No.

IN THE

SUPREME COURT OF THE UNITED STATES

Roderick Perez-Gonzalez,

Petitioner,

v.

United States of America,

Respondent

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

Raul S. Mariani-Franco
Counsel of Record

P.O. Box 9022864
San Juan, PR, 00902-2864
Tel.: (787) 620-0038
Fax: (787) 620-0039
Counsel of Record for Petitioner Roderick Perez-Gonzalez

QUESTION PRESENTED

Whether Subsequent Prosecution of Conspiracies Violate the Double Jeopardy Clause of the United States Constitution when Both Conspiracies Operate Under a Single Continued Uninterrupted Agreement to Conspire.

LIST OF PARTIES

Petitioner-Defendant is Roderick Perez-Gonzalez

Respondent, United States of America

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

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit dismissing the appeal in the instant case.

INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits more than one prosecution for the same offence. Lower Courts have repeatedly stated that the effects of the Double Jeopardy protection with regards to conspiracies raise special concerns because of the possibility that the government literally could

comply with the Blockburger test while carving up a single conspiracy to commit several crimes into separate prosecutions.

It is black letter law that were a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution for the same offense alleged as having been committed within a period that overlaps any part of the former period. Lower courts, however, have allowed the government to ignore this simple constitutional constraint by invoking a mechanic test that in most, if not all, cases trigger a finding that defendant is not protected by the Double Jeopardy Clause, not because the lower court finds that a new conspiracy existed, but because the factors are predesigned to ignore whether the original agreement to conspire continued with the new criminal conduct.

Factors, like the passage of time, new conspirators and new roles are credited as sufficient factual indicia to support a new conviction. Whether this new conduct is part and parcel of the original conspiracy which carried a criminal conviction is conveniently ignored.

In so doing, circuit courts have sidestepped long standing precedents by this Court that recognize that in the Double Jeopardy context the conspiracy is a continuing offense that continues absent compelling evidence that a defendant has exited such conspiracy to join another.

To allow this situation to continue permits the government to have the cake and eat it too. The Government benefits from the application of the presumption of a continued conspiracy at trial, while at the same time ignoring it for purposes of consecutive prosecutions. This Petition provides this High Court with the opportunity to address the validity of the multi-factor test employed by the First Circuit and foreclose the unfair, conflictive and unreasonable application of such test to similarly situated defendants who were convicted and sentenced twice for participating in a single ongoing conspiracy.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on July 28, 2020. The opinion is published at *United States v. Pérez-González*, 967 F.3d 53 (2020) and is attached as **Appendix A**.

JURISDICTIONAL GROUNDS

Petitioner requests review of the judgment of the First Circuit entered on July 28, 2020 . Supreme Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition concerns the Double Jeopardy Clause of the Fifth Amendment of the Unites States Constitution. (Attached hereto as **Appendix B**). It also concerns a Conspiracy to Possess with Intent to Distribute Controlled Substances, 21 U.S.C. §846. (Relevant statutory provisions attached as **Appendix C).**

STATEMENT OF THE CASE

The defendant-appellant was, along with forty (40) other defendants, the subject of a five (5) count Indictment rendered by a District of Puerto Rico Grand Jury on July 19, 2016. The Indictment, in essence, charged defendant from participating in a drug conspiracy that occurred from in and about the year 2010 up to and until the return of the indictment in Mayaguez Puerto Rico. The indictment charged that the object of the conspiracy was to distribute narcotics (cocaine, marijuana,

Percocet and Xanax) at drug points located within the *Columbus Landing* Public Housing Project (hereinafter "*Columbus Landing*") located in the Municipality of Mayaguez, Puerto Rico.

The plea agreement in this case required Mr. Perez to accept responsibility for participating in the *Columbus Landing's* conspiracy on the charged dates acting as a drug point owner. Mr. Perez had previously been charged and convicted in two (2) prior drug cases that occurred within the same time frame of the charged conspiracy in this case and in the same location.

