No. _____

In the Supreme Court of the United States

BROWN LASTER, JR.,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Eleventh Circuit entered a decision that conflicts with this Court's precedent in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) and consequentially, solidified the existence of a conflict between other United States court of appeals on the same important matter?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Brown Laster, Jr. respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on December 30, 2019, affirming the judgment of the United States District Court for Middle District of Florida, Fort Myers Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at United States v. Browdy, 798 Fed. Appx. 397 (11th Cir. 2019). It is attached as **Appendix A.**

The judgment of the United States District Court for the Middle District of Florida, Fort Myers Division, is unpublished and is attached at **Appendix C.**

JURISDICTION

The court of appeals entered its order on December 30, 2019. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on January 14, 2020. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on March 11, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of three separate constitutional and statutory provisions.

U.S. Const. amend. V.

> 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.

Fed. R. Crim. P. 52(a).

> (a) Harmless Error.
>
> > Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Brown Laster, Jr., faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on December 20, 2017. Mr. Laster filed a timely notice of appeal on December 28, 2017. The Eleventh Circuit exercised jurisdiction over Mr. Laster's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns an important question about when a conviction can be the result of a material variance and not simultaneously violate the United States Constitution. The Eleventh Circuit issued an opinion that conflicts with the Court's decision in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) and consequentially, solidified the existence of a conflict between other United States court of appeals on the same important matter. The Eleventh Circuit and other United States court of appeals are reviewing cases that involve a material variance, and deciding whether a defendant is entitled to have his/her conviction reversed, whilst applying a stricter standard than other courts. This conflict creates the reasonable possibility that defendants similarly situated with Mr. Laster are being denied relief because of the United States court of appeal that their case is pending before.

B. Factual Background.

Mr. Laster and two co-defendants (Jerry Browdy and Wesley Petiphar) proceeded to a seven day trial that began on July 19, 2017. The government's theory of the case was that Mr. Laster, Browdy, Petiphar and other individuals were involved in an agreement to ship trafficking amounts of controlled substances through the mail from California to various states in the Southeastern region, including Florida.

Throughout the seven (7) day trial, the government presented the testimony of eighteen (18) witnesses and introduced close to 300 pieces of evidence. The government's first witness was Billy Feltz ("Feltz"). (Doc. 388 at 36). Feltz testified that in September of 2014, he was introduced to Herbert Battle (known as "Dooney"), by his secretary, at a mansion party in Port Charlotte. (Doc. 388 at 41). Following their introduction, Dooney started to ask Feltz to create shipping labels for him, which Feltz did with no questions asked. (Doc. 388 at 49). Soon thereafter, Feltz went on a trip to California with Dooney and stayed there for an entire month in a hotel room making shipping labels for Dooney. (Doc. 388 at 52, 54). Feltz did not work with or learn of Mr. Laster or his co-defendants while he was in California.

In January of 2015, after returning to Florida, Feltz was advised that Dooney was going on vacation and as a result, Mr. Laster would be bringing him $1,500 to get by. The following day, Mr. Laster went to Feltz's house, brought him the $1,500, and also advised Feltz that Dooney was not on vacation but was in jail. (Doc. 388 at 66). Feltz testified that Mr. Laster advised him that Mr. Laster was actually Dooney's

boss, and Feltz then started working for Mr. Laster. (Doc. 388 at 66). Feltz alleged that he started making labels for Mr. Laster. Feltz clarified that he was making labels for Dooney only from September of 2014 to December of 2014. At that point in time, he stopped because Dooney went to jail. Dooney was released from jail in late March, April, or "[i]t could have been around July-ish", and Feltz began making labels for him again. (Doc. 388 at 88). Feltz testified that he was making labels for Dooney and Mr. Laster from July 2015 until November 2015. (Doc. 388 at 89). Then, in late November to early December of 2015, Feltz started to make labels for William Rollerson. (Doc. 388 at 101).

