

No. ___-___

IN THE
Supreme Court of the United States



COLLYER GOODMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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March 17, 2020

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred by affirming the judgment of conviction and sentence pronounced by the United States District Court for the Southern District of New York because the lower courts did not require proof of a shared objective of a narcotics conspiracy as required by the Supreme Court and several other Circuit Courts of Appeals.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION AND STATEMENT OF THE CASE	5
REASON FOR GRANTING THE PETITION	15
ARGUMENT	15
CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE INVOLVES AN IMPORTANT MATTER NAMELY, WHETHER PROOF OF A SINGLE NARCOTICS CONSPIRACY REQUIRES EVIDENCE OF A UNIFYING PURPOSE	
CONCLUSION	19
FOR ALL OF THE FOREGOING REASONS, WE RESPECTFULLY URGE THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING PETITIONER'S CONVICTION	

APPENDICES

Appendix A:

Opinion and Order of the United States Court of Appeals for the Second Circuit dated October 11, 2019, which is unpublished

Appendix B:

Order of the United States Court of Appeals for the Second Circuit dated December 19, 2019

Appendix C:

Excerpts of Trial Transcript in *United States v. Oscar Boria, Jr., Collyer Goodman and Damon Wheeler*, Docket 16-cr-478, United States District Court for the Southern District of New York, October 5, 2017 through October 13, 2017

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Am. Sales Co., LLC v. AstraZeneca LP (In re Nexium (Esomeprazole) Antitrust Litig.)</i> , 842 F.3d 34 (1st Cir. 2016)	17
<i>Dickson v. Microsoft Corp.</i> , 309 F.3d 193, 203-04 (4th Cir. 2002)	17
<i>In re Ins. Brokerage Antitrust Litig.</i> , 618 F.3d 300, 327 (3d Cir. 2010)	17
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946)	6, 11, 15, 16, 17
<i>United States v. Beniquez</i> , 790 Fed. Appx. 238 (2d Cir. 2019)	passim
<i>United States v. Cannady</i> , 924 F.3d 94 (4th Cir. 2019)	18
<i>United States v. Carnagie</i> , 533 F.3d 1231 (10th Cir. 2008)	17
<i>United States v. Huff</i> , 609 F.3d 1240 (11th Cir. 2010)	17
<i>United States v. Jones</i> , 608 F. App'x 748 (11th Cir. 2015)	18
<i>United States v. Leal</i> , 921 F.3d 951 (10th Cir. 2019)	17
<i>United States v. Perez</i> , 489 F.2d 51 (5th Cir. 1973)	18
<i>United States v. Wilson</i> , 168 F.3d 916 (6th Cir. 1999)	16
<u>FEDERAL STATUTES</u>	
Title 21, United States Code, Section 846	2, 6

Title 21, United States Code, Section 841 2, 6, 7

Title 28, United States Code, Section 1254(1) 1

SUPREME COURT RULES

USSC Rule 10 1, 15

USSC Rule 13(1) 1

USSC Rule 13(3) 1

OPINION BELOW

The Summary Order and Judgment of the United States Court of Appeals for the Second Circuit in *United States v. Beníquez, et al.*, 790 Fed. Appx. 238 (2d Cir. 2019), which is unpublished, appears as Appendix A of this petition (A1-7)¹.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1) and predicated upon the entry of a decision by a United States court of appeals in conflict with the decision of other United States courts of appeals on the same important issue as to call for an exercise of the Court's supervisory power, and Rules 10(a) and 13 of this Court's rules.

The Order of the Court of Appeals denying Petitioner's petition for rehearing en banc, which is unpublished, appears as Appendix B of this petition, was entered on December 19, 2019 (A8). This petition was filed within ninety days of that date. U.S. Sup. Ct. Rule 13 (1) and (3).

¹ "A" followed by a number refers to pages in the appendices being filed with this petition.

STATUTORY PROVISIONS INVOLVED

Title 21, United States Code, Section 846

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21, United States Code, Section 841

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

(b) Penalties . . . any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

- (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
- (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
- (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
- (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III) . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or \$10,000,000 if the defendant is an individual. . . .

Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of

imprisonment. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—. . .

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or \$5,000,000 if the defendant is an individual. . . . Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Collyer Goodman respectfully requests that a writ of certiorari issue to review the Summary Order and Judgment dated October 11, 2019 (A1-7), entered by the United States Court of Appeals

for the Second Circuit which affirmed the judgment of conviction and 120 month sentence entered against him on March 26, 2018, in the United States District Court for the Southern District of New York.

