CASE NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

EDGAR RENE MIER-GARCES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Double Jeopardy Clause prohibits successive conspiracy prosecutions when the conspiracy underpinning a subsequent prosecution is part of the same conspiracy that underpinned a previous prosecution. The question presented is:

1. Whether the Tenth Circuit's test for determining whether two conspiracy prosecutions involve the same conspiracy—a test that is at odds with the test applied by every other circuit court that has addressed the issue—renders the Double Jeopardy Clause inapplicable, as a practical matter, to successive conspiracy prosecutions.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edgar Rene Mier-Garces seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Mier-Garces*, 967 F.3d 1003 (10th Cir. 2020).

OPINIONS BELOW

The Tenth Circuit's opinion in *United States v. Mier-Garces*, cited immediately above, is included in the Appendix at App. A. The United States District Court for the District of Colorado's June 14, 2017 oral ruling denying Mr. Mier-Garces motion to dismiss on double jeopardy grounds is appended as App. C.

JURISDICTION

The Tenth Circuit issued its opinion affirming Mr. Mier-Garces' conviction and sentence on July 28, 2020. *See* App. A. The circuit court denied his timely petition for rehearing on August 10, 2020. *See* App. B. In view of this Court's Order of March 19, 2020, extending the deadline to file any petition for a writ of certiorari to 150 days from the denial of a timely petition for rehearing, Mr. Mier-Garces' petition for certiorari is due on January 7, 2021.

The United States District Court for the District of Colorado had jurisdiction under 18 U.S.C. §3231. The Tenth Circuit Court of Appeals had

jurisdiction under 28 U.S.C. §§ 1291. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. Amend. V.

STATEMENT OF THE CASE

Mr. Mier-Garces was based in El Paso, Texas, and was alleged to be the "gatekeeper" in a conspiracy that involved the importation of cocaine from Ciudad Juarez, Chihuahua, Mexico. According to the government, after cocaine had been brought from Mexico to El Paso, Mr. Mier-Garces would load it into vehicles that had been equipped with secret compartments. After the cocaine had been delivered to its destination and sold, those same vehicles would be loaded with currency and returned to Mr. Mier-Garces, who would offload the money and arrange for it to be sent to Mexico.

In August 2014, a New Mexico state patrolman acting on a tip from the United States Drug Enforcement Agency ("DEA") stopped a vehicle driven by Jack Lucero. After obtaining Lucero's consent, a search of his vehicle uncovered 15 kilograms of cocaine and other items, including a receipt from a hotel located

in Northglenn, Colorado. A subsequent investigation revealed that a number of individuals were involved in the transportation of cocaine and currency between El Paso, Texas and the Denver, Colorado metropolitan area, all revolving around Mr. Mier-Garces.

Meanwhile, in February 2015, a confidential informant advised the DEA that he/she had been contacted by "a drug trafficking organization based in the El Paso, Texas and Ciudad Juarez, Chihuahua, Mexico area." The ensuing investigation revealed that Mr. Mier-Garces was a member of the organization who "was responsible for picking up vehicles from couriers . . ., taking them to his residence where they would be loaded with drugs or drug proceeds in the form of bulk U.S. currency, and then returning the vehicles back to the couriers." The government learned that "[t]he drug couriers would then transport the drugs to destination cities in the U.S. and the money couriers would smuggle the drug proceeds back into Mexico."

On March 8, 2015, Mr. Mier-Garces provided the informant with a motor vehicle that was to be driven to Albuquerque, New Mexico. The vehicle contained 10.6 kilograms of cocaine, and the DEA subsequently arrested two individuals who had attempted to take possession of the vehicle in Albuquerque.

On September 2, 2015, a federal grand jury in the Western District of Texas returned an Indictment against Mr. Mier-Garces charging him with one count of

conspiring to possess with the intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. Sections 841(a)(1), 841(b)(1)(A)(ii) and 846, and one count of money laundering. The Indictment alleged that the conspiracy involved other persons "known and unknown" to the grand jury, but Mr. Mier-Garces is the only individual identified by name. The Indictment is based upon a conspiracy that is alleged to have occurred on a single day: March 8, 2015 (the day Mr. Mier-Garces loaded the confidential informant's car with 10.6 kilograms of cocaine destined for Albuquerque). The Indictment was prepared by Juan Anton Saenz, a DEA agent based in El Paso, Texas.

