No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

RANDY ESTEVEZ

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

/s/ Bruce R. Bryan

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ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in not instructing the jury that it should be unanimous on the date and location of his alleged possession of the firearm?

2. Whether there was insufficient evidence to support the four-level enhancement under U.S.S.G. §2K2.1(B)(6) that Estevez used a firearm in connection with another felony?

3. Whether the sentence of 100 months incarceration was substantively unreasonable?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Randy Estevez. The Respondent is the United States of America.

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Appellee- Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Petitioner, Randy Estevez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit held that (1) the district court did not err when it did not instruct the jury that it should be unanimous on the date and location of his alleged possession of the firearm; (2) there was sufficient evidence to support the four-level enhancement under

U.S.S.G. §2K2.1(b)(6) that Estevez used a firearm in connection with another felony; and (3) the sentence of 100 months incarceration was substantively unreasonable.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, dated June 5, 2020, has been published at *United States v. Estevez*, ___ F.3d ___, 2020 WL 3022983 (2d Cir. 2020). The Opinion is reproduced in Appendix A, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Opinion in *United States v. Estevez*, ___ F.3d ___, 2020 WL 3022983 (2d Cir. 2020) is dated and was entered on June 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Southern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the due process clause of the Fifth Amendment of the United States Constitution. This case also involves the interpretation of 18 U.S.C. §3553(a) and U.S.S.G. §2K2.1(b)(6)(B). The pertinent texts of the Constitution, Statute, and Guideline are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

Randy Estevez ("Estevez") was found guilty after a jury trial in the Southern District of New York (McMahon, J.) of the crime of being a felon in possession of a firearm after having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §§922(g)(1) and (2). On December 20, 2017, Estevez was sentenced to 100 months incarceration followed by a term of three years supervised release. On December 22, 2017, the Judgment of Conviction was filed. On December 29, 2017, the Notice of Appeal was timely filed.

On appeal, the Second Circuit affirmed. As to the contention that the district court erred in not instructing the jury that it should be unanimous on the date and location of his alleged possession of the firearm, the Second Circuit held that the offense of which Estevez was charged is a continuing offense, and therefore the district court acted consistently with the offense to not require the jury to find that the offense occurred on a specific date and at a specific location. The jury was permitted under a continuing offense to conclude unanimously that the crime was committed over a period of time. Based on the evidence at trial, the Indictment charged and the government proved that Estevez possessed the firearm over a period of time that spanned several days.

As to the claim of procedural error in the sentence, the Second Circuit held that the district court properly found that the four-level increase under Guideline § 2K2.1(b)(6)(B) applied. Based on the testimony of the government's chief witness, the Court rejected the contention that Estevez aspired to rob the victim at some nebulous time in the future. The Court also held that it was irrelevant that the robbery never in fact occurred, given that attempted robbery is also a felony.

As to the claim of substantive error in the sentence, the Second Circuit held that a reversal on appeal will only occur in exceptional cases. The district court had considered the factors raised by Estevez in support of a lower sentence and fashioned the sentence accordingly. The Second Circuit noted that Estevez has a serious criminal history justifying the district court's sentence.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Opinion of the Second Circuit conflicts with decisions of this Court. This case also involves at least one important question of first impression and public importance.

A. The district court erred in not instructing the jury that it should be unanimous on the date and location of his alleged possession of the firearm

It is true that a jury is not typically required to particularly state how it "reach[ed] agreement on the preliminary factual issues which underlie [its] verdict." *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring). But when one of the theories charged in the indictment is deficient, a determination of error may depend on whether the theory is legal or factual. See *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993).

When "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). When jurors "have been left the option of relying upon a factually inadequate theory," they are less likely to err because they are able to analyze the evidence. *Id*. at 59.

Moreover, unanimous verdicts are required in federal criminal convictions. *See Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748 (1948); Fed. R. Crim. P. 31(a); *see also* Fed. R.

Civ. P. 48. This petition raises the issue of "what the jury must be unanimous about." *See Schad v. Arizona*, 501 U.S. 624, 630 (1991) (plurality opinion).

In *Richardson v. United States*, 526 U.S. 813, 817 (1999), this Court held that when a defendant is tried for engaging in a narcotics-related continuing criminal enterprise in violation of 21 U.S.C. § 848, the jury must the unanimous on the defendant's guilt not only of the enterprise, but also of each "predicate" comprising the crime, because each predicate is a separate element, and not a means. *Id*. at 820. *See also Monsanto v. United States*, 348 F.3d 345, 346 (2d Cir. 2003). Unfortunately, criminal statutes do not ordinarily state "whether the individual violation is an element or a means." *Richardson*, 526 U.S. at 818.

A special verdict on unanimity may be required "in cases where the complexity of the evidence or other factors create a genuine danger of jury confusion." *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986). In addition, a count in an indictment is duplicitous when it "joins two or more distinct crimes in a single count." *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992). A duplicitous indictment creates the "possibility of a non-unanimous jury verdict" that obscures the crime for which the defendant was convicted. *United States v. Helmsley*, 941 F.2d 71, 91(2d Cir. 1991).