This petition for certiorari asks the Court to resolve the conflict among the Circuits regarding whether to prove a conspiracy under 21 United States Code, Section 846, it is necessary to show a unified and shared objective or “rim” as recognized by the Court in *Kotteakos v. United States*, 328 U.S. 750, 773 (1946) and the Fourth, Tenth and Eleventh Circuits but not applied by the Second Circuit in affirming this case.

The instant petition results from the judgment entered against Petitioner Goodman following a jury trial which convicted him of conspiring to distribute and possess with intent to distribute cocaine and crack in violation of Title 21, United States Code, Sections 846, 841(b)(1)(A) and 841(b)(1)(B). By a special verdict form, the jury found that Goodman was responsible for five kilograms or more of cocaine and 28 grams or more of cocaine base, which resulted in a ten year mandatory minimum sentence. Title 21, United States Code, Section 841(b)(1)(A). The district court sentenced Petitioner Goodman to the

mandatory minimum term of imprisonment of 120 months. He remains incarcerated on that judgment.

Petitioner Goodman was convicted and sentenced based on a single conspiracy, where the evidence, viewed most favorably to the government, shows at most, multiple conspiracies, none of which involved the weight necessary to trigger the mandatory minimum sentence imposed. However, he was sentenced to the mandatory minimum term of ten years imprisonment required by Title 21, United States Code, Section 841(b)(1).

Petitioner Goodman's conviction resulted from a joint trial with Oscar Boria and Damon Wheeler, who were also convicted, but the jury found that Boria and Wheeler were responsible for lesser drug weights. The jury found that Wheeler was guilty of a conspiracy involving "more than 500 grams of cocaine" and "less than 28 grams of crack cocaine" and that Boria was guilty of a conspiracy involving "less than 500 grams of cocaine" (A106).

Viewing the record, as we must, most favorably to the government, the record showed that Petitioner Goodman distributed crack and cocaine to Boria on a single occasion. The evidence also

showed that Petitioner Goodman communicated with Wheeler, as well other individuals alleged to be engaged in narcotics trafficking. However, there was no evidence showing that the various individuals to whom Petitioner Goodman allegedly sold drugs acted in concert with one another. As such, there was no evidence of a single overarching conspiracy involving all the actors having a shared objective.

The investigation which led to the indictment against Petitioner Goodman and others, in fact, focused on the activities of a narcotics trafficker named Juan Beniquez. Throughout the investigation, law enforcement officers conducted surveillances of approximately twenty individuals associated with Beniquez. The investigators utilized cooperators and undercover agents to make purchases from several of the subjects, utilized court authorized wiretaps and employed a pole camera outside of the Beniquez residence from the summer of 2015 to August 2016 (A29-30).

Throughout this investigation, Petitioner Goodman was never observed at Mr. Beniquez's residence or found in possession of illegal drugs. None of the approximately 50 controlled buys law enforcement made in the course of the investigation were made from Petitioner

Goodman (A38). Similarly none of the law enforcement officers acting in an undercover capacity purchased narcotics from Petitioner Goodman. No narcotics were ever found in Petitioner Goodman's possession (A39-40). No narcotics were ever observed being passed from or to Petitioner Goodman (A40). At most, the evidence showed that after Boria met with Petitioner Goodman, law enforcement officers stopped Boria's vehicle and seized a quantity of drugs.

There were not any undercover or informant purchases or seizures from Petitioner Goodman. No ledgers or other drug records were seized (A103).

The law enforcement agents testified that on several occasions they intercepted conversations and text messages between cell phones associated with Beniquez and Petitioner Goodman. All of the intercepted communications and surveillances which the government alleged involved Petitioner Goodman occurred in an eight week period between April 21, 2016 and June 14, 2016. On seven or eight occasions, they even observed the two men meet (A35). However, throughout the surveillances and interceptions, law enforcement agents never saw drugs actually changing hands (A39). Rather, they speculated that such

an exchange took place, without any real evidence.

Evidence of 38 of the approximately 50 controlled buys was admitted into evidence at trial. Of these, approximately 24 involved Beniquez, five involved Denise Flores-Jacobson (“Flores”), who was a cooperating witness at trial and nine involved another individual, named Ross Durann (A9-21). There was no evidence that Petitioner Goodman was involved in any of these sales.

On one occasion, May 5, 2016, law enforcement officers observed Beniquez meet with Petitioner Goodman in a supermarket parking lot and walk away carrying a shopping bag. While the officers suspected that the bag contained narcotics, they never determined what was in the bag (A100). Text messages between Petitioner Goodman and Beniquez at the time of this meeting did not reflect its purpose (A22).

