No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAMIAN PERRY, a/k/a Primo,

Petitioner,

v.

UNITED STATE OF AMERICA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the First Circuit impermissibly narrowed the application of Double Jeopardy Clause of the United States Constitution therefore removing any practical protections to the right to be free from multiple punishments for the same offense?

PARTIES TO THE PROCEEDING

Petitioner in this Court is defendant-appellant Damian Perry. Respondents in this Court are the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Damian Perry respectfully petitions this court for a writ of certiorari to review the decision of the United State Court of Appeals of the First Circuit.

OPINION BELOW

The decision of the First Circuit under review is reported at *United States v. Perry*, 24 F.4th 33 (1st Cir. 2022) and included in the Appendix at 1a – 20a.

STATEMENT OF JURISDICTION

The First Circuit issued its opinion on September 19, 2022. The time within which to petition for certiorari extends to December 19, 2022 (pursuant to Rule 30 of the Rules of the Supreme Court of the United States). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Proceedings in the District Court

A. Factual Background

Damian Perry was involved in a drug conspiracy stretching from Connecticut up to Maine. A2. He was charged and indicted in the District of Connecticut for involvement in that conspiracy from October 1 through October 12, 2016. A2. On August 29, 2018, Perry was sentenced to 92 months on the conspiracy charge in the Connecticut case. A3.

Unfortunately, while out on bail and with the Connecticut case still pending, Perry was arrested in Maine on additional drug conspiracy charges. A2-3. On July 18, 2018, he was indicted on charges of continuing that drug conspiracy in the District of Maine from January 1, 2015, through September 1, 2017 – a time that encapsulated the Connecticut charges. A3.

When the District Court of Maine dismissed the charge of conspiracy charges against the leader of the drug conspiracy, Louis Padilla, on Double Jeopardy grounds, the Government filed new charges against Perry for drug possession with intent to distribute and use of communication device to commit a drug crime. A3-4. Perry entered a guilty plea to these charges on August 19, 2019. A4. The Maine conspiracy charges were dismissed as part of a plea deal between the parties. A4.

On March 24, 2021, the parties filed a stipulation with the District Court Perry had been part of a drug trafficking conspiracy since prior to his arrest in

December 2016 and he had resumed his participating in that conspiracy upon his release on bail in that case. A7-8.

B. Pre-Sentencing Order

Prior to sentencing, Perry asserted the principles of Double Jeopardy apply to the court's sentencing calculations. Perry did not argue the charges themselves were barred by Double Jeopardy. Rather, he argued factors such as relevant conduct, applicable drug weights, and sentencing enhancements for violations while under bail were all implicated in the case in Connecticut to which Perry had already pled guilty and been sentenced. Double Jeopardy, Perry argued, should be considered when determining the fairness of the sentence and whether the sentence imposed in the Maine case should run concurrent to that of the Connecticut case.

The Government objected to such arguments and the District Court, in a December 3, 2020 Sentencing Order agreed, stating Perry's assertions of a potential violation of Double Jeopardy protections run counter to this Court's holding in *Witte v. United States*, 515 U.S. 389 (1995), and the First Circuit's interpretation of that case in *United States v. Lombard*, 72 F.3d 170 (1st Cir.1995). Perry, the District Court said, was charged with and sentenced for drug conspiracy in the Connecticut case and the Government had chosen to exclude any allegations of that case in the Maine possession case. The District Court found the sentencing in the Connecticut case was based on Perry's actions in that case, Perry's bail violation (the acts in the Maine case), and a host of other factors. Consideration of conduct by the Connecticut court, the District Court found, did not preclude it from considering

those acts when determining an appropriate sentence in the Maine case. Additionally, the District Court concluded the Connecticut case was not relevant conduct for the Maine possession case given the distinction between the nature of the two cases and therefore it would not present the "tail which wags the dog" quandary addressed by the Court in *Witte* and *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), and clarified by the First Circuit in *Lombard*. It reserved judgement on whether arguments a Double Jeopardy concerns could be raised in the context of an 18 U.S.C. § 3553(a) analysis.

