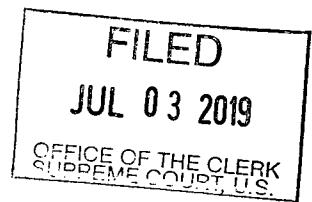


ORIGINAL

19-5243  
No.



IN THE  
SUPREME COURT OF THE UNITED STATES

Larry D. Marvel — PETITIONER  
(Your Name)

vs.

State of Delaware — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of Delaware  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Larry D. Marvel  
(Your Name)

James T. Vaughn Corr. Ctr., 1181 Paddock Rd.  
(Address)

Smyrna, Delaware 19977  
(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Where the State General Assembly legislatively defines in two separate statutes the same identical "conduct" for two criminal offenses mandating the same identical essential requirements of substance, purpose and resultant effect;

And the State charges, prosecutes, convicts and then sentences the Defendant for both offenses separately and cumulatively;

The Question presented is whether that constitutes violation of the guaranteed protections provided by the Double Jeopardy Clause of Amendment V to the United States Constitution prohibiting such multiple punishments for the same offense as imposed upon the State of Delaware by U.S.C.A. Const. Amend. 14, Section 1?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OPINIONS BELOW

The Opinion of the highest state court to review the merits appears at Appendix Exhibit A to the Petition and is as yet unpublished.

The Opinion of the lower state court in review of the merits appears at Appendix Exhibit B to the Petition and is as yet unpublished.

The Opinion of the lower state court in review of the merits upon which Appendix Exhibit B depends appears at Appendix Exhibit C of the Petition and is as yet unpublished.

JURISDICTION

The date on which the state's highest court decided my case was April 2, 2019. A copy of that decision appears at Appendix Exhibit A.

A timely petition for rehearing was thereafter denied on April 16, 2019 and a copy of the denial order for rehearing appears at Appendix Exhibit D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The Petitioner humbly prays that this United States Supreme Court exercise its judicial discretion under the appropriate Rule 10(c) and perform review of the decisions rendered by the highest court for the State of Delaware concerning the deprivation included therein.

## Constitutional And Statutory Provisions Involved

1. U.S.C.A. Const. Amend. IV of the United States Constitution holds and provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Title 11 Delaware Criminal Code § 206 - "Method of prosecution when conduct constitutes more than 1 offense", mandates the following analytic process "provision" to determine:

"(a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. The defendant's liability for more than 1 offense may be considered by the jury whenever the State's case against the defendant for each offense is established in accordance with 301 of this title. The defendant may not, however, be convicted of more than 1 offense if:

(1) One offense is included in the other, as defined in subsection (b) of this section; or

(2) One offense consist only of an attempt to commit the other; or

(3) Inconsistent findings of fact are required to establish the commission of the offenses.

(b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

- (1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

3. Delaware State Constitution, Article 1, Section 8 holds and provides the following:

"No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same offense twice put in jeopardy of life or limb; nor shall any person's property be taken or applied to public use without the consent of his or her representatives, and without compensation being made."

4. U.S.C.A. Const. Amend. 14, Section 1 of the United States Constitution holds and provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Statement Of The Case

On May 4, 2006 Petitioner was convicted by trial by jury in the Superior Court for the State of Delaware. The charged offenses were: Attempted Assault 1<sup>st</sup> Degree - 11 Del. C. § 531, Criminal Solicitation 2<sup>nd</sup> Degree - 11 Del. C. § 502 and Conspiracy 2<sup>nd</sup> Degree - 11 Del. C. § 512. The Petitioner was acquitted of Attempted Assault 1<sup>st</sup> Degree. Petitioner was found guilty of the two attached "inchoate" offenses of Criminal Solicitation 2<sup>nd</sup> Degree and Conspiracy 2<sup>nd</sup> Degree. (See Appendix Exhibit I - Docket at D.I. # 22)

Specific to this Petition for Writ of Certiorari the following filings have taken place:

On May 16, 2017 Petitioner filed "Motion To Correct Sentence 35 (a)" to review the statutory language of both convicted offenses for double jeopardy violations. (See D.I. # 96)

On July 6, 2017 the Superior Court ordered the State to respond to the "Motion". (See D.I. # 98)  
On July 25, 2017 the State entered their Response to said "Motion". (See D.I. # 121)

On August 7, 2017 the Petitioner (Defendant) filed "Reply" to State's Response. (See D.I. # 102)

