
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL MARIE JORDAN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has recognized that an appeal waiver in a plea agreement cannot bar a challenge when a conviction, or sentence, is based on "constitutionally impermissible factors." *See, e.g., Menna v. New York*, 423 U.S. 61 (1975) (guilty plea did not bar a challenge under the Double Jeopardy Clause).

The questions presented are:

1. Does a facially valid and credible good faith claim of a Double Jeopardy violation constitute a "constitutionally impermissible factor" which cannot be barred from challenge in a criminal appeal simply because the explicit waiver of appeal in a guilty plea agreement did not contain an exception for such a violation?
2. Where an appellate court grants a dispositive motion by the government to dismiss a criminal defendant's appeal because the plea agreement contains a waiver of the defendant's right to appeal her conviction and sentence, and the appeal asserts a violation of the Double Jeopardy Clause, does the order of dismissal, without opinion, explanation or reasons, deny the defendant due process of law and her right to present a complete defense, including the right to appeal the dismissal in order to secure a complete defense?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Angel Marie Jordan, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

Related Proceedings

1. United States v. Angel Marie Jordan, No. 7:22-CR-00010-O (01).
2. The State of Texas v. Angel Marie Jordan, Cause No. CR11647, 90th District Court, Young County, Texas (Jan. 25, 2021)(case dismissed "in the interests of justice" on May 19, 2021).
3. The State of Texas v. Angel Marie Jordan, Cause No. CR11662, 90th District Court, Young County, Texas (Jan. 25, 2021).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Angel Marie Jordan, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Fifth Circuit entered on December 28, 2022.

OPINION BELOW

The unpublished order of the United States Court of Appeals for the Fifth Circuit *United States v. Angel Marie Jordan*, No. 22-10757 (5th Cir., December 28, 2022), is reproduced in the Appendix. (Pet. App. 1a).

JURISDICTION

This Court has jurisdiction under Title 28, United States Code § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

2. This case also involves the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States which provides that:

"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

STATEMENT OF THE CASE

1. Course of Proceedings in the District Court and Relevant Facts

On January 25, 2021 Petitioner was charged with possession of controlled substance with intent to deliver by the State of Texas in State of Texas v. Angel Marie Jordan, No. CR11647. She served 6 months of incarceration in the Texas Substance Abuse Felony Punishment Facility ("SAFPF") on that charge and was given 10 years probation by the State of Texas. Petitioner was later charged for the same events described in a federal Criminal Complaint in case number 7:21-MJ-38, filed on August 12, 2021 and sworn to by law enforcement officer Jerod Hutchins, who signed the Criminal Complaint affidavit on August 12, 2021 as "Jerod Hutchins, Affiant, Drug Enforcement Administration."

The federal Criminal Complaint was the basis for the federal prosecution that led to the Superseding Information in this case, to which Jordan entered a guilty plea pursuant to a written plea agreement, with a waiver of the right to appeal. The alleged criminal acts underlying the Superseding Information occurred on October 24, 2020 and were the same acts underlying Jordan's conviction by the State of Texas in Cause No. CR11662.

The government had no authority to prosecute Jordan for the same crime committed on the same date, and investigated by the same law enforcement officer, Jerod Hutchins, who was the lead investigator for the State of Texas in Cause No. CR11662 and the case agent in the instant federal case in United States v. Angel Marie Jordan, No. 7:22-CR-010. The record in State of Texas v. Angel Marie Jordan shows that the prosecution in Cause No. CR11662, which case "reformed" Texas Cause No. CR11647, State of Texas v. Angel Marie Jordan, (which was dismissed "in the interests of justice") took place on

the same date and involved the same acts committed in Young County, Texas by Jordan on that date as the events described in the Superseding Information in the federal case. In other words, the court records in the Texas case and the United States case allow the court to determine that the same acts committed by the same defendant were charged in two different cases, one by the State of Texas and one by the United States. However, Texas and the United States were not acting as two "sovereigns" because a joint federal/state task force investigated and prosecuted both cases, with Officer Hutchins being the lead investigator/case agent in both cases. Hutchins was a law enforcement officer of the State of Texas during both investigations.

