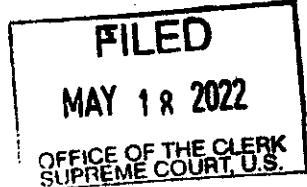


No. 21-7997

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Benjamin G. Robinson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Benjamin G. Robinson
(Your Name)

FCI Coleman Medium, P.O. Box 1032
(Address)

Coleman, Florida 33521-1032
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

- (1) Whether the lower courts abused their discretion in granting the Government's motion in limine to admit into evidence, Petitioner's prior State court conviction for cocaine trafficking
- (2) Whether the lower courts abused their discretion in denying Petitioner's pretrial motion to suppress the initial cocaine shipments that were intercepted and seized at the U.S. Post Office in Daytona Beach, Florida
- (3) Whether there was sufficient evidence to deny the Petitioner's Motion for judgement of acquittal as to the charge of conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine
- (4) Whether plain error occurred when renewed pretrial arguments were not made to exclude Petitioner's prior State cocaine trafficking conviction and the initial seizure of cocaine in Petitioner's case
- (5) Whether post-trial, the lower court abused its discretion in not dismissing this case against the Petitioner

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:

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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 _____; 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 is unpublished.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 N/A to the petition and is

reported at N/A; 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 N/A to the petition and is

reported at N/A; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

reported at N/A; 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 3/12/2022.

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: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Fifth Amendment of the United States Constitution

Sixth Amendment of the United States Constitution

Statutory Provisions

21 U.S.C. §§ 841, 846

STATEMENT OF THE CASE

A Grand Jury returned a superseding indictment charging Petitioner with conspiring to distribute and possess with intent to distribute a controlled substance. The grand jury charged Petitioner with the violation of being involved with 500 grams or more of cocaine. Petitioner proceeded to trial and was convicted of conspiracy to distribute and possess with intent to distribute a controlled substance. Petitioner appealed his conviction to the United States Court of Appeals and was denied. Petitioner now pursues this writ of certiorari to the Honorable United States Supreme Court for its opinion in this case.

QUESTIONS PRESENTED

(1) Whether the lower courts abused their discretion in granting the Government's motion in limine to admit into evidence, Petitioner's prior State court conviction for cocaine trafficking

The Government in this case was unconstitutionally allowed in violation of the Petitioner's Fifth and Sixth Amendment rights to use Movant's prior State conviction for cocaine trafficking to be admitted into evidence to demonstrate that Petitioner's prior State cocaine charge would establish that he was a cocaine trafficker. However, it did not establish: (a) the use of U.S. Mail or similar interstate courier, (b) the involvement of interstate actors, (c) the use of any secret packaging, (d) any preparation or plan similar to the Federal trafficking case at all, (e) any knowledge of the means and methods similar to the federal trafficking case, or (f) any absence of mistake or lack of evidence.

The government's failure to demonstrate any reasonably cognizable "similar facts" between Petitioner's State prior for cocaine trafficking conspiracy and the underlying federal cocaine trafficking charge. The Government did not need the prior State charge to prove intent regarding the Federal charge. See United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1993). The purpose of the prior conviction was unfairly used to establish propensity. See Fed. R. Evid. 403. Any probative value was outweighed by unfair prejudice resulting from introduction of the prior conviction, and therefore, the prior conviction should have been excluded, according to United States v. Diaz-Lizaraza, *supra*.

(2) Whether the lower courts abused their discretion in denying Petitioner's pretrial motion to suppress the initial cocaine shipments that were intercepted and seized at the U.S. Post Office in Daytona Beach, Florida

Petitioner filed a pretrial motion to suppress evidence. The motion was filed immediately upon the defenses's August 5, 2019 receipt of information from the United States informing that it could not substantiate law enforcement's representation in the underlying January 20, 2016 application for search warrant--that is, that a canine altered to the presence of cocaine in a parcel intercepted at a post office facility in Daytona Beach that was addressed to 128 Big Ben Drive,

Daytona Beach, Florida ("parcel") without even a hearing from the lower court and without specifically in its discretion in denying the motion to suppress, as the search of the package, which was based on a materially flawed application for a search warrant in which the material evidence regarding the possible cause asserted canine sniff, is void. This was a violation of the Petitioner's Fourth Amendment rights under the United States Constitution and his Fifth Amendment right to due process for his Fourth Amendment rights not to be violated. United States v. Tamari, 454 F.3d 1259, 1265 (11th Cir. 2006). The lower courts simply violated the Petitioner's Fourth and Fifth Amendment rights and even denied the Petitioner a hearing.

(3) Whether there was sufficient evidence to deny the Petitioner's Motion for judgement of acquittal as to the charge of conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine

The Petitioner filed a motion of acquittal at the close of evidence to properly preserve and challenge to the sufficiency of the evidence for appeal and an appeal. Clark v. United States, 293 F.2d 445, 448 (5th Cir. 1961). Whether the evidence was sufficient to sustain the Petitioner's conviction was a question of law which Petitioner felt was the Appellate Court's review for de novo. United States v. Joseph, 709 F.3d 1082 (11th Cir. 2013); and United States v. To, 144 F.3d 737 (11th Cir. 1998).

