No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

****

ANTONIO KEVIN McKOY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

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

****

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QUESTION PRESENTED

I. WHETHER THE JURY SHOULD BE REQUIRED TO RETURN A SPECIAL VERDICT FORM ADDRESSING ALL ESSENTIAL ELEMENTS OF CONTINUING CRIMINAL ENTERPRISE (CCE), IN THAT A CCE CONVICTION SUBSTANTIALLY RAISES THE MAXIMUM AND MINIMUM PENALTIES IN DRUG CASES; AND WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO SUBMIT A SPECIAL VERDICT FORM, AND WHETHER THE FOURTH CIRCUIT ERRED IN HOLDING IT WAS NOT REQUIRED.

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CASES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Antonio Kevin McKoy, respectfully prays this Court that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit, issued on February 9, 2021, affirming his judgment and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Antonio Kevin McKoy, No. 19-4498 (4th Cir., February 9, 2021). The opinion is unpublished. The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was issued on February 9, 2021. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

On October 26, 2016 Antonio McKoy was charged along with twenty-four other individuals in a 49 count indictment with drug, money laundering and firearm offenses. Mr. McKoy was charged in Count 1 with drug conspiracy, Count 2 with Continuing Criminal Enterprise (CCE), and Count 3 with money laundering. He was also charged in Counts 4, 5, 7, 9, 10, 18, 25, 26, 27, 31, 35, 41, 43, and 47

with various drug offenses. He was charged in Count 44 with possession of a firearm in furtherance of a drug trafficking crime. A copy of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, is reproduced as Appendix E. A copy of Counts 1 and 2 of the indictment is reproduced as Appendix F.

This appeal concerns whether a jury should be required to return a special verdict form addressing all essential elements of Continuing Criminal Enterprise (CCE), where such conviction substantially raises the maximum and minimum penalties in drug cases. The verdict form in the instant case is reproduced as Appendix G. The Constitutional provisions involved are the Fifth Amendment and the Sixth Amendment to the United States Constitution and are reproduced as Appendix H.

STATEMENT OF THE CASE

Procedural History

On October 26, 2016, Petitioner Antonio Kevin McKoy was charged along with twenty-four other individuals in a 49 count Indictment with drug and firearm offenses. Mr. McKoy was charged in Count 1 with drug conspiracy, Count 2 with Continuing Criminal Enterprise (CCE), and Count 3 with money laundering. He was also charged in Counts 4, 5, 7, 9, 10, 18, 25, 26, 27, 31, 35, 41, 43, and 47 with various drug distribution charges. He was charged in Count 44 with possession of a firearm in furtherance of a drug trafficking crime.

The case came on for trial at the May 14, 2018 criminal term of court sitting in Raleigh, North Carolina, the Honorable James C. Dever, III, District Court Judge

Presiding. At the conclusion of the case the Government dismissed drug Counts 4, 5, 7, and 10. Motions for judgment of acquittal were denied. On May 23, 2018 the jury found Mr. McKoy not guilty of Count 41, and guilty of the remaining charges.

On November 27, 2018 the Court entered an order allowing trial counsel to withdraw. Undersigned counsel was appointed and filed his notice of appearance on December 3, 2018.

The case came on for sentencing at the June 19, 2019 criminal term, Judge Dever presiding. Petitioner's motion to vacate the conspiracy conviction due to the CCE conviction was allowed. Petitioner's objection to increased mandatory minimums in light of the First Step Act was also allowed by the Court. All other objections and sentencing motions filed by the Petitioner were denied.

Judge Dever imposed a life sentence on Count 2, CCE. On Counts 25, 26, 27, 31, 35, 43, and 47 he imposed a sentence of 480 months per count, to be served concurrently; on Count 3 he imposed a sentence of 240 months to be served concurrently; and on Counts 9 and 18 he imposed a sentence of 360 months per count to be served concurrently. On the Count 44 firearm conviction, he imposed a 60 month consecutive sentence. The total term was therefore life imprisonment plus 60 months. (App. D).

The notice of appeal was filed on July 1, 2019. In an opinion filed on February 9, 2021, the Fourth Circuit Court of Appeals affirmed. (App. A).