Mr. Perez was first charged, by local authorities, on March 20, 2010 with possessing with the intent to distribute cocaine in *Columbus Landing*. Eventually, Mr. Pérez plead guilty to the minor included offense of simple possession of controlled substance and was sentenced to a three (3) year imprisonment term. That same year, on July 16, 2010 Mr. Perez was charged in federal case 10-246 (ADC), a drug conspiracy case, that also took place in *Columbus Landing* from the year 2005 up to and including the return of the indictment on July 2010. As part of such case the government produced discovery including

evidence of Mr. Perez' arrest in *Columbus Landing* in March 2010 to support its allegation that Mr. Perez was a member of the DTO at *Columbus Landing.*

For such case, Mr. Perez plead to a single count of Conspiracy to Possess with the Intent to Distribute the same amount of narcotics (Cocaine) as in the instant case, receiving a sentence of 70 months.

Mr. Perez was then charged again and eventually accepted responsibility to having participated in a drug conspiracy in *Columbus Landing* from 2010 up to the year 2016. As in the prior conspiracy case, the government produced in discovery evidence of Mr. Perez' arrest at *Columbus Landing* in March 2010.

In his appeal Mr. Perez claimed that this third conviction for participating in a drug conspiracy at the *Columbus Landing* Public Housing Project was barred by the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution. He claimed that his last conviction was part of the same ongoing conspiracy for which he was charged and convicted in the year 2011.

The First Circuit denied Mr. Perez' request for relief from the sentence imposed by the district court, applying a multi-factor test that ignores the existence of a continuing conspiracy and which does not require the lower courts to examine whether the agreement to conspire in the first conviction is the same agreement found in the subsequent conviction, which will then be barred by the Double Jeopardy Clause of the United States Constitution.

While Mr. Perez requested the appellate court to revisit its multi-factor test, the First Circuit refused such invitation and confirmed the sentence imposed to Mr. Perez.

REASONS FOR GRANTING THE WRIT

This petition presents a matter of first impression to this High Court and is a viable instrument for this High Court to provide proper guidance as to an urgent and recurring question of law. For many decades circuit courts have grappled with the application of the Double Jeopardy Defense in the context of recurring drug conspiracies and similar crimes.

For over a hundred years the law has been clear that conspiracy is a continuing offense that continues absent compelling evidence that a defendant has exited such conspiracy to join another. *United States v. Kissel*, 218 U.S. 601, 607 (1910). Likewise, since at least 1893 this High Court has been clear that "[t]he gist of the offense of conspiracy... is [the] agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States v. Falcone*, 311 U.S. 205, 207 (1940), citing *Pettibone v. United* States, 148 U.S. 197 (1893).

Nonetheless, circuit courts have repeatedly refused to apply a simple test that examines the existence of one continuing agreement *vis a vis* the existence of a new different agreement to conspire when examining Double Jeopardy claims related to multiple consecutive conspiracies. Circuit courts instead have insisted in applying a mechanic, multi-factor test, which focuses on the overlap between cases and the identity of co-conspirators, while ignoring the material element of the offense of conspiracy, which is the existence of one or more agreements between conspirators.

In the opinion issued in this case, the First Circuit has applied the aforementioned multi-factor analysis which provides this High Court the opportunity to address the validity of the same in view of this Court's precedents. The unfairness for defendants to allow circuit courts to incorrect apply the Double Jeopardy defense is manifest and detrimental to the proper functioning of the criminal justice system and can be addressed in this petition.

I. The Multi-Factor Analysis applied by the Court of Appeals to Determine Whether Prosecution of Multiple Conspiracies Violates the Double Jeopardy Clause of the United Stated Constitution is Incorrect as it Ignores the Material Element of the Offense of Conspiracy, which is the Agreement to Conspire

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits more than one prosecution for the same offence. *Puerto Rico v. Sanchez*-Valle, __ U.S.__, 136 S.Ct. 1863, 1867, 195 L.Ed. 2d 179 (2016). Lower Courts have repeatedly stated that the effects of the Double Jeopardy protection with regards to conspiracies raise special concerns because of the possibility that the government literally could comply with the Blockburger test1 while

