22-5206

No. 22-

ORIGINAL

IN THE

# Supreme Court of the United States



SHAIN DUKA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FROM A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the Third Circuit Erred in Utilizing the Concurrent Sentence Doctrine to Uphold a Concededly Invalid 924(c) Conviction

## LIST OF PARTIES AND RELATED CASES

Dritan Duka is an additional party.

## RELATED CASES

*United States v. Duka,* No. 09-2301, U.S. Court of Appeals for the Third Circuit. Opinion on Direct Appeal

*In re Shain Duka*, No. 16-2977, U.S. Court of Appeals for the Third Circuit. This Motion for Permission to file Second or Successive Habeas Petition was dismissed as moot when the case was remanded to the District Court (and then not considered Second or Successive under *United States v. Santarelli*, 929 F.3d 95 [3rd Cir. 2019])

*Shain Duka v. United States*, No. 16-3246, U.S. Court of Appeals for the Third Circuit. Motion for Certificate of Appealability of Decision on motion to set aside judgment that denied 2255 Petition (which then was re-opened under *Santarelli.*)

*Shain Duka v. United States*, No. 16-4439, U.S. Court of Appeals for the Third Circuit. This was another attempt to appeal the denial of the 2255, which was then re-opened under *Santarelli.*)

*Shain Duka v. United States*, No. 19-2676, U.S. Court of Appeals for the Third Circuit. The Third Circuit denied a request for a certificate of appealability as to the denial of the 2255 Petition under Rule 60(b). (As noted, this 2255 was later re-opened under *Santarelli.*)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Shain Duka respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINION BELOW

The March 8, 2022 opinion of the Third Circuit Court of Appeals (1a-16a) is reported at 27 F.4th 189 (3rd Cir. 2022.) A Petition for en banc review was denied on May 3, 2022. (1b)

## JURISDICTION

The judgment of the court of appeals was entered on March 8, 2022. A petition for rehearing *en banc* was denied on September 9, 2008. This Court has jurisdiction pursuant to 28 USC 1254.

## STATEMENT OF THE CASE

1. My attorney entered this case when the original 2255 petition was still pending in the district court, and argued that the 924(c) convictions should be vacated; that there should be a new trial on the conspiracy based on ineffective assistance of counsel regarding an improper jury instruction; and that the men are actually innocent. The trial court rejected all these claims, and granted a Certificate of Appealability only as to the 924(c) claim, after applying the "rationale" of the concurrent sentence doctrine to preserve convictions the court knew were clearly invalid. The appeal mainly focused on the 924(c) claim, yet also argued to expand the Certificate of Appealability to include the other claims.

## REASONS TO GRANT THE PETITION

**Introduction**

2. Two brothers, Shain and Dritan Duka (along with a third brother), were sentenced to life in prison for a conspiracy to kill unknown US military members at an unknown place (possibly overseas) at an unknown time based on statements to an informant which they then quickly repudiated. They also received consecutive sentences of thirty years for what are now clearly unconstitutional 924(c) convictions. The panel declined to consider two claims challenging the life sentences, and expanded the problematic "concurrent sentence doctrine" in order to retain the invalid 924(c) convictions out of a sense of "practicality" when the simplest thing would have been to vacate them.

3. The three Duka brothers, and two others, were targeted by two different informants, and drawn into two different plots – one, targeting the others, involved an informant-inspired plot to attack the Fort Dix military base. The other, targeting the Dukas, involved the purchase of guns the brothers wanted to use at a shooting range, but which they couldn't legally possess as they were undocumented, having been brought to this country as young children.

4. However, the Dukas were also charged in the conspiracy to attack Fort Dix, even though the informant pushing that plot (Mahmoud Omar) testified that they were not aware of it. Faced with this, during trial the government changed its theory to the "unknown place, unknown time" approach. The Dukas were acquitted of attempted murder, but convicted of conspiracy in the climate of fear in the years following 9/11.