Statement Of Facts

This case arose out of an investigation conducted by the Sampson County

Sheriff's Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regarding alleged drug trafficking within the Eastern District of North Carolina. The Count 1 conspiracy was from on or about December of 2013 up to and including the date of the indictment, October 26, 2016. The investigation consisted of the use of confidential informants, surveillance, seizures, and statements from cooperating witnesses. Additionally, in 2016, the investigation incorporated wire intercepts that captured conversations between the co-conspirators and others. Antonio McKoy was the main target of the investigation. The investigation also targeted McKoy's home and other buildings in Garland, North Carolina.

The jury was instructed on all counts pertaining to Petitioner McKoy. On the Count 1 conspiracy and several of the other drug counts, a special verdict form was included to have the jury determine the amount of drugs applicable to the conspiracy and those particular drug counts. No such special verdict form was offered to the jury on the Count 2 CCE charge. See verdict form, reproduced herein as Appendix G. No request was made by counsel for McKoy to submit a special verdict form on any of the elements of CCE, and in particular whether there was unanimity as to the incidents supporting a "continuing series of violations." This issue was raised on appeal. The Fourth Circuit took the position that the district court committed no error, plain or otherwise, citing United States v. Marshall, 332 F.3d. 254, 263 n. 5 (4th Cir. 2003). (App. A, p. 9).

Further facts will be developed during the argument portion of this petition.

REASONS FOR GRANTING THE PETITION

I. A JURY SHOULD BE REQUIRED TO RETURN A SPECIAL VERDICT FORM ADDRESSING ALL ESSENTIAL ELEMENTS OF CONTINUING CRIMINAL ENTERPRISE (CCE), IN THAT A CCE CONVICTION SUBSTANTIALLY RAISES THE MAXIMUM AND MINIMUM PENALTIES IN DRUG CASES, AND THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO SUBMIT A SPECIAL VERDICT FORM, AND THE FOURTH CIRCUIT ERRED IN HOLDING IT WAS NOT REQUIRED.

Petitioner Antonio McKoy contends that the district court erroneously failed to require the jury to return a special verdict form on the charge of Continuing Criminal Enterprise (CCE). There was no objection to the jury charge, so it is reviewed for plain error. United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The Fourth Circuit Court of Appeals dealt with this issue in a footnote, finding that the district court committed no error, plain or otherwise. The Fourth Circuit cited its earlier opinion in United States v. Marshall, 332 F.3d 254 (4th Cir. 2003). The Petitioner contends the Marshall opinion should not be controlling, and therefore the Court of Appeals erred in affirming the district court and not requiring a special verdict form.

The Marshall case involved a drug conspiracy and Continuing Criminal Enterprise. One primary issue was whether a defendant could be convicted and sentenced for both CCE and the predicate conspiracy charges proved as elements of the CCE offense. The Fourth Circuit held that it could not, citing its earlier decision in United States v. Wilson, 135 F.3d 291, 303 (4th Cir. 1998), which in turn cited the Supreme Court decision in Rutledge v. United States, 517 U.S. 292, 116

S.Ct. 1241, 134 L.Ed.2d 419 (1996). As previously mentioned in the procedural history portion of this petition, the district court herein vacated the conspiracy sentence in light of the CCE conviction.

In Marshall the Fourth Circuit only mentioned a special verdict on the elements of the CCE count in a footnote. Footnote 5 in Marshall stated ". . . the district court did not err in failing to require a special verdict on all elements of the CCE count", citing United States v. Console, 13 F.3d 641, 663 (3rd Cir. 1993), and United States v. Ellis, 168 F.3d 558, 562 (1st Cir. 1999), superseded by Rule on other grounds in U.S. v. Gorsuch, 404 F.3d 543 (1st Cir. 2005). While the quoted portions of the decisions in Console and Ellis are correct in footnote 5 to the Marshall opinion, the facts in Console and Ellis are significantly distinguishable from the facts in the case at bar.

In United States v. Console, defendant Console was being re-tried on a RICO mail fraud case where the jury at the first trial could not reach a verdict on the RICO and certain mail fraud counts. Console presented a double jeopardy argument because his requested special verdict form at the first trial was denied. In denying Console's double jeopardy argument, the Third Circuit noted that a defendant has no right to a verdict on the elements of an offense. 13 F.3d at 663. It went on to hold that the district court had discretion in determining whether to submit special interrogatories to the jury regarding the elements of an offense. It further noted that the district court in Console submitted to the jury a special interrogatory listing the predicates within the statute of limitations because for a

RICO conviction the Government had to prove at least one predicate within the statute of limitations. It further noted that the court instructed the jury to specify which of the racketeering acts it found to constitute a pattern of racketeering only if it found Console guilty of the RICO count. 13 F.3d at 663-664.