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1 Referring to *Blockburger v. United States,* 284 U.S. 299 (1932).

carving up a single conspiracy to commit several crimes into separate prosecutions. *United States v. Laguna-Estela* 394 F. 3d 54, 56-57 (1st. Cir. 2005). This High Court has said that "the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

To address this "special concern" and the reality that the government continuously charge defendants for recurring conduct, circuit courts have devised a multi-factor test to examine whether differences in participants, places, objectives, times and conduct, demonstrate that two charged conspiracies are factually distinct, such that they are not for the same offense for double jeopardy purposes even though the statutory offense charged is the same. *United States v. Reyes-Correa*, 971 F.3d 6, 12 (1st. Cir. 2020) (collecting cases).

In the First Circuit the multi-factor test for determining whether two conspiracies are in fact the same for purposes of double jeopardy, contains five factors to wit: "(1) the time during which the activities occurred; (2) the persons involved in the conspiracies; (3) the places

involved; (4) whether the same evidence was used to prove the two conspiracies; and (5) whether the same statutory provision was involved in both conspiracies." *United States v. Booth*, 673 F.2d 27, 29 (1st Cir. 1982); *see United States v. Garcia-Rosa*, 876 F.2d 209, 228 (1st Cir. 1989).

This multi-factor test, with variations, has been adopted by circuit courts. *United States v. Estrada*, 320 F.3d 173, 180-181 (2nd Cir. 2003) (Detailing eight (8) factors). *United States v. Liotard*, 817 F.2d 1074, 1078 (3rd Circ. 1987) (explaining test);*United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988) (Multi-pronged "totality of the circumstances" test with five (5) factors). *United States v. Nichols*, 741 F.2d 767, 771 (5th Cir. 1984) (determination grounded in five (5) factors). *United States v. Wheeler*, 535 F.3d 446, 450 (6th Cir. 2008) (recognizing and adopting the First and Second Circuit tests). *Arnold v. United States*, 336 F.2d 347 (9th Cir. 1964) (five (5) factor analysis).

The Eight Circuit, however, while framing the legal question ("whether the totality of the circumstances demonstrate that the alleged conspiracies are in reality the same conspiracy") in its test it has ruled

that the "dispositive double jeopardy issue is whether there are two distinct conspiracies or a single overall agreement". *United States v. Bennett*, 44 F.3d 1364, 1369-1370 (8th Cir. 1995).

While *Bennett* stands for the proposition that the Eight Circuit has adopted the "totality of the circumstances test" to determine whether two conspiracies constitute the offense, such statement must be contrasted with the actual holding in *Bennett*. Particularly, as from our study, the Eight Circuit, contrary to other circuits, correctly imprints the importance of the conspiracy agreement to the multi-factor test. *Bennett* explains, that "the essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object. This is so because the characteristic which defines the scope of a conspiracy is the unlawful agreement, and in order to determine whether the government can prosecute a defendant for more than one conspiracy a court must ordinarily determine whether there was more than one agreement." *Bennett* at 1370.

The examination of the existence of more than one agreement is what is lacking from the First Circuit's multi-factor test and the similar tests employed by other circuits. The end result of such omission is that, in configuring a multiple factor test, circuit courts are routinely side stepping this Honorable Court's well established law that conspiracy is a continuing offense that requires that the continuity of the same be presumed. *Smith v. United States*, 568 U.S. 106 (2013), *United States v. Starrett*, 55 F.3d 1525 (11th. Cir. 1995) (conspirator's participation in a conspiracy is presumed to continue until all activity relating to the conspiracy ceased, accordingly, each defendant is presumed to be a participant for duration of conspiracy unless he can overcome the presumption by proving his withdrawal); *United States v. Pizzonia*, 577. F.3d 455 (2nd Cir. 2009) (the law presumes the continued existence of the conspiracy and places the burden on the defendant to prove that the conspiracy was terminated or that he took affirmative steps to withdraw); *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995) (where conspiracy contemplates continuity of purpose and continued

performance of acts, it is presumed to exist until there has been affirmative showing that it has terminated).