On August 11, 2017 the Superior Court ordered briefing of the double jeopardy violation claim by both parties. (See D.I. # 103)

On August 22, 2017 Petitioner filed request for "Appointment of Counsel" due to inability to access prison law library after Feb. 1, 2017 riot at James T. Vaughn Corr. Ctr. (See D.I. # 122)

On September 6, 2017 the Superior Court ordered Appointment of Counsel was warranted in Petitioner's double jeopardy violation filing. (See D.I. # 106)

On September 11, 2017 Chief Public Defender Brendan O'Neill contacted Superior Court Judge via "ex-parte" e-mail refusing to appoint counsel for Petitioner as ordered requesting order be rescinded. O'Neill tried to manipulate proceedings by stating Petitioner's filing was attempting modification of sentence under habitual statute, not correction of sentence due to double jeopardy violation "at any time" under Super. Ct. Cr. Rule 35(a). (See D.I. # 123)

At that point in time all proceedings on the double jeopardy violation issue were halted by assigned Superior Court Judge Diane Clark Street without explanation or given reason,

On September 27, 2017 without assistance of counsel as ordered by the Superior Court Judge Diane Clark Street Petitioner filed timely his "Opening Brief" in compliance with the Court's Scheduling Order (D.I. # 103) which the Prothonotary's office mistakenly titled "Motion For Correction Of Sentence Filed Pro-Se" (See D.I. # 109) Petitioner's "Cover Letter" that accompanied Petitioner's "Opening Brief" sent to Judge Street was separated and filed independently for reasons unknown to the Petitioner. (See D.I. # 110)

On October 11, 2017 without notice or assignment Superior Court Judge William C. Carpenter took over the proceedings and conducted a 11 Del. C. § 206 (b)(1) standard "same elements" test solely upon the statutory language of both statutes for the convicted offenses or the equivalent of the federal "Blockburger" test. (See D.I. # 111 or Appendix Exhibit C)

On March 8, 2018 the decision made by the Superior Court under 11 Del. C. § 206 (b)(1) was appealed to the Delaware Supreme Court (D.I. # 145) that affirmed the same. (D.I. # 153)

On October 25, 2018 Petitioner filed "Motion To Correct Sentence 35 (a)" specifically seeking review under 11 Del. C. § 206 (b)(3) due to the fact that Delaware law mandates review of

double jeopardy violation concerning lesser-included offense determination must receive analysis under all three (3) prongs of 11 Del. C. § 206 (b). The Superior Court decision ruled the initial 11 Del. C. § 206 (b)(1) review was sufficient and cited dependence upon that ruling of D.I.\* 111 for basis. (See D.I.\* 156 or Appendix Exhibit B)

On February 11, 2019 Petitioner appealed the Superior Court decision to the Delaware Supreme Court (D.I.\* 157) who affirmed the same. (See Appendix Exhibit A)

The Petitioner now files for Writ of Certiorari on those proceedings with the United States Supreme Court for deprivations of due process and equal protection under U.S.C.A. Const. Amend. 14, Section 1.

## Reasons For Granting The Petition

The basis of Petitioner's addressing this United States Supreme Court for Writ of Certiorari is the State of Delaware's denial and deprivation of rights imposed and guaranteed by U.S.C. A. Const. Amend. 14 § 1 that invokes those protections enacted therein:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is a well-established recognition by the Courts of the State of Delaware of the constitutional double jeopardy principles applicable to the Petitioner's criminal prosecution as expressed in their holding of State v. Willis, 673 A.2d 1233 (1995) that clearly states:

"Applicable Constitutional Double Jeopardy Principles

The protection against double jeopardy is fundamental to our criminal justice system. It is found in the Fifth Amendment to the United States Constitution, in Article 1, § 8 of the Delaware Constitution, and in the Delaware criminal statutes. 11 Del. C. 206-210...

Double jeopardy guarantees three protections. 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against

multiple punishments for the same offense.' *State v. Cook*, Del. Supr., 600 A.2d 352, 354 (1991) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969) . . .