Feltz testified that eventually he told Dooney that he was making labels for Mr. Laster, and Dooney was "furious." (Doc. 388 at 81). In February or March 2016, Feltz started cooperating with the DEA after Dooney brought them to his house. (Doc. 388 at 102). On cross-examination, Feltz admitted that every time Dooney would come around, Mr. Laster would disappear. (Doc. 388 at 124).

The government then called Special Agent Phil Muollo, who started the investigation after learning about an individual named Bradley Wegert. Wegert, Herbert Battle (a/k/a Dooney) and Deborah Scott (another cooperating witness) were all represented by the same attorney: Steven Birch. (Doc. 389 at 117). It was through Birch and Dooney that Muollo was introduced to Feltz and Rollerson.

The government called numerous other witnesses including Teresa Mahoney (Doc. 389 at 184), Deborah Scott (Doc. 390 at 15), Devonta Chisholm (Browdy's daughters' boyfriend) (Doc. 391 at 143) and Vontisha Scott (Browdy's daughter) (Doc.

391 at 218). The government also read into the record the previous trial testimony of Dawn Cimmino, which had nothing to do with Mr. Laster.

William Rollerson, another co-defendant who took a plea instead of going to trial, also testified. (Doc. 390 at 119). Mr. Rollerson testified that it was Herbert Battle (Dooney) who connected him with Bill, the ghost, who was the one who would make the labels. (Doc. 390 at 124). Mr. Rollerson was asked if he recognized any of the defendants sitting at the table and he could not. Additionally, Mr. Rollerson acknowledged that he never dealt with any of them when sending packages to Florida. (Doc. 390 at 125).

C. Procedural History in the District Court.

On July 6, 2016, a federal grand jury issued a one count indictment against the Mr. Laster and several co-defendants including Browdy, Petiphar and William Rollerson. (Doc. 3). The indictment charged Mr. Laster with knowingly and willfully combining and conspiring with each other to possess with intent to distribute and to distribute 500 or more grams of a mixture or substance containing a detectable amount of methamphetamine in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(viii). (Doc. 3).

The matter originally went to trial on June 2, 2017 and lasted seven (7) days. (Doc. 289-95). The jury was adjourned on June 12, 2017 to deliberate. However, on June 13, 2017, the district court announced that the jury was unable to reach a verdict and the jury was adjourned. On July 19, 2017, Mr. Laster proceeded to his second trial. The trial lasted seven (7) days.

During the testimony of Feltz, trial counsel for Mr. Laster made an objection based on evidence that had been admitted thus far. The following conversation was had on the record.

> TRIAL COUNSEL: This is just like my objection before. What the government is doing is trying to make it sound as if Battle, Dooney, is working in the same conspiracy as my client and the way these answers are going it's a who provided the phones. Sometimes Dooney, sometimes -- it sounds like they're working in the same conspiracy, giving a totally wrong impression to this jury. And it shouldn't be allowed. Highly prejudicial. It's not -- they're two separate entities here, and a lot of the questions, though, I let it go until now, but a lot of the questions were answered in the same fashion. It sounds as if Dooney and my client are working together in the same conspiracy. It's just not the case.
>
> [...]
>
> THE COURT: Are you indicating this is a separate case or the same conspiracy or should it not matter?
>
> GOVERNMENT: Your Honor, the conspiracy is to ship packages of controlled substances from California to the southeastern United States. It involves more than two people, sometimes not the same two people at different times. For example, Mr. Battle is out from approximately January to summer of 2015. But the conspiracy remains the same. Mr. Feltz is involved, there are arrangements being made. This is all part of the same conspiracy. Regardless of whether Mr. Laster and Mr. Battle are in agreement or in accord with each other, it's very obvious that there's a rivalry between the two. It does not defeat the fact that there is a broad conspiracy between more than two people to ship packages of controlled substances from California to the southeastern United States, to make the shipping labels for them using fictitious e-mails, fictitious accounts, and they all involve Mr. Feltz.
>
> TRIAL COUNSEL: So I would just like a clarification to your answer, Judge. Is Mr. Battle in the same conspiracy, not a separate conspiracy, the same conspiracy as the defendants? I don't think we got a clear answer to that.
>
> GOVERNMENT: And, Your Honor, in response, you asked specifically about the conspiracy, but there's also a relevance here as to why Mr. Battle eventually rats out Brown Laster to -- his attorney to the DEA.