This Honorable Court stated over a hundred years ago that were a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution for the same offense alleged as having been committed within a period that overlaps any part of the former period. *Burton v. United States*, 202 U.S. 344 (1906).

Petitioner respectfully submits that this Honorable Court should, in the context of this case, examine this matter and determine that the multi-factor test being used by most of the circuit courts fails to grasp the well settled norm that a conspiracy is a continuing offense and absent compelling evidence it must be assumed that defendant has not exited one conspiracy and entered another. The fact that a subsequent conspiracy has different co-conspirators, or a larger time frame are weak indicators of the existence of a separate conspiracy as they merely show that new co-conspirators have been joining a continuing conspiracy under the same original agreement. See the concept and

criticism explained in Theis William, *The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy*, 49 SMU L. Rev. 269 (1996).

The solution to the paradigm presented by subsequent criminal conduct within a same ongoing conspiracy, certainly is not ignoring the existence of a single conspiracy because the framers of the Constitution did not had to contend with Conspiracy Laws when they elected to forbid the government to dole punishment two times for a same offense.2

On the contrary, to allow subsequent prosecutions, without any regard to the existance of a continued uninterrupted agreement to conspire, permits the government to have the cake and eat it too. The government can avail itself of the benefits of the presumption of continuity of the agreement for trial and prosecution purposes, but then suffer no prejudice when it elects to charge subsequent conduct in a previously prosecuted conspiracy under the same agreement. The Government do this simply by advising the trial court that the role of defendant, conspiracy participants or time-scope, has changed.

This is fundamentally unfair and incorrect as a matter of law. This Honorable Court has the tools at hand to foreclose such unfair, conflictive and unreasonable application of its precedents in this petition.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

Raúl Mariani-Franco
P.O. Box 9022864
San Juan, PR, 00902-2864
Tel.: (787) 620-0038
Fax: (787) 620-0039
Counsel of Record for Petitioner Perez

Date: October 23, 2020

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2 "Congress enacted few Conspiracy Statutes prior to the Civil War" Federal Conspiracy Law: A Brief Overview. Congressional Research Service, April 3, 2020 https://fas.org/sgp/crs/misc/R41223.pdf

CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on October 23, 2020, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding, or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Mariana E. Bauzá-Almonte
Assitant United States Attorney
Chief, Appellate Division

Francisco A. Besosa-Martinez
Assistant United States Attorney
United States Attorney's Office
Torre Chardon, Room 1201
350 Carlos Chardon Street
San Juan, Puerto Rico 00918

In San Juan, Puerto Rico, October 23, 2020.

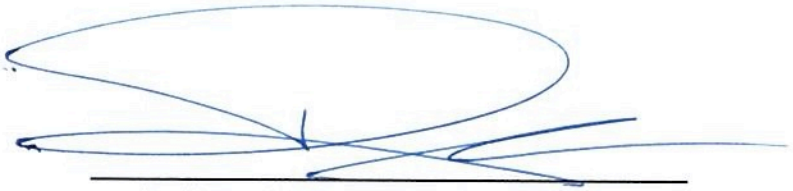
RAUL S. MARIANI FRANCO

CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,681 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 2020.



RAUL S. MARIANI FRANCO

IN THE

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Petitioner,

v.

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

APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Reyes-Correa, 1st Cir.(Puerto Rico), August 14, 2020

967 F.3d 53
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Roderick PÉREZ-González, a/k/a Canito, Defendant, Appellant.

No. 17-1754
|
July 28, 2020

Synopsis
Background: Defendant was convicted, on guilty plea entered in the United States District Court for the District of Puerto Rico, Aida M. Delgado-Colon, J., of federal drug conspiracy offense, and he appealed.

[Holding:] The Court of Appeals, Barron, Circuit Judge, held that district court did not plainly err, in violation of defendant's rights under the Double Jeopardy Clause, in allowing a second drug conspiracy prosecution to proceed, after defendant had previously pled guilty to conspiracy to distribute many of the same drugs at same location.

