

19-5810

No: _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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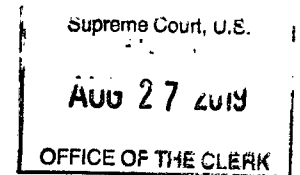
DANIEL LOPEZ DE-JESUS

Petitioner,

v.

JEFF PREMO

Respondent.



* * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

* * * * *

PETITION FOR WRIT OF CERTIORARI

DANIEL LOPEZ DE-JESUS

SID - 15275091

2605 STATE STREET

SALEM, OREGON 97310

-No Available Phone Number-

QUESTION(S) PRESENTED

Mr. Dejesus alleged that his trial counsel was ineffective for failing to object to a jury instruction that effectively aided the state to surpass the necessary threshold of proving elements of the crime charged. Mr. Dejesus was convicted, in large part, by the use of a mandatory, conclusive, and irrebuttable presumptive jury instruction that directed the jury to convict Mr. Dejesus for a crime that the state did not prove under *in re Winship*.

Did the Ninth Circuit err in applying the harmless error analysis to a jury instruction that implicitly included critical elements of the crime charged?

LIST OF PARTIES

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

TABLE OF CONTENTS

| | |
|---|-----|
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 2 |
| STATEMENT OF THE CASE | 8 |
| REASONS FOR GRANTING THE WRIT | 12 |
| I. THE NINTH CIRCUIT'S MISAPPLICATION OF THE HAMRLESS ERROR STANDARD OF <i>SANDSTROM</i> AND <i>IN RE WISHIP</i> WARRANTS THIS COURT'S ATTENTION | 12 |
| a) It allowed the judge to effectively and improperly lightened the prosecutions burden of proof by using a jury instruction that was conclusive and mandatory and not subject to rebuttal | 13 |
| b) The Jury Instruction allowed the judge and the State to use such a presumption to improperly shift the burden of proof to the defendant | 15 |
| CONCLUSION..... | 16 |
| Appendix A Decision of the Ninth Circuit Court of Appeals | 1a |
| Appendix B Memorandum and Order of the District Court | 4a |
| Appendix C Order granting certificate of appealability | 20a |
| Appendix D Order denying rehearing or rehearing En Banc | 21a |

TABLE OF AUTHORITIES CITED

| CASES | PAGE NUMBER |
|--|--------------------|
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000) | 16 |
| <i>In re Winship</i> , 397 U.S. 358, 371, 90 S. Ct. 1068, 25 L. Ed. 2D 368 (1970)..... | 11, 12, 13, 15, 17 |
| <i>Sandstrom v. Montana</i> , 442 US 510, 513, 523-24, 99 S Ct 2450, 61 L Ed 2d 39 (1979) | 10, 11, 12, 13, 17 |
| STATUTES AND RULES | |
| FEDERAL CONSTITUTION | |
| 6 th Amendment, U.S. Constitution..... | 2, 14 |
| 14 th Amendment, U.S. Constitution..... | 2, 12, 15 |
| FEDERAL STATUTES | |
| 28 U.S.C. § 1254 | 1 |
| 28 U.S.C § 2254..... | 2, 12, 15 |
| OTHER | |
| Oregon's Delivery Jury Instruction | 7, 9, 10, 14 |
| ORS 161.405 | 16 |
| OAR 213-004-0005 (1) | 16 |

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Daniel Lopez De-Jesus, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, rendered in this proceeding on March 13th, 2019.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed petitioner's conviction in its case number 18-35054. The opinion is unpublished, and is reprinted in the appendix to this petition at page 1a, *infra*. The order of the Ninth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page 21a, *infra*.

JURISDICTION

The original opinion of the Ninth Circuit Court of Appeals was entered on March 13th, 2019.

A timely motion to that court for rehearing was denied on June 4th, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254, where this court has jurisdiction to hear this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. 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.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State;

or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be

estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and

circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS c 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

OREGON JURY INSTRUCTION

Deliver or delivery means the actual constructive or attempted transfer from one person to another of a controlled substance. Thus, under Oregon law, possession with intent to deliver constitutes delivery, even when no actual transfer is shown.

