No. 22-7092

IN THE

SUPREME COURT OF THE UNITED STATES

LORENZO HARDWICK, Pro-se — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Lorenzo Hardwick #16128-050
(Your Name)

Federal Correctional Institution
2680 Highway 301 South
(Address)

Jesup GA 31599
(City, State, Zip Code)

(Phone Number)

LIST OF PARTIES

[X] 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:

QUESTION(S) PRESENTED

DID THE APPEALS COURT FOR THE THIRD CIRCUIT ERROR BY DENYING PETITIONERS CERTIFICATE OF APPEALABILITY WHERE APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY OMITTING A OBVIOUS DOUBLE JEOPARDY ISSUE ON DIRECT APPEAL.

DOES THE GOVERNMENT VIOLATE PETITIONERS FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL WHEN THE GOVERNMENT TRIES PETITIONER TWICE FOR THE SAME OFFENSE AFTER ACQUITTAL.

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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

[X] 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,
[X] is unpublished.

The opinion of the United States district 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[ ] is unpublished.

[ ] 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[ ] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 6, 2021.

[x] 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: _____, 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).

[ ] 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

SIXTH AMENDMENT

SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

FIFTH AMENDMENT

FIFTH AMENDMENT RIGHT AGAINST SUCCESSIVE PROSECUTIONS FOR THE SAME OFFENSE AFTER ACQUITTAL BY THE SAME SOVEREIGNTY.

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OTHER

STATEMENT OF THE CASE

Petitioner was indicted in Superseding Indictment, United States v. Bernard Murray, 02-684(RBK). Charged Bernard Murray, Allen Resto, Lorenzo Hardwick, Ramon Saldana, and Jose Rodriguez.

Count 1, the Grand Jury in and for the District of New Jersey, sitting at Camden, charges. From in or about January 1998, to in or about, September 2002, at Camden, in the District of New Jersey, and else where, the defendants did, knowingly and intentionally conspire and agree with **one another** and **with other's,** to distribute and possess with the intent to distribute more than one kilogram of heroin, a Schedule I narcotic drug controlled substance, and more than 50 grams of cocaine base, that is crack cocaine, a Schedule II narcotic controlled substance, contrary to Title 21 United State Code 841(a)(1), and 841(b)(1)(A). In violation of § 846.

At times relevant to this Superseding Indictment, defendants Bernard Murray, Allen Resto, Lorenzo Hardwick, Jose Rodriguez, **and other's** constituted an organization, involved in the distribution of controlled substances, such as heroin and cocaine base, that is crack cocaine, at locations in, **Camden New Jersey area** and **elsewhere.** OBJEJCT MANNER AND MEANS OF THE CONSPIRACY,: it was the object of the conspiracy to distribute controlled substances in Camden New Jersey, and elsewhere for profit.

On, March 23, 2003 petitioner was again Indicted in, Second Superseding Indictment, United States v. Leonard Paulk, 03-228(FLW). Charged, Leonard Paulk, Lorenzo Hardwick, Martin Johnson, Gregory Brown, Stanley Crump, and Tyrone Judge, Count 1 charges, from in or about October 2000, to in or about March 2003, at Camden in the District of New Jersey, and **elsewhere**, defendants did knowingly and intentionally conspire and agree with one another, and **with others** to distribute one kilogram of heroin a Schedule I narcotic drug controlled substance, Five kilograms or more cocaine, a Schedule II narcotic controlled substance, and 50 grams of cocaine base, that is crack cocaine, a Schedule II controlled narcotic substance, contrary to Title 21, United States Code 841(a)(1), 841(b)(1)(A), in violation of § 846.