## I. THE DECISION HEREIN EXPANDED THE CONCURRENT SENTENCE DOCTRINE TO PRESERVE A CLEARLY INVALID CONSECUTIVE CONVICTION

5. The panel herein implicitly conceded that the 924(c) convictions were clearly unconstitutional and that there was nothing to decide in that regard. Yet the Decision held that that it somehow wasn't an abuse of discretion to use a doctrine which didn't actually apply in order to retain clearly unconstitutional convictions for the purpose of "saving judicial resources" when it actually meant expending more of them. This is not the approach of other United States Courts of Appeal, or this Court, although various Circuits have taken various approaches to this issue. This Court should grant Certiorari and resolve the Circuit split.

6. Although the prosecution tried to argue otherwise, the district court clearly understood that the 924(c) convictions were unconstitutional and that there was *nothing for him to decide in order to vacate them.* District Court Decision, at 15-16 (Appx C at 15-16) The panel herein seems to have reached the same conclusion. The panel stated:

> "Appellants assert there are no judicial resources to be conserved, as there was 'nothing left to decide.' But this is belied by their contention that vacatur should result in a full resentencing..." (a12)

7. That statement conflates two different things: there was nothing left to be decided on the question of *whether the 924(c) convictions were unconstitutional.* The district court could have vacated those convictions, yet declined to hold a full resentencing. Of course Petitioner would have liked to have a full resentencing, but that is a separate question, one decided on different grounds. Likewise, the Third Circuit panel herein could have vacated the concededly

unconstitutional convictions, and also could have declined to order a full resentencing. *It is very clear that there was nothing left to decide as to the invalidity of the 924(c) charges, and thus it was an abuse of discretion for the Third Circuit and the district court to preserve them by expanding a doctrine intended to conserve judicial resources.*

8. Neither the Third Circuit *nor any other Circuit Court* has ever before applied the concurrent sentence doctrine in order to preserve a *clearly invalid consecutive conviction.*

9. Moreover, there is a long line of Supreme Court cases which seem to indicate that this is *not* permissible. See i.e. *Putnam v. United States,* 162 US 687, 714-15 (1896) (the ends of justice required vacating a conviction with a fully concurrent sentence); *Sibron v. New York*, 392 US 40, 50, 56-57 (1968) (the Supreme Court said it is not clear what collateral consequences may arise in the future from an invalid conviction and thus stated, "It is 'always preferable' to litigate the validity of a conviction "when it is directly and principally in dispute."); *Ball v. United States*, 470 US 856, 864-865 (1985) (a second conviction "does not evaporate simply because of the concurrence of the sentence"); *Rutledge v. United States*, 517 US 292, 302-303 (1996)(the other life sentences did not obviate the need to review a conviction with a concurrent sentence.)

**There is a Circuit Split**

10. Different Circuit Courts take several different approaches when it comes to the concurrent sentence doctrine. Some Circuits, such as the Ninth and the Fifth, decline to apply the doctrine to preserve potentially invalid convictions at all. (See *United States v. DeBright*, 730

F.2d 1255 [9th Cir. 1984]; *United States v. Stovall*, 660 F.3d 880 [5th Cir. 2011].)

11. The Fourth, Eighth and Eleventh Circuits don't apply the doctrine to possibly invalid *convictions* (rather than just sentences) which are either concurrent or consecutive to unchallenged life sentences. *United States v. Charles*, 932 F.3d 153, 160 (2019); *Oslund v. United States*, 944 F.3d 747 (8th Cir. 2019); *United States v. Wainwright*, 2019 US APP LEXIS 28380 (11th Cir. 2019.)

12. This means there is a Circuit split because the Second, Third and Seventh Circuits do apply the doctrine (or harmless error analysis) to convictions as well as sentences, at least in the 2255 context. See *Kassir v. United States*, 3 F.4th 556, 563-567 (2021); *United States v. Ross*, 801 F.3d 374, 381-382 (3rd Cir. 2015); *Ruiz v. United States*, 990 F.3d 1025, 1033-1034 (7th Cir. 2021.)

13. Moreover, no other Circuit has applied either the rationale of the concurrent sentence doctrine to preserve consecutive convictions *which are clearly invalid.* It has only been done *to avoid reaching the merits where the law wasn't entirely clear*, not in a situation where, as in this case, there was nothing left to decide. For example, in *Kassir*, supra, at 565 the Second Circuit stated:

> "...[R]eliance on the discretionary concurrent sentencing doctrine in a collateral context serves all the same interests advanced by applications of the harmless error rule. *We avoid unnecessary adjudication of issues and unnecessary pronouncements of law.*" (emphasis supplied.)