The very same day that the Texas Indictment was returned, Jeff Baumert—a DEA agent based in Denver, Colorado—appeared before a Colorado federal grand jury and testified about the investigation that arose from the August 2014 stop of Jack Lucero. The next day—September 3, 2015—the Colorado grand jury returned the Indictment underlying this case, which also charged Mr. Mier-Garces with possession with intent to distribute more than 5 kilograms of cocaine in violation of 21 U.S.C. Sections 841(a)(1), 841(b)(1)(A)(ii) and 846.

Agents Saenz and Baumert had been in close communication with one another throughout their investigations. Among other things, they "coordinated that we were going to indict [Mr. Mier-Garces] around the same time." They also worked together in connection with Mr. Mier-Garces' arrest. More

specifically, on November 18, 2017, Mr. Mier-Garces was stopped by Border and Customs agents at the port of entry in El Paso and arrested on a warrant that had issued as a result of the Texas Indictment. Days earlier, and in coordination with Agent Saenz, Agent Baumert had traveled from Denver to El Paso so he could be present at the time of the arrest. The agents took custody of Mr. Mier-Garces and told him that he was being charged with drug trafficking. But they did not say anything about the Colorado Indictment because they did not want Mr. Mier-Garces to know about it.

After advising Mr. Mier-Garces of his *Miranda* rights, he answered all of the agents' questions and confirmed the *modus operandi* of the conspiracy described above. Among other things, Mr. Mier-Garces admitted that he was aware that the vehicles he loaded with cocaine would be delivered "to destinations throughout the United States," including Denver.

Mr. Mier-Garces pled guilty to the charges set forth in the Texas Indictment and was sentenced to 57-months incarceration. He subsequently moved to dismiss the charges underlying this case prior to trial, arguing that this prosecution violated the protection against double jeopardy. The district court held an evidentiary hearing on the issue, and later entered its oral ruling denying the motion. Mr. Mier-Garces was convicted at trial and sentenced to 178 months' incarceration. He appealed arguing, among other things, that his conviction

violated his Fifth Amendment rights. The Tenth Circuit disagreed and affirmed Mr. Mier-Garces' conviction and sentence.

REASONS FOR GRANTING THE PETITION

I. The Test Developed By The Tenth Circuit In This Case Creates A Split Among The Circuits About How Double Jeopardy Claims Involving Successive Conspiracy Prosecutions Are To Be Evaluated—A Question This Court Has Never Addressed.

"[T]he principal test for determining whether two offenses are the same for purposes of barring successive prosecutions [is the *Blockburger* test]." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980). Under *Blockburger*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *United States v. Morehead*, 959 F.2d 1489, 1506 (10th Cir. 1992) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

"It is well settled that the Double Jeopardy Clause prohibits the government from subdividing a single criminal conspiracy into multiple violations." *United States v. Aguilera*, 179 F.3d 604, 607 (8th Cir. 1999). However, because *Blockburger's* "same evidence" test assumes prosecutions based upon "two distinct statutory provisions," numerous courts have recognized that the test is ill-suited to double jeopardy challenges involving the same conspiracy statute. *See, e.g., United States v. Allen*, 539 F.Supp. 296, 303-304 (C.D.Cal. 1982)

("given that large-scale conspiracies frequently involve several individuals, numerous overt acts, and diverse illegal objectives, careful drafting of the Indictments to avoid duplicative allegations would permit the government to subdivide every such conspiracy under the Blockburger test, thereby easily removing conspiracy prosecutions from double jeopardy protection").

Thus, the majority of courts that have addressed the issue have concluded that, "[i]n conspiracy prosecutions the multiple/single conspiracy issue is determined by applying a 'totality of the circumstances' test rather than the more limited 'same evidence' test normally applied to double jeopardy reviews of substantive offenses." *In re Grand Jury Proceedings*, 797 F.2d 1377, 1380 (6th Cir. 1986). *See also United States v. Rigas*, 605 F.3d 194, 213 (3rd Cir. 2010) ("the majority of the Courts of Appeals, including the Third Circuit, have developed a totality-of-the-circumstances test to distinguish conspiracy prosecutions"); *United States v. Doyle*, 121 F.3d 1078, 1089 (7th Cir. 1997) ("In most cases, to determine whether two Indictments charge the same offense, we consider whether each offense contains an element not contained in the other. … However, in the conspiracy context, which is typically more involved, we must look at more varied factors than just whether the same elements are required or whether the same evidence must be admitted.").

