

20-7085

No. _____

Supreme Court, U.S.
FILED

DEC 29 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Thomas Hoey, Jr. — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Hoey, Jr.

(Your Name)

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SUPREME COURT, U.S.**

QUESTION(S) PRESENTED

1-Should lower courts be permitted to interpret the plain text and meaning of sentencing commission's provisions to inflict harsher punishment upon petitioner?

Did the lower courts err when refusing to adhere to the plain text of U.S.S.G. grouping provision 3D1.2 and prior precedents because "there is no binding precedent from the Supreme Court?"

2-Is petitioner's indictment tainted by a violation of the attorney-client privilege and violations of Title 18 U.S.C. §207 and 208 conflict of interest laws?

Was petitioner's indictment tainted by improper influence by the victim in this cases brother, a former Special agent in charge DEA, in violation of petitioner's Fifth, Sixth, and Fourteenth Amendment rights?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

RELATED CASES

18-3338, 2nd Circuit Court of Appeals
1:11-cr-00337-PKC, Southern District of New York
13-Mc-189(Part 1), Southern District of New York

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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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 19-3338(2nd Cir. App ct.)2020; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

☐ reported at 1:11-cr-00337-PKG(SDNY 2019(2015)); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.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 March 18, 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: 9/25/2020, 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. § 1254(1).

** mandate Postmarked 9/28/2020
(See Appendix A-11)*

☐ 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

**Fifth, Sixth, & Fourteenth Amendments to the United States
Constitution**

STATEMENT OF CASE(Question #1)

The district court erred, and the Second Circuit Court of Appeals refused to adhere to plain text of the United States Sentencing Guidelines provision 3D1.2, that requires under subsection (b) that counts are grouped together because "the societal interests that are harmed are closely related." (See Application note 2, USSG 3D1.2(b)). The Second Circuit also refused to acknowledge petitioner's alternative argument that subsection (c) applies because Count II and Count III embody "conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," requiring grouping. (See subsection (c) of USSG 3D1.2) (See Probation Dept.'s Calculation, Appendix D-15)

The Second Circuit reasoned, "How multiple counts should be grouped is an open question in this Circuit." And "...given the lack of contrary case law from the Supreme Court or this Court, the district court did not plainly err in its guidelines calculation." (See Appendix A-8)

This Court should be aware that the Second Circuit has INDEED taken the petitioner's position in *Us v. Leung*, 360 F.3d 62 (2nd Cir. 2004) by reversing and remanding Leung's sentencing because the district court had divided the defendant's convictions "into two groups: the first consisting of the Hawaii passport fraud, bail jumping, and obstruction of justice counts, and the second containing solely the New York State passport fraud count." Leung contended that all counts should have been placed in a single count pursuant to 3D1.2(c). Leung contended that by failing to do so the district court had impermissibly double counted the obstructive conduct, that resulted in a one-level increase in his combined offense level, because the obstructive conduct had been counted both to create the first group, and then increase the offense level for the second. The Second Circuit agreed.

Petitioner pleads with this Honorable Court to reverse and remand this case back to the district court with specific instructions that they adhere to the prior precedent in *Leung*

and the Eighth Circuit's precedent in US v. Hawkins, 931 F.2d 1256, 1264-65 (8th Circuit 1991)(court erred in failing to group bank robbery and escape counts under subsection (c) where court enhanced bank robbery count two by levels under 3C1.1 based on conduct underlying the escape count).

Petitioner argues this is precisely what happened in his case. The district court grouped count one and two together, and put count three in its own group, contrary to the PSR and the plea agreement. This error resulted in a two-level harsher punishment and sentence upon petitioner. Petitioner argues all of his counts should have been placed in a single group, as provided for and found by the Probation Department in its PSR. (See Appendix D-15) I humbly plead to this Court for relief for myself and all that suffer and will suffer harsher punishments due to the lower courts refusal to adhere to the plain text of the sentencing commissions guideline provisions.

Statement of Case(Question #2)

The lower courts erred by allowing an indictment, prosecution, and sentencing of petitioner, after learning of violation of the attorney-client privilege in the grand jury, and the illegal, influence and improper actions by the victim in this case's brother, Arthur Anderson, a former Special Agent in Charge of the DEA, who was "pressing" the agents during the investigation prior to petitioner's indictment and arrest. The DEA agents that were being improperly "pressed" by Anderson disclosed later that they had NO evidence of "drug activities relating to petitioner".(See DEA Email chain marked as Appendix G-1)

The Fifth, Sixth and Fourteenth Amendments of the Constitution guarantee a criminal "defendant adequate protections, including... a disinterested prosecutor, and impartial decision-maker..."(See *Pounders v. Watson*, 521 US 982, 988, 117 Supreme Court 2359, 138 L.Ed 2d 076 (1977)). "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigourously disinterested fashion."(See *Young v. United States ex rel Vuitton et Fils S.A.*, 481 US 787, 810, 107 S.Ct. 2124, 95 L.Ed 2d 740 (1987)).