### Delaware's Double Jeopardy Statutes

Protection against double jeopardy is codified in the Delaware criminal statutes, 11 Del. C. 206-210, which are based on 1.07-1.11, respectively, of the *Model Penal Code*, a legislative project of the American Law Institute which was completed in 1962. *Model Penal Code* 1.07-1.11 (1985); *Delaware Criminal Code with Commentary* 101 at 2 (1973) (hereinafter *Code Commentary*). See also 16 Del. C. 4752. As the Explanatory Note for 1.07-1.11 of the *Model Penal Code* explains, 'sections 1.07-1.11 involve different aspects of double jeopardy protection.' *Model Penal Code* 1.07 explanatory note at 102.

Section 206 ('Method of prosecution when conduct constitutes more than 1 offense'), based on *Model Penal Code* 1.07, states the general rule that a defendant may be convicted of more than one offense arising from the same conduct but not if 'one offense is included in the other, as defined in subsection (b) of this section'. 11 Del. C. 206 (a)(1) . . .

In a case in which the same conduct violates two statutory provisions, 'the first step in a double jeopardy analysis is to determine whether the legislature intended that each violation be treated as a separate offense.' *Hackett v. State*, Del. Supr., 569 A.2d 79, 80 (1990). To make that determination, Delaware courts apply the statutory rule set forth in 11 Del. C. 206 (b),

one part of which (subsection (b)(1)) parallels the well-known federal *Blockburger* test. *Hackett v. State*, 369 A.2d at 80; *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932) (holding that a single act or transaction may constitute two separate offenses only where each offense requires proof of an element which the other does not). Thus, the *Hackett* Court stated clearly that 206 is applicable in double jeopardy analysis. . .

See *Model Penal Code* 1.07 explanatory note at 102. (stating that 107 [on which 206 is based] 'involves different aspects of double jeopardy' and 'specifies the situations in which conviction for more than one offense based on the same conduct is precluded.' . . .

Subsection (b) of 11 Del. C. 206 Provides Three Alternative Tests for Determining Whether an Offense is a Lesser-included Offense.

The definition of lesser included offenses is found in 11 Del. C. 206 provides in pertinent part that:

(a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. He may not, however, be convicted of more than 1 offense if: (b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

- (1) One offense is included in the other, as defined in subsection (b) of this section . . .
- (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

- (2) It consists of an attempt to commit an offense charged or to commit an offense otherwise included therein; or
- (3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Thus, under the Delaware statute, this Court must apply all three prongs of subsection (b) before concluding that an offense is not a lesser-included offense of another. See *Hackett v. State*, 569 A.2d at 80 (undertaking a three-part analysis which parallels the 3 subsections of 206 (b)).

If one offense is considered a lesser included offense according to the standard in any of the three prongs of 206 (b), then Defendant cannot be prosecuted for both offenses. 11 Del. C. 206 (a).

The first prong of the Delaware statutory test (206 (b)(1)) is the equivalent of the federal *Blockburger* test. (citations omitted)

The *Blockburger* test provides that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. at 304. . .

The Delaware Supreme Court recently considered the statutory scope of lesser-included offenses as defined in 11 Del. C. 206 in the context of jury instructions. *Lilly v. State*, Del. Supr., 649 A.2d 1055 (1994). The *Lilly* court held that each of the three parts of 206 (b) must be considered when determining under Delaware law whether one offense is included in another.

*Id.* The trial court in *Lilly* erroneously had adopted a strict "statutory elements" (Blockburger) analysis (in declining defendant's request for a jury instruction on a lesser-included offense) which had focused "solely upon the elements" in the statutory definitions of the charged offense and the alleged lesser-included offense." *Id.* at 1061. As explained in *Lilly*:

The official commentary to the Delaware Criminal Code states that Subsection [b][1] provides the "standard" statutory elements definition of included offenses. *Delaware Criminal Code with Commentary*, 15 (1973).... This Court has recognized the propriety of using the "statutory elements" test to determine lesser-included offenses. See *Hward v. State*, Del. Supr., 575 A.2d 1156, 1158-59 (1990). This Court's holding in *Hward*, however, can most accurately be characterized as deciding that one proper focus under 11 Del. C. 206 (b) is on the statutory elements of the offenses, i.e., Section 206(b)(1), *Id.* at 1061. The Delaware Supreme Court rejected this narrower approach limited to the application of 11 Del. C. 206 (b)(1), noting that "unlike its federal corollary, the Delaware statute prescribing included offenses is not limited exclusively to the standard 'statutory elements' approach." *Id.* at 1061. The Court stated:

In fact, the official commentary to the Delaware Criminal Code states that subsection 3 [of 11 Del. C. 206 (b)] of the Delaware definition of included offenses expressly contemplates that "there may be some dissimilarity in the elements necessary to prove the [included] offense." *Id.* (quoting *Code Commentary* 206 at 16.)...

