

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UGUNDA GIOVANNI SANDERS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: August 24, 2020

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QUESTION PRESENTED

The Government charged Sanders with a conspiracy taking place on June 28, 2017. When Sanders pled guilty the Government reserved the right to charge him for relevant conduct that happened before June 28. Then the Government charged him with a conspiracy running from April 2016 to May 2017. At trial the Government presented evidence over Sanders's objection of events happening on June 28, 2017, and after. Did the Government violate Sanders's rights under the Fifth Amendment to have a grand jury consider the charge and to have the Government honor its implied agreement not to use later events against him?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Sanders, Case No. 19-3237 (6th Cir. July 15, 2020)
- United States of America v. Sanders, No. 5:17-cr-268 (N.D. Ohio January 31, 2019)
- United States of America v. Sanders, No. 5:17-cr-405 (N.D. Ohio March 15, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Ugunda Giovanni Sanders respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not published. It appears at United States v. Sanders, Case No. 19-3237, 2020 U.S. App. LEXIS 22326 (6th Cir. July 15, 2020) (Pet. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on July 15, 2020. There was no petition for rehearing. The Sixth Circuit's mandate issued on August 7, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Presentment and Due Process Clauses of the Fifth Amendment to the Constitution. They say that "No person shall be held to answer for a . . . , crime, unless on a presentment or indictment of a Grand Jury. . . . nor be deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

This case concerns Sanders's conviction by a jury of conspiracy to

possess with intent to distribute more than 500 grams of methamphetamine.

He was sentenced to serve 188 months in prison. (Judgment, R. 157, Page ID # 1510–16) (filed March 15, 2019).

Sanders's travails began when he and Gary Hite were arrested on June 28, 2017, following a traffic stop. Officers found cash and about 30 pounds of methamphetamine in the car.

Sanders and Hite were charged in another case, N.D. Ohio Case No. 5:17-cr-268, with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine. (Indictment, United States v. Sanders, R. 13. N.D. Ohio, Case No. 5:17-cr-268, Page ID # 192–193 (filed July 19, 2017).

Sanders pled guilty. An additional charge of possessing methamphetamine with intent to distribute was dismissed. There was a written plea agreement that said Sanders's plea of guilty was only for the conduct that occurred on June 28, 2017, and not for any prior conduct and that he could be separately charged "for any relevant conduct that occurred prior to . . . June 28, 2017 . . ." (Case No. 5:17-cr-268, Plea Tr., R. 72, Page ID # 627). On January 31, 2018, he was sentenced to serve 108 months in prison. (Case No. 5:17-cr-268, Judgment, R. 76, Page ID # 695–702). Sanders has been in custody since June 28, 2017.

Then the government charged him again. He was named as an

unindicted co-conspirator in Count One and indicted as a conspirator in Count Six of a superceding indictment. (Superceding Indictment, N.D. Ohio, Case No. 5:17-cr-405, R. 38, Page ID # 160–68 (filed April 11, 2018).

Count One alleged a conspiracy to possess with intent to distribute more than 500 grams of methamphetamine beginning in February 2016 and continuing to January 2018, involving various people including Sanders. (Id., R. 38, Page ID # 160–161). Count Six covered a shorter time. It charged Sanders and others with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine “[b]eginning at least as early as April 2016, continuing through to May 2017, the exact dates unknown to the grand jury . . . ”. (Id., R. 38, Page ID # 163).

Before trial Sanders moved to exclude evidence about his June 28, 2017, arrest and guilty plea. He said it was improper other bad acts evidence under Federal Rule of Evidence 404(b). (Motion in Limine, R. 71, Page ID # 253–56). The district court allowed the evidence at trial, but gave the jury cautionary instructions. (Trial Tr., R. 145, Page # 1281–82, 1302, Trial Tr., R. 173, Page ID # 1595). Sanders was tried alone, and only on the charges in Count Six.

The government’s proofs went beyond the times alleged in Count Six. Various witnesses testified about the Count One conspiracy. In addition to

the testimony about the events of June 28, 2017, the government also called witnesses who testified about a traffic stop on August 8, 2017, that uncovered 20 pounds of methamphetamine, and the execution of a search warrant on September 16, 2017, that yielded seven kilograms of methamphetamine, \$23,800 in cash and a gun. (Trial Tr., R. 145, Page ID # 1301–17, 1351, 1364, Trial Tr., R. 141, Page ID # 761, 766, 768, 773, 779–80, 828–29, 889).

Apart from telling the jury that Sanders was only on trial for the crime charged in the indictment, the district court did not tell the jury that it must acquit Sanders if it found that he was a member of some other conspiracy. (Trial Tr., R. 173, Page ID # 1595, 1600).¹

After Sanders was convicted the district court sentenced him to serve 188 months in prison to run concurrently with the 108-month sentence imposed on him in Case No. 5:17-cr-268. (Judgment, R. 157, Page ID # 1510–1516).