Affirmed.

Procedural Posture(s): Appellate Review.

West Headnotes (6)

[1] **Double Jeopardy**⇐Multiple prosecutions

Double Jeopardy Clause bars the United States from prosecuting a single person for the same conduct under equivalent criminal laws. U.S. Const. Amend. 5.

[2] **Double Jeopardy**⇐Plea of guilty, or nolo contendere

As long as the record supplied a rational basis for concluding that the two drug conspiracy counts to which the defendant pled guilty were predicated on different conduct, then the defendant, by pleading guilty twice, conceded that he had committed two separate crimes and could not pursue claim under the Double Jeopardy Clause. U.S. Const. Amend. 5.

[3] **Criminal Law**⇐Effect in General

Defendant who has pleaded guilty cannot contradict the admissions necessarily made upon entry of voluntary plea of guilty.

[4] **Double Jeopardy**⇐Plea of guilty, or nolo contendere

Defendant who brings a double jeopardy challenge to a second prosecution in which he pleaded guilty, based on a prior one in which he did the same, is limited to the facts contained in the indictments and the existing record. U.S. Const. Amend. 5.

[5] **Criminal Law**⇐Constitutional questions

Double jeopardy claim would be reviewed only for plain error, in absence of a challenge below. U.S. Const. Amend. 5.

[6] **Criminal Law**—Constitutional questions

District court did not plainly err, in violation of defendant's rights under the Double Jeopardy Clause, in allowing a second drug conspiracy prosecution to proceed, after defendant had previously pled guilty to conspiracy to distribute many of the same drugs at same location; rational basis existed for finding that the conduct underlying the first drug conspiracy conviction was distinct from the conduct underlying the second, given that the charged conspiracies began on different dates and ended on different dates, that the two charged conspiracies involved many distinct participants, with only four individuals overlapping, and that while both conspiracies involved cocaine, cocaine base, and marijuana, the second also involved certain prescription drugs. U.S. Const. Amend. 5.

1 Cases that cite this headnote

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Aida M. Delgado-Colón, U.S. District Judge]

Attorneys and Law Firms

Raúl S. Mariani-Franco, San Juan, PR, for appellant.

Daniel N. Lerman, Attorney, Criminal Division, Appellate Section, United States Department of Justice, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Francisco A. Besosa-Martínez, Assistant United States Attorney, were on brief, for appellee.

Before Torruella, Dyk,* and Barron, Circuit Judges.

Opinion

BARRON, Circuit Judge.

***54** In early 2017, **Roderick Pérez-González** pleaded guilty to a drug conspiracy offense in the United States District Court for the District of Puerto Rico. He now raises a double jeopardy challenge under the Fifth Amendment to the United States Constitution to that conviction based on his earlier prosecution for a federal drug conspiracy crime, to which he had also pleaded guilty. We affirm.

I.

In July of 2010, a federal grand jury in the United States District Court for the District of Puerto Rico charged Pérez with conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana around the Columbus Landing Public Housing Project in Mayagüez, Puerto Rico, in violation of 21 U.S.C. § 846. The indictment alleged that the conspiracy began roughly in 2002, continued to the date of the indictment, and involved Pérez and twenty-seven of his co-defendants. The indictment also charged Pérez with four additional offenses: three counts of aiding and abetting in the possession with intent to distribute, for cocaine base, cocaine, and marijuana, respectively, in violation of 21 U.S.C. § 841(a)(1), and one count of conspiracy to possess firearms during and in relation to drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)(A) and § 924(o).

In April of 2011, Pérez agreed to plead guilty to the conspiracy to possess with intent to distribute charge in exchange for the government's agreement to request dismissal of the other counts. Pérez conceded in the plea agreement's statement of facts that he "acted as a seller for the drug trafficking organization" at the Columbus Landing Public Housing Project, and that, in so doing, he "distribute[d] street quantity amounts of crack cocaine, cocaine, and marijuana" and "possess[ed] and carr[ied] firearms in order to protect the drug distribution activities and their proceeds."