Petitioner felt that in the Appellate Court's authority to consider, or in the Appellate Court's jurisdiction to consider the sufficiency of the evidence, that it considers all evidence and/or sufficiently of all evidence admitted at trial, admissible or inadmissible. See Lockhart v. Nelson, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). The Appellate Court should not have affirmed a criminal conviction based on a theory not contained in the Petitioner's indictment or not presented to the Petitioner's jury. The Government's theory in the Petitioner's case was specific that Petitioner was trafficking in "cocaine."

However, the evidence in the Petitioner's case was insufficient to sustain a conviction that Petitioner knowingly and willfully trafficked in "cocaine." Petitioner contends that his case was similar to United States v. Young, 39 F.3d 1561 (11th Cir. 1994), where evidence was found insufficient to support Young's conviction for conspiring to possess with intent to distribute marijuana, although Petitioner was involved in selling marijuana.

The Petitioner, like the defendant in United States v. Brown, 872 F.2d 385 (11th Cir. 1989), while it may have been suggested or even demonstrated that Petitioner had in the past purchased cocaine from the principal member of the conspiracy on previous occasions, there was no proof that Petitioner resold the cocaine or was otherwise a member of the conspiracy, except as a purchaser. See United States v. Dekle, 165 F.3d 826 (11th Cir. 1999). Specifically, on the point of any purported reselling of cocaine by Petitioner to others, Special Agent Robert Curely testified, "I do not believe we investigated who Petitioner was distributing to." Special Agent Curley also confirmed that the Muscle Milk containers could accommodate a significant amount of "pressed" marijuana, approximately 1,812 grams or 4.4 pounds, which if sold on the streets by the gram would be \$15 to \$20 dollars per gram or could yield \$27,000 for the amount of pressed marijuana that would fit inside a container of Muscle Milk and being sold for just \$15 dollars per gram. Petitioner was not trafficking in cocaine. The lower courts abused their discretion in denying Petitioner's motion of acquittal.

(4) Whether plain error occurred when renewed pretrial arguments were not made to exclude Petitioner's prior State cocaine trafficking conviction and the initial seizure of cocaine in Petitioner's case

Despite having made pretrial arguments to exclude Petitioner's prior State cocaine conspiracy conviction and to suppress the initial seizure of a cocaine package at the U.S. Post Office in Daytona Beach (a seizure secured by a materially flawed application in support of issuance of a search warrant), the failure to renew these objections at the start of trial and to continuously raise the objections during trial and to contend that the district court had ruled in error, affected the substantial rights of the Petitioner. See United States v. Monroe, 353 F.3d 1346 (11th Cir. 2003); United States v. Turner, 474 F.3d 1265 (11th Cir. 2007). The cumulative prejudiced effect from not continuously raising the objections resulted in an insurmountable effect on the substantial rights of the Petitioner. United States v. Olano, 507 U.S. 725 (1993).

When a defendant does not object to a decision of the lower court, the issue is then usually by the Appellate Court for plain error. Fed. R. Crim. P. 52(b). When a party fails to lodge a contemporaneous objection to improper testimony, the plain error standard applies. United States v. Turner, 474 F.3d at 1276. To satisfy the plain error standard, the court must find that:

(1) there was error in the lower court's determination, (2) the error was plain or obvious, and (3) the error "affected substantial rights" in that the error was prejudicial and not harmless. United States v. Olano, 507 U.S. 725 (1993); United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998). In Petitioner's case, the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Foree, 43 F.3d 1572 (11th Cir. 1995).

(5) Whether post-trial, the lower court abused its discretion in not dismissing this case against the Petitioner

The lower court should have dismissed the case against the Petitioner in light of the Government's post-trial disclosure of relevant and material evidence that impacts the jury verdict. The United States government provided the Petitioner with discovery information that had not been provided prior to trial or during trial. A taped recording of a proffer interview that Special Agent Dah'l conducted with the principal member of the conspiracy. The recording was newly discovered evidence to Petitioner. The Government never disputed the interview, was conducted in January of 2018, was accomplished during the investigation of the Petitioner, prior to Petitioner being indicted in June of 2019, and subsequent to Petitioner's September 2017 arrest in Volusia County, Florida on State marijuana charges. Despite Special Agent Dah'l's testimony at trial, the recording clearly demonstrated that Agent Dah'l was clearly and fully aware that Petitioner was engaged in marijuana trafficking. Aware of Special Agent Dah'l's testimony to the jury upon receipt of the post-trial discovery, Petitioner filed a post-trial Motion requesting that the district court Judge vacate the verdict and dismiss the case against the Petitioner or in the alternative, grant Petitioner a new trial. Petitioner's contention at trial was that he was trafficking in marijuana, not cocaine. In an effort to determine the theory that Petitioner was dealing in marijuana, Special Agent Dah'l, the lead case agent who was sitting at the prosecution table throughout the trial repeatedly testified that he had no knowledge that Petitioner was engaged in marijuana trafficking. Special Agent Dah'l informed the jury that Petitioner dealing in marijuana was not discussed in our investigation. However, it turns out that a proffer that Special Agent Dah'l conducted of co-conspirator Freeney revealed that contrary to Agent Dah'l's own trial testimony, he was in fact aware that Petitioner was engaged in marijuana trafficking, and as Special Agent Dah'l put it himself: "Ben was over there running amuck." Petitioner was significantly prejudiced in trial preparation and at trial (including, but not limited to):

