

III. COVER PAGE - RULE 34

20-5421

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

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DOVED BEN DOWNER,  
Petitioner,

v.

CASE NO: \_\_\_\_\_

SECRETARY, DEPARTMENT  
OF CORRECTIONS AND  
ATTORNEY GENERAL, STATE  
OF FLORIDA "et al."  
Respondent.

ORIGINAL

PETITIONER'S PRO-SE MOTION FOR WRIT OF CERTIORARI TO  
UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION. PETITION FOR WRIT OF CERTIORARI

DOVED BEN DOWNER, D.C. #391900  
DADE CORRECTIONAL INSTITUTION  
19000 S.W. 377<sup>TH</sup> STREET  
FLORIDA CITY, FLORIDA 33034-6499

FILED
JUL 24 2020
OFFICE OF THE CLERK SUPREME COURT, U.S.

#### **IV. QUESTION(S) PRESENTED**

1. IS SIMPLE POSSESSION UNDER F.S. 893.13(6)(A). A LEGALLY PERMISSIBLE RACKETEERING PREDICATE INCIDENT UNDER F.S. § 895.02(1)(a), § 895.02(1)(b)?
2. CAN A DEFENDANT BE TRIED AND CONVICTED FOR AN OFFENSE THAT THE INFORMATION DOES NOT ALLOWS?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Adams, Sr. Joh. Judge, Ninth Judicial Circuit, State of Florida;  
Barbour, Elaine, Judge, Ninth Judicial Circuit, State of Florida;  
Bogle, Richard B., Assistant Statewide Prosecutor, State of Florida;  
Conway, Anne C., Senior U.S. District Court Judge, Middle District of Florida;  
  
Craner, A. James, Judge, Ninth Judicial Circuit, State of Florida;  
Evander, Kerry J., Chief Judge, Florida Fifth District Court of Appeal;  
Forrester, Eileen, Chief Assistant Public Defender, Ninth Judicial Circuit, State of Florida;  
Hall, Nora, Assistant Attorney General, State of Florida;  
Kidd, Embry J., U.S. Magistrate Judge, Middle District of Florida;  
Luka, Thomas B. Attorney Duval County, Florida  
Miller, James T., Attorney Duval County, Florida  
Orr, Janice, Attorney Lake County Florida  
Orfinger, Richard B., Judge, Florida Fifth District Court of Appeal;  
Sawaya, Thomas D., retired judge, Florida Fifth District Court of Appeal;  
Schneider, James, Assistant Attorney General, Statewide Prosecution State of Florida;  
Strickland, Sta, Judge, Ninth Judicial Circuit, State of Florida;  
Tynan, Greg A., Judge Ninth Judicial Circuit, State of Florida;

I hereby certify that no publicly traded company or corporation has an interest in the outcome of this appeal.

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[x] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 14, 2020.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### CONSTITUTIONAL

Amendment V, not to be deprive of life, liberty, or property without due process of law.

Amendment VI, to be informed to the nature and cause of the accusation, and to have effective assistance of counsel for his defense.

Amendment XIV (section 1) Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of laws.

### STATUTORY

Fla. Stat. § 895.02(1)(a)

Fla. Stat. § 895.02(1)(b) defined the “incidents of racketeering activity”

18 U.S.C. § 1961(1)(A)(D) The federal definition of Racketeering activity

18 U.S.C. § 1956 (a)(1) the federal money laundering statute

Fla. Stat. § 893.13 (6) simple possession

## STATEMENT OF THE CASE

### A. Pretrial

Petitioner was arrested on April 29, 2003 with 12 co-defendant following an 18-month investigation by several law enforcement agencies under the direction of the Statewide prosecutor in Orlando, Florida. The counties involved in the investigation were Lake, Orange, and Seminole.