**The Petition for Certiorari Recently Denied in Ruiz v United States 21-6200**

14. In *Ruiz v. United States,* supra, the Seventh Circuit utilized the harmless error doctrine – *not the concurrent sentence doctrine used herein* - to preserve a 924(c) conviction for conspiracy to commit kidnapping. While it is submitted that that conviction should have been vacated, there were also other 924(c) convictions therein which fell within the elements clause of 924(c) and would not have been vacated. Significantly, there were also *seven* concurrent life sentences. The Seventh Circuit held that under the "exceedingly rare" circumstances therein, it would uphold the 924(c) convictions using a harmless error analysis.

15. When a Petition for Certiorari was filed for Mr. Ruiz, this Court requested that the government respond. The response focused on the following factors, *none of which apply herein*: 1) the Ruiz Court did *not* apply the concurrent sentence doctrine; 2) the Ruiz case involved an "extraordinary fact pattern" and "exceedingly rare circumstances;" and 3) Mr. Ruiz had not tried in any way to show how *any* of the seven life sentences could possibly be vacated in the future, let alone all of them.

16. In the instant case, in contrast to *Ruiz*, the Third Circuit *did* apply the concurrent sentence doctrine (stating that it was applying its "rationale," which in essence expanded an already problematic doctrine.) The Third Circuit Decision herein *did not even mention the harmless error doctrine.*

17. While it may be "exceedingly rare" to have a case with *seven* concurrent life sentences accompanied by several additional 924(c) convictions and sentences, it is not so rare to

have a single life sentence accompanied by one or more 924(c) convictions which are clearly invalid under the *Davis* line of cases. Most Circuits just vacate the invalid 924(c) convictions in those circumstances – this Circuit split should be resolved.

18. In contrast to Mr. Ruiz, Shain Duka also argued actual innocence (discussed below) in his 2255 Petition. The argument is essentially that the evidence was far too vague and speculative to validly sustain a conviction for conspiracy to murder. Again, *this was a sting operation charging conspiracy to kill unknown US military members at an unknown place (possibly overseas) at an unknown time based on statements to an informant which were then quickly repudiated.* In Shain Duka's case, his *only* statement indicating an intent to do *something* (it was very unclear what) was repudiated almost immediately, when later that same day, he said "never mind, we don't have the ass. We can't do it." (Trial transcript at 5376, Trial Prosecution Exh. 854-D, p. 9-10).

19. It is submitted that it is certainly possible, hopefully likely, that courts will hold in the future that, like the invalidation of the residual clause of 924(c), a conspiracy to kill may not be based on such thin evidence as was held to suffice herein. Yet what happens if the life sentence is vacated but the *concededly invalid* 924(c) conviction remains because it is too late to challenge it?

20. This Court should grant Certiorari to resolve the Circuit split on this issue and hold that concededly invalid convictions should simply be vacated.

## II. Actual Innocence and Erroneous Jury Instruction

21. Petitioner is including a summary of the other two arguments he raised in the District Court, even though the Third Circuit declined to expand the Certificate of Appealability, mainly because it shows he *did* try to challenge the life sentence.

**Actual Innocence**

22. Based on *Voneida v. AG Pa.,* 738 Fed. Appx 735 (3rd Cir. 2018) and the other cases cited herein, Petitioner should be considered actually innocent because, as discussed below, a *properly instructed jury* would likely have acquitted him of conspiracy to murder.

23. As discussed below, the jury was *not instructed on a necessary element of the conspiracy to murder charge* – the need to prove malice aforethought and premeditation. In the habeas context, with regard to an actual innocence claim, the standard is whether it is more likely than not that no reasonable juror would have convicted the defendant if properly instructed. *Cordaro v. United States*, 933 F.3d 232 (3rd Cir. 2019); *Schwartz v. Hollingsworth*, 2018 US Dist. LEXIS 169791 (DNJ 2018.)