Additionally, an attempted transfer of a controlled substance from one person to another is a delivery.

An attempted transfer occurs when a person intentionally engages in conduct which constitutes a substantial step towards the transfer of a controlled substance. Examples of a substantial step include but are not limited to possession of a large amount of a controlled substance not for personal use, but consistent instead with trafficking in controlled substances. Or possession of items associated with drug trafficking, such as drug records, scales, large sums of money, razor blades, or those types of things.

STATEMENT OF THE CASE

In 2010, Mr. DeJesus was convicted of Robbery in the 1st degree, two Counts of Robbery of the 2nd degree, two counts of Delivery of Drugs and one Count of Possession of Drugs. The charges stemmed from a February, 2007 incident, in where Mr. DeJesus and friends were invited to a party at Ms. Tristan Way's house. In this party, the victim, Mr. Calderilla-Duran, was invited by Ms. Way by a chat-line. During Mr. Calderilla's visit he offered Ms. Way drugs for sex, after Ms. Way refused, Mr. Calderilla tried to rape Ms. Way.

Ms. Way alerted Mr. DeJesus and friends of Mr. Calderilla's attempted rape.

At the request of Ms. Way, Mr. DeJesus confronted Mr. Calderilla about Ms. Way's allegations, Mr. Calderilla tried to deny it. Ms. Way mentioned how Mr. Calderilla was showing-off to her that he was a big-time drug-dealer from Woodburn, Oregon, and that Mr. Calderilla had offered his drugs for sex, and when she declined his offer, Mr. Calderilla tried to rape Ms. Way. Ms. Way wanted to show this guy a lesson, so that is when Mr. Calderilla was robbed of his belongings. Mr. Calderilla emptied packets of drugs and condoms, ect... When the incident was over, Mr. Calderilla was told to leave and never come back. Mr. Calderilla thereafter hailed a police officer and mentioned that he was robbed.

Days later, Mr. DeJesus was apprehended, police obtained a search warrant to execute a search at Mr. DeJesus's bed-room where Mr. Calderilla's cellphone was

located. A locked safe was also located in the bedroom closet and seized. Years later, police officers opened the safe and found the drugs that was taken from Mr. Calderilla still packaged.

Mr. DeJesus was charged with Robbery offenses and delivering drug offenses.

In Mr. DeJesus's trial the state used the evidence of drugs that was taken from Mr. Calderilla (the victim of the charged robbery) to argue that it was in fact Mr. DeJesus who was selling and delivering drugs. To amplify the state's theory, the state used the statements of a police officer to collaborate by saying that by the amount found in the safe of Mr. DeJesus signifies that it is not an amount for personal use but a dealer's amount. The state and the police officer did not mention to the jury that the drugs originally belonged and came from Mr. Calderilla-Duran.

The State centered her prosecution on a Jury Instruction that the trial judge later used in instructing the jury, which ordered the jury that if they found elements of packaged items then the jury must find Mr. Dejesus guilty of a substantial step to delivering drugs – which, according to Oregon's Jury Instruction would constitute a complete delivery of drugs offense – a much more serious charge than what the evidence constitutionally proved.

The judge instructed the jury accordingly:

“Deliver or delivery means the actual, constructive, or attempted transfer from one person to another of a controlled substance. Thus, under

[O]regon law, possession with [i]ntent to deliver [constitutes] delivery, even when no actual transfer is shown.'

'Additionally, an attempted transfer of a controlled substance from one person to another is a delivery.'

'An attempted transfer occurs when a person intentionally engages in conduct which constitutes a substantial step towards the transfer of a controlled substance. [Examples] of a substantial step include but are not limited to possession of a large amount of a controlled substance not for personal use, but consistent instead with trafficking in controlled substances. Or possession of items associated with drug trafficking, such as drug records, scales, large sums of money, razor blades, or those type of things.'

Appellant's Opening Brief, page 6

Mr. DeJesus was ultimately convicted of all the charges against him and sentenced to incarceration to the amount of 144 months in prison.