The federal conviction and 30-month sentence of Angel Marie Jordan violated the Double Jeopardy clause because the United States had no power to exact punishment for the same acts by the same defendant on the same date, following the earlier conviction by the State of Texas for the same offense. A guilty plea and a waiver of appeal clause in the guilty plea agreement does not bar a challenge to the authority of the United States to impose punishment on the plea in the instant federal case. This was plain error because this Court's decisions in *Blackledge v. Perry* and *Menna v. New York* clearly established that such punishment was a constitutional violation. Petitioner's conviction and sentence was based on "constitutionally impermissible factors," violations of the Double Jeopardy Clause and the Due Process Clause.

A. Procedural History.

The charges against petitioner were based on acts that took place on October 24, 2020

when petitioner was stopped by Graham, Texas police officers in a traffic stop and methamphetamine was discovered in the vehicle. Petitioner was indicted by the State of Texas on January 25, 2021 for possession of a controlled substance with intent to deliver. Petitioner was arrested on February 7, 2022 by federal and state Task Force Officers, pursuant to a federal arrest warrant, for the same acts committed on the same date, as described in the earlier Texas indictment, as well as other acts on July 2, 2020, and charged with Possession of a Controlled Substance with intent to distribute.

1. Arrest and Texas State Court Prosecution.

According to the federal Presentence Investigation Report ("PSR") petitioner was arrested on October 24, 2020 by the Graham, Texas Police Department "for ... a state charge related to the instant federal offense," specifically for possession of a controlled substance with intent to deliver. She was charged, on January 25, 2021, by the State of Texas with Possession of Methamphetamine with the intent to deliver under Texas law. The lead investigator in the state case was Jerod Hutchins, a law enforcement officer employed by the Texas Department of Public Safety ("Hutchins). Hutchins knew the defendant, Angel Marie Jordan ("petitioner" herein) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On January 25, 2021, petitioner was charged by the State of Texas in single count indictment with Possession of Controlled Substance with Intent to Deliver, styled State of Texas v. Angel Marie Jordan, Cause No. CR11647. That indictment was based on events that occurred on July 2, 2020. On May 19, 2021 a Motion for New Trial was filed by petitioner and a Motion to Dismiss was filed by the State of Texas "in the interests of justice" [REDACTED]

[REDACTED]

[REDACTED] As part of the negotiated arrangements between petitioner's counsel and the Texas prosecutor, petitioner was charged in a new indictment, dated the same date but reformed "via nunc pro tunc" to reflect the conditions of community supervision in [Cause No. CR11647], including but not limited to SAFPF and other associated conditions." The new indictment was identical in wording except that the date of the offense was "October 24, 2020" instead of "July 2, 2020" reflecting a different offense. Petitioner began the period of incarceration assessed by the State of Texas on June 3, 2021 and completed that term and was returned from the SAFPF on December 3, 2021, a period of six months, as described in the Presentence Report. Petitioner's punishment assessed by the State of Texas for the October 24, 2020 incident was six months incarceration and a ten year probation. The

federal/state Task Force that arrested petitioner on February 7, 2022 included Hutchins, a Texas DPS employee [REDACTED] as well as officers with the Drug Enforcement Administration ("DEA").

2. United States District Court Prosecution and Case.

On February 7, 2022, petitioner was arrested by Task Force Officers ("TFO's"), pursuant to a federal arrest warrant, for the instant federal offense. Petitioner's arrest by federal and state Task Force Officers was just 2 months and 5 days after her release from the six month incarceration under the State of Texas charge arising out of the October 24, 2020 incident. The indictment in that Texas case stated that "Angel Marie Jordan, hereinafter styled Defendant, on or about October 24, 2020" in Young County, Texas possessed, with intent to deliver, a controlled substance. This is exactly the same incident charged in the federal Superseding Information. The federal Superseding Information, to which petitioner pleaded guilty, was based on the same October 24, 2020 incident for which petitioner had just recently served 6 months incarceration in a Texas Felony Punishment Facility and was placed on deferred adjudication probation for a period of 10 years. Officer Hutchins was the lead investigator in the State of Texas case for which petitioner was arrested on October 24, 2020 by Graham, Texas police officers and was the case agent for the federal case for which petitioner was arrested by state and federal Task Force Officers on February 7, 2022.