24. In *Voneida v. AG Pa.*, 738 Fed. Appx. 735 (3rd Cir. 2018) it was held that the habeas petitioner had adequately supported his actual innocence claim based on his argument that (due to the change in law set forth in *Elonis v. United States*, 135 S. Ct. 2001 [2015]) *if the jury had been properly instructed on intent, his conduct would have been found to be non-criminal.*

25. Petitioner is not, as in *Voneida,* alleging a subsequent change in law rendering the

jury instructions improper. Instead, he is arguing that, as discussed above, the jury instructions were *always improper* (and failure to object to them constituted ineffective assistance of trial and appellate counsel.) However, it is submitted that the standard set forth in *Voneida* applies here – the failure to charge the jury on an essential element of the offense (the *mens rea*) renders Petitioner actually innocent (at least for the time being, pending a new trial.)

26. Moreover, not only is Petitioner actually innocent (pending a new trial) due to the improper jury instruction, *he is factually actually innocent*. With a conspiracy charge, there must be proof of an agreement to commit a particular offense and the conspirators must agree as to the "*essential nature" of the plan. Blumenthal v. United States*, 332 US 539 (1947.) Here there was *no plan*, only a vague statement by Petitioner which he then immediately repudiated.

27. Here, Petitioner did not conspire with *anyone* other than to buy guns (and the guns were *not* the kind of weapons which had been mentioned as essential in any attack – he and his brother were offered those by the informant *and declined.*) He never agreed to a conspiracy to murder. The closest he came was on March 10, 2007. Even the key prosecution witness, the Confidential Informant Bakalli, conceded that prior to March 10, 2007 everything was only theoretical and there was *no agreement* to take any action. (Trial transcript at 5314)

28. On March 7, 2007, after a vague statement of intent to do *something* (the date and targets and all other details were never specified) Shain Duka then made it clear *on that same date* that he wasn't going to act, saying, "never mind, we don't have the ass. We can't do it." (Trial transcript at 5376, Trial Prosecution Exh. 854-D, p. 9-10). And he never again made any

actual statements indicating support for a conspiracy to kill.

29. In *United States v. Stone*, 2012 US Dist. LEXIS 41434 (EDMI 2012) the court granted a motion for acquittal in a case charging seditious conspiracy and conspiracy to use weapons of mass destruction. *Unlike the instant case*, this was a well-established group which included members who wanted to wage war against the United States government *before* any informant got involved. In the instant case, the Duka brothers, even *with* the coaxing of two different informants, never committed to any plan to attack anyone, and made many statements showing a lack of intent to do so.

30. In the *Stone* case, even though there *was* a plan, supported by many statements of intent to engage in war against the United States, as well as lots of military-style training (including the use of explosive devices) and the possession of firearms, the court granted the Rule 29 motion of acquittal, even before the case went to the jury, stating that there was mainly just loose talk, and insufficient evidence of a conspiracy.

31. In the instant case, in contrast, *there was clearly no plan at all*. Yet Petitioner and his brothers were convicted of conspiracy to murder, and were sentenced to life.

32. While recognizing that the holding in *Stone*, supra (and it is noted that the government did not appeal that ruling) was made by a district court, it is instructive to note how much *more* egregious the facts were in that case, yet the case was thrown out as insufficient before going to the jury. See also *United States v. Valle*, 2015 US App. LEXIS 21028 (2nd Cir. 2015) (Rule 29 acquittal upheld where conspiracy conviction was not based on a real plan, but

on a fantasy); *United States v. Mercer*, 165 F.3d 1331 (11th Cir. 1999) (legally insufficient evidence of conspiracy in a drug case.) There is a very strong argument to be made herein that Petitioner is factually innocent of conspiracy.

**The Jury Instruction**

33. While it is true that three different panels of the Third Circuit stated that "the correctness of the challenged jury instruction is not debatable," none of the panels gave any reasoning for this, with the second two (the motions panels and merits panels herein) simply nothing that this had been said by a prior panel. But that prior panel did so on a *pro se* Rule 60(b) motion where the argument was not fully developed, and provided no reasoning for its claim.