OBJECT MANNER AND MEANS OF THE CONSPIRACY

It was the object manner and means of the conspiracy to distribute controlled substances in Camden New Jersey and elsewhere for profit. The government chose to prosecute the Paulk trial first, and after a twelve week trial petitioner was unanimously acquitted of all counts in Second Superseding Indictment 03-228(FLW). The trial in the above matter United States v. Bernard Murray 02-684(RBK), began on April 11, 2005. There was a eight week trial, were petitioner was found guilty of the same offense, with the government using the same evidence the government proffered in Paulk in violation of petitioner's 5th Amendment right against being tried twice for the same offense after acquittal.

Petitioner proffered that the prosecution and conviction in Murray should have been barred in it's entirety by the double jeopardy clause. In the alternative, the government should have been collaterally estopped from re-litigating evidence at trial which was the subject of his prior acquittal, thereby forcing him to relitigate against allegations of which he has already been acquitted.

In other words the government presented to the jury the evidence and fact patterns which were previously litigated with the resulting verdict favorable to petitioner. Under the governments proffer in Paulk, the jury determined that the government failed to prove that petitioner conspired, possessed and possessed with the intent to distribute 50 grams of crack and a kilogram or more of heroin with those known in Paulk, and with other from about October 2000 to in or about March 2003 at Camden in the District of New Jersey, and elsewhere.

During the second trial petitioners counsel Jerome Ballarotto objected to the admissibility of testimony and evidence which had been introduced and rejected by the jury in the first trial (03-228)(FLW). Counsel's objections related to testimony and evidence from Mark Lee and Jose Perez. While objecting again to Mark Lee's testimony counsel added an oral motion pursuant double jeopardy. At petition April 28, 2006 resentencing hearing petitioner raised among other issues his double jeopardy issue that counsel raised during trial, that he raised durning sentencing, that counsel didn't raise on direct appeal.

REASONS FOR GRANTING THE PETITION

INEFFECTIVE ASSISTANCE OF COUNSEL: There are two component that demostrate a violation of ineffective assistance of counsel: 1. That counsels performance was deficient. Defendant must show that counsels representation fell below an objectionable standard or reasonableness and, 2. Defendant must show that he was prejudiced by counsels deficient performance.

Defendant must show that counsels errors were so serious as to deprive the defendant of a fair trial and he must show that there is a reasonable probability that but for counsels unprofessional errors the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 688,104 S.Ct.2054, 80 L.Ed 2d 674 (1984). Defendant also has a Sixth Amendment right to effective assistance of counsel at sentencing.

As stated above petitioner must show that appellate counsel's performance on appeal was deficient as measured by professional norms at the time of the alleged error and that but for appellate counsel's deficient performance there is a reasonable probability that the outcome of the appeal would have been different. Strickland, 466 U.S. at 694-95.

Appellate counsel's performance is entitled to great deference, yet "an appellate advocate may deliver deficient performance and prejudice defendant by omitting a '**dead-bang winner.**'" United States v. Cook, 45 F.3d 388,394-95(10th Cir. 1995)(definding 'dead-bang winner' as "an issue which was obvious from the trial record... and one which would have resulted in reversal on appeal."). Petitioner's double jeopardy issue was obvious from from the charging documents, both trial records, and counsel's own objections and motions for double jeopardy at trial

When a habeas petitioner alleges that his appellate counsel rendered ineffective asistance by failing to raise an issue on direct appeal, we first examine the merits of the omitted issue.

If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. See Parker v. Champion, 148 F.3d 1219,1221 (10th Cir. 1998)(citing Cook, 45 F.3d at 392-93),cert. denied, 143 L.Ed 2d 58, 119 S.Ct 1053 (1999).If the issue has merit, the court then must determine whether counsel's failure to raise the claim on direct appeal was deficient and prejudicial. See Cook, 45 F.3d at 394.

For exsample, counsel's failure to raise a "dead-bang winner" on appeal - an issue that is both **obvious** from the trial record, and one which would have resulted in reversal on appeal-constitutes, counsel's performance is objectively unreasonable because the issue was obvious from the trial record, and the omission is prejudicial because the issue warranted reversal on appeal. See Gray v. Greer, 800 F.2d 644,646 (7th Cir. 1985)("Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance.").