a presentation of the recording in the cross-examination of Special Agent Dah'l by the Government's failure for disclosing the recording before trial or even during trial as Special Agent Dah'l got at the prosecution counsel's table, listening to the Defense attempt to explain its theory of the Petitioner's case to the jury. The Defense's ability to successfully attack the credibility of Special Agent Dah'l, as well as the ability to support to the Defense's theory of the case (i.e., Petitioner's engagement in marijuana trafficking, the marijuana in the Muscle Milk container, and his non-participation in any current cocaine trafficking), was prejudiced by the Government's failure to disclose the recordings of Freeney's proffer with Special Agent Dah'l. See United States v. Cargo-Vegara, 57 F.3d 993, 998-99 (11th Cir. 1995); United States v. Christian, 198 F.3d 1378, 1384 (11th Cir. 1999). To Petitioner, the Government's post-trial disclosure of the recording between Special Agent Dah'l and co-conspirator Freeney was newly discovered evidence which required the jury's verdict be vacated and a new trial ordered. See Fed. R. Crim. P. 33(a); United States v. Ramos, 179 F.3d 1333 (11th Cir. 1999) (a new trial may be granted in the interest of justice or on the basis of newly discovered evidence); Brady v. Maryland, 373 U.S. 83 (1963). Petitioner believed that the distinct wording of the charging document and the verdict form, specifying "500 grams or more of cocaine," distinguished in the instant case from United States v. Becerra-Becerra, 437 Fed. Appx. 827 (2011); United States v. Mejia, 97 F.3d 1391 (11th Cir. 1996); United States v. Gomez, 905 F.2d 1513 (11th Cir. 1990), the lower court in the instant case did not instruct the jury that Petitioner only had to have knowledge that a controlled substance as opposed to "cocaine" was an alternative means of conviction of jury instruction.

The lower court without any elaboration, denied Petitioner's motion to dismiss the case.

Petitioner did not discover the evidence at issue until after the trial. Petitioner exercised his due diligence (as information was solely in the hands of the Government), the tape recording of co-conspirator Freeney's proffer (as well as Special Agent Dah'l's participation in the proffer) was not merely cumulative or impeaching as it went to the heart of the theory of the defense and demonstrated that persons had departed from engaging in cocaine trafficking, because of the stiff penalties, the tape recording was material (as has been demonstrated) to the lower courts, and the apparent vacillation by the jury in its deliberations (i.e., the Allen charge, the scribbling on the verdict form, etc.) demonstrate that a different result was possible.

The Lower courts, both the U.S. District Court and the Appellate Court, abused their discretion in not granting the Petitioner a new trial.

Petitioner's substantial rights were constantly violated in this case. Petitioner therefore, based on all of the above stated information in this writ of certiorari, hopes and prays that this case will be heard by the nine (9) justices of the United States Supreme Court, so that no other American citizen's substantial rights will ever be stomped over like Petitioner's rights were in this case in point by the lower court and the Appellate court.

REASONS FOR GRANTING THE PETITION

Petitioner understands that review of his petition to the Supreme Court is not a matter of right, but of judicial discretion. The lower courts, meaning the U.S. District Court and the Court of Appeals for the Eleventh Circuit, unconstitutionally entered a decision in the Petitioner's case, which is in violation of the Petitioner's substantial rights and Borden v. United States, 141 S. Ct. 1817 (2021). The Eleventh Circuit is in conflict with all of the other circuits regarding "mens rea" of the illicit nature of the substance based on the Florida State statute § 893.13, which was a State prior used to unconstitutionally convict the Petitioner in this case in violation of Borden v. United States, 141 S. Ct. 1817 (2021). The Court of Appeals for the Eleventh Circuit has therefore entered a decision in the Petitioner's case that is in extreme conflict with all of the other circuits, and has sanctioned the Florida State lower court's decision, which totally violated Petitioner's substantial rights regarding mens rea of the illicit nature of the substance. This is one of the Petitioner's claims in this petition regarding a Florida State prior for Florida State statute § 893.13(1) (drug trafficking), which is in violation of Borden, *supra*.

Petitioner therefore hopes and prays that this Honorable United States Supreme court will accept this petition, considering the facts above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Berlin

Date: 5/12/22