An indictment may sometimes allege in a single count criminal activity that takes place at different times. See *United States v. Tutino*, 883 F.2d 1125, 1141 (2d

Cir. 1989). In general, "aggregation is permissible" when two or more acts are part of a continuing scheme. *Id*. at 1141; *see also Schaffer v. United States,* 362 U.S. 511, 517 (1960).

Duplicitous pleading is impermissible when it prejudices the defendant. *United States v. Olmeda*, 461 F. 3d 271, 281 (2d Cir. 2006). *See also United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001). "An indictment is impermissibly duplicitous where: (1) it combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)'s requirement that there be 'a separate count for each offense,' and (2) the defendant is prejudiced thereby." *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980). There are three types of potential prejudice from duplicitous pleading: (1) lack of notice of the charged crime and maximum penalty; (2) possibility that a second trial on the same offense will not be barred by double jeopardy; and (3) possible uncertainty with the jury's verdict and its implications for sentencing. *See Sturdivant*, 244 F.3d at 77-78; *Accord Olmeda*, 461 F.3d at 281.

In the case at bar, it was not possible from the general verdict rendered by the jury to tell whether the jury found Estevez guilty of the alleged conduct on February 21, 2016 or of the alleged conduct on February 26, 2016, or both. It was possible the jury was not unanimous as to whether Estevez was guilty of possession on February 21, 2016, or on February 26, 2016. Estevez disputes the claim that he possessed the

gun as part of a continuing scheme. The government presented evidence that Estevez allegedly possessed a gun on two separate occasions. The crime of possession was complete in a single moment. The crime did not require a finding that his possession continued over a period of time. Therefore, the indictment was duplicitous. It alleged separate crimes in a single count. The district court should have given the jury the requested instruction for the jury to state which date or dates that Estevez possessed the gun.

Estevez was prejudiced because the jury instructions and general verdict created an uncertainty on what the jury unanimously found. The general verdict concealed whether the jury found guilt as to one incident or another, or both. Estevez was also prejudiced at sentencing. While the government alleged that Estevez had possessed a firearm between February 21, 2016 and February 26, 2016, the government changed its position at sentencing and argued the court should treat the shootings as separate incidents and then determine whether Estevez should receive a four-level enhancement for either incident.

Estevez contends he should either be granted a new trial in which a jury is required to make special findings of guilt on the date(s) when possession allegedly occurred, or sentence Estevez under the least onerous construction of the facts. Such construction would be one in which Estevez would not be found accountable for a

four-level enhancement for the use or possession of a firearm in connection with another felony.

B. There was insufficient evidence to support the four-level enhancement under U.S.S.G. §2K2.1(b)(6) that Estevez used a firearm in connection with another felony

Under U.S.S.G. §2K2.1(b)(6), a defendant may receive a four-level enhancement on the ground that he "used or possessed any firearm…in connection with another felony offense; or possessed or transferred any firearm…with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." U.S.S.G. §2K2.1(b)(6). The applicable Guidelines commentary states that this enhancement applies "if the firearm…facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. §2K2.1 application note 14(a). The Guidelines commentary defines "another felony offense" as "any [f]ederal, state or local offense," other than the offense of conviction, "punishable by imprisonment for a term exceeding one year, regardless of whether the criminal charge was brought, or a conviction obtain." U.S.S.G. §2K2.1(b)(6) application note 14(c)).

The court based the enhancement on the testimony of the main cooperating witness who said that he and Estevez planned to rob a person named Sharkey on February 26, 2016. The witness testified that Estevez called him on February 26, 2016 and they "talked about" robbing Sharkey. The witness told Estevez "he didn't

need to bring a gun" to commit the robbery and they could instead "just beat him up." Estevez replied "all right." (A73) The witness said he expected Estevez to nonetheless bring a gun "because he always got a gun on him." *Id*.

Section 2K2.1(b)(6) contains two independent clauses. The section states that the enhancement applies if the person (1) "used or possessed" the firearm "in connection with" another felony offense; or (2) "possessed or transferred" the firearm "with knowledge, intent, or reason to believe" that it would be used or possessed "in connection with" another felony offense. U.S.S.G. §2K2.1(b)(6). As shown below, neither clause applies.

The first clause in Section 2K2.1(b)(6) applies to felony offenses that in fact occurred. It does not apply to planned felony offenses that never ultimately occurred. The words "used or possessed" are in the past tense. The words presuppose that the felony happened. In the case at bar, the robbery never occurred. (In fact, it was never going to occur because the cooperating witness instead intended to rob Estevez and Estevez would be the victim.)