In United States v. Ellis, the defendant was convicted of possession of a firearm by felon and cultivating marijuana charges. Several firearms were found at the defendant's home and attached property pursuant to a valid search warrant. The defendant requested a special verdict form in order to determine which items (shotgun, revolver, or ammunition) the jury agreed he had knowingly possessed. The First Circuit held that special verdicts in criminal cases are generally disfavored, and noted that defendant Ellis had not explained how knowing precisely what the jury found beyond a reasonable doubt would have aided in his cause before the court at sentencing. 168 F.3d at 561-562. It should be noted that the simultaneous possession of multiple firearms generally constitutes only one violation of 18 U.S.C. § 922(g). See United States v. Dunford, 148 F.3d 385, 390 (4th Cir. 1998). Therefore a special verdict form is not required. It should be further noted that in Ellis, the First Circuit concluded that a district court has discretion to use a special verdict form should it so decide. 168 F.3d at 562, n. 2.

Petitioner McKoy contends that the Fourth Circuit's footnote reliance on the Marshall court's footnote reliance on Console and Ellis is misplaced and does not address the requirement of a special verdict form herein. In the instant case, the jury charge pertaining to CCE was given on day six of the trial. The verdict form

only had "guilty" and "not guilty". (App. G). In Richardson v. United States, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), the Supreme Court held that the jury in a CCE case must unanimously agree not only that the defendant committed some continuing series of violations, but also about which specific violations make up that continuing series.

The Richardson court affirmed the sanctity of unanimity in jury verdicts. However, it did not specifically offer guidance on how this could be achieved. It did leave to the appellate courts the question of whether to engage in harmless-error analysis, and if so, whether the error was harmless in the Richardson case. 526 U.S. at 824. It did not address the language of a proper jury instruction, nor whether a special verdict form was necessary.

In the instant case the district court judge listed the elements for CCE. He defined "a continuing series of violations" as three or more violations of the federal narcotics laws which are in some way related to one another; and told the jury they must unanimously agree on which three acts constituted the series of violations and that the defendant Antonio McKoy committed each of the violations. Petitioner was convicted of conspiracy and a number of distribution counts, but there is nothing in the record to indicate which of these counts the jury determined to include in the "continuing series of violations". The thrust of the defense was that this was a loose group of friends buying and selling drugs on a number of isolated occasions and therefore not a conspiracy or a continuing criminal enterprise. It is urged that some of the jurors may have felt that some of the drug charges were in the nature of

individualized transactions and not part of the alleged conspiracy or criminal enterprise. Therefore, a special verdict form, which would require the jury to unanimously agree about which specific "violations" make up the "continuing series", would have been appropriate.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court held that under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, a fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, committed to a jury, and proven beyond a reasonable doubt. (App. H). It is respectfully urged that the CCE charge necessarily raises the penalties of drug cases to a minimum of 20 years and a maximum of life imprisonment. As previously noted, a defendant cannot be convicted of both CCE and conspiracy. See Rutledge v. United States, supra. Therefore, a special verdict form which would require the jury to specifically answer which of the three drug cases in the "series of violations" were unanimously agreed upon to support the CCE conviction should have been submitted. While the indictment herein appears to have properly alleged the elements of a Continuing Criminal Enterprise charge (App. F), the jury form omitted all special verdicts, including which particular acts or counts were unanimously agreed upon and constituted the "series of violations" to support the CCE charge and raise the penalties. (App. G).

There is a clear distinction as to why this case requires a special jury instruction and the firearm by felon case in United States v. Dunford, supra, does not. A felon possessing three firearms is guilty of a violation of 18 U.S.C. § 922(g) whether he possesses one, two, or three of the guns charged. Therefore it does not matter whether all 12 jurors agree that the felon possessed one, two or three firearms as long as every juror determines the felon possessed at least one firearm. To the contrary, in the instant case, it is impossible to determine whether all 12 jurors unanimously agreed to three specific events that constituted the "series of violations" to support the CCE conviction. As previously noted, we do not know from the verdict sheet whether some of the jurors found Mr. McKoy guilty of a drug transaction that was not part of the alleged conspiracy or continuing criminal enterprise.