Counsel cannot be deemed ineffective if his actions were part of a "sound trial strategy." However the strategy actually pursued by counsel, who raised Double Jeopardy vigorously at trial could not be deem a sound strategy in light of the arguments actually made by counsel, it's clear that counsel realized the danger that the evidence and testimony presented posed to petitioner, and thus there is no rational basis upon which counsel may have chosen to omit double jeopardy which was a far stronger argument leading to petitioner's result, namely reversal of sentence and conviction. Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994)("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that where clearly and significant weaker."). Also see Smith v. Robbins, 528 U.S. 259,288,145 L.Ed. 2d 756, 120 S.Ct. 746(2000)(noting although appellate counsel need not raise all possible claims, counsel is expected to "maximize the likelihood of success on appeal"). Accordingly trial counsel's decision to omit the violation of double jeopardy if this was a conscious decision after arguing double jeopardy viigorously at trial, could not have been made as part of sound legal strategy pursued by appellate counsel, and the ineffectiveness prong of Strickland is therefore satisfied.

PREJUDICE PRONG: Regarding the prejudice requirement, the Supreme Court held that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. This standard requires "less than a preponderance of the evidence." United States v. Cross, 30 F3d 308,315(3d Cir. 2002). This standard applies to both trial and appellate counsel. Smith v. Robbins, 528 U.S. 259,285, 145 L.ED 2d 756, 120 S.Ct. 746 (2000).

In this case, the prejudice that counsel caused was that if counsel had raised a violation of Double Jeopardy and Collateral Estoppel on direct appeal the Third Circuit Court of Appeals would have reversed petitioner's sentence and conviction, or in the alternative ordered a evidentiary hearing to determine if double jeopardy and collateral estoppel was violated. See Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985)("If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. Petitioner proffers that the appellate court could have reversed his sentence and conviction, however he could not have received a new trial because he's claiming that the second trial shouldn't have happened, however an evidentiary hearing should in this case hold the same weight as a new trial would have held.

DOUBLE JEOPARDY

The Fifth Amendment guarantee's against double jeopardy is enforceable against the states through the Fourteenth Amendment. 1. It protects against a second prosecution for the same offense after acquittal. 2. It protects against a second prosecution for the same offense after conviction, and 3. it protects against multiple punishments for the same offense. North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.ED 2d 656 (1969).

Two offense are the same offense for double jeopardy purposes unless each offense requires proof of a fact that the other does not. Offenses are not the same merely because they arise out of the same general course of criminal conduct, they are the same only when the evidence required to support a conviction upon one indictment would have been sufficient to warrant a conviction the other. United States v. Young, 503 F.2d 1072,1075 (3d Cir. 1974).

The elements of 846 reads in part: 1. that there is an agreement between two or more individuals to break the law, 2. that defendant knew of the unlawful conspiracy and 3. defendant knowingly and voluntarily joined the consparacy. Petitioner proffers that the two offenses in the above captioned matter are the same for double jeopardy purposes because they both require the same proof. In other words the evidence in Paulk would have been sufficient to warrant a conviction in Murray. See Young, 503 F.2d at 1075. In petitioners first trial Paulk, petitioner was charged with a violation of 841(b)(1)(A) and 846, in the subsequent trial in Murray petitioner was again charged and tried for a violation of 841(b)(1)(A), and 846 these statues require the same proof for a conviction.

Collateral estoppel

Collateral Estoppel simply means that when an issue of ultimate fact has once been determined by a valid and final judgement, that issues cannot again be litigated between the same two parties in **any** future lawsuits. Id. at 475. Where a previous judgement of acquittal was based on a general verdict, this approach requires a court to examine the record of the prior proceedings take into account the pleadings, evidence, charges and **other** relevant matter's and conclude wheather a rational jury could have grounded it's verdict upon an issue other than that which the defendant seeks to foreclose from consideration. Id at 476.