Thus, *Hackett* and *Lilly* stand for the proposition that Delaware has adopted the Blockburger "same elements" approach to included offenses in 206 (b)(1) but has also followed the *Model Penal Code*'s expanded definition of included

offenses in 206 (b)(3) for double jeopardy purposes. Eleven Del. C. 206(b)(3) is by its terms broader and more expansive than 206 (b)(1). As stated in the Comment to 1.07 of the *Model Penal Code*: "Conviction of an offense and an 'included offense' as defined by [11 Del. C. 206 (b)(2) and (3)] would not necessarily be barred under the Blockburger test." *Model Penal Code* 1.07 comment at 108."

State v. Willis, pgs 1235-1239

State Court Review Of Petitioner's Double Jeopardy Protection Deprivation Focused Solely Upon 11 Del. C. § 206 (b)(1) "Blockburger" Standard ("same elements") Analysis Denies Full And Adequate Review Under The Law Owed Under The Due Process And Equal Protection Clause Of The Fourteenth Amendment.

The State Court Review of Petitioner's "Motion To Correct Sentence 35(a)" appears at "Appendix Exhibit C" of this Petition clearly substantiates that the "Blockburger" standard "same elements" analysis was applied and "only" applied to the wording of the statutory language of both offenses of Criminal Solicitation 2<sup>nd</sup> Degree and Conspiracy 2<sup>nd</sup> Degree.

It is this ruling that the State Courts depend for all subsequent rulings relating to the deprivation of double jeopardy protections. (See Appendix Exhibit A and Appendix Exhibit B) All rulings cite basis and give reference to the Superior Court of Delaware's ruling as fulfilling the due process mandate of a full analysis under 11 Del. C. § 206(b)(1), (2) and (3).

The Petitioner avers the very analysis performed by the Delaware Courts, whether termed "Blockburger" or 206(b)(1), is inadequate failing to fully review the legislatively enacted definitions of both offenses contained in the Official Code Commentary for the Delaware Criminal Code. Official Commentary, when available, is the final word on the essential, material elements of any offense providing the law's definition of the offense as enacted and legislatively intended.

Delaware Courts long ago established judicial recognition of the Delaware Criminal Code Commentary as the overwhelmingly significant legal authority for definitions of laws that express the enacted legislative intent for each and every offence contained in the Delaware Criminal Code:

"The official commentary to the Delaware Criminal Code states that Subsection [b][1] provides the 'standard' statutory elements definition of included offenses. . . one proper focus under 11 Del. C. 206 (b) is on the statutory elements of the offenses, i.e., Section 206(b)(1). . . unlike its federal corollary, the Delaware statute prescribing included offenses is not limited exclusively to the standard "statutory elements" definition. . .

In fact, the official commentary to the Delaware Criminal Code states that subsection 3 of the Delaware definition of included offenses expressly contemplates that 'there may be some dissimilarity in the elements necessary to prove the [included] offense. *Code Commentary* at 16."

Hilly v. State, Del. Supr. 649 A.2d 1055, 1061 (1994)

"In this case, in support of his double jeopardy argument, Poteat's attorney relies upon the official *Commentary to the Delaware Criminal Code of 1973*...

This Court has previously stated that the *Blockburger* test 'is only an aid to statutory construction. It does not negate clearly expressed legislative intent and where . . . a better indicator of legislative intent is available, it does not apply.' In ascertaining legislative intent, courts are required to give great weight to an official commentary written by the drafters of the statute.

Poteat v. State, Del. Supr. 840 A.2d 599, 605 (2003)

The State Court Review of Petitioner's Double Jeopardy Protection deprivation (Appendix Exhibit C) and all subsequent dependent rulings (Appendix Exhibit A and Appendix Exhibit B) fail to consider the Official Delaware Criminal Code Commentary in any related analysis or decision causing the initial "Blockburger" - 206 (b)(1) test to be in error.