> It's a reason why Mr. Feltz became cooperating with law enforcement. This is all part of the same narrative of events, regardless of conspiracy here, multiple conspiracies, who's involved. All these things are just distractions from what the actual issues here are and what is the state of mind of the witness.
>
> [...]
>
> TRIAL COUNSEL: Again, is it the same conspiracy? I haven't heard yes or no.

(Doc. 388 at 83-86). Following the government's case, trial counsel argued a motion for judgment of acquittal under Rule 29. (Doc. 392 at 86).

> [T]here is insufficient evidence drawing all evidence in a light most favorable to the government and drawing all reasonable inferences and credibility choices therefrom. A reasonable trier of fact could not establish that the evidence established guilt beyond a reasonable doubt as to Brown Laster, that he was part of a conspiracy to distribute and possess with intent to distribute more than 500 grams of methamphetamine.
>
> Your Honor, we heard testimony from multiple law enforcement witnesses and cooperating witnesses, and that failed to show the existence of a conspiracy and the defendant's involvement in the conspiracy.
>
> We heard from witness Billy Feltz, otherwise known as The Ghost, his testimony was not credible. He testified that he destroyed evidence and destroyed that – and by destroying that evidence, destroyed the corroboration of his testimony. Mr. Feltz had a motive to lie, to keep from being charged, he flip flopped as to dates and times, he never – he testified he never observed Brown Laster in California, he testified that he never observed Brown Laster with methamphetamine. We heard from law enforcement officers, none of the law enforcement officers testified that they observed Brown Laster possess or conspire to possess methamphetamine.
>
> As far as the government's cooperating witnesses, they were composed of admitted liars, drug dealers, drug users and convicted felons. They all had a motive to lie, which was to cooperate to reduce their sentences. Some gave false statements to law enforcement officers and at least one witness was – Billy Feltz was paid for his testimony. We heard about

> attorney Steve Birch who represented Deborah Scott, Brad Wegert, Herbert Battle, and we heard that he advised Deborah Scott to lie about who was the kingpin behind the shipment of methamphetamine. We heard that Attorney Birch was passing on information to Agent Muollo, which violated client confidentiality.
>
> Lastly, Your Honor, I submit there were multiple conspiracies, not just the one charged in this indictment. There is a Battle, Herbert Battle conspiracy and an alleged Brown Laster conspiracy. Further, there is evidence that no conspiracy took place at all, and that each of the defendants allegedly sold meth and they could have done that easily by the evidence that we heard independent of each other. So for these reasons, Your Honor, I'm asking the Court to grant the Rule 29 motion for judgment of acquittal.

(Doc. 392 at 86-88). The district court denied the motion.

D. Eleventh Circuit's Consideration of the Matter.

On appeal, Mr. Laster argued, amongst other things, that the district court erred in denying his motion for judgment of acquittal and motion for new trial when the evidence presented was insufficient to sustain a conviction and created a material variance. A three-judge panel of the Eleventh Circuit entertained the matter at an oral argument on December 13, 2019. Thereafter, said panel held that a reasonable jury could "easily have found each of the defendants guilty of the charged conspiracy." Pet. App. A3.

> By the time of trial, multiple members of the former conspiracy were cooperating witnesses for the government. Their testimony was sufficient to establish both the existence of the conspiracy to ship methamphetamine from California to Florida and Georgia and that each defendant had knowingly and voluntarily joined it. For example, one cooperating witness testified that all three defendants came to her house and that Laster took the lead in recruiting her to pick up drug shipments. Another witness testified that Petiphar recruited her to pick up drug shipments from hotels. Browdy's own daughter testified that he had recruited her to pick up drug shipments as well. Particularly given the overlapping members, timeframe, and location of the charged

> conspiracy, a reasonable jury could have concluded that each defendant was guilty.

