No. ___-____

IN THE

Supreme Court of the United States

JUNIOR GRIFFIN,

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

JAMES E. NEUMAN, P.C.
Attorney for Petitioner
100 Lafayette Street, Suite 501
New York, New York 10013
212-966-5612
james@jamesneuman.com

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QUESTION PRESENTED

1. Whether courts must consider allegations of "bad faith" by the government when deciding motions to join counts pursuant to Fed. R. Crim. P. 8(a), or motions to sever counts pursuant to Fed. R. Crim. P. 14, just as they do when deciding motions to join co-defendants pursuant to Fed. R. Crim. P. 8(b).

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OPINION BELOW

The opinion of the Court of Appeals appears in Westlaw as 2020 WL 2079457 (2nd Cir. 2020) and in the Appendix as 1a-8a. In that Order, which was entered on April 30, 2020, the Second Circuit affirmed the judgment of the United States District Court, Southern District of New York, entered on January 8, 2019, which convicted the Petitioner, after a jury trial, of conspiring to distribute cocaine and distributing cocaine, in violation of 21 U.S.C. §§ 812, 846), and sentencing him to concurrent terms of 120 months of imprisonment, five years of supervised release, and forfeiture in the amount of $57,030. The Second Circuit rejected Petitioner's argument, *inter alia,* that the District Court erred in denying his motion to sever pursuant to Federal Rule of Criminal Procedure 8(a) and 14(a).[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. C. § 1254. The Order of the Court of Appeals sought to be reviewed was filed on April 30, 2020. Accordingly, this Petition for a Writ of

[1] References preceded by the letter "A" are to the Appendix submitted to the Second Circuit.

Certiorari is timely, pursuant to U.S. Sup. Ct. Rule 13, 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. Pro. 8: Joinder of Offenses or Defendants:

> (a). Joinder of Offenses: The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged – whether felonies or misdemeanors or both – are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
>
> (b). Joinder of Defendants: The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 14: Joint Trial of Separate Cases:

> The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

STATEMENT OF THE CASE

This case raises an important question arising out of a recurring practice by federal prosecutors: i.e., the addition and joinder of new charges on the eve of trial. Specifically, the question is whether allegations of bad faith by the government are properly considered when deciding joinder motions pursuant to

subdivision (a) of Fed. Rule of Crim. P. 8, or severance motions pursuant to Fed. Rule of Crim. P. 14.

The factual background to this case is relatively straightforward. On October 5, 2016, an indictment was unsealed, charging the Petitioner and 21 other individuals with participating in a conspiracy to distribute narcotics between 2014-2016. A111-24. The essential theory of those charges was that Defendant supplied retail quantities of narcotics to individuals who sold the drugs in the Highbridge neighborhood of the Bronx. Approximately 17 months after that indictment was filed, and just eleven days before trial was scheduled to commence in March, 2018, a superseding indictment was filed, adding two substantive distribution counts, one of which was later dismissed prior to trial. A253-57. The remaining distribution count was based upon the theory that Petitioner personally sold eight grams of cocaine to a person he worked with in New Jersey, in the summer of 2015.

Prior to trial, Petitioner raised two arguments in favor of severing counts. First, he asserted that the substantive narcotics counts charged in the superseding indictment were improperly joined pursuant to Fed. R. Crim. P. 8(a) with the narcotics conspiracy count originally charged. A127-30, 258-60. In this regard, Petitioner asserted that the new counts were not part of "the same act or transaction," "part of a common scheme or plan," or of "similar character," as the Rule required. For example, Petitioner

observed that the original conspiracy count alleged a "sprawling narcotics conspiracy," whereas the additional counts alleged discrete, isolated and unrelated substantive narcotics offenses." A128.

Alternatively, Petitioner contended that severance of those counts was warranted pursuant to Fed. R. Crim. P. 14(a). A127-30, 258-60. He maintained that the purpose of the superceder was merely "to gain a tactical advantage at trial, and get before the jury highly prejudicial evidence." A130. Further, Petitioner argued that there was "great risk that the jury [would] consider the mere fact that [Petitioner] is charged with *** unrelated counts of narcotics offenses as evidence of his guilt at trial." A130.

In response, the government insisted that joinder was proper pursuant to Rule 8(b) since the counts were "of the same or similar character." A249. Further, the government denied that any prejudice was discernible, justifying severance pursuant to Rule 14(a). In reply, Petitioner's attorney noted, *inter alia*, that the government had not disputed that the decision to add charges on the "eve of trial" was motivated to secure a tactical advantage. A260. Ultimately, the Court held that the counts were sufficiently similar as to be joined pursuant to Rule 8. A276-77. And the Court rejected the claim of prejudice. A278-29.

On appeal to the Court of Appeals for the Second Circuit, Petitioner expanded upon his arguments in favor of severance. Most relevant for present purposes, Petitioner emphasized that the trial court should have taken into account his unchallenged allegation that the superseding charge was filed – eleven days before trial – in "bad faith," solely for tactical reasons and with the purpose of prejudicing the defense.

The Second Circuit rejected all of Petitioner's arguments. Initially, the Court stated that joinder under Rule 8(a) was appropriate because the counts were "clearly 'somewhat alike,' as they both involved the sale and purchase of the same narcotic, in the same city, within the same approximately one-year period." 4a. Further, the Court stated that Petitioner had failed to demonstrate "substantial prejudice" so as to warrant severance under Rule 14.