Please consider Point No. 1 :

The Official Delaware Criminal Code Commentary for the convicted offense of Criminal Solicitation 2<sup>nd</sup> Degree - 11 Del. C. § 502 is found at "Criminal Code § 501 Commentary" at pgs. 136 thru 138 and appears at "Appendix Exhibit G" of this Petition. Section 501 Commentary states in relevant part to the essential, material elements of the offense:

" The section requires an overt act of solicitation, request, command, importunity, or similar initiatory conduct. A mere intention that a crime be committed, unaccompanied by any act, is insufficient. For liability, however, such an intention must be proved in addition to the solicitation."

Three (3) specific dictates from the legislative definition clearly establish the intended substance, set purpose and effect of the material element mandate:

" The section requires an overt act . . .

A mere intention that a crime be committed, unaccompanied by any act, is insufficient.

. . . such an intention must be proved in addition to the solicitation."

These legislatively enacted mandates produce a specific result from a specific purpose by a specific act or conduct. The section's requirement of an overt act proves the intention that a crime be committed. The Official Commentary expresses these points unambiguously.

The Official Delaware Code Commentary for the convicted offense of Conspiracy 2<sup>nd</sup> Degree-  
II Del.C. § 512 is found at "Criminal Code § 511 Commentary" at pgs. 140 thru 144 and appears at "Appendix Exhibit H" of this Petition. Section 511 Commentary states in relevant part to the essential, material elements of the offense:

"This section makes the gist of the offense an agreement..."

Intention to promote or facilitate commission of a crime is a material element of conspiracy under this Criminal Code.

An important change in the former law is the requirement that an overt act be committed in pursuance of the conspiracy.

Such a requirement is the best possible proof of a settled intention to promote or facilitate commission of the crime."

These legislatively enacted mandates produce a specific result from a specific purpose by a specific act or conduct. The section's requirement of an overt act is proof of the intention to promote or facilitate commission of the crime.

The offense of conspiracy requires one additional fact be proved of "agreement" as a material element mandate. The Official Commentary expresses these points unambiguously.

Therefore it is clearly apparent that the Official Code Commentary substantiates that:

The Offense of Criminal Solicitation 2<sup>nd</sup> Degree requires an overt act to prove the intention that a crime be committed,  
and,

The Offense of Conspiracy 2<sup>nd</sup> Degree requires an overt act to prove the intention to promote or facilitate commission of the crime.

These material element mandates are literally the same and aim at and produce the same identical result. Only the Conspiracy 2<sup>nd</sup> offense requires one additional fact be proved that the Criminal Solicitation 2<sup>nd</sup> offense does not.

"In a case in which the same conduct violates two statutory provisions, the first step in a double jeopardy analysis is to determine whether the legislature intended that each violation be treated as a separate offense! *Hackett v. State*, Del. Supr., 569 A. 2d 79, 80 (1990). To make that determination, Delaware courts apply the statutory rule set forth in 11 Del. C. 206 (b), one part of which (subsection (b)(1)) parallels the well-known federal Blockburger test. *Hackett v. State*, 569 A. 2d 80; *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932) (holding that a single act or transaction may constitute two separate offenses only where each offense requires proof of an element which the other does not)."

State v. Willis, *supra*, at 1236.

The State Court Review of Appendix Exhibit C of this Petition fails to meet the standard set by the "Blockburger"- 206(b)(1) test when considering the Official Delaware Criminal Code

Commentaries for the two offenses. While the Conspiracy offense requires proof of an additional element or fact that Criminal Solicitation does not, Criminal Solicitation offense does not require any additional element or fact the Conspiracy offense does not.

Under the facts and circumstances of the Petitioner's case the offense of Criminal Solicitation is a lesser- included offense of the Conspiracy offense.

Please consider Point No. 2:

Delaware Courts are well-settled on the law and it's statutory mandate that all three (3) subsections of 11 Del. C. § 206 (b) must be performed as part of any Delaware court's analysis to determine whether an offense is a lesser- included offense of another:

"Thus, under the Delaware statute, this Court must apply all three (3) prongs of (11 Del. C. § 206) subsection (b) before concluding that an offense is not a lesser- included offense of another. See *Hackett v. State*, 569 A.2d at 80 (undertaking a three- part analysis which parallels the 3 subsections of 206 (b)).

If one offense is considered a lesser included offense according to the standard in any of the three prongs of 206 (b), then Defendant cannot be prosecuted for both offenses. 11 Del. C. 206 (a)."

State v. Willis, supra at 1238.