Pet. App. A3-4. The panel then used the same factual basis to find that there was no material variance at trial.

> For similar reasons that the evidence was sufficient to find each defendant guilty of the charged conspiracy, therefore, we conclude that there was no material variance at trial. (Nor, in any case, have the defendants shown that any prejudice would have resulted if the evidence had established multiple conspiracies.) *See id.* (requiring substantial prejudice to warrant reversal).

Pet. App. A4-5.

Mr. Laster moved for a Petition for Rehearing and Rehearing *En Banc* after the Eleventh Circuit rendered its decision. Mr. Laster argued that the panel's decision was contrary to Eleventh Circuit precedent in United States v. Richardson, 532 F.3d 1279 (11th Cir. 2008). However, Mr. Laster's petitions were ultimately denied. No judge in regular active service on the Eleventh Circuit panel requested that the Court be polled on rehearing en banc. Pet. App. A12.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Presents A Conflict With The Court's Decision In Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

The Eleventh Circuit's decision in this case presents a conflict with the Court's decision in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The basis for this conflict rises from the Eleventh Circuit's application of United States v. Richardson, 532 F.3d 1279 (11th Cir. 2008) to the facts of Mr. Laster's case.

In Kotteakos, thirteen defendants were charged with a single conspiracy to violate provisions of the National Housing Act. The defendants sought review of the judgment that convicted them of said single conspiracy, asserting that they suffered substantial prejudice by being convicted with evidence that the United States admitted proved eight or more different conspiracies that were executed through a common key figure. Id. at 765. The United States argued that the variance in proof from the single conspiracy charged in the indictment was harmless error. Id. at 767. The United States based its argument on the proposition that the proof was sufficient to establish the participation of each defendant in one or more of the several smaller conspiracies offered, and thus, was sufficient to convict each defendant. Id. at 771. The Court rejected that argument and found that using a "harmless" error standard wasn't appropriate for those facts. The Court found that when it could not say, with fair assurance, after pondering all that happened without stripping an erroneous action from the whole, that a judgment was not substantially swayed by an error, it is impossible to conclude that substantial rights were not affected. Id. as a result, the Court held that the error affected the defendants' substantial right to not be tried en masse for the conglomeration of distinct and separate offenses committed by others. Id. at 775.

In United States v. Richardson, 532 F.3d 1279 (11th Cir. 2008), the defendant was convicted of one count of conspiracy to distribute five kilograms or more of cocaine and appealed said conviction on the basis that the evidence presented at trial tended to prove the existence of multiple conspiracies, which fatally varied from, the single

conspiracy charged in the indictment. Id. at 1282. Richardson was the only person charged in the conspiracy. Id. At trial, the government presented testimony from numerous witnesses. The first witness was Gregory Barnes, who testified that Richardson was his "partner" and the two stayed involved in the distribution of cocaine from 1989 to 1993. Id. at 1283. Following Barnes's testimony, the government called several individuals who described dealing drugs with Richardson and others between 1992 and 2002. Id. Only one of those witnesses established a temporal overlap with the time that Richardson and Barnes worked together. Narvis Benton testified that he started dealing with Richardson in 1992, which was within the period of Barnes and Richardson's collaboration. Id. The remaining witnesses testified about their dealings with Richardson and others between 1994 and 2001. The evidence established that many members of Richardson's network of drug dealers knew and worked with not only Richardson, but other members as well. Id. at 1284. Richardson's main argument on appeal was that his association with Barnes could not be considered part of the same drug conspiracy or conspiracies that Richardson engaged in from 1992 to 2001 with other individuals. Id. at 1283.

The court ultimately disagreed with Richardson's material variance argument. First, the court found that there was a common goal. Id. at 1285.

> When viewed in the light most favorable to the government, the evidence in this case clearly shows a common goal of buying and selling cocaine for profit—in Atlanta, Miami, and elsewhere—among Richardson and his various coconspirators.
>
> ...