A 16 - count information was filed alleging money laundering, racketeering, conspiracy to commit racketeering, and structuring to evade reporting or registration requirement. This information was filed in the Ninth Judicial Circuit Court in and for Orange County, Florida under case # 03-cf-5195. On September 11, 2003 co-defendant Catherine Chisem entered a plea to count seven of this information, structuring transactions to evade reporting or registration requirements. On September 22, 2003, the Honorable John H. Adams severed the case of the remaining 11 co-defendants from Petitioner subsequently seven more co-defendants entered guilty pleas. A sentencing hearing was set for December 1, 2003. On October 27, 2003 the State dismissed the case against Petitioner and the remaining 4 co-defendants. The courts dismissed the case against the other co-defendants except Catherine Chisem. When the State failed to appear for sentencing on December 1, 2003.

A revised probable cause affidavit was submitted by F.D.L.E. The State refilled information soley against Petitioner on May 19, 2004. Petitioner as was re-arrested on June 8 2004 and charged with racketeering, money laundering, and structuring transactions to evade reporting or registration requirements. Count one included 76 predicate incidents of money laundering activity relating to money transmitter felony violations. Beverage law enforcement violations, and drug abuse prevention and control violations. The State amended the information on September 23, 2004 adding four predicate incidents to count one to wit; one predicate incident of selling alcohol without a license and three predicate incidents of simple possession of marijuana. Money laundering count two, and structuring transaction to evade reporting or registration requirements count three. Trial counsel entered a plea of not guilty on behalf of Petitioner to the amended information during a hearing held on October 6, 2004. The State also filed in open court on October 6, 2004. The State's response to Defendants motion for statement of particulars/statement of particulars, and State's response to Defendant's motion in limine. The case went to trial on October 11, 2004 through October 13, 2004. The State nolle prossed the structuring transaction to evade reporting or registration requirement, count three.

## **B. Trial**

The first day of trial Petitioner filed a stipulation in open court. The stipulation told the jury on the third day of trial that the seventy six money transfers were done by Petitioner at his request and that Petitioner provided the money and provided the information for the Western Union transmittal forms. In the stipulation Petitioner admitted to the amount in excess of 320,000 was provided by Petitioner.

The State presented 13 witnesses. No defense was presented at trial. Petitioner did not testify. On October 13, 2004 Petitioner was convicted of racketeering, count one. The jury acquitted Petitioner of money laundering count two. The State filed a nolle prosequi with respect to structuring transactions to evade reporting or registration requirements count three.

Petitioner was sentenced the same day to twenty five years in the Department of Corrections followed by five years of supervised probation.

## **C. Appeal**

The Fifth District Court of Appeal per curiam affirmed and the mandate issued on January 3, 2006. On March 5, 2007 on Petitioner's behalf, private counsel filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. The petition was denied on June 7, 2007. While his state habeas petition was pending private counsel filed a Florida Ruler of Criminal

Procedure 3.850 motion for postconviction relief for Petitioner on May 2, 2007.

On May 20, 2008 the state was ordered to respond to the 3.850 motion July 7, 2008 the State filed its response to the 3.850 motion on September 8, 2008 private counsel filed a motion for permission to amend pending motion for post-conviction relief. On January 27, 2010 Petitioner filed a pro se motion for leave to supplement and amend pending 3.850 and Petitioner's notice of intent to file petition for writ of habeas corpus pursuant to Steele v. Kehoe. On March 1, 2010 an order granting motion to amend was entered and the Court advised that since the motion requesting leave to amend was filed outside of Rule 3.850 two year limitation Petitioner would not be permitted to add any new grounds for relief and may only supplement existing grounds. Additionally, the Court advised that because Petitioner was represented by counsel, counsel must file all pleading. The Court would not consider any pleadings filed simultaneously by Petitioner pro se and counsel. On April 21, 2010 counsel filed a motion for extension of time to file amendment to pending Rule 3.850 Fla. R. Crim. P. motion. On September 7, 2011 the second amended motion for postconviction relief and memorandum of law in support thereof was filed. The Petitioner filed the amended motion pro se. On December 27, 2011 counsel filed a motion to adopt pro se pleading. On April 25, 2013 Petitioner filed a letter to the clerk of court requesting that the clerk file the letter as notice of the death of his attorney James T. Miller. On August 8, 2016

Petitioner filed a notice of inquiry to the clerk of court requesting a status on his pending 3.850 motion. On October 14, 2016 Petitioner filed a writ of mandamus.

On October 27, 2016 the second amended motion was summarily denied.