As previously demonstrated the Delaware Courts in performing the lesser- included offense analysis only applied the (Blockburger) standard "same elements" test to Petitioner's initial "Motion To Correct Sentence 35 (a)" that appears at "Appendix Exhibit C" of this Petition.

Having been denied due process of law to a full analysis under 11 Del.C. § 206 (b) (1), (2) and (3) the Petitioner filed a second "Motion To Correct Sentence 35(a)" specifically for review under 206(b)(3). The Sentencing Court depending upon the initial review under 206 (b)(1) denied Petitioner's Motion filed under 206 (b)(3). (See Appendix Exhibit B) That decision was appealed to the highest court in the State of Delaware who affirmed the lower court decision. (See Appendix Exhibit A)

The Petitioner avers that the decision so affirmed is not in full accordance with the law 11 Del.C. § 206 (b)(3) and is clearly in error denying the constitutional rights that the Petitioner enjoys.

In this Petition the Petitioner previously demonstrated the essential material elements as legislatively enacted in the Official Code Commentaries contained in the Delaware Criminal Code, Title 11. As legislatively intended definitions of the law, the Official Code Commentaries clearly show the following:

Section 501 Commentary applicable to 11 Del.C. § 502- Criminal Solicitation 2<sup>nd</sup> Degree defines the essential material elements that constitute the offense are that the section's mandate of an overt act is required to prove the intention that a crime be committed.

Section 511 Commentary applicable to 11 Del.C. § 512- Conspiracy 2<sup>nd</sup> Degree defines the essential material elements that constitute the offense are that the section's mandate of an overt act is required to prove the intention to promote or facilitate commission of the crime.

Section 501's mandate of an overt act requirement to prove the intention that a crime be committed, and,

Section 511's mandate of an overt act requirement to prove the intention to promote or facilitate commission of the crime produces the same results. 11 Del.C. § 206(b)(3) applies.

The Delaware Supreme Court has judicially concluded that the Official Code Commentary applicable to 11 Del. C. § 206 (b)(3) is the recognized authority relating to the provisional parameters for lesser-included offense determination under that subsection:

"Unlike its federal corollary, the Delaware statute prescribing included offenses is not limited exclusively to the (Blockburger) standard "same elements" definition. See 11 Del. C. 206; *G. Schmuck v. United States*, 489 U.S. 705, 715-21, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989) (Fed. R. Crim. P. 31(c) adopts 'statutory elements' approach)

In fact, the official commentary to the Delaware Criminal Code states that subsection 3 of the Delaware definition of included offenses expressly contemplates that 'there may be some dissimilarity in the elements necessary to prove the [included] offense.' *Code Commentary* at 16. With regard to subsection 3 the *Code Commentary* provides:

[Subsection 3] differs from [Subsection 1] in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the elements necessary to prove the offense. Therefore, [1] would not strictly apply and [3] is needed to fill the gap. For example, criminally negligent homicide would probably not be included in murder under [1], because negligence is different in quality from intention. It would obviously be included under [3], because the result is the same and only the required degree of culpability changes. (emphasis added)."

Lilly v. State, Del. Supr. 649 A.2d 1055, 1061 (1994)

The Official Code Commentary for the "included" offense of Criminal Solicitation 2nd Degree mandates the requirement of an overt act to prove the intention that a crime be committed,

and,

The Official Code Commentary for the "inclusive" offense of Conspiracy 2nd Degree mandates the requirement of an overt act to prove the intention to promote or facilitate commission of the crime.

Under 11 Del. C. § 206 (b)(3) the two offenses produce the same result and Criminal Solicitation is a lesser- included offense of the Conspiracy offense. Having failed to consider the Legislative definitions of both offenses, the State Courts erroneously concluded the two offenses distinct from one another.

The Petitioner was denied his rights guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution under the Due Process and Equal Protection Clause to a full analysis under 11 Del. C. § 206 (b)(1), (2) and (3) by the Delaware Courts. Had the Official Code Commentaries for the two inchoate offenses of Criminal Solicitation 2nd Degree and Conspiracy 2nd Degree been considered by the State Courts for the legislative intent contained and defined therein, the specifically mandated elements relating to substance, purpose and resultant effect of the two offenses would have been judicially determined not only to be parallel, but the same or identical, and thus would have failed to survive the analysis of all three (3) prongs of 11 Del. C. § 206 (b).