Prior to petitioner's indictment, Anderson was "pressing" his former subordinates and friends at the DEA regarding the accidental overdose death of his sister, Kim Calo. "On February 11, 2013, this "pressing" by Anderson led Agent Gregory Finning, SAC DEA, Agent Eric Baldus, DEA, and Agent Kristen Krause, Homeland Security to the home of petitioner's lawyer's investigator, Deidre Johnson." "Once inside Johnson's apartment, the agents improperly spoke for over two hours about petitioner and his defense."(See Judge Sidney Stein's Opinion, Appendix C-5) "At some point during the conversation, Agent Baldus served Johnson with a subpoena to appear in the Grand Jury." "At some point during the interview, conversation turned to the file Johnson kept concerning petitioner's case." "Johnson turned over petitioner's entire defense files to Agent Baldus."(See Stein

opinion C-5) "The day after Johnson's meeting with agents, she told petitioner's lawyer that she had spoken with government agents and provided them a copy of her case file." (See Stein Appendix C-6) Petitioner "On May 31, 2013, filed a motion to intervene and to quash the grand jury subpoena." (See Stein opinion C6-7) "The Court concludes that communications between Johnson and Hoey are privileged pursuant to the so-called Kovel exception." (See Stein opinion C-7) Judge Stein ruled that, "Johnson was acting as Lawyer's agent with Hoey, as the ultimate principle. Therefore, the Kovel exception applies- communications between Hoey and Johnson for the purpose of obtaining legal advice from Lawyer are privileged." (See Stein's Ruling, Appendix C-9) It is for this reason petitioner moves this Honorable Court to Vacate petitioner's indictment. Under these circumstances, the government lawyers and agents should be disqualified from appearing before the grand jury in petitioner's case. The Code of Professional Responsibility fully applicable to government's lawyers here, that "a lawyer shall not accept employment or pending litigation, if he knows or it is obvious that he ought to be called as a witness." (See Code of Professional Responsibility DR-5-101(B).) These US Attorneys were subject to being called as witnesses at a "taint hearing".¹ Petitioner also argues that the government lawyers in this case should be disqualified pursuant to Federal Rule of Criminal Procedure 6(d) (presence of an unauthorized person before a grand jury), because the information they gleaned from Johnson was privileged, and altered, shaped, or led to questions presented to petitioner's grand jury indictment, the indictment must be dismissed. Here there is no question agents gleaned petitioner's privileged communications that they shared with the US Attorney on February 11, 2013, before petitioner's indictment on December 12, 2013. Of course the US Attorney could have cured this by creating a "chinese wall" between those exposed to petitioner's attorney-client privileged information. They chose to ignore petitioner's Fifth, Sixth and Fourteenth Amendment rights to due process and moved to indict petitioner without seeking the

¹ With the motion to quash sub judice, the same prosecutors here without seeking the court's permission, indicted petitioner.

court's permission. It is clear that these provisions of the Code govern government lawyers. Their applicability was decided by the Second Circuit in US v. Alu, 246 F.2d 29 (2nd Cir. 1957). At least two federal courts have quashed indictments because of violations of the principle of separation between the government attorney as prosecutor and as witness. (See US v. Treadway, 445 F.Supp. 959 (N.D. Texas 1978) and (See US v. Braniff Airways, 428 F. Supp. 579, 583 (W.D. Texas 1977))

Very troubling, petitioner's lawyer complained to the O.P.R. about Finning's actions. After that complaint was filed, Agent Gregory Finning testified that he indeed was the lead agent in charge of the DEA investigation of petitioner, but he was "recently re-assigned to the Office of Professional Responsibility" and now his "job is to investigate misconduct and criminal wrongdoing by DEA agents." (See Stein Hearing August 2, 2013, case 13-MC-189 (Part 1) SDNY) Who exactly would investigate Finning's actions, now he himself oversees misconduct of agents? Finning testified that Anderson had called him on his cell phone about this case during the investigation. "He called me recently, in like the last 2 weeks." (See Transcript of Stein hearing, August 2, 2013, Appendix E-2) When petitioner's lawyer asked, "Had nothing to do with this case. though, right?" Finning testified, "It did." When petitioner's lawyer asked Finning, "Would it be fair to say that Artie Anderson was deeply interested in getting to the bottom of the death of his sister?" Finning testified, "Yes." Petitioner's lawyer then asked, "And that he was pressing you and your colleagues to do that?" Finning testified, "Yes." (See Appendix E2-3) Petitioner argued to the Second Circuit in his appeal that Anderson should be held accountable to violations of Title 18 U.S.C. § 207. (See Appendix D1-D8) The government argued, "Hoey fails to cite any law giving Judge Castel or this Court the authority to order an investigation or dismiss indictment because a former law enforcement agent urged the investigation." (See government brief, Appendix F-3) These shocking admissions, by an investigator from the O.P.R. in