If a defendant has been acquitted of a charge underlying that charge and evidence is offered against the defendant in a subsequent prosecution, then issue preclusion should bar such use. Such a situation arises in a prosecution that results in an acquittal and in a second criminal prosecution the government uses the same evidence, which was insufficient to convict the defendant in the first trial, (e.g. Paulk, 03-228(FLW) and Murray, 02-684(RBK).

This is what the ("AUSA") Kevin Smith and Jason Richardson did in the the Paulk and Murray trial. The ultimate issue of fact in Paulk was did petitioner knowingly and intentionally conspire and agree with one another and with **other's** to distribute and possess with the intent to distribute one kilogram or more heroin and 50 grams or more cocaine base, crack From in or about October 2000- to in or about March 2003 in Camden, New Jersey and elsewhere. The government in Murray charged that the conspiracy ran form 1998-September 2002. The jury unanimously found petitioner not guilty.

The time frame of both conspiracies are exactly the same for double jeopardy purposes, petitioner was not available for either conspiracy prior to 2000 because he was incarcerated in a New Jersey State Prison from 1996-April 5, 2000. See Presentence report.

The government used the same evidence from his acquittal to convict him in Murray. The gist of the governments case was in Paulk was centered around the consensual recordings of Jose Perez, Darnell tuten and Mark Lee. Jose Perez was a government informant and consensual wire recorder and Tuten and Lee where both codefendant of petitioner. The jury rejected the consensual recordings of Perez the evidence and testimony of both Tuten and Perez. The government took a second bite of the apple using the same consensual wire recording and testimony of Perez, Tuten and Lee to convict petitioner in Murray.

TOTALITY OF THE CIRCUMSTANCES TEST

The Third Circuit has developed a "totality of the circumstance" test to distinguish conspiracy prosecutions based o the same conspiracy statute. United States v. Rigas, 584 F.3d 594, 610(3d Cir. 2009). The ultimate goal of the totality of the circumstances test is to determine :whether there are two agreements or only one." United States v. Smith, 82 F.3d 1261,1267(3d Cir. 1996); also see United States, 892 F.2d 265,268 (3d Cir. 1989)(the critical determination is whether one agreement existed.").

In assessing this issue, the Third Circuit considers whether: (a) "LOCUS CRIMINUS: of the two conspiracies are the same; (b) there is a significant degree of TEMPORAL OVERLAP between the two conspiracies charged; (c) there is and overlap of PERSONNEL between the two conspiracies , (including **indicted as well as unindicted** co-conspirators); (d) the OVERT ACTS charged and, (e) the ROLE PLAYED by the defendant according to the two indictments are similar. See United States v. Liotard, 817 F.2d 1074,1078 (3d Cir. 1979).

In other words, the defendant must show that the place, time, people, actions, and responsibilities are similar in both prosecutions. However this list is not exhaustive and "different conspiracies may warrant emphasizing different factors." Smith, 82 F.3d at 1367. Further, in applying the test a district court must "assure that the substance of the matter controls and not the grand juries characterization of it ." Thus a court must "look to the full scope of activities described and implied in the indictment." Smith, 82 F.2d at 1268, (we must look to the entire record before the district court").

Locus Criminus: the locality of the place where the crime was committed. Both conspiracies were alleged to have taken place in Camden, New Jersey, in North Camden and South Camden. In particular the government charged in both conspiracies that petitioner controlled the crack cocaine set at 7th & Vines Street in North Camden. App'x . (A.U.S.D.A.) Kevin Smith explaining to the jury in the opening of both trials that petitioner controlled crack sales at 7th & Vine.

Temporal Overlap: both conspiracies were during the same time frame. Murray, 02-684(RBK) charged From in, on or about January 19198 to September 2002. Paulk, 03-228(FLW) charged From in, on or about October 2000-March 25, 2003. Petitioner was not available for either conspiracy prior to April 5, 2000 he was incarcerated in a New Jersey State Prison from, 1996-April 5, 2000. See App'x (PSR). Also the investigation into both conspiracies began on October 11, 2000. See App'x . Detective McNair stating that both investagations were conducted jointly.