34. Petitioner was convicted of Conspiracy to Commit Murder of Members of the United States Military under 18 USC 1117 (and 1114, the substantive offense.) The substantive crime of Murder of US military members includes as elements *malice aforethought* and *premeditation*. Very significantly, right before telling the jury about those elements, the District Court stated, "The government is *not required to prove those elements in this case*, but the government is required to prove that the defendants entered into an agreement to commit that crime." (Trial transcript, at 6316, emphasis supplied)

35. It is clear that it *was* necessary for the government to prove that Petitioner *conspired* to kill *with premeditation and malice aforethought*. *United States v. Zapata*, 583 Fed. Appx 357 (5th Cir. 2014); *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997); *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *United States v. Chaga*, 807 F.2d 398 (5th Cir. 1986); *United*

*States v. Harrelson*, 766 F.2d 186 (5th Cir. 1985)(en banc); *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985.)

36. In the panel decision in *United States v. Harrelson*, supra, the Fifth Circuit panel explained that, based on *Ingram* and other cases, in order to properly instruct the jury on conspiracy to commit murder under 18 USC 1117, 1114 and 1111, it was necessary that the jury be instructed that *the defendant must have malice aforethought and premeditation.* Because the jury was not so instructed, the court reversed the conspiracy to murder conviction for Elizabeth Chaga, one of the defendants. The en banc decision in *Harrelson*, supra, arrived at the same conclusion.

37. Like the jury instruction as to Elizabeth Chaga, where the instruction on malice aforethought was given with regard to another defendant, the instruction herein (for all of the defendants) did not properly convey the intent required with regard to the conspiracy. The District Court did tell the jury that malice aforethought and premeditation were elements of the *substantive* offense of murder, and even defined them, but the Court also told the jury, at the same time, that "the government is not required to prove these elements in this case." (T 6316) The Court went on to say that the government had to prove an agreement "to commit that crime."

38. As in *Harrelson*, simply telling the jury there had to be proof of an agreement to commit the crime, without telling them that there had to be proof that the defendants had the *mens rea* of malice aforethought and premeditation, was reversible error. A reasonable juror trying to follow the Court's instructions would have no way of knowing the required intent - *that*

*there had to be proof beyond a reasonable doubt that each defendant had to have malice aforethought and premeditation* with regard to the conspiracy to murder.

39. A "jury instruction that omits or materially misdescribes an essential element of an offense... violate[s] federal due process rights." *Smith v. Horn*, 120 F.3d 400, 411 (3rd Cir. 1997.) As the jury instruction omitted telling the jury they needed to find that the defendants acted with malice aforethought and premeditation, essential elements of the conspiracy to murder charge, it violated the Due Process Clause.

40. The error was not harmless. As discussed below, the evidence that Petitioner (and his brothers) actually joined a conspiracy to murder, and did not withdraw from said conspiracy prior to the arrest, is sparse to nonexistent. The government cherry-picked certain statements but ignored other statements which showed a lack of intent to be part of such a conspiracy. As such, it cannot be said that the jury instruction error herein was harmless.

41. It constituted ineffective assistance of counsel not to object to said instruction. The instruction misstated the law regarding the intent/ state of mind necessary for the conspiracy to murder charge. Thus the first prong of *Strickland* – deficient performance – has been met.

42. With regard to the prejudice component of *Strickland*, it must be shown that there is a reasonable probability that, but for the deficient performance, the result would have been different. *Strickland v Washington*, 466 US 668, 694(1984); *Whitney v. Horn*, 280 F.3d 240, 258 (3rd Cir. 2002.)

43. Petitioner and his brothers were acquitted of attempted murder, and the evidence

of conspiracy was slight to nonexistent, as discussed above. Given all of Petitioner's statements showing a *lack of intent* to take any action, deficient performance in failing to object to the erroneous instruction regarding intent was very prejudicial. Were it not for that failure, it is reasonably probable that Petitioner would have been acquitted on the conspiracy to murder charge.

## CONCLUSION

Therefore, based on the foregoing, this Court should grant the petition for a writ of certiorari.

Dated: 7/11/22

Respectfully Submitted,

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