Nonetheless, the Tenth Circuit has sometimes applied *Blockburger's* "same evidence" test to double jeopardy challenges involving multiple conspiracy prosecutions, while simultaneously acknowledging the inherent problem in doing so. *See, e.g., United States v. Puckett,* 692 F.2d 663, 668 (10th Cir. 1982) ("[w]hile we adhere to the same evidence test, we recognize that it has been criticized in recent years as an inadequate measurement of double jeopardy when applied to multiple prosecutions for conspiracy charges"); *United States v. Cardenas,* 105 Fed.Appx. 985, 987 (10th Cir. 2004) (unpublished) ("this circuit continues to follow the 'same evidence' test set forth in *Blockburger* . . . to determine whether two conspiracy prosecutions violate the double jeopardy clause"). *See also United States v. Mier-Garces,* App. A at 1016 ("we have expressly rejected on more than one occasion the totality-of-the-circumstances test and applied instead what we have labeled a 'same evidence' test").

On other occasions, the Tenth Circuit has applied a different test, focusing on the question of whether the two conspiracies are "interdependent," meaning that the success of one conspiracy is necessary to further the objectives of the other. *See, e.g., United States v. Leal,* 921 F.3d 951 (10th Cir. 2019) (double jeopardy violation involving conspiracies requires a court to "determine whether the two transactions [alleged in the charges] were interdependent and whether the [co-conspirators] were united in a common unlawful goal or purpose") (alteration in

original; internal quotations omitted); *United States v. Mintz,* 16 F.3d 1101, 1104 (10th Cir. 1994) ("[i]n a double jeopardy analysis involving conspiracies, the court must determine whether the two transactions were interdependent and whether the Defendants were united in a common unlawful goal or purpose"); *United States v. Sasser,* 974 F.2d 1544, 1550 (10th Cir. 1992) ("[t]o determine whether Sasser participated in a single conspiracy or two separate conspiracies, the focal point of the analysis is whether the alleged co-conspirators were united in a common unlawful goal or purpose" with a focus on "whether the conduct of the alleged co-conspirators, however diverse and far-ranging, exhibits an interdependence") (internal quotations and citations omitted).

The Tenth Circuit's decision is this case seeks to reconcile these conflicting lines of authority, without overruling or rejecting either one.[1] The test resulting from that effort appears to be both unique, and at odds with the test applied in

[1]Absent en banc reconsideration or superseding contrary authority from this Court, one panel of the Tenth Circuit may not depart from the holding of a previous panel. *E.g. United States v. Elliott,* 937 F.3d 1310, 1316 n. 5 (10th Cir. 2019).

As for the Tenth Circuit's "well-worn same-evidence test," the Court in this case concluded that that test, "properly construed," could "coexist harmoniously" with those cases, like *United States v. Leal,* which focus on the issue of interdependence. App. A at 1017. The Court went on to opine that, to the extent there was some conflict between the two lines of authority, "that conflict is not *real*." App. A at 1021 (emphasis in original; internal quotations omitted).

every other circuit that has addressed the double jeopardy issue presented here. It also is a test that renders the protection against double jeopardy all but meaningless in cases involving successive conspiracy prosecutions.

a. The Decision in *United States v. Mier-Garces*.

When a second conspiracy charge is alleged violate the prohibition against double jeopardy because it involves the same conspiracy as an earlier conspiracy prosecution:

> [O]f principal concern is whether the conduct of the alleged co-conspirators, however diverse and far-ranging, exhibits an interdependence. And the focal point of the analysis for determining whether two charged conspiracies are interdependent is the inquiry into whether they are united in a common unlawful goal or purpose.

App. A at 1013 (internal quotations and citations omitted).

However, "[a] common goal . . . is not by itself enough to establish interdependence: What is required is a *shared*, single criminal objective, not just similar or parallel objectives between similarly situated people." *Ibid.* (emphasis in original; internal quotations and citations omitted). "A shared objective is present when the activities of [the] alleged co-conspirators in one aspect of the charged scheme were necessary or advantageous to the success of the activities of co-conspirators in another aspect of the charged scheme, or the success of the venture as a whole." *Id.* at 1014 (internal quotations and citations omitted).