Notably, the Second Circuit did not address Petitioner's argument that the government's "bad faith" was a relevant consideration.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD REVIEW THIS CASE TO RESOLVE WHETHER COURTS MUST CONSIDER ALLEGATIONS OF "BAD FAITH" BY THE GOVERNMENT WHEN DECIDING JOINDER MOTIONS PURSUANT TO FED. R. CRIM. P. 8(A), OR SEVERANCE MOTIONS PURSUANT TO FED. R. CRIM. P. 14, JUST AS THEY DO WHEN DECIDING JOINDER MOTIONS PURSUANT TO FED. R. CRIM. P. 8(B)

This case presents this Court with an opportunity to address a common, abusive practice by federal prosecutors: i.e., the addition and joinder of new charges on the eve of trial. As any experienced federal defense attorney can attest, this practice is routine, unfair and insidious. It is manifestly invoked to gain tactical advantage at trial. It subverts the reasonable expectations of the defense and raises doubt about the fairness of the plea bargaining process. As such, the practice undermines the integrity of the federal criminal justice system.

Still, these dangers of prosecutorial abuse may largely be remedied by one simple safeguard: permitting the district court to consider whether additional charges were added and joined in "bad faith." This approach not only would serve laudable purposes, but also is fully consistent with the approach already employed in the related context of subdivision (b) of Federal Rule of Criminal Procedure 8. That subdivision provides as follows:

> "The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts of transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."

Interpreting this provision, courts have repeatedly held that joinder of co-defendants is permissible "absent a showing of bad faith on the government in bringing the indictment." *Peterson v United States,* 405 F.2d 102 105 (8th Cir. 1969); *see also, United States v Kabbaby,* 672 F.2d 857, 860 (11th Cir. 1982); *United States v Garza,* 664 F.2d 135, 142 (7th Cir. 1981); *United States v Turkette,* 656 F.2d 5,8 (1st Cir. 1981); *United States v Ong,* 541 F.2d 331, 337 (2nd Cir. 1976). By this simple safeguard, courts have ensured that joinder under subdivision (b) is not undertaken for nefarious purposes, thereby bolstering confidence in the fairness of prosecutions.

In this case, Petitioner emphatically argued that joinder of the additional count was not only improper under the traditional analysis of subdivision (a) of Rule 8 – and that severance was appropriate pursuant to Rule 14 on the ground of prejudice – he also alleged that the joinder was undertaken solely in order to gain a tactical advantage. On appeal, Petitioner reiterated this claim, albeit rephrasing it somewhat to allege more directly that the joinder was done in "bad faith." Although the government never disputed that the joinder was intended to create a tactical

advantage at trial, neither the district court nor circuit court acknowledged or considered Petitioner's claim that bad faith was a relevant factor.

Perhaps, the courts assumed that it sufficed simply to consider whether Petitioner was "prejudiced," as that term is understood in the context of Rule 14. If so, the courts were mistaken.

Under a typical Rule 14 analysis, courts often state that Defendants wishing to sever counts must demonstrate "not simply some prejudice but substantial prejudice." *United States v. Sampson*, 385 F.3d 183, 190 (2d Cir. 2004) (citing *Werner*, 620 F.2d at 928); *see also, United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994); *United States v. Rucker*, 586 F.2d 899, 902 (2d Cir. 1978). It is insufficient for a defendant to show simply that he would have a better chance for acquittal without joinder. *United States v. Rucker,* 586 F.2d at 902, *supra*. And the prejudice must also be outweigh the judicial economy that could be realized by avoiding multiple lengthy trials. *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998)).

One court summarized the "prejudice" analysis as follows:

> "Prejudice occurs so as to justify granting severance when the defendant might become embarrassed or confounded in presenting separate defenses, the jury might use evidence of one of the crimes charged to infer a criminal disposition to commit the other crime or crimes charged, or the jury might cumulate evidence of the various crimes charged to find

> guilt on a count, which if considered separately, it would not so find." *United States v Chevalier,* 776 F.Supp. 853, 857 (D. Vermont 1991), citing *United States v Lewis,* 626 F.2d 940, 945 (D.C. Cir. 1980); *see also, Blunt v United States,* 404 F.2d 1283, 1288 (D.C. Cir. 1968).

See also, United States v Villanueva Madrid, 302 F.Supp.2d 187 (S.D.N.Y. 2003) (severing on prejudice grounds where counts were joined for being similar in character), and citing *United States v Halper,* 590 F.2d 422 (2nd Cir. 1978) (risk of prejudice is heightened where offenses have been joined under the character prong).

But while the above analysis may adequately address *trial* prejudice arising out of the jury's consideration of multiple counts, it does not address the other *structural* evils occasioned by the last-minute addition of charges. For example, the traditional Rule 14 prejudice analysis does not purport to deter prosecutors from purposely waiting until the eve of trial to add charges as a matter of gamesmanship. It does not discourage prosecutors from adding charges as a way to punish defendants who wish to exercise their right to a trial. Thus, the Rule 14 prejudice-analysis does nothing to ensure that prosecutorial decisions regarding joinder of counts are motivated and carried out for proper reasons. These concerns, however, could all be adequately addressed if courts were permitted to consider the "bad

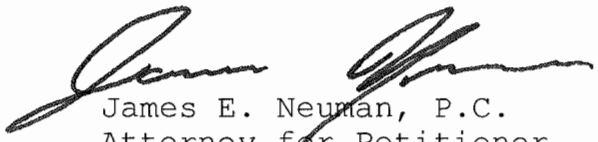
faith" of the federal prosecutors, just as the courts do when considering joinder of defendants under subdivision (b) of Rule 8.

Accordingly, this Court should review this case both to address the prevalent, nefarious practice of federal prosecutors whereby they add charges on the eve of trial, and also to provide needed clarity to the interpretation of the federal rules concerning joinder and severance of counts.

CONCLUSION

THE PETITION SHOULD BE GRANTED

Respectfully submitted,



James E. Neuman, P.C.
Attorney for Petitioner
100 Lafayette Street, Suite 501
New York, NY 10013
(212) 966-5612