Very few cases concerning Continuing Criminal Enterprise (CCE) have reached the United States Supreme Court. The Third Circuit Court of Appeals considered two such cases. In United States Edmonds, 80 F.3d 810 (3rd Cir. 1996), the Court of Appeals held that to convict a defendant under the CCE statute, the jury must unanimously agree that the same three related predicate offenses occurred, and it concluded:

> "In summary, we hold that the CCE statute requires unanimous agreement as to the identity of each of the three related offenses comprising the continuing series. Our interpretation is guided by constitutional concerns, traditions in criminal jurisprudence, and the rule of lenity."

80 F.3d at 822.

However, under harmless-error review, the Third Circuit held that the error was harmless beyond a reasonable doubt, and the district court judgment was affirmed. 80 F.3d at 827.

It is interesting to note that the Supreme Court in Richardson, supra, agreed to hear the issue because of a circuit split and cited United States v. Edmonds, supra, on the side of unanimity on which "violations" constitute the series. 526 U.S. at 816.

The Third Circuit re-visited the CCE jury instruction on this issue in United States v. Russell, 134 F.3d 171 (3rd Cir. 1998). In Russell the Third Circuit found that the CCE instruction, indicating that the jury had to agree unanimously that the defendant participated in at least three or more violations of federal narcotics law, was a general unanimity instruction and violated the defendant's Sixth Amendment right to a unanimous verdict, in that it permitted conviction even if jurors relied on different acts in finding the requisite three violations. It held that the instruction should have required jury unanimity not only as to the existence of the continuing series of violations, but also as to the identity of the violations comprising that series. 134 F.3d at 176-177. It followed United States v. Edmonds in that regard. The Third Circuit in Russell also held that under the facts and circumstances in the case, the error was not harmless and was plain.

The Third Circuit's conclusion succinctly summarizes its reasoning to support a specific jury instruction on this issue, and bears repeating. The Third Circuit concluded:

> "Thus, because the jurors may well have agreed that a continuing series of violations had occurred, yet disagreed as to the identity of the three related offenses comprising the series, we conclude that the district court's failure to give a specific unanimity charge violated Russell's Sixth Amendment right to a unanimous verdict.[2]"

134 F.3d at 177.

In footnote 2 the Third Circuit opined it was not suggesting that in addition to a specific unanimity charge a special verdict form must be submitted to the jury, nor that it believed it was appropriate to prescribe specific language to be used when charging a jury. It opined that this should be determined by the district court judges on a case by case basis. Petitioner McKoy urges that due to the seriousness of this issue and the dramatic penalty increase for Continuing Criminal Enterprise, it is time for the Supreme Court to address this issue in more detail.

The Second Circuit has addressed this issue in several cases, none of which are dispositive of the case at bar. However they bear mentioning. In United States v. Ogando, 968 F.2d 146 (2nd Cir. 1992), the Second Circuit held the defendants were not entitled to submit jury blank-line special interrogatories as to each defendant, series of offenses, and supervisees. The district court judge suggested the defendants choose between two multiple-choice formats for interrogatories, which were rejected by the defendants. Therefore no special verdict forms were submitted. The Second Circuit held that under the circumstances the district court judge was well within his discretion in denying the demand for blank-line interrogatories to the jury.

In United States v. Burrell, 43 Fed. Appx. 403 (2nd Cir. 2002), the Second Circuit held that the defendant did not request a charge that the predicate acts must be related and identified no cases holding that a relatedness charge was required. Citing its earlier decision in Ogando, the Second Circuit held that the district court judge had broad discretion in determining whether to use a special verdict sheet in a complex criminal case and did not abuse that discretion.

Based upon the foregoing, Petitioner Antonio McKoy respectfully contends that the issue on whether the jury should be required to return a special verdict form addressing the essential elements of Continuing Criminal Enterprise is ripe for review. It is urged that the only way to assure that the jurors are unanimous on all elements of CCE, and in particular the three "series of violations", is to require that a special verdict form be submitted to the jury.

CONCLUSION

For the foregoing reasons, Petitioner Antonio Kevin McKoy, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his conviction and sentence.

This the 10th day of May, 2021.

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