Thus, in order to prove that two conspiracies are united in common

purpose and goal and are, therefore, at least potentially "interdependent," "[t]he evidence must show that the [first] conspiracy was designed to further and to promote the success of the [second] conspiracy." *Id.* at 1014 (internal quotations omitted; alterations in original). And only when "there is not direct evidence that the separately charged conspiracies shared a single unlawful objective" should a court "look for commonalities in time, place, and personnel." *Id.* at 1014 (internal quotations omitted).

According to the Tenth Circuit, the principles discussed above "underscore[] the central and determinative importance in our case law of interdependence in the assessment of whether two separately charged conspiracies are actually a single conspiracy." *Id.* at 1017-18.

b. The Rule Applied in Other Circuits.

There does not appear to be any other circuit that places dispositive weight on the issue of "interdependence," nor does there appear to be any authority from outside the Tenth Circuit requiring that interdependence be proven by establishing that one conspiracy is intended to "further and promote the success" of a second conspiracy. And for good reason: as explained in subpart c below, the test developed by the Tenth Circuit renders the protection against double jeopardy entirely illusory where multiple conspiracies are at issue, as this case vividly demonstrates.

Apart from the Tenth Circuit, it appears that every circuit court that has addressed the issue had concluded that the "totality of the circumstances" must be considered when evaluating whether two charged conspiracies are in fact one and the same. *See, e.g., United States v. Rivera,* 844 F.2d 916, 925 (2nd Cir. 1988) ("the merits of a double jeopardy claim [determined] in light of the totality of the circumstances presented by a particular conspiracy charge"); *United States v. Rigas*, 605 F.3d 194, 213 (3rd Cir. 2010) ("the majority of the Courts of Appeals, including the Third Circuit, have developed a totality-of-the-circumstances test to distinguish conspiracy prosecutions"); *United States v. Alvarado*, 440 F.3d 191, 198 (4th Cir.2006) ("[t]he Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses, and we employ a totality of the circumstances test to decide whether two conspiracies are distinct") (internal citations omitted); *In re Grand Jury Proceedings*, 797 F.2d 1377, 1380 (6th Cir. 1986) ("[i]n conspiracy prosecutions the multiple/single conspiracy issue is determined by applying a 'totality of the circumstances' test rather than the more limited 'same evidence' test normally applied to double jeopardy reviews of substantive offenses"); *United States v. Sertich*, 95 F.3d 520, 524 (7th Cir. 1996) (in evaluating double jeopardy challenges to successive conspiracy prosecutions, "we do not just tabulate similarities or dissimilarities . . . [t]he test is ultimately one of [the] totality of the circumstances") (internal quotations omitted); *United*

States v. Okolie, 3 F.3d 287, 290 (8th Cir. 1993) ("[t]he courts have not adopted the 'totality of the circumstances' test to determine whether multiple conspiracies exist" for purposes of double jeopardy). *See also* 1 *Criminal P. Checklists 5th Amend.* §12:6 (2017) ("Conspiracies: A totality of the circumstances test is applied to determine whether a single conspiracy is being charged as multiple conspiracies").

Although there are minor differences in the precise formulation, when applying the totality of the circumstances test, five general factors are to be considered: "(1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated." *Alvarado*, 440 F.3d at 198 (internal quotations omitted). *See also United States v. Sinito*, 723 F.2d 1250, 1256-57 (6th Cir. 1983) ("[t]he test requires the trial court, in determining whether two conspiracies arise from a single agreement, to consider the elements of: 1) time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the

activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place").

There are no cases outside the Tenth Circuit that consider factors such as time, persons involved, place, and overt acts only to the extent they furnish indirect evidence that one conspiracy was designed to "further and promote" the other conspiracy and thus, evidence that might possibly establish "interdependence" between the two. *See, e.g., Rabhan,* 628 F.3d at 205 ("[a]n overlap in time periods between two alleged conspiracies favors a finding of a single conspiracy, especially when that overlap is substantial," and the same is true "the geographic overlap between the bases of operation of the two schemes is significant"); *United States v. Winship,* 724 F.2d 1116, 1126 (5th Cir. 1984) (where "[t]he marijuana conspiracy occurred wholly within the period of the methamphetamine conspiracy . . . the time element cuts in favor of the existence of one conspiracy, as does the fact that both conspiracies involved the same "main distribution line between Oklahoma and Louisiana, despite the fact that one prosecution also involved evidence of distribution from South Texas"); *United States v. Cooper*, 442 F.Supp. 1259, 1263 (D.Minn. 1978) (where Arizona and Minnesota Indictments charged conspiracies to distribute controlled substances from Phoenix to each respective jurisdiction, two cases involved a single

conspiracy because "there was but one overall conspiracy to import marijuana and to distribute it throughout the United States").