Petitioner appealed to the Florida Fifth District Court of Appeals which per curiam affirmed on July 25, 2017 and mandate was issued on September 20, 2017. On September 6, 2017 Petitioner filed the instant 28 U.S.C. petition for writ of habeas corpus with the United States District Court Middle District of Florida Orlando Division. The Middle District of Florida court ordered the response on October 31, 2017. November 15, 2017 notice of appearance by Robin A. Compton on behalf of Attorney General. January 29, 2018 response to 1 petition for writ of habeas corpus by Attorney General. February 20, 2018 motion for leave to file reply to Respondents response by Petitioner. February 22, 2018 order granting it motion for leave to file reply to the response. May 24, 2018 Motion for Extension of Time to file Reply as to response. May 29, 2018 order granting Extension of Time to file Response. June 4, 2018 Reply re 13 response to habeas petition by Petitioner.

February 7, 2019 Order: within Thirty (30) days from the date of this order Respondents shall file a supplemental response addressing whether ground twelve is substantial to overcome the procedural default bar. March 7, 2019 Supplemental Response to 1 petition for writ of habeas corpus by Attorney General. April 5, 2019 Petitioner's reply to State's supplement response. June 5, 2019 order. The

Petition for Writ of Habeas Corpus (Doc. 1) is Denied July 8, 2019 motion for reconsideration re 23. November 25, 2019 order denying motion for reconsideration. December 19, 2019 Motion for Extension of Time to file certificate of appealability by Petitioner (originally receive in the U.S.C.A. on 12/16/2019 and forwarded to USDC.) January 2, 2020 Order granting 28 motion for extension of time to file. Petitioner shall have through January 17, 2020 to file an application for certificate of appealability. January 8, 2020 Motion for Certificate of Appealability by Petitioner (entered ~~1/18/2020~~), May 14, 2020 the United States Court of Appeals for the Eleventh Circuit order denying Petitioner application for Certificate of Appealability. A petition for writ for certiorari seeking review of a judgment of a lower court that is subject to discretionary review by the State court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review.

**REASONS FOR GRANTING THE PETITION**  
**THIS PETITION SHOULD BE GRANTED FOR THE FOLLOWING**

**REASONS**

**Reason 1**

Petitioner's verdict was a miscarriage of justice because the jury based it's verdict of guilt on predicate incidents within the racketeering charge that cannot be used to support the charge of racketeering activity as defined in the charging information.

It was improper to allow the jury to consider predicate incidents 2, 16, 79, and 80 because they were not legally permissible racketeering predicate incidents.

The State amended information in Count 1: Defined the racketeering enterprise by stat. 895.02(3) Fla. Stat: Defined the pattern of racketeering activity by 895.02 (4) Fla. Stat., and defined the incidents of racketeering activity by 895.02(1)(B)\* which cross referenced to 18 U.S.C. § 1961 (1), which states, as used in this chapter 1961(1) racketeering activity means (a) any act or threat involving murder, kidnapping, gambling, arson, robbery, extortion, dealing in obscenity matter, or dealing in a controlled substance or listed chemical as defined in Section 102 of the controlled substance act [21 U.S.C. 802] which is chargeable under state law and punishable by imprisonment for more than one year. There were no federal equivalent statutes reference in predicate incidents 2, 16, 79, and

80 as there was in the 76 money laundering predicate incidents. The charging information specifically defined the incidents of racketeering activity by federal standard. The referenced state law violations in predicate incident 2, 16, 79, and 80 were not sufficiently charged. Predicate incident two reference sale of alcohol without a license, a misdemeanor under state law. Fla. Stat. 562.12(1). Also defined in section 102 of the controlled substances means a drug of other sustenance, or immediate precursor, including schedule I, II, III, IV, or V of part B of this title [21 U.S.C. 812] the term does not include distilled spirits, wine, malt beverages, or tobacco as those terms are defined or used in subtitle E of the internal revenue code of 1954 [26 U.S.C. 5001 et seq]. predicate incident 79, while referenced as a felony under state law was factually a misdemeanor because there was no evidence that the 7 seeds of marijuana weighted more than twenty grams, and predicate incidents 16, 79, and 80 referenced simple possession under state law exclusively while the predicate incidents of possession reference felony violation. Under the federal statute defining the incidents of racketeering activity, the felony violations encompassing the controlled substances abuse act require proof of dealing in the controlled substances. Under the plain meaning of the statute, dealing in a controlled substance requires proof of specific intent beyond simple possession.