Similarly, while law enforcement officers observed Petitioner Goodman meet with Wheeler on June 9, 2016, in a strip mall parking lot, there was no evidence of purpose of the meeting (A23-25).

Faced with the dearth of evidence of an actual conspiracy, the Court of Appeals cobbled together a theory that Petitioner Goodman, and not Beniquez, was the hub of a “wheel” conspiracy in which Boria,

Wheeler and others were the “spokes” (A4). However, the evidence did not show that such a conspiracy existed because there was no “rim” joining those disparate spokes into a single wheel. At most, the evidence showed that Petitioner Goodman participated in a series of buyer-seller transactions which the government improperly charged “under the umbrella of a single conspiracy count.”

This theory conflicts this Court’s holding in *Kotteakos v. United States*, 328 U.S. at 773 that merely showing that multiple buyers purchased from the same source is not sufficient to prove a single conspiracy. The evidence must show that the alleged conspirators all had a stake in the outcome of the conspiracy—that is what was not shown in this case.

Flores’ testimony, cited in the Summary Order at A6, did not establish the existence of the alleged conspiracy nor to the quantities of the drugs alleged. Flores, who supported her own drug habit by selling drugs to others, never testified that there was a single conspiracy.

Flores testified that she obtained her drugs from Wheeler prior to his arrest in 2015. Flores did not know anything about Petitioner Goodman prior to Wheeler’s arrest. Flores testified that after Wheeler

was incarcerated, he directed her to deliver some money to Petitioner Goodman but directed her NOT to purchase any drugs from Petitioner Goodman. However, Flores testified that she disobeyed Wheeler and never purchased drugs from Wheeler again. Flores testified that she obtained drugs from Petitioner Goodman for a few weeks (A52), until her relationship with Petitioner Goodman ended in August 2015, after which she purchased drugs from Beniquez (A58). While Flores testified that she saw Beniquez and Goodman together on one occasion, she never testified that the two men conspired to distribute drugs.

Moreover, the record showed that the drugs which Flores sold to government informants in 2016, came after she stopped obtaining drugs from Petitioner Goodman. These separate events could not provide a sufficient basis to infer the existence of the conspiracy. At most, the Flores testimony provided a basis to speculate that Goodman may have dealt drugs with Wheeler and Beniquez, but such speculation is not enough.

Even crediting, as the Court must, Ms. Flores' sketchy and contradictory testimony and drawing all reasonable inferences in the government's favor, the evidence did not show that Petitioner Goodman

gave drugs to the purchasers on consignment. On the rare occasions he extended credit, Ms. Flores' testified that he was anxious to be repaid (A55-56).

Flores did not testify that Petitioner Goodman helped her locate and supply her customers. This is in contrast to Flores' testimony that when she started selling drugs, well before she met Petitioner Goodman, Durann, who was her supplier at the time, suggested likely customers to her (A44) and that she and Beniquez helped each other serve customers (A62).

While the record showed that Wheeler sold drugs to informants from November 2015 to June 2016 (A93-98), there was no evidence from Flores or anyone else connecting these sales to Petitioner Goodman.

Nor do the intercepted messages cited in the Summary Order at A6, support the proposition that Petitioner Goodman supplied Wheeler. The government relied upon a series of ambiguous messages and conversations which were intercepted from a telephone number which the government labeled as the "Goodman Phone." There was no direct evidence from Flores or anyone else that Petitioner Goodman actually used that phone. Nor was a phone with that number ever found with

Petitioner Goodman.

Even assuming that Petitioner Goodman used the so-called Goodman phone, the messages were generally limited to the word “Yo”, and did not support the inference that they related to drug dealing. See, e.g., A27, A62).

The record does not show the number of times, if any, that Beniquez, Wheeler and/or Boria purchased drugs from Petitioner Goodman or the price they paid for those drugs. There was no evidence of any coordination among the alleged co-conspirators. Indeed, the evidence showed that each was engaged in separate businesses and had no more than buyer-seller relationships with one another.

Notably, while the jury convicted both Boria and Wheeler, it did not find that either had conspired to distribute the same amount of narcotics as Petitioner Goodman.

REASON FOR GRANTING THE PETITION

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE INVOLVES AN IMPORTANT MATTER NAMELY, WHETHER PROOF OF A SINGLE NARCOTICS CONSPIRACY REQUIRES EVIDENCE OF A UNIFYING PURPOSE

Collyer Goodman is serving a ten year sentence in contradiction to this Court's holding in *Kotteakos v. United States*, 328 U.S. at 773 and the holdings of other Circuit Courts of Appeals. We respectfully submit that this case presents an important matter warranting the grant of certiorari. U.S. Sup. Ct. Rule 10.