C. Sentencing Hearing

At sentencing, the District Court held any further Double Jeopardy concerns in the context of applying the sentencing guidelines and its 18 U.S.C. § 3553(a) analysis were inapplicable. The District Court agreed with the parties to not consider the drug quantities in the Connecticut case as relevant conduct in determining Perry's guideline range. It noted, however, excluding the Connecticut drug quantities from the Guidelines calculation would result in a "slightly lower guideline range" than including the Connecticut drug quantities and adjusting Perry's sentence under U.S.S.G. § 5G1.3(b). However, because it was excluded, the District Court determined the conviction in the Connecticut case resulted in a higher criminal history score than if the conduct would have been considered relevant conduct.

Determining Perry had a guideline range of 262 to 327 months, the District Court reduced that range to 210 to 262 months to account for the disparity between

crack and powder cocaine. After undergoing an 18 U.S.C. § 3553(a) analysis, the District Court ordered Perry to serve a below guideline range sentence of 137 months, which included a consecutive 6-month sentence on the bail violation. The District Court denied Perry's request to run his time fully concurrent to the Connecticut sentence or to give him a deduction on the time he had been serving on the Connecticut case, instead ordering the sentence to be concurrent only as of the date of sentencing.

II. The First Circuit Decision

On appeal to the First Circuit, Perry asserted the District Court's sentence was both procedurally and substantively unreasonable. The core of Perry's arguments concerned how the District Court treated the intersection of the Connecticut and Maine sentences. Perry argued the District Court's failure to properly account for the Connecticut court's incorporation of the Maine cases conduct in the Connecticut sentence led to an improperly calculated sentence in the Maine case. Had it been properly accounted under the sentencing guidelines, he argued, Perry's sentence in the Maine case would have been required to run fully concurrent to the one in the Connecticut case. Further, Perry argued, the District Court did not take into consideration Double Jeopardy principles when making its 18 U.S.C. § 3553(a) calculations. By calculating a sentence using facts and factors already incorporated by the court in Connecticut, Perry asserted, the District Court meted out successive punishment of the kind warned of by this Court in *Witte,*

where conduct from another case becomes a driving factor in unfair increase in the sentence of a subsequent case. *See* 515 U.S. at 396

The First Circuit was unpersuaded. When the parties agreed the conduct in the Connecticut case was not to be considered relevant conduct, the First Circuit held it had no role in any of the sentencing guideline calculations. It believed the District Court properly applied the sentencing guidelines

> [T]he judge — who agreed with the parties not to consider the Connecticut drug activity in calculating the base-offense level, listened to the pitch for a fully concurrent sentence under § 5G1.3, but picked a partially concurrent one — followed our caselaw to a T. A judge after all must settle on one understanding of "relevant conduct" in calculating a sentence. And once the judge here said yes to excluding the Connecticut drug activity in figuring the base offense level, he committed no error in using that consistent understanding of "relevant conduct" in working with § 5G1.3.

A11.

Perry's Double Jeopardy arguments likewise found no support. The First Circuit noted *Witte* would preclude such an argument in nearly all similar circumstances, and that only in the rarest of times, such as was found in *Lombard*, will it find prior relevant conduct inordinately dictate a subsequent sentence to the level of raising Constitutional concerns. It rejected Perry's contention that in his case "the 'tail' of the conduct considered in Connecticut 'wagg[e]d the dog' of his substantive offenses in Maine." A15.

> Perry's case bears no meaningful comparison to *Lombard*. And we can so conclude by noting that the Maine federal judge did not use the drug quantities from the Connecticut case to boost up Perry's offense level. Don't forget either that the Maine federal judge explicitly said that he crafted the below-guidelines sentence to "punish[ ]" him "for what [he] did in Maine," not to "punish [him] again for what [he] did in

> Connecticut." Faced with these realities, Perry offers no compelling way to "realistically" see his sentence as "punishment" for the Connecticut conviction, rather than as "punishment" for the Maine conviction, *see Lombard*, 72 F.3d at 181 — he offers no sensible basis for concluding that his case fits Lombard's "unusual and perhaps ... singular" mold.

A16-17. Rejecting all of Perry's procedural and substantive challenges to his sentence, the First Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. **The First Circuit has impermissibly narrowed the scope of the Double Jeopardy protections relating to successive punishments.**

Under the Fifth Amendment's Double Jeopardy clause, no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989) (*citing Pearce v. North Carolina*, 395 U.S. 711, 717 (1969)). "The third of these protections ... has deep roots in our history and jurisprudence." *Halper*, 490 U.S. at 440. The constitutional proscription against multiple punishments safeguards "'humane interests,'" and the protection "is intrinsically personal." *Id*. at 447 (*quoting United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

When cumulative punishments are imposed at a single proceeding, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983). Nevertheless:

> [W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

Halper, 490 U.S. at 451 n. 10; *see also Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937 (1994).