Washington, D.C., proves that Anderson intended to influence Finning, and deny petitioner his right to an investigation free of his intentional bias. Anderson used his connections to taint and alter an ongoing investigation with his own emotional bias, That's not all, Anderson had brought a civil lawsuit against petitioner for wrongful death of his sister. (That lawsuit was settled for over a million dollars by petitioner's insurance company in 2019)

Petitioner argues that Anderson's motivation to win millions of dollars in the civil case led him to cross the line by "pressing" the agents in this matter resulted in petitioner being denied his rights to due process, guaranteed by the Constitution, and an "impartial decision-maker." (See Pounders at 988 id.) (See the Fifth, Sixth, and Fourteenth Amendment to the Constitution)

Petitioner did file a Motion to vacate his plea of guilty after learning that his lawyer, Joseph Conway, was a longtime friend and colleague of Arthur Anderson.

Petitioner pleads with this Court to reverse conviction and sentence, and remand to the district court for further proceedings, or alternatively dismiss indictment due to the fact that Anderson, "harnessed the machinery of the criminal justice system for (his) own personal ends." (See Patrice Taylor, Appellant District of Columbia Court of Appeals, 73 A. 3d 85; 2013 D.C. App. LEXIS 435, no.10-PM-1167, June 12, 2012 argued, August 1, 2013 decided.) In Taylor, the Court of Appeals reasoned that, "We have no doubt that if the Metropolitan Police Department allowed any citizen to grab a badge, a gun, and a cruiser to go out and resolve personal disputes, it would undermine the public's interest in their operations." "So too, it reflects poorly on the courts to allow private citizens to harness the machinery of the criminal justice system for their own personal ends." "We do not think the public would be pleased to know that, in funding the operations of the courts with its tax dollars, it also funded this private feud." "We expect that the public would be shocked to know that one private citizen

could send another to jail."(See Taylor at 73 A. 3d at 106 id.) This is precisely what happened in petitioner's case now before this Court. I really was the largest Banana wholesaler and ripener in New York prior to my arrest. I was never convicted of any crime until I met Anderson's 41 year old sister for the first time at 420am in my hotel room. I was denied my rights when Anderson's former subordinates pressed a case with "no evidence of drug activity related to hoey".(See Agent Baldus' email to the US Attorneys, Appendix G-1) I do not sell drugs. The district court stated this at petitioner's sentence, "Lifestyle is an accurate way to describe this defendant's criminality..."These were not sales (of cocaine) but distributions to social friends, would be friends, acquaintances and hanger-oners." "It was not done for monetary gain. It was done to support his social stature, to attract women, and in other words, the cocaine distribution was integral to his lifestyle."(See district court at petitioner's sentence Appendix G55)

With an ever growing number of federal agents and employees, all with their own private disputes happening, I plead with this Court that the abuse of power by Anderson and the entire prosecution team. They stole my attorney-client files and communications. Abuse by agents in this matter happens to many criminal defendants. I am sure it happens to many unknowingly. Sadly, this injustice has fallen on deaf ears. Mostly because in the Second Circuit Court of Appeals it appears Anderson has a friend and former colleague, Second Circuit Panel Judge Gerard Lynch, who happens to be Anderson's former boss, when Lynch was the Chief of the Criminal Division at the U.S Attorney's Office for the Southern District of New York.

"Everyone knows the horrors done by Nero"... "When the evil sword of power is joined to the poison of passion, the commonwealth groans under an intolerable burden."(See The Consolation of Philosophy"-Boethius, Dated 524 A.D.) I do have faith that we have come a LONG way in the last 1500 years since the wrongful imprisonment of Boethius. I have faith in our

system, and ultimate faith in Our Supreme Court, so that we never suffer because we failed to remember the past, and thus "condemned to relive it."-The Prince, Machiavelli. I pray for relief.

REASONS FOR GRANTING THE PETITION

I think it is important for this Court to hear this case because there needs to be uniformity within the lower courts regarding how they apply/interpret the United States Sentencing guidelines, because it affects so many criminal defendants at sentencing. Sadly, many fellows suffer harsher punishments unknowingly. I humbly assert that direction from the Supreme Court will put an end to this unfair penalty to already harsh sentences.

I think the Country is at a time when blood-thirsty foes scrutinize each other in search of bringing criminal charges against one another. I think my case will bring National attention that this unfair abuse of position MUST stop. Emotion should play no role in a Federal criminal investigation or prosecution. Sadly, it appears to be very evident at ALL levels of government. Foes looking to use their influence with the US Attorney's Office to "harness the machinery of the criminal Justice system for their own personal ends." I am not upset with Mr. Anderson. I am grateful for all that I've learned through this experience. Most importantly to view others fairly, and not easily look to scrutinize my fellow Americans the way I might have before my incarceration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Thomas Hoey, Jr.

Date: December 22, 2020