The District Court accepted Pérez's guilty plea and sentenced him to seventy months' imprisonment, which was later reduced to a prison term of sixty months. In October of 2015, Pérez completed his sentence and began his term of supervised release.

Less than a year later, in July of 2016, a federal grand jury in the United States District Court for the District of Puerto Rico again charged Pérez with conspiring to possess narcotics with the intent to distribute in violation of 21 U.S.C. § 846. Again, it was alleged that the

conspiracy was to sell narcotics within the Columbus Landing Public Housing Project. This time, though, the grand jury charged Pérez alongside thirty-nine alleged co-conspirators and alleged that the conspiracy began around 2010 and continued up to the date of the 2016 indictment. The new indictment also charged Pérez with an additional three counts of aiding and abetting in the distribution of narcotics in violation *55 of 21 U.S.C. § 841(a)(1) for distributing, respectively, cocaine base, cocaine, and marijuana. Finally, like the first indictment, the new one charged him with conspiracy to possess firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) and § 924(o).

Pérez entered into another agreement with the government in February of 2017. As before, Pérez agreed to plead guilty to the drug trafficking conspiracy charge in exchange for the government promising to request the dismissal of the other charges. The plea agreement incorporated a statement of facts in which Pérez admitted "that he was a drug point owner of the drug trafficking organization" at the Columbus Landing Public Housing Project and that he "controlled and supervised the drug trafficking operations" there. In the statement of facts, Pérez also acknowledged that, in his role as a drug point owner, he "was responsible for directly and indirectly providing sufficient narcotics to the runners and sellers" of the conspiracy "for further distribution" and that he "collected the proceeds of the drug sales and paid [his] co-conspirators."

The plea agreement incorporated a waiver of appeal provision. In it, Pérez "knowingly and voluntarily waive[d] the right to appeal the judgment and sentence in this case, provided that [he] [was] sentenced in accordance with the terms and conditions" of the deal.

The District Court accepted Pérez's guilty plea and sentenced him, in accord with the plea agreement, to a term of seventy-two months' imprisonment.[1] Pérez then filed a timely notice of appeal.

II.

[1]The Double Jeopardy Clause of the United States Constitution bars the United States from prosecuting "a single person for the same conduct under equivalent criminal laws." Puerto Rico v. Sánchez Valle, —— U.S. ——, 136 S. Ct. 1863, 1876, 195 L.Ed.2d 179 (2016); see U.S. Const. amend. V. Pérez contends that his second prosecution for conspiracy in violation of 21 U.S.C. § 846 impermissibly put him "twice" "in jeopardy" "for the same offense," U.S. Const. amend. V, because it was for the same underlying conduct as his prior prosecution for violating that statute.

The government responds in part that Pérez's waiver of appeal in his plea agreement requires that we dismiss this challenge. But, even if it is not waived because a double jeopardy violation would work a "miscarriage of justice," Sotirion v. United States, 617 F.3d 27, 33 (1st Cir. 2010) (quoting United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001)), the challenge still fails.

[2] [3] [4] [5] [6]So long as the record supplies "a rational basis" for concluding that two counts to which a defendant has pleaded guilty are "predicated on different conduct," United States v. Stefanidakis, 678 F.3d 96, 100 (1st Cir. 2012), then the defendant has, by pleading guilty twice, "concede[d] that he has committed two separate crimes," United States v. Broce, 488 U.S. 563, 570, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Moreover, a defendant who has pleaded guilty cannot "contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.' " Class v. United States, —— U.S. ——, 138 S. Ct. 798, 805, 200 L.Ed.2d 37 (2018) (quoting Broce, 488 U.S. at 573-74, 109 S.Ct. 757). Thus, a *56 defendant who brings a double jeopardy challenge to a second prosecution in which he pleaded guilty based on a prior one in which he did the same is limited to the facts contained in the "indictments and the existing record." Class, 138 S. Ct. at 804 (quoting Broce, 488 U.S. at 576, 109 S.Ct. 757). Because Pérez did not raise his challenge below, we apply plain error review. See Stefanidakis, 678 F.3d at 99-100; see also United States v. Ríos-Rivera, 913 F.3d 38, 41-43 (1st Cir.) (treating an unpreserved challenge to a conviction entered after a guilty plea as forfeited when it targets "the government's authority to prosecute a defendant"), cert. denied, —— U.S. ——, 139 S. Ct. 2647, 204 L.Ed.2d 292 (2019). We conclude he cannot meet that standard because there is a "rational basis" for finding that the conduct underlying the first federal conspiracy conviction is distinct from the conduct underlying the second, to which he also pleaded guilty.