> To be sure, Richardson relied on several suppliers, transporters, and customers—many of whom may not have known about the others—**but the goal of trafficking cocaine with Richardson was common among them.**

Id. at 1285. (Emphasis added). The court next found that there was the existence of an underlying scheme.

> The government's evidence supported the conclusion that Richardson and his coconspirators would work together to buy cocaine for relatively low prices in Miami and sell it for relatively high prices in Atlanta, thereby turning a profit. Although the evidence did not establish that all of Richardson's coconspirators only worked together, it did not have to. Even if, on occasion, Richardson's confederates did drug deals with each other without Richardson's involvement, that would not undermine the existence of an underlying scheme. The evidence supported a reasonable conclusion that **each coconspirator worked with Richardson according to Richardson's general scheme.**

Id. (Emphasis added). The court also found that there was an overlap of participants and times.

> Based on this evidence, when viewed in the light most favorable to the government, the jury could have reasonably concluded that Richardson was "a 'key man' [who] direct[ed] and coordinate[d] the activities and individual efforts of various combinations of people." Whether there was overlap among all of Richardson's coconspirators is irrelevant. *Id.*
>
> ...
>
> **That Richardson knowingly involved himself with each conspiratorial act proved at trial is enough for the jury to have concluded that a single conspiracy existed.**

Id. at 1286. (Emphasis added) (Internal citations omitted).

Not only did the court find that only one conspiracy had been established, but it also found that Richardson failed to show he was substantially prejudiced. Id. at

1287. The court addressed that in order for a defendant to show that he was substantially prejudiced, he would have to show one of two things:

> 1) that the proof at trial differed so greatly from the charges that [he] was unfairly surprised and was unable to prepare an adequate defense; *or* 2) that there are so many defendants and separate conspiracies before the jury that there is a substantial likelihood that the jury transferred proof of one conspiracy to a defendant involved in another.

Id. at 1287. The court found that reversal was not appropriate.

> The prosecution need not prove exactly what the indictment alleges. It is sufficient for the government to prove a subset of the allegations in the indictment, as long as the allegations that are proved support a conviction for the charged offense. See United States v. Ward, 486 F.3d 1212, 1227 (11th Cir.2007); see also United States v. Duff, 76 F.3d 122, 126 (7th Cir.1996) (citing United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985)) ("A prosecutor may elect to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged.").

Id. at 1288-89.

Under Richardson, the Eleventh Circuit has created a test for reviewing claims involving material variances that conflicts with the underlying rule and purpose in Kotteakos. Richardson allows the Eleventh Circuit to affirm a conviction, even if there is a material variance, **so long as** the allegations that are proved support a conviction for the charged offense. This does not require the Eleventh Circuit to consider, or give adequate credence to the real possibility that an error, such as a material variance, substantially swayed the judgment. See, Kotteakos, 328 U.S. at 764-65 (holding that the "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error."). The Eleventh Circuit applied this holding in Mr. Laster's case, and found that because the evidence was

sufficient to support the underlying conspiracy charge, there could be no material variance or prejudice. Under Kotteakos, the appropriate question would have been whether the introduction of evidence of other conspiracies (i.e., the "Battle" conspiracy) swayed the jury to a guilty verdict. The failure to ask this question is why this Court should grant certiorari in the instant case.

II. The Eleventh Circuit's Decision Solidified A Conflict Amongst the United States Courts of Appeal.

The Eleventh Circuit's decision solidified the fact that there is a conflict amongst the United States courts of appeal when it comes to issues of material variance and prejudice suffered by defendants. The standard should be that as laid out by the Court in Kotteakos. However, that is not the current status of the courts.

The Fourth Circuit Court of Appeal discussed its standard in United States v. Cannady, 924 F.3d 94 (4th Cir. 2019), where the defendant argued that there was a fatal variance between the single conspiracy charged in the indictment and the evidence offered at trial. The court ultimately disagreed and found that the defendant could not satisfy, amongst other things, the prejudice prong. Id. Citing to the decision in United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), the court discussed what a defendant bears the burden of establishing when alleging a fatal material variance. Id.