Mr. Dejesus appealed to the Oregon Court of Appeals and the Oregon's Supreme Court but was denied relief. Mr. Dejesus proceeded a Post-Conviction petition raising the claim that the Jury Instruction used in Mr. DeJesus's trial was constitutionally ambiguous and overboard and that it was contradictory to the decision issued by the United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61

L. Ed. 2D 39 (1979) and *In re Winship*, 397 U.S. 358, 368-372, 90 S Ct 1068, 25 L Ed 2d 368 (1970). Mr. DeJesus was denied Post-Conviction relief.

Mr. DeJesus filed a Federal Habeas Petition to the United States District Court of Oregon raising the same claims. The District Court denied habeas corpus relief on the assumption that Mr. DeJesus re-packaged the drugs that was taken from Mr. Calderilla. In denying Federal Habeas relief, the United States District Court granted a certificate of appealability on the issues presented here.

Mr. DeJesus appealed to the Ninth Circuit Court of Appeals. However, in denying relief, the Ninth Circuit Court of Appeals ruled that the jury instruction violated Mr. DeJesus's due process under *Sandstrom v. Montana*, 442 U.S. 510 (1979) with respect to the substantial step element of the crime being accused. Nonetheless, the Ninth Circuit Court of Appeals ruled that the repackaging of stolen drugs proved intent to sell and therefore would justify a conviction for delivery of drugs conviction.

Mr. DeJesus respectfully petitions this court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S MISAPPLICATION OF THE HARMLESS ERROR STANDARD OF *SANDSTROM* AND *IN RE WINSHIP* WARRANTS THIS COURT'S ATTENTION

The Ninth Circuit Court of Appeals correctly ruled that the Jury Instruction used in this case is unconstitutional because it violated Mr. DeJesus's Due Process, under the 14th Amendment and under *Sandstrom v. Montana*, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979). However, the Ninth Circuit Court of Appeals ruled that the Jury Instruction used in this case was harmless due to the court's conclusion that Mr. DeJesus repackaged the stolen drugs would justify an intent to sell accusation which would then justify a complete delivery offense conviction.

The Ninth Circuit Court of Appeals' concluding justification is incorrect and the jury instruction used was not harmless as decided by this Court in previous decisions.

This Court made very clear when it decided *In re Winship* that the “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged” at, 397 US, at 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970) and in *Sandstrom v. Montana*, this court established that a jury instruction may not be used to instruct the jury that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” at 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2D 39 (1979)

Firstly, this Court ruled that jury instructions that carry an effect on the jury to

view the challenged instruction as conclusive and mandatory and not subject to rebuttal are prohibited. *see* 442 U.S. at 523-524. Secondly, this Court prohibited the use of jury instruction that shifts the burden of persuasion to the accused because it would be a violation of a defendants Constitutional Due Process rights. *at* 442 U.S. At 523-524.

Both prohibition on jury instructions as decided in *Sandstrom* and *In re Winship* occurred in this case and the jury instruction used in this case was not harmless and requires this courts intervention.

The Jury Instruction used in this case was not harmless because: a) it allowed the judge to effectively and improperly lightened the prosecutions burden of proof by using a jury instruction that was conclusive and mandatory and not subject to rebuttal, and; b) it allowed the judge and the state to use such a presumption to improperly shift the burden of proof to the defendant.

a) It allowed the judge to effectively and improperly lightened the prosecutions burden of proof by using a jury instruction that was conclusive and mandatory and not subject to rebuttal.

In *Sandstrom* this Court reversed Mr. Sandstrom's conviction because it concluded that Mr. Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. Here in this case, Mr. DeJesus's Jurors could reasonably have concluded that they were directed to find against defendant on the element on intent and on the element of delivery.

The jury instruction used in this case had three federal Constitutional violations.

First, the jury instruction said:

“under Oregon law, possession with intent to deliver *constitutes* delivery *even* when no actual transfer is shown.”