The Double Jeopardy Clause "serves the function of preventing both successive punishment and successive prosecution and that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Witte,* 515 U.S. at 396 (internal quotations omitted). "[T]he language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* for such punishment." Id. (emphasis in original).

While the Sentencing Guidelines and years of jurisprudence related to those guidelines leave no question sentencing courts may consider relevant conduct in making Guidelines determinations, this Court has recognized the Due Process Clause imposes limits on this principle, and the Guidelines must be interpreted

considering those constraints. *Id.* Enhancements in sentencing cannot be used in such a manner to where the enhancement overwhelms the sentence of the underlying offence by becoming a disproportionate share of the sentence given. Specifically, the Constitution is implicated where a sentence enhancement turns out to be a "tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

In response to interpreting the United States Sentencing Guidelines through the lens of this Court's sentencing Double Jeopardy jurisprudence, the First Circuit has winnowed the shadow of *Witte's* concerns down to the narrowest of pinpoints. On first blush, it acknowledges there is a possibility where Double Jeopardy concerns can be implicated in this context:

> [T]he burgeoning use of sentence enhancers by Congress and the Sentencing Commission as part of the catechism of punishment poses an obvious danger that, in extreme circumstances, the lagniappe might begin to overwhelm the main course. In all probability, there are constitutional limits on the way sentencing factors can be deployed in the punishment of a substantive offense.

Lombard at 182 (*quoting United States v. Rivera–Gomez*, 67 F.3d 993, 1001 (1st Cir.1995)). The First Circuit noted this "convergence…is exactly the reason for the Supreme Court's reserve in *McMillan* and in *Witte* when it carefully withheld its constitutional blessing for a sentence "enhancement" that would be a "tail which wags the dog" of a defendant's offense of conviction." *Id.* 182-83.

The First Circuit has continued to helpfully warn of the "convergence" without finding it present.

> At the outer limits, Guidelines offense-level increases based on uncharged crimes might violate a defendant's Sixth Amendment and due process rights if the additional increases are responsible for such a disproportionate share of the sentence that they become the "tail which wags the dog of the substantive offense."

United States v. Gonzalez, 857 F.3d 46, 59–60 (1st Cir. 2017) (*quoting United Lombard*, 72 F.3d at 176 and *McMillan*, 477 U.S. at 88, 106 S.Ct. 2411). In that same case, the First Circuit admits a finding of disproportionate share is an elusive one. "[A]s far as we can tell, we have recognized this concern only once before [in *Lombard*]" *Gonzalez*, 857 F.3d at 60.

Lombard found application of the "tail wagging the dog" in context of defendant was convicted of a firearms offense with no statutory maximum, and the relevant conduct was an uncharged murder. *Lombard* at 177. The applications of the guidelines with this relevant conduct would have adjusted the guideline sentence from a range 262 to 327 months to a life sentence. Id. Finding this an unconstitutional result, the First Circuit set aside the sentence with a warning: "Absent [these] special circumstances ... no comparable concerns would be raised by cases involving even sizeable sentence increases based on ... uncharged or acquitted conduct." Id. at 186–87.

Double Jeopardy protections cannot be limited in scope to reach the point they become nothing more than theoretical

II. The sentence handed down by the District Court and affirmed by the First Circuit infringed upon Mr. Perry's right to be free from successive punishments for the same offense.

The First Circuit made clear Perry's Double Jeopardy concerns can be waived easily away by finding it does not fit within the "unusual" and "perhaps singular" framework of *Lombard*. A16 (*quoting Lombard* at 187). However, Constitutional protections cannot be so limited it takes a once-in-a-lifetime confluence of events to invoke them. The limitations of *Lombard* have swallowed the rule they were designed to shape. Perry acknowledged to the First Circuit his case did not perfectly align with the factors in enumerated in *Lombard* – most importantly: the severity of a life sentence versus the 262-327 months, the absence of a statutory maximum for the felon in possession offense, the mandatory operation of the guidelines in treating the resulting death enhancement no different from a guidelines calculation for murder, and the way in which the Government sought to achieve the outcome it failed to achieve in a state court murder prosecution. *Lombard* at 178. But the First Circuit has chosen to use these factors as an impassible gatekeeper in rejecting Double Jeopardy claims under *Lombard*, rather than taking a case-by-case approach looking at the Double Jeopardy implications of those cases.