Because of the specificity with which the state charged the money laundering predicate incidents. The omission of any reference to stat. 895.02(1)(a) Fla. Stat. in the body of the racketeering charge in count 1 of the amended information is presumed not to be a technical oversight nor can such an omission be explained away as harmless given its substantive affect on the admissibility of the evidence necessary to sustain the State burden of proof. The substantive due pro se clause implication are inherent. Furthermore, under Florida Law, the State may amend the information anytime before trial. see Fla. R. Crim. P. 3.140(j) (“An information on which the defendant is to be tried, that charges an offense may be amended on the motion of prosecuting attorney or defendant any time prior to trial because of formal defects.”) As Petitioner counsel did file a motion in limine prior to trial alleging that it is unclear from the information what racketeering activity the state is alleging and counsel boldly asserted that there is no connection between alleged predicates to the racketeering charge. And the State’s response to said motion in limine filed in open court five days before trial stating it is the States position that the information properly alleges that the Petitioner was engaging in at least two incidents of racketeering activity as defined in Florida Statute 895.02(1)(b) and if the state fails to make a *prima facie* case at trial the court has the authority and obligation to grant a Judgment of Acquittal. As the State’s Response to Defendants motion in limine filed on October 6, 2004 is

direct contradiction to the United States District Courts ruling in its order denying relief. As stated that the Respondents mistakenly charged Petitioner with racketeering activity defined in section 895.02(1)(b) and had counsel moved to dismiss the three possession of cannabis predicate incidents charged in court one prior to trial, the State would of amended the information to charge Petitioner with racketeering activity under section 895.02(1)(a) as a result, Petitioner has not demonstrated that a reasonable probability exists the outcome of trial would have been different had counsel filed a pretrial motion to dismiss the three possession of cannabis predicate incidents. Petitioner pointed this out in his motion for reconsideration to the State District Court. This notwithstanding even if the incidents of racketeering activity had been charged by Stat. 895.02(1)(A) and (B) Fla. Stat., the statutory construction does not automatically make simple possession under Stat. 893.13(6) a legally permissible racketeering predicate incident.

Statutory construction - Florida general references to racketeering activity Florida Statute 895.02(1)(A)(40) (2004); in defining racketeering activity generally references chapter 893, relating to drug abuse prevention and control. Compare with 18 U.S.C. Stat. 1961 (1)(A): Racketeering activity means (a) dealing in a controlled substance or listed chemical (as defined in Section 102 of the controlled substance act), and 18 U.S.C. Stat 1961 (1)(d): or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in a

controlled substance or listed chemical (as defined in Section 102 of the controlled substances act).

Simple possession under Florida Statute 893.13(6), and sales of alcohol without license under Florida Statute 562.12(1), are not predicates to support (RICO) prosecution for committing crimes chargeable under provisions of the statutes relating to racketeering activity and money laundering.

The statutory construction relating to has been construed not to encompass every criminal act contained in the referenced statute where the criminal act does not comport with legislative intent or pass constitutional muster in the prosecution of a racketeering violation. State v. Rubio, 967 So.2d 768, 779-80 (Fla. 2007) (“[S]ection 895.02(1)(a)(26), limits its predicate offenses to only those sections that include the elements of fraud by including language.) Bradenton Group Inc. v. State, 920 So.2d 403, 409-10 (Fla. 5<sup>th</sup> DCA 2007) violations of bingo statute 849.0931 are not punishable under the lottery or RICO statutes [(citing 895.02(1)(A)(32), Fla. Stat. (1995)]; State v. Gusow, 724 So.2d 135 (Fla. 4<sup>th</sup> DCA 1998) predicate offense relating to collection of advance fee from borrower and loan broken found did relate to interest and usurious practices, and thus did not constitute racketeering activity. State v. Vessler, 626 So.2d 251 (Fla. 4<sup>th</sup> DCA 1993) lewdness and assignation are not predicates to support RICO prosecution for committing crimes chargeable under provisions of statutes relating to prostitution.