This part of the jury instruction allows the prosecution to by-pass the necessary element of delivery from the constitutionally required reasonable-doubt-standard and mandatorilly and conclusively directed the jury to foreclose independent jury consideration of whether the facts proved established certain elements of the offense with which Mr. DeJesus was charged. In this case, there was no delivery ever proved.

Secondly, the instruction had the effect of directing the jury to find Mr. Dejesus guilty of the element of intent by including examples of the evidence that would presume that Mr. Dejesus intended the ordinary consequence of his voluntary acts. This portion of the jury instruction eased the State's burden of proving the element of intent.

Thirdly, the overall jury instruction was engineered as a top down decrease of the necessary threshold of the mandatory reasonable doubt standard that must be met by the State. By instructing that a complete offense is reached by an intent and that *x* evidence shall constitute intent – is in clear violation of the *Sandstrom* decision and the Constitution of the United States because such mandatory and conclusive instruction forbade any rebuttal by the defense that literally forbade Mr. Dejesus's trial attorney from being effective. Thus, denying Mr. Dejesus's effective assistance of counsel protected under the Sixth Amendment of the United States Constitution. Additionally,

counsel was ineffective by failing to object to the jury instruction.

b) The Jury Instruction allowed the judge and the State to use such a presumption to improperly shift the burden of proof to the defendant.

The Jury Instruction was not harmless because the jury instruction also relieved the State of its burden of proof articulated in *In re Winship*, namely proving evidence of any essential element of Mr. Dejesus's crime beyond a reasonable doubt.

Mr. DeJesus was charged with a delivery of drugs offense. However the State's case-in-chief was that Mr. DeJesus attempted to deliver drugs. In this case there was not an overt act to the commission of the accused crime – much less a delivery of drugs. However, the state relied heavily on the jury instruction to by-pass the necessary and mandatory challenge of proving every essential element of Mr. Dejesus's crime beyond a reasonable doubt as mandated by this court in *Winship*.

The critical element of delivery needed to be proved beyond a reasonable doubt was not met at all. It was a hidden inclusion of the jury instruction that allowed the State to obtain such an unconstitutional conviction.

When this argument was challenged in state court and the lower federal courts, the state defended the jury instruction by arguing that this jury instruction was lawful under Oregon law. However, the State did not mention how this jury instruction and the trial process it produces was lawful under the Federal Constitution, namely, under the 14th Amendment Due Process.

The Ninth Circuit Court of Appeals justified the conviction by the notion that Mr. DeJesus repackaged the stolen drugs, thus, in the court's view justified the accusation of attempted delivery, thus, justifying the conviction of a delivery charge. The Ninth Circuit Court of Appeals was incorrect in doing so.

Mr. DeJesus was not convicted of an attempted delivery – which is a lesser and separate charge¹ – but was convicted of a delivery charge that – but for the prejudicial and unconstitutional jury instruction – was not proved by the State.

The decision of the Ninth Circuit Court of Appeals is in conflict with the

¹ Oregon does have attempt laws that apply to all felonies (ORS 161.405) However, Oregon did not use its own laws to match its theory of the case. Oregon has been doing this since 1989 and overcharging defendants from the theory actually used by the prosecution. And allowing the State to rely on the Jury Instruction at hand to obtain convictions that the state did not prove beyond a reasonable doubt. The delivery of drugs charge carries a more severe punishment than what an attempt to deliver drugs would carry. (see OAR 213-004-0005 (1)).

The jury instruction would also implicate this Court's ruling under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000) (holding that, other than the fact of a prior conviction, any fact increasing a criminal penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

established decision of the United States Supreme Court under *Sandstrom* and *In re Winship*. Because the Ninth Circuit Court of Appeals has truncated the scope of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2D 39 (1979) and the long and well established decision of *In re Winship*, 397 U.S. 358, 371, 90 S. Ct. 1068, 25 L. Ed. 2D 368 (1970), this Court must grant certiorari to correct this error.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully Submitted,



Daniel Lopez-Dejesus

Sid: 15275091

2605 State Street

Salem, Oregon 97310