Perry's sentence when looked at holistically, and through a Double Jeopardy lens, should fall within those protections in determining the formulation of a fair sentence free of Double Jeopardy concerns.

A. **Origins of the Maine Case**. The Maine case cannot be separated from that of his Connecticut case despite the District Court's assurances. The prosecution's decision to charge Mr. Perry's on a possession charge arose out of the ashes out of the ultimately dismissed Maine conspiracy charge – dismissed because

of a plea deal, but also because of the Government's own concern about Double Jeopardy issues. In fact, the parties stipulated to the connection between the two:

> Prior to his arrest on December 15, 2016 in Connecticut, Perry had been participating in a drug trafficking conspiracy with Luis Padilla and other since 2016. At some point following his release following his arrest in Connecticut on the December 15, 2016, Perry resumed his participation in the conspiracy.

A12. Yet, the Government's recommendation of 240 months in the possession remained rooted in the that dismissed case, as was the District Court's eventual sentence.

The sequence of events in these cases, that the charges the Maine possession case were filed less than a month after Padilla's charges in the Maine conspiracy case were dismissed on Double Jeopardy grounds, should have guided the District Court's analysis in determining Perry's sentence. That prosecutors in the Connecticut and Maine cases took pains to point their arguments away from those same shoals, only gives strength to the concerns Perry was being subjected to a sentence implicating the principles of Double Jeopardy.

B. USSG § 3C1.3 enhancement. Both the District Court and the Connecticut court incorporated the bail violation – the acts in the Maine case – into their sentences. The District Court did it explicitly by applying the enhancement under USSG § 3C1.3. A17-18. The Connecticut court did it by incorporating it directly into it sentencing analysis under 18 U.S.C. § 3553(a). A17-18. Sentencing in each court on the same factual concerns should be implicate a Double Jeopardy

analysis in the subsequent sentencing even if they emerge from different parts of a court's sentencing analysis.

C. USSG § 5G1.3(b) vs. USSG § 5G1.3(d). The interplay of the two cases played out in the District Court's application of these two provisions. If the Connecticut case was considered relevant conduct, the guideline calculation under USSG § 5G1.3(b) would require the Trial Court to have considered the Connecticut sentence, adjusting for time Mr. Perry served to date and to have this sentence run concurrently with unserved Connecticut time – which could have shortened the time Perry had to serve by 48 months. By contrast, once the Connecticut sentence was not deemed relevant conduct, USSG § 5G1.3(d) makes this a discretionary choice.

Despite the party's stipulation, the District Court decided it was not relevant and did not apply USSG § 5G1.3(b). The Trial Court could have imposed its sentence consecutively or concurrently, in whole or in part, with the Connecticut sentence to achieve a reasonable punishment for the Maine offense under USSG § 5G1.3(d), but again did not and cited the connection between the two cases as a primary reason not to do so.

Both courts – Maine and Connecticut – look to the acts of the two connected cases and applied a sentence incorporating both. While the Connecticut court was free to do so, being first in time, the District Court had to consider whether it was treading on Double Jeopardy grounds. The far-reaching tendrils of these cases show why the First Circuit noted "[i]n drug-trafficking cases, "relevant conduct" includes

all acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *United States v. Rentas-Muniz*, 887 F.3d 1, 4 (1st Cir. 2018) (*quoting* USSG § 1B1.3(a)(2)). It is an appropriate approach given the scope of claims often asserted in drug cases, which can include diverse allegations from different sources. Further, it is an interpretation consistent with the First Circuit's observation "Section 5G1.3 is designed to achieve an *incremental punishment* for a defendant who, at the time of sentencing for the instant offense, is subject to an undischarged term of imprisonment." *United States v. Parkinson*, 44 F.3d 6, 8 (1st Cir. 1994) (emphasis added).

Despite these warnings, the First Circuit has continued to take an impermissibly narrow approach to Double Jeopardy concerns in the aftermath of *Witte* and *McMillan*.

CONCLUSION

When a Constitutional protection is purely theoretical, it is no protection at all. The First Circuit's jurisprudence in this area cannot be reconciled with the protections of the Fifth Amendment's Double Jeopardy.

This Court should grant the writ of certiorari.

Respectfully submitted,

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