The first clause in Section 2K2.1(b)(6) also does not apply because the gun was not to be used or possessed "in connection with" the planned robbery. The cooperator and Estevez had agreed they would not use a gun to commit the robbery but instead "just beat [Sharkey] up" to steal his marijuana. (A72) The cooperator confirmed that Estevez brought the gun simply "because he always got a gun with

him." The fact that he brought the gun did not change the fact that it would not be used to commit the robbery. The mere proximity of the gun to Estevez is insufficient to demonstrate that the gun would be used or possessed "in connection with" a planned robbery. The cooperator's testimony was to the contrary. The government was required to do more than prove that Estevez possessed a gun.

The second clause in Section 2K2.1(b)(6) likewise does not apply. Estevez did not possess or transfer the gun to the cooperator "with knowledge, intent, or reason to believe" that it would be used or possessed in connection with a planned robbery. Rather, Estevez transferred the gun to the cooperator to temporarily allow him to examine the gun. Estevez did not transfer the gun to the cooperator for the purpose that the cooperator would then use the gun to commit a planned robbery. In fact, when the cooperator refused to give the gun back to Estevez and instead pointed the gun at Estevez to rob Estevez of his coat, Estevez lunged at cooperator to try to take the gun back from him.

The second clause in Section 2K2.1(b)(6) also does not apply because the gun was not to be used or possessed "in connection with" the planned robbery. As discussed above, the cooperator and Estevez had agreed to not use a gun to commit the robbery. Instead, they were going to "just beat [Sharkey] up."

Application Note 14(a) of Section 2K2.1 is consistent with the foregoing analysis. Application Note 14(a) states that the enhancement applies "if the

firearm…facilitated, or had the potential of facilitating, another felony offense." First, Application Note 14(a) may not be interpreted independently of the clear Guideline section to which it applies. As discussed above, the clear language of the Guideline Section 2K2.1(b)(6) demonstrates that the Guideline does not apply.

Second, there are two phrases in Application Note 14(a). The first phrase is "if the firearm…facilitated" another felony. Like the first clause in Section 2K2.1(b)(6), the phrase applies to a felony that occurred. This phrase further explains the meaning of the first clause in Section 2K2.1(b)(6). As discussed above, the robbery never occurred. Therefore, the first phrase of Application Note 14(a) does not apply to the incident on February 26, 2016.

The second phrase in Application Note 14(a) states if it "had the potential of facilitating" another felony offense. The second phrase may not be interpreted independently of the language in Section 2K2.1(b)(6). Therefore, the second phrase also does not apply because, as discussed above, Estevez did not possess or transfer the firearm (1) "with knowledge, intent or reason to believe that it would be used or possessed" for a planned robbery; and (2) Estevez had no knowledge, intent, or reason to believe that it would be used or possessed "in connection with" the planned robbery.

The district court did not find that the February 21, 2016 incident provided a basis for the four-level enhancement under Section 2K2.1(b)(6), despite that the

government had argued that it provided a basis. The government apparently recognized that the evidence in support of the February 21, 2016 incident might be insufficient to invoke the four-level enhancement when it alternatively argued that "even if this Court sets aside the February 21 shooting, the four-level enhancement still applies based on [the cooperator's] credible testimony that Estevez brought the Firearm on February 26, 2016 because Estevez and Curley had agreed to rob Sharkey."

The district court impliedly determined that the evidence relating to the February 21, 2016 incident was insufficient to invoke the four-level enhancement under Section 2K2.1(b)(6) when it ordered that Paragraph 20 of the PSR be amended to read: "as the firearm was possessed by the defendant in connection with another felony offense, specifically, an attempt to commit a robbery on or about February 26, 2016." Paragraph 20 of the PSR had stated that the four-level enhancement applied because another felony had allegedly been committed in relation to the February 21, 2016 incident.

There was good reason to determine that the evidence relating to the February 21, 2016 incident was insufficient to support the four-level enhancement. According to defense counsel, the government had introduced "some grainy video and ambiguous cell phone records and data to try to suggest that Randy Estevez was involved in the shooting alleged on February 21, [2016]." Defense counsel also

challenged the ballistic evidence allegedly linking the gun to the February 21, 2016 shooting as unreliable.

C. The sentence of 100 months incarceration was substantively unreasonable

Estevez suffered extensive child abuse when held in custody in juvenile detention facilities for an extended period of his teenage years. He was vulnerable to the abuse while in custody, which included at least one physical assault by a staff member of a facility. Criminal History Category IV overstated the seriousness of his prior criminal conduct. The vast majority of Estevez's criminal record occurred prior to the age of 18. Most of the misconduct occurred while he was held in custody in juvenile detention facilities.

There were extenuating circumstances in these convictions. Estevez was wounded in the incident on February 26, 2016. Therefore, he suffered a form of punishment not contemplated by the Guidelines. Estevez was only 19 years of age at the time he possessed the firearm. A 19-year-old lacks the same degree of maturity as an older adult. Estevez submits that he was treated more severely than similarly situated defendants with similar backgrounds. There is nothing to indicate that a sentence of 100 months incarceration will foster Estevez's rehabilitation.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

DATED: July 7, 2020

Respectfully submitted by

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