Based on the fact that Florida Statute 893.13(6)(a) allows the permissive inference that if a person has exclusive possession of a thing knowledge of its presence may be inferred or assumed. As explained in Chicone v. State, 684 So.2d 736 (Fla. 1996) this knowledge provides the criminal intent element necessary to prove the act of possession. By virtue of this assumed knowledge element. Simple possession of a controlled substance is an isolated crime. As the intent of simple possession cannot provide the interrelatedness of one possession incident to another neither can it infer the ongoing probability of a repeated action sufficient to sustain an open-ended pattern of racketeering activity Cf. stat. 895.02(4) Fla. Stat. (2004) Pattern of racketeering activity means engaging in at least two incident of racketeering conduct that are not isolated incidents. Also because they were committed by a single individual they could not support the charge of racketeering, conclusively, what the legislature prohibited through statutory construction the state in this case is trying to circumvent by argument. The federal court has reverse convictions when the error has substantial and injurious effect or influence in determining the jury's verdict. It is clear from record and the State court responses that Petitioner is charged with multiple crimes charged as RICO in count 1 through multiple federal money laundering predicate incidents under 18 U.S.C. stat 1956 as the charging information in Petitioner's case specifically defined the incidents of racketeering activity by federal standards the state court is bound under the

statutory construction rule of ejusdem generis. As applying only to crimes of the same kind as those precisely stated in the statute under the definitions as used in chapter 18 U.S.C. stat. 1961(1) defining racketeering activity simple possession of marijuana in violation of Florida Statute 893.13(6) nore sale of alcohol without a license in violation of Florida Statute 562.12(1) cannot be charged as predicate incidents under the federal RICO, state, or federal money laundering because they were resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law. The State completely failed to prove the charges of rackteering against Petitioner and this failure is fundamental error. See F.B. v. State, 852 So.2d 226 (Fla. 2003)(The guilty verdict could not be reached without the assistance of the alleged error or Petitioner conduct did not legally constitute a crime.) The jury in this case found Petitioner not guilty of money laundering since all of the crimes for money laundering for which Petitioner had been acquitted were charged identically as racketeering predicate incidents whatever the jury found lacking for the substantive count was necessarily lacking for the racketeering predicate incidents. Also see U.S. v. Shenberg, 828 F.Supp. 968, 972 S.D. (Fla. 1993). The State was collaterally estopped from obtaining a guilty verdict as to racketeering based on predicate incidents 1-3-15, 17-78. The State court contends in their response that federal money laundering under 18 U.S.C. 1956 and state money laundering under 896.101 are not the same

crime for collaterally estopped purposes. The State court claims that the federal money laundering offense requires an interstate or foreign commerce element absent from the Florida Statute. This lacks merits because the Florida Statute subsumes the interstate or foreign commerce element by requiring in any way or degree affects commerce element, which Petitioner was acquitted of in count two.

By the State's acknowledgement that Petitioner is charged with federal money laundering predicate incidents under 18 U.S.C. 1956 and the reasoning used by the State in denying Petitioner's Florida Rule of Criminal Procedure 3.850 motion the State cited to Harvey v. State, 617 So.2d 1144, 1148 (Fla. 1<sup>st</sup> DCA 1993)(finding the definition of racketeering activity does not require the state to obtain conviction for alleged predicate incidents. It merely requires proof of any crime which is chargeable by indictment or information under the specific provisions of the statutes enumerated therein.) By these facts it is clearly established federal law that the proof of any crime which is chargeable by indictment or information under the specific provision of the statute enumerated therein couldn't of been predicate incidents 2, 16, 79, or 80. Sales of alcohol without a license or simple possession of marijuana because they do not meet the criteria of racketeering activity as defined under the statue enumerated therein.

For the above reasons Petitioner was denied his 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup>, constitutional rights of a fair trial, due process, effective assistance of counsel for his defense, and equal protection of the laws.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David B. Downer

Date: 7/24/20