefore, no lack of conspiratorial agreement in this case." []
>
> When the two indictments are viewed in this factual matrix, a significant question arises whether, under the unique circumstances of this case, the defendants stood charged with participation in only one long-standing conspiracy.

United States v. Broce, 781 F.2d 792, 797 (10th Cir. 1986). The Tenth Circuit held that a guilty plea did not bar a double jeopardy challenge and remanded the case back to the district court "for a factual determination on only the evidence originally presented upon the filing of the defendants' motions, including the stipulation between the parties." *Id.* at 798.

The Government's cert. petition to the Supreme Court *did not* seek review of the determination that the bid-rigging in the two indictments was part of one overall conspiracy. *Broce,* 488 U.S. at 569. The Government instead challenged the Tenth Court's holding that the defendants were *entitled to a factual determination* of their one-conspiracy claim, given that they had entered guilty pleas. *Id.* The Supreme Court held the defendants were not entitled to draw on factual evidence outside the original record in order to *collaterally attack* their convictions. The following quotes are instructive.

> When respondents pleaded guilty to two charges of conspiracy on the explicit premise of two agreements which *started at different times and embraced separate objectives*, they conceded guilt to two separate offenses. (emphasis added)

Broce, 488 U.S. at 571.

> Respondents had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding. They chose not to, and hence relinquished that entitlement.

Id.

> An exception to the rule barring collateral attack on a guilty plea was established by our decisions in *Blackledge* v. *Perry*,

> 417 U.S. 21 (1974), and *Menna* v. *New York*[.] . . . In neither *Blackledge* nor *Menna* did the defendants *seek further proceedings at which to expand the record with new evidence*. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered *on the basis of the existing record*. Both *Blackledge* and *Menna* could be (and ultimately were) resolved without any need to venture beyond that record. (emphasis added)

Id. at 574-75.

> Respondents here, in contrast, pleaded guilty to indictments that on their face described separate conspiracies. *They cannot prove their claim by relying on those indictments and the existing record.* Indeed, as noted earlier, they cannot prove their claim without contradicting those indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas.

Id. at 576.

Petitioner Benton's situation is inapposite to the *Broce* defendants in at least four ways. First, Benton, unlike the *Broce* defendants, is not making his double jeopardy argument by way of a collateral attack. He is not seeking an evidentiary hearing to expand the record to make his argument. He is simply asking the Second Circuit to look not only at the allegations in the indictments, but to also look at the rest of the existing record. Second, unlike the *Broce* defendants, Benton raised the double

jeopardy issue in the district court in No. 1:15-cr-40, alleging that he had already been convicted of the same conduct in 3:12-cr-104:

> Defendant Benton is currently in custody serving a sentence [in] docket [3:12-cr-104] from the United States District Court in the District of Connecticut[.] . . . [T]he Connecticut case is subsumed by the instant indictment and relates to the same evidence and drug dealing activity. It is part and parcel of the same criminal enterprise and as such to subject Defendant to the instant indictment is to place him twice in jeopardy for the same conduct.

No. 1:15-cr-40, Doc. #195. This motion was pending at the time Benton requested that the case be transferred from Maine to Connecticut. No. 1:15-cr-40, Doc. #395, Doc. #403. It does not appear that the Connecticut district court ever actually ruled on this specific Maine motion.[5] Third, and unlike the *Broce* defendants, the indictments in Case Nos. 3:12-cr-104 and 3:16-cr-71 allege the same controlled substances and allege overlapping time frames, the latter fact conceded by the Second Circuit ("The only overlap between the 2012 case and the instant appeal is temporal."). Fourth, Benton is not seeking to contradict the allegations

[5] Benton's trial counsel in 3:15-cr-174 were also appointed to represent him in 3:16-cr-71. No. 3:16-cr-71, Doc. #4-5. Trial counsel filed a motion to withdraw pending motions (without prejudice to refile). No. 3:16-cr-71, Doc. #10. The record does not indicate that the district court ruled on the motion to withdraw pending motions.

in either of the counts at issue. He has never, unlike the *Broce* defendants, stipulated that the offense conduct in Case No. 3:12-cr-104 is different conduct than the offense conduct in Case No. 3:16-cr-71. He is simply arguing that they embrace the same agreement.

Conclusion

For the foregoing reasons, Petitioner Benton respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 5th day of June, 2019.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Jeffrey Benton