The Court in *Kotteakos v. United States* held that the mere showing that multiple buyers purchased from the same source is not sufficient to prove a single conspiracy. The evidence must show that the alleged conspirators all had a stake in the outcome of the conspiracy, which is what was not shown in this case.

The Court of Appeals ignored this principle in its decision. The appellate court stated that the evidence showed that Petitioner Goodman distributed wholesale quantities of powder cocaine and cocaine base to Boria, Beniquez, Wheeler and Flores with the expectation that they would resell the drugs (Summary Order at A5-6).

However, there was no indication, and the appellate court did not cite any, that Petitioner Goodman's customers had any shared stake in the outcome of an overarching conspiracy. In other words, while Petitioner Goodman may have wanted his customers to succeed in selling the drugs so that he would be repaid, the customers had no shared interest in each other's success.

Nor was there any evidence of coordination among the alleged coconspirators which would indicate that each was a part of a subdivided conspiracy rather than that multiple conspiracies existed.

See, *United States v. Wilson*, 168 F.3d 916, 924 (6th Cir. 1999).

Using the analogy of the wheel conspiracy, the appellate court found that there were a hub and spokes but no rim to hold the wheel together. Just like the wheel collapses without a rim, the appellate court's holding that a single conspiracy existed collapses without evidence of shared interest in its outcome. The Court recognized that to be cohesive, a wheel conspiracy must be joined by a rim. See *Kotteakos*, 328 U.S. at 755.

The Tenth Circuit has held that "individuals operating as independent spokes, connected through a center hub, are part of the

same conspiracy only if they are enclosed by a ‘rim’—that is, ‘a unified and shared objective”. *United States v. Leal*, 921 F.3d 951, 959 (10th Cir. 2019), citing *Kotteakos* and *United States v. Carnegie*, 533 F.3d 1231, 1238 (10th Cir. 2008). The Eleventh Circuit has held that where the ‘spokes’ of a conspiracy dealt independently with the hub conspirator without any knowledge of or connection with any other, dealing, there is not a single conspiracy, “but rather as many conspiracies as there are spokes.” *United States v. Huff*, 609 F.3d 1240, 1244 (11th Cir. 2010). To show a single conspiracy, the Eleventh Circuit held that “the various spokes are aware of each other and of their common aim,” *Id.*

In the antitrust context, the First Circuit cited *Kotteakos* to hold that interdependent conduct without a “rim” to show agreement does not suffice to establish an overarching conspiracy. *Am. Sales Co., LLC v. AstraZeneca LP (In re Nexium (Esomeprazole) Antitrust Litig.)*, 842 F.3d 34, 57 (1st Cir. 2016). See also, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010). The Fourth Circuit held that “a wheel without a rim is not a single conspiracy.” *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) citing *Kotteakos*.

This is not to say that the conspiracy must have a discrete, identifiable organizational structure but that the participants must have known that the illegal efforts of others were required to make their own dealings possible. See *United States v. Cannady*, 924 F.3d 94, 101 (4th Cir. 2019). Several circuits have approved “rimless wheel” arguments but required that the evidence show “knowledge by individual spokes of the existence of other spokes.” *United States v. Perez*, 489 F.2d 51, 59 n.11 (5th Cir. 1973); *United States v. Jones*, 608 F. App'x 748, 755 (11th Cir. 2015).

In the instant case, taking the evidence most favorable to the government, the evidence showed that various individuals made separate purchases from Petitioner Goodman which were possible without the participation of others or even knowledge of the dealings between Petitioner Goodman and the others. Other than Wheeler's request that Flores make a payment to Petitioner Goodman, there was no evidence of more than one individual participating in a transaction with Petitioner Goodman. Flores saw Beniquez and Petitioner Goodman meet on one occasion but did not know the reason for the meeting.

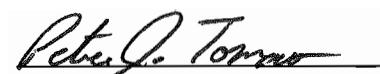
The distinction between single and multiple conspiracies is critical to Petitioner Goodman because the existence of a single conspiracy is necessary to apply the mandatory minimum sentencing provision which resulted in his ten year sentence.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, WE
RESPECTFULLY URGE THIS COURT TO GRANT A
WRIT OF CERTIORARI TO REVIEW THE JUDGMENT
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Dated: Garden City, New York
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