Here, Pérez correctly notes that the two conspiracy prosecutions concerned conduct at the same "places" and charged him with violations of "the same statutory provision." United States v. Laguna-Estela, 394 F.3d 54, 57 (1st Cir. 2005). But, the record still reveals that

there is a rational basis to conclude that the two conspiracies were distinct.

The record shows that the counts in question charged conspiracies that began on different dates, ended on different dates, and, despite spanning a fourteen-year period, overlapped for about six months at most. See United States v. Collazo-Aponte, 216 F.3d 163, 198 (1st Cir. 2000) (holding two conspiracies to be distinct, in part because they "involve[d] different time periods" despite a year-long overlap), vacated on other grounds, 532 U.S. 1036, 121 S.Ct. 1996, 149 L.Ed.2d 1000 (2001); Broce, 488 U.S. at 570, 109 S.Ct. 757 (looking at the different start dates of conspiracies to find them facially distinct). Pérez urges that we adopt a rule that would "solely require[ ] [the] defendant to establish that the charged conspiracy was committed within the same overlapping period[ ] as his prior acquittal or conviction for the same offense," but, as he recognizes, our precedent rejects such a rule. See, e.g., Laguna-Estela, 394 F.3d at 57-59 (finding two conspiracies distinct in spite of an overlap in time period); see also United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018) (discussing the law-of-the-circuit doctrine).

In addition to the temporal distinctions between the two charged conspiracies, a review of the counts in question shows that the charged conspiracies involved many distinct participants. Specifically, they were alleged to have involved, respectively, twenty-eight and forty co-conspirators, with only four individuals, including Pérez himself, overlapping. See United States v. Booth, 673 F.2d 27, 29-30 (1st Cir. 1982) (finding two conspiracies distinct in part because only ten individuals participated in both conspiracies and thus "the persons involved in the two conspiracies [were] substantially different"). The record also shows that Pérez played a different role in each conspiracy (as a seller and drug point owner, respectively). See Laguna-Estela, 394 F.3d at 58 (finding two conspiracies distinct in part due to evidence that the defendant's role in each conspiracy was different). And, while the second conspiracy aimed to sell all the same drugs as were involved in the first conspiracy -- cocaine, cocaine base, and marijuana -- it also involved the sale of two additional drugs -- Percocet and Xanax -- that were not identified in the first indictment. See Broce, 488 U.S. at 571, 109 S.Ct. 757 (deeming two conspiracies facially distinct in part because they "embraced separate objectives").

***57** Thus, there is ample support for finding that Pérez has "conceded guilt to two separate offenses." Id. at 571, 109 S.Ct. 757. Accordingly, we **affirm** the conviction that Pérez challenges.

All Citations

967 F.3d 53

Footnotes

* Of the Federal Circuit, sitting by designation.

1 At the same hearing, the District Court sentenced Pérez to an additional eighteen months' imprisonment for violating the conditions of release for his initial conviction and ordered the two sentences to run consecutive to one another.

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IN THE

SUPREME COURT OF THE UNITED STATES

Roderick Perez-Gonzalez

Petitioner,

v.

United States of America,

Respondent

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

APPENDIX B

Amendment 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.

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APPENDIX C

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

21 U.S.C.A. § 846

§ 846. Attempt and conspiracy

Currentness

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CREDIT(S)

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

Notes of Decisions (3925)

21 U.S.C.A. § 846, 21 USCA § 846
Current through P.L. 116-169.

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