> "In order to show actual prejudice stemming from a multiple conspiracy variance, an appellant must prove that there are so many defendants and so many separate conspiracies before the jury that the jury was likely to transfer evidence from one conspiracy to a defendant involved in an unrelated conspiracy." [Kennedy, 32 F.3d at 883]. The defendant bears the burden of establishing a prejudicial variance. United States v. Malloy, 568 F.3d 166, 178 (4th Cir. 2009).

Id. at 100.

The Sixth Circuit Court of Appeal entertained a similar issue in United States v. Mize, 814 F.3d 401 (6th Cir. 2016). Therein, the defendant argued and the court agreed that there was a variance between the charges in the indictment and the evidence produced at the defendant's trial. The court further found that the variance was prejudicial and warranted reversal of the defendant's conviction. Id. at 401. In coming to these ultimate conclusions, the court applied a two-step inquiry. Id. at 410. First, the court had to determine if there was a variance and second, if so, was it prejudicial. Id.

> To determine whether a variance has occurred, we look to whether the evidence can "reasonably be construed only as supporting a finding of multiple conspiracies" rather than the single conspiracy alleged in the indictment. United States v. Warner, 690 F.2d 545, 548 (6th Cir.1982) (citing Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Moreover, "defendants can establish a variance by referring exclusively to the evidence presented at trial." [United States v.] Hynes, 467 F.3d [951] at 962 [(6th Cir. 2006)].

Id. In determining whether a defendant has established prejudice, the court found that prejudice exists

> "where the defendant is unable to present his case and is taken by surprise by the evidence offered at trial"; "where the defendant is convicted for substantive offenses committed by another"; or "where spillover [occurs] because of a large number of improperly joined defendants." United States v. Swafford, 512 F.3d 833, 842–43 (6th Cir.2008).

Id. The government, in trying to defend the conviction, argued that any error that occurred with a material variance was harmless error. However, the court rejected that argument and cited to Kotteakos, where the Court held that "this is not and

cannot be the test." Kotteakos, 328 U.S. at 767. "Prejudice in this context means whether Defendants were found guilty of a different conspiracy from that charged in the indictment, not whether the evidence was sufficient to justify the verdict." Mize, 814 F.3d at 412.

The Seventh Circuit was faced with a similar argument by the defendants in United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991). In Townsend, the defendants similarly argued that the government offered proof of multiple conspiracies at trial, when the indictment charged otherwise. The court discussed that whether a single conspiracy exists is a question of fact and these types of arguments on appeal amount to a challenge to the sufficiency of the evidence presented. Id. at 1389. The court discussed what it reviews when deciding if a material variance exists and requires reversal.

> The fact that the government's evidence might also be consistent with an alternate theory is irrelevant; the law does not require the government to *disprove* every conceivable hypothesis of innocence in order to sustain a conviction on an indictment proved beyond reasonable doubt. United States v. Beverly, 913 F.2d 337, 361 (7th Cir.1990); United States v. Douglas, 874 F.2d 1145, 1152 (7th Cir.1989). Consequently, "even if the evidence arguably establishe[d] multiple conspiracies, there [is] no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment." United States v. Prince, 883 F.2d 953, 959 (11th Cir.1989).

Id. at 1389. The court ultimately found that the evidence was insufficient to establish that all defendants agreed to join one single, ongoing conspiracy. Id. at 1410.

The Eighth Circuit analyzed a similar situation in United States v. Rosnow, 977 F.2d 399 (8th Cir. 1992), wherein the defendant argued and the court agreed that

there was a variance between the charges in the indictment and the evidence produced at the defendant's trial. The court found thereafter that the variance caused substantial prejudice to the defendants. Id. at 407. The court came to this finding after considering whether the jury could have erroneously transferred guilt from one to another and found defendants guilty of an overall conspiracy. Id.