3. Appeal to the Fifth Circuit Court of Appeals and Issuance of Order of Dismissal.

On August 9, 2022, petitioner filed a Notice of Appeal, appealing the judgment and

sentence in her federal case. The first issue in petitioner's brief was that the prosecution of petitioner was a violation of the Double Jeopardy Clause of the Fifth Amendment. On November 10, 2022, the government moved to dismiss the appeal "because the appellate waiver in Jordan's plea agreement bars his [sic] sole claim." The government's motion to dismiss the appeal acknowledged that "[o]n appeal, she asserts a violation of the Double Jeopardy Clause" and stated that "[n]one of her claims fall within the limited exceptions to this waiver" and stated that "[t]his Court should dismiss the appeal based on the waiver in the plea agreement." The request for dismissal of the appeal was based solely on the waiver in the plea agreement and made no mention of controlling law in *Menna v. New York*, that an appeal waiver in a plea agreement cannot bar a challenge when a conviction or sentence is based on "constitutionally impermissible factors." See *Menna v. New York*, 423 U.S. 61, 62 (1975). The appealability of a double jeopardy claim depends upon its being at least colorable. *Richardson v. United States*, 468 U.S. 317, 322 (1984). A colorable claim "presupposes that there is some *possible* validity to a claim." *Richardson*, 468 U.S. 317, 326 n.6 (*emphasis supplied*).

On December 28, 2022, the Court of Appeals for the Fifth Circuit, in an Unpublished Order, ordered that the government's "opposed motion to dismiss is GRANTED," with no opinion or further explanation. On January 17, 2023 petitioner filed an opposed motion for reconsideration of the December 28, 2022 Order of the Court of Appeals which granted the government's motion to dismiss the appeal filed by petitioner. On January 23, 2023, the motion for reconsideration was denied by the Fifth Circuit Court of Appeals without comment.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Order Contravenes This Court's Double Jeopardy Jurisprudence and Violates a Defendant's Right to Due Process.

This Court's Double Jeopardy jurisprudence recognizes that a Double Jeopardy Claim is a significant claim that requires examination and consideration by a court if it is "colorable" and could possibly be true. A colorable claim "presupposes that there is *some possible validity* to a claim." *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (emphasis supplied). A guilty plea to a charge does not waive a claim that, judged on its face, is one that the State may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 (1975).

It is within the supervisory powers of courts of appeals to establish procedures "to weed out frivolous claims of former jeopardy." *Abney v. United States*, 431 U.S. 662 n.8 (1977). That was not done here as there appears to have been no examination or review of the double jeopardy claim, just a simple granting of the government's motion to dismiss the appeal, thereby arbitrarily ending the petitioner's opportunity to obtain a review of her right to appeal a claimed double jeopardy violation which this Court's jurisprudence recognizes as a significant right.

Petitioner's position here is very much like the petitioner in *Menna*. In *Menna*, the petitioner asserted unsuccessfully that his indictment should be dismissed under the Double Jeopardy Clause. He thereafter pleaded guilty and was sentenced on his plea. Petitioner appealed, claiming the Double Jeopardy Clause precluded the State from haling him into court on the charge to which he had pleaded guilty. The New York Court of

Appeals affirmed the conviction, declining to address the double jeopardy claim on the merits, holding that the double jeopardy claim had been "waived" by petitioner's counseled plea of guilty. This Court reversed, saying that where the State is precluded by the Constitution from haling a defendant into court on a charge, federal law requires the conviction on that charge to be set aside even if the conviction was entered pursuant to a counseled plea of guilty, citing *Blackledge*. The Court then granted the petition for certiorari and remanded the case to the New York Court of Appeals for a determination of petitioner's double jeopardy claim on the merits. Likewise, petitioner's claim here deserves to be considered by the court below and receive a determination so that her appeal can proceed. If there has been a double jeopardy violation, petitioner's conviction should be set aside. A plea of guilty to a charge does not waive a claim that judged on its face based upon the existing record, would extinguish the government's power to constitutionally prosecute if the claim were successful. *Class v. United States*, 583 U.S. ____ (2018)(quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)).

B. The Questions Presented Significantly Impact the Administration of Criminal Justice.

1. The Involvement of Joint Federal/State Task Forces in Investigating and Prosecuting Drug Offenses Creates Uncertainty and Confusion in Applying the "Dual Sovereignty" Rule in Resolving Double Jeopardy Issues Where the States and the Federal Government are Both Investigating the same Drug Offenses.