Furthermore, while some courts *do* consider whether two charged conspiracies share a "common goal" in assessing the totality of the circumstances, none of them consider a common goal as a prerequisite to finding that two conspiracies are one, and none of them construe the common goal factor as narrowly as the Tenth Circuit. For example, in *United States v. Rigas*, 605 F.3d 194 (3rd Cir. 2010), the court concluded that there was a common goal that supported finding a single conspiracy because the defendants sought to "enrich themselves through the looting of Adelphia." But the court concluded that it was immaterial that the New York case involved securities, bank and wire fraud while the Pennsylvania Indictment involved tax fraud: "[T]the underlying purpose of the alleged criminal activity" was the same in both cases." *Id.* at 214 (citing *United States v. Greenidge,* 495 F.3d 85, 93 (3rd Cir. 2007) (describing common goal as "to make money by depositing stolen and altered corporate checks into business accounts"); *United States v. Kelly,* 892 F.2d 255, 259 (3rd Cir. 1989) ("describing common goal as "to make money selling 'speed'")).

c. As a Practical Matter, the Tenth Circuit's Test Renders the Double Jeopardy Clause Inapplicable To Successive Conspiracy Prosecutions.

The Tenth Circuit, by contrast, considers whether two charged conspiracies are "united in a common unlawful goal or purpose," but "understood in the narrow sense of a *shared*, single criminal objective, not just similar or parallel objectives between similarly situated people." App. A at 1024 (emphasis in original; internal quotations omitted). And, as noted above, the question of whether two conspiracies involve a "shared, single criminal objective" is not one of many factors to be considered, it is a prerequisite to finding "interdependence" and thus, a prerequisite to establishing a double jeopardy violation involving successive conspiracy prosecutions.

Applying the requirement that two conspiracies share a single objective—as that phrase is narrowly construed—the Tenth Circuit rejected the contention that the Texas and Colorado conspiracies revolving around Mr. Mier-Garces shared the same goal of "distributing controlled substances for profit," and it also rejected the contention that both conspiracies involved "the importations of cocaine from Mexico to El Paso, and the distribution of that cocaine from El Paso to other destinations." App. A at 1024 (quoting Mr. Mier-Garces' opening brief). The Court first said it was "at least questionable" whether the Colorado and Texas cases involved a conspiracy to import cocaine from Mexico because neither

indictment "charged an agreement to import." *Ibid.* But as other circuits have sensibly recognized, when assessing the underlying purpose of a conspiracy, courts should not "give undue weight to the grand jury's characterization of the [defendant's] conduct, instead of focusing on the substance of the matter." *Rigas*, 605 F.3d at 214 (internal quotations and citations omitted).

In any case, far more problematic is the Tenth Circuit's substantive conclusion that Mr. Mier-Garces' double jeopardy claim failed because he did not prove "that the [first] conspiracy was *designed* to further and to promote the success of the [second] conspiracy." App. A at 1025 (emphasis and alterations in original; internal quotations omitted). It was not enough, according to the court, for Mr. Mier-Garces to contend that the money earned in the Albuquerque transaction was designed to facilitate the distribution venture as a whole on grounds that a single transaction "can be calculated to . . . [and] meaningfully contribute to the success of [the larger] drug operation." *Id.* at 1025. Rather, the court ruled that while the Texas and Colorado conspiracies may have shared the "parallel" objective of importing controlled substances from Mexico and distributing controlled substances in the United States, Mr. Mier-Garces had not "convincingly explain[ed] how they were mutually reinforcing." *Id.* at 1026.

The problem with the Tenth Circuit's analysis is obvious. If individual acts of distribution that revolve around the same central character, involve the

same location, take place at the same time, and rely upon the same *modus operandi,* do not establish that those individual acts are part of a larger conspiracy for double jeopardy purposes, it is difficult to think of any meaningful double jeopardy limitation on successive conspiracy prosecution involving the distribution of controlled substances in the Tenth Circuit. *Compare, e.g., United States v. Hemphill*, 514 F.3d 1350, 1364 (D.C.Cir. 2008) ("a conspiracy's purpose should not be defined in terms too narrow or specific" and rejecting the claim that different methods used to transfer money established multiple conspiracies where all the methods were in "pursuit of a single objective: to steal money from the union"): *United States v. Seher,* 562 F.3d 1344, 1366 (11th Cir. 2009) ("Courts typically define the common goal element as broadly as possible, with 'common' being defined as 'similar' or 'substantially the same.' If a defendant's actions facilitated the endeavors of other coconspirators, or *facilitated the venture as a whole,* then a single conspiracy is shown.") (emphasis in original).