Overlap of Personnel: (including indicted as well as unindicted co-conspirators); when evidence indicates that the activities of the conspiracies are not interdependent or mutually supportive and there are major participants in each conspiracy who lack knowledge of, or any interest in the activities of the other, this weighs in favor that two conspiracies exist). Smith 82 F.3d at 1269.

There was a good commonality of participants from both conspiracies: Enrique Perez testifying about him and Murray supplying petitioner and Darnell Tutten with heroin for tuten's heroin set. Darnell Tuten testifying that petitioner had some bundles of heroin on his block.

USDA Richardson explaining in Paulk that evidence would support that Darnell Tuten would supply petitioner with crack that petitioner would put out on 7th & Vine. David Lopez petitioner's codefendant in Murray testifying that petitioner told him that Pooh, (i.e. Leonard Paulk) was supplying him with coke. Paulk was petitioner's codefendant in the acquittal.

E.Perez testifying he fronted petitioner with more dope for Tutens set. Also see App'x for E. Perez testifying that him and Murray had a conversation with Tuten about some money that came up short at Tutens set. E. Perez testifying that him and Murray had a talk with Lamont Powell, petitioners codefendant in Paulk about paying him to kill one of there workers.

Confidential Source (CS) Jose Perez recorded coversations for the government in both conspiracies and was the governments chief witness. Special Agent Robert Sweeney, Joseph Wysocki, and Lt. McNair headed thr investagation of both organizations togeteher, the same wire conversations that was evidence in Paulk the government used again in Murray to convict petitioner.

SIMILAR OVERT ACTS: § 846 does not require an overt act. The Third Circuit of Appeals has held, since there is no requirement of an overt act, we hold that this approach to this prong is too narrow and rigid under the modern "totality of the circumstances" test. Smith F.3d at 12 68.

Petitioner has shown that his appellate counsel rendered him ineffective assistance of counsel. Counsel did not submit the violation of double jeopardy and collateral estoppel as instructed by petitioner. Counsel's omission of double jeopardy and collateral estoppel could not have been deemed as part of a sound strategy as shown above, through counsel's objections to testimony and evidence that was entered and by counsel's motion for double jeopardy, and him revisiting that motion throughout the trial. Petitioner was prejudiced from counsel not submitting the double jeopardy violation, had counselor submitted the violation the Third Circuit would have reversed, or in the alternative ordered a evidentarary hearing.

Petitioner has made out an non-frivolous showing of double jeopardy and has provided this court with evidence from both trials that satisfy the (totality of circumstance test). He has shown through testimony that some of the main actors were central to both indictments, that conspiratorial activities were interdependent and mutually supportive.

Petitioner has shown that he was convicted of a successive drug conspiracy after being acquitted for violating the same statute, in the same city and state, during the same time frame, with the same people and prosecuted by the same sovereignty in violation of double jeopardy and collateral estoppel. Petitioner asks this court to order the trial transcripts of both trials U.S. v. Paulk 03-228(FLW) and U.S. v. Murray 02684(RBK) and determine if double jeopardy was violated and reverse the lower courts decision.

Pro-se petitioner, Lorenzo Hardwick, Prays that this honorable court orders the complete records for both of his trials, U.S. v. Paulk, 03-228(RBK), and U.S. v. Murray, 02-684(RBK), review the record and determine that the Third Circuit Court of Appeals errored when deneying petitioners COA where appeal counsel rendered petitioner ineffective assistance of counsel, and determine that the government violated petitioners Fifth Amendment right against successive prosecutions by the same soveriegnty for the same offense after acquittal violating petitioners right against Double Jeopardy.

CONCLUSION

The petition for a writ of certiorari should be granted. In the interest of justice for the above stated reasons.

Respectfully submitted,

Pro-Se petitioner, Lorenzo Hardwick. #16128-050

Date: 03/07/23