> We believe the defendants here suffered from "unwarranted imputation of guilt from others' conduct," constituting a prejudicial variance on the charge of conspiracy. See Kotteakos, 328 U.S. at 777, 66 S.Ct. at 1253. The record is replete with evidence of inflammatory actions of individuals which, especially in light of the length and complexity of the trial, the jury could have easily applied to the group as a whole.

Rosnow, 977 F.2d at 407.

Even when considering these appellate courts, the difference in the standards being applied is obvious. Ironically, all the courts individually cite to the Court's decision in Kotteakos and find a way to "apply" it to the facts of their case. However, as presented above, this application is not consistent with the Court's initial analysis in Kotteakos. Currently, some appellate courts review material variance claims under the question of whether the evidence was sufficient to justify the verdict (such as the Eleventh Circuit in the instant case). Other appellate courts review these same issues under the completely different question of whether the defendant was found guilty of a different conspiracy from that charged in the indictment. This lack of uniformity and solidified conflict with the Court's decision in Kotteakos creates an ideal situation for certiorari review.

III. Importance Behind Obtaining Convictions Under Single Versus Multiple Conspiracies.

The question asked by most individuals is, what does it matter if a defendant is convicted after presenting evidence of multiple conspiracies instead of a single conspiracy, if there was enough evidence to find him guilty of the single conspiracy anyway? The answer is simple and critical to the Court's decision on whether to grant certiorari review.

The United States of America is faced with countless defendants and cases every day. One way that the government manages this obscene number of defendants is to charge some of them as a conspiracy. This allows the government to charge numerous individuals, who are charged with being involved with a similar crime. In doing so, the government is able to take all defendants to trial at once (as in the instant case) and benefit in other ways. For example, coconspirators are liable for the substantive crimes committed by members of the conspiracy that are in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946). A finding that a defendant joined a conspiracy therefore exposes that defendant to much more than criminal liability for joining the conspiracy; he or she also faces liability for the substantive crimes of the conspiracy. However, the government has to make sure that they are charging defendants appropriately and grouping them correctly under the right "agreement" or "conspiracy."

Individuals charged under a conspiracy are seen as more dangerous and often receive higher punishments. We punish conspiracy because joint action is, generally, more dangerous than individual action. "[W]hat makes the joint action of a group

of *n* persons more fearsome than the individual actions of those *n* persons is the division of labor and the mutual psychological support that collaboration affords." L. KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW (1987); see also United States v. Manzella, 791 F.2d 1263, 1265 (7th Cir.1986). A conspiracy "is a partnership in criminal purposes," United States v. Kissel, 218 U.S. 601, 608, 31 S.Ct. 124, 126, 54 L.Ed. 1168 (1910).

With these opportunities for greater sentences and punishments for individuals charged with conspiracies, it is critical that a uniform and understood analysis be available to ensure that individuals are not being convicted under a multiple conspiracy theory, when they were only charged under a single conspiracy. The government is not going to stop charging individuals with conspiracies – the benefits are too great. However, a defendant such as Mr. Laster is entitled to equal benefits and the right to be convicted of what he was charged with.

IV. The Eleventh Circuit's Decision Presents An Opportunity To Create Uniformity Amongst the Courts.

This case presents an ideal opportunity to resolve this important and recurring issue. The Eleventh Circuit's decision revealed a conflict amongst the courts that needs resolution. It cannot be said that Mr. Laster is the first, or last, defendant who will fall under this conflict and suffer as a result. The harsh reality is that if Mr. Laster had been convicted in the Sixth or Eighth Circuit, his conviction would have been reversed because Mr. Laster was found guilty of a different conspiracy from that charged in the indictment. The mere possibility that such a violation could be happening, because of a lack in consistent holdings, is something this Court has the

ability to resolve. This Court should grant certiorari to remedy this conflict and set appropriate boundaries in order to ensure that no future violations of similar magnitude take place.

CONCLUSION

For the reasons stated above, Brown Laster, Jr., respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Brown Laster, Jr., Petitioner

Date: June 9, 2020

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