Indeed, if every individual act of distribution might share, in the words of the *Mier-Garces* court, only the "parallel objective" of every other act of distribution, then every individual act of distribution can be regarded as a separate conspiracy (in the absence of evidence demonstrating that each act was somehow "designed" to further every other act). But how, for example, might a defendant possibly prove that distributing cocaine to person A at 12 in the

afternoon was somehow "designed" to further the act of distributing cocaine to person B at 2 in the afternoon, apart from both contributing to the success of the distribution scheme as a whole? *Compare, e.g., United States v. Russell*, 134 F.3d 171, 182 (3rd Cir. 1998) (describing "the common goal of this conspiracy was to make money selling cocaine" and observing that "drug distribution activities conducted in different locations can certainly be encompassed within a single conspiracy"); *United States v. Fishman*, 645 F.3d 1175, 1190 (10th Cir. 2011) ("[t]he goals of all the participants need not be congruent for a single conspiracy to exist, *so long as their goals are not at cross purposes* .... [A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation) (emphasis in original); *United States v. Adams*, 1 F.3d 1566, 1583-84 (11th Cir. 1993) (holding that the "common goal" inquiry was satisfied by the common crime of importing marijuana); *United States v. Jones*, 913 F.2d 1552, 1560-61 (11th Cir. 1990) (holding that the "common goal" inquiry was satisfied by the common crime of importing cocaine).

In short, the Tenth Circuit's double jeopardy jurisprudence permits the government to subdivide a single conspiracy into as many separate conspiracies as there are individual transactions. As other courts have recognized, however, "it would be preposterous to argue that, if several persons combine to sell drugs

generally, that single venture breaks up into as many separate ventures as there chance to be sales. The sales are the conclusion and the fruit of the original plan, the very reason for its being; they may be multiform, but the plan is single." *United States v. Mazzochi,* 75 F.2d 497, 498 (2nd Cir. 1935). *See also United States v. Calderone*, 982 F.2d 42, 48 (2nd Cir. 1992) (where one "conspiracy is simply a small component of the prior larger conspiracy . . . the two conspiracies are the same for jeopardy purposes. The Government cannot be permitted to retry defendants on smaller and smaller conspiracies, wholly contained within the scope of a large conspiracy, until it finds one small enough to be proved to the satisfaction of a jury"); *United States v. Allen*, 539 F.Supp. 296, 306-07 (C.D.Cal. 1982) ("[A] difference in suppliers does not give rise to a separate conspiracy. If it did, the Allens could be indicted and tried as many times as there were individual suppliers. That cannot be the law.") (internal citation omitted).

The prohibition against double jeopardy has no meaningful application in the context of successive conspiracy prosecutions under Tenth Circuit law. So long as the government takes care to reference one transaction in one indictment, and a different transaction in a subsequent indictment, any double jeopardy challenge to the latter will fail. And that, of course, is precisely what occurred in this case. Mr. Mier-Garces was alleged to be the "gatekeeper" of a conspiracy that distributed controlled substances to destinations throughout the United

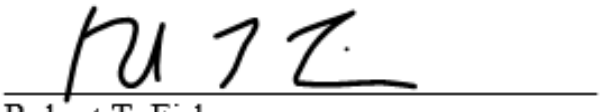
States, with his efforts all revolving around El Paso, Texas. Among other things, he arranged for the distribution of cocaine to Denver and Albuquerque during the very same period of time. Yet his double jeopardy claim failed because he could not show that one act of distribution was somehow "designed" to further the other act distribution. In other words, his double jeopardy claim was rejected—just as virtually any such claim applied to successive conspiracy prosecutions will be doomed to fail—under the rules developed and applied by the Tenth Circuit in this case.

CONCLUSION

For the reasons set forth above, Petitioner Edgar Rene Mier-Garces respectfully asks this Court to grant his petition for a writ of *certiorari*.

DATED this 29th day of December, 2020.

Respectfully Submitted,



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