Sanders appealed. He objected to the district court's admission of evidence of other acts that occurred after the ending date of the conspiracy charged against him in Count Six and while he was in custody. He argued that the admission of the evidence constructively amended the indictment

¹Sanders did ask for such an instruction, although the Sixth Circuit has a pattern instruction that could apply. See Pattern Criminal Instruction 3.08, Multiple Conspiracies —Material Variance from the Indictment (Sixth Circuit Committee on Pattern Criminal Jury Instructions) (July 1, 2019).

against him.

The Sixth Circuit rejected his arguments. It held that the evidence was best understood as background evidence and was relevant to prove the charges and thus did not implicate Federal Rule of Evidence 404(b). The court also said that the proofs did not constructively amend the indictment because the evidence showed one overarching conspiracy that lasted longer than the interval listed in Count Six. The Court said that the evidence of the events that took place after May 2017 showed that Sanders was likely aware of the conspiracy in May and that his involvement was not a mistake. The court said there was not a “substantial likelihood” that Sanders was convicted of a conspiracy other than the one charged in Count Six.

Sanders now seeks a writ of certiorari from this Court to review the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

The Government may not constructively amend an indictment, nor may it fail to honor its promises. The Court should grant the petition to make clear that these Fifth Amendment requirements apply in drug conspiracy cases.

When deciding whether if it will grant a petition for certiorari the Court considers if the petition presents an important issue “that has not been, but should be, settled by [the] Court.” S. Ct. R. 10(a).

Here, the Court should grant the petition to make clear that the loose

practice followed by the government in this case deprived Sanders not only of his constitutional right to be indicted by a grand jury, but of due process of law.

The Court should not allow the government to extract a guilty plea, reserve the right to bring charges for crimes before June 28, 2017, and then proceed under the guise of res gestae or other acts evidence to submit proofs of a crime taking place after June 28, 2017.

The requirement of presentment to a grand jury contained in the Fifth Amendment prevents the prosecutor at trial from modifying the theory and evidence on which the indictment is based. *United States v. Rivera*, 837 F.2d 906, 919 (10th Cir. 1989).

Constructive amendments to an indictment are *per se* prejudicial because they infringe upon a defendant's Fifth Amendment right to have a grand jury pass upon the allegations against him. *United States v. Mize*, 814 F.3d 401, 409 (6th Cir. 2016). A constructive amendment occurs when the terms of an indictment are altered by the presentation of evidence and jury instructions which modify essential elements of the offense charged so that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment. *United States v. Mize*, 814 F.3d at 409.

Here, the government charged Sanders in Count Six with a methamphetamine conspiracy from April 2016, to May 2017. It charged others in a different conspiracy in Count One that covered a different time.

At trial the government presented evidence against Sanders of events that took place before and after April 2016 to May 2017. These proofs may have proved the Count One conspiracy, but that is not what Sanders was charged with. The Court of Appeals side-stepped the unfairness to Sanders from the evidence by saying that the prosecutor's decision on how to word the indictment was a "charging decision" that was not prejudicial to Sanders.

United States v. Sanders, 2020 U.S. App. LEXIS 32326 at * 8. But it was. He was forced to sit through a trial where the jury heard about events that occurred before April 206 and after May 2017, including counts that happened on June 28, 2017, and after June 28, 2017, while he was held in custody. And, anyway, the government's charging decision cannot trump the right to have a grand jury pass on the charges. Stirone v. United States, 361 U.S. 212, 217 (1960).

In addition, the Sixth Circuit completely ignored the consideration of holding the government to its written promise in the companion case.

Due process of law requires the Government to act fairly, and to seek justice, not merely a conviction. Berger v. United States, 295 U.S. 78 (1935). Due process requires procedures that satisfy traditional notions of fair play

and substantial justice. *International Shoe v. Washington* , 326 U.S. 310, 316 (1945).

By permitting proof of relevant conduct before June 28, 2017, the plea agreement in Sanders's companion case implied that June 28, 2017, was the ending date of Sanders's criminal liability. As a matter of fundamental fairness the Court should hold the Government to its promise. *Santobello v. New York*, 404 U.S. 257 (1971) Cf. *Puckett v. United States*, 556 U.S. 129, 146 (2009) Souter, J., dissenting,(stating that the fifth Amendment's due process guarantee of fundamental fairness means that “[a]greements must be kept by the Government as well as by the individual.”).

That did not happen in this case.

The unfairness to Sanders means that even if there may have been sufficient evidence to convict him on Count Six, the Court should still vacate his conviction and grant him a new trial. Cf. *Kotteakos v. United States*, 328 U.S. 750 (1946).

CONCLUSION

Ugunda Giovanni Sanders respectfully asks that the Court grant his

petition for certiorari, vacate his conviction, and remand his case for a new trial.

Respectfully submitted,

Dated: August 24, 2020

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