Cumulative Sentences By Two Statutes For "Same Prescribed Offense" Violates Petitioner's Constitutional Protective Rights Against Multiple Punishment Under U.S.C.A. Const. Amend. 5

The Petitioner specifically presented the federal question to the State courts on two separate occasions; (1) once in the lower Superior Court and (2) again on appellate review

in the Delaware Supreme Court, the highest State court:

" 1. Here we are confronted with the question of the scope of the Double Jeopardy Clause and its protections as provided by the 5<sup>th</sup> Amendment to the U.S. Constitution, Article 1, Section 8 of the Delaware State Constitution and the Delaware Criminal Code 11 Del.C. § 206 through § 210 when cumulative punishment is imposed for the "same offense" consistent with the intent of the General Assembly. As imposed upon the States and embodied in the 14<sup>th</sup> Amendment to the U.S. Constitution the concept of double jeopardy does not prescribe the consecutive sentences levied against the Defendant and precludes the imposition of such cumulative punishments. (Question preserved at A8, paragraph 3)"

(See Appendix Exhibit F at page 1)

The (highest) Delaware Supreme Court has formally adopted the federal standard of review required under the Fifth Amendment where two separate statutes punish the "same offense" causing double jeopardy protection deprivation by infliction of cumulative sentencing and punishment under both statutes:

"Review of a double jeopardy claim directed against a criminal statute(s) which appears to permit cumulative sentencing involves a two step analysis: (1) Cumulative punishment for the same offense is not authorized in the absence of a clear indication of contrary legislative intent.' *Whalen v. United States*, 445 U.S. 684, 692, 100 S. Ct. 1432, 1438, 63 L. Ed. 2d 175 (1980) and (2) where the legislative intent is not clear a constitutional analysis under the Double Jeopardy Clause of the Fifth Amendment is required. *Missouri v. Hunter*, 459 U.S. 359, 368,

74 L. Ed. 2d 535, 103 S. Ct. 673 (1983)."

Lecompte v. State, Del. Supr. 516 A. 2d 898, 904 (1986)

(See Appendix Exhibit F at pages 1 and 2)

The State Courts having failed to perform any analysis pertinent or particular to the rights guaranteed the Petitioner under the Double Jeopardy Clause of the 5<sup>th</sup> Amendment denied the Petitioner Due Process and Equal Protection Clause rights to a full two step analysis required to determine whether the Petitioner's cumulative sentencing violated those guaranteed constitutional rights of protection provided under the Double Jeopardy Clause and U.S.C.A. Const. Amend. 5.

### Conclusion

In conclusion the Petitioner has successfully demonstrated three (3) separate deprivations of protection violative of the constitutionally guaranteed rights provided by the Due Process and Equal Protection Clause within the Fourteenth Amendment to the U.S. Constitution.

These violations deny the Petitioner his constitutional protections against Double Jeopardy that are fundamental to our criminal justice system. These protections are found in the Fifth Amendment to the United States Constitution, in Article 1, Section 8 of the Delaware State Constitution, and in the Delaware criminal statutes applicable. 11 Del.C. § 206 thru § 210.

These violations deprive the Petitioner of established due process determinations relating to those rights provided to be free from denial of Double Jeopardy Clause protections. Specifically these violative occurrences are:

(a) Petitioner was denied full due process of Delaware law 11 Del.C. § 206 (b)(1) by Delaware State Court's failure to consider the Official Code Commentaries for two separate

statutes defining the "same offense" in determining whether one offense is a lesser-included offense of another under Double Jeopardy review;

(b) Petitioner was denied full due process of Delaware law 11 Del. C. § 206 (b)(3) by Delaware State Court's failure to consider the Official Code Commentaries for two separate statutes that define the same essential material elements of substance, purpose and resultant effect to determine whether both statutes "produce the same result" under Double Jeopardy review;

(c) Petitioner was denied due process of law, both State and (adopted) Federal, to a two-step analysis to determine whether Petitioner being sentenced for two separate statutes which define the "same offense" constitutes "cumulative punishment" as prohibited by the Double Jeopardy Clause of the 5<sup>th</sup> Amendment to the U.S. Constitution.

Therefore, this Petitioner humbly prays that this Honorable United States Supreme Court review these violations for constitutional infirmity and direct the State Courts of Delaware in the manner deemed appropriate.

Respectfully Submitted,

Dated: 7-2-19

org. Larry D. Marvel

Larry D. Marvel