The use of federal/state Task Forces, where state and local officers are deputized as federal drug agents, thus "extending their jurisdiction" has become a common occurrence in drug prosecutions. The question that arises when a defendant is prosecuted twice for

the same offense, once in state court and once in federal court, using some of the same law enforcement officers and "evidence" from the investigations, is which "sovereign" is actually directing the investigation and prosecution. The "dual sovereignty" doctrine does not permit both the federal and state governments to punish a defendant for the same offense where the prosecutions are not conducted by separate sovereigns but are effectively the same sovereign. Under the shield of this task force, state authorities may lose a case and then hand the file to the federal prosecutors the very next day. In the instant case, the authorities were simply prosecuting the same case, twice over. The same lead investigator in both cases; much of the same evidence; and, the same event on the same day and at the same locations. This multi-jurisdictional drug law enforcement by the Task Force provided an opportunity for federal and state investigators and prosecutors to "join together to take a second bite at the apple." *See United States v. All Assets of G.P.S. Automotive*, 66 F.3d 483, 498 (2d Cir. 1995)(Calabresi, J., concurring).

The Court must decide the important question of whether a joint federal/state Task Force investigating and prosecuting illegal drug activities is an arm of the federal government or an arm of the state government, or both, for purposes of the Double Jeopardy Clause. In the instant case, the petitioner's activities were investigated by both the state of Texas and the United States government. The use of joint task forces to investigate, and in some cases, to prosecute activities of offenders will lead to confusion and uncertainty where prosecutions are brought by both a state and the federal government involving the same, or over-lapping time periods and locations and the same

individuals and conduct. If the same individuals are charged, some by state prosecutors and some by federal prosecutors, and the evidence and offenses are the same, or partly the same, the question arises as to whether each--state law enforcement and federal law enforcement--is a "sovereign" who can lawfully prosecute the same individuals for the "same" criminal acts or a "hybrid" sovereign who must prosecute as a single sovereign. In the instant case, the State of Texas prosecuted the petitioner and the same acts, followed shortly thereafter by the prosecutions by the United States. It has been said that this situation has the appearance of a "dry run" or "practice round" approach, where the successor gets the benefit of a "second chance" to prosecute using information, experience and investigators from the first prosecution. This Court could provide some needed review of this situation to provide clarity and guidelines to avoid the possibility of Double Jeopardy violations.

C. The Right to a Complete Defense is Denied by Dismissal of an Appeal in a Criminal Case Without Comment or Explanation which Frustrates the ability to appeal and Denies Due Process.

There is a Constitutional guarantee to a criminal defendant under the Fifth Amendment to the United States Constitution to a "meaningful opportunity to present a complete defense." *See California v. Trombetta*, 467 U.S. 479, 485 (1984). The right to present a complete defense is an incomplete and ineffective remedy if there is no guarantee of the right to appeal a frustration or denial of that complete defense by allowing the government to grant dismissal of a criminal appeal with no explanation of the reasons justifying such a dismissal. Here, petitioner was denied an appeal, with no

explanation or reason, where there was a colorable claim of a Double Jeopardy violation which, if true, at least deserved consideration where existing precedent established that an appeal waiver in a plea agreement could not bar appeal of such a violation.

"[T]he procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Here, the effective denial of her appeal by a simple act of granting a dispositive motion to dismiss defendant's appeal with no explanation of the justification for the dismissal allowed her sentence to be imposed on the basis of information that petitioner had no understanding of and no opportunity to challenge. Petitioner was denied "the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *United States v. Cronin*, 466 U.S. 648, 656 (1984). *See also, Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

Decisions of this Court have recognized that an appeal waiver provision in a plea agreement cannot bar an appeal where a violation of Double Jeopardy is claimed. But the granting of the dismissal of the appeal in this case has arbitrarily barred petitioner from exercising her right, violating her right to due process. Because there was just a bare and unexplained order granting the motion to dismiss the appeal, petitioner was arbitrarily denied her right to know why the apparent availability of the right to appeal without regard to an appellate waiver clause in the plea agreement, where there is a colorable violation of the Double Jeopardy Clause, does not apply to her claim. The defendant has no effective way to enforce her right "to require the prosecution's case to survive the

crucible of meaningful adversarial testing" where her appeal can be summarily dismissed without comment or explanation in the face of a challenge of a conviction and sentence having been based on "constitutionally impermissible factors." Surely the decisions did not intend to commit a futile act of giving the defendant the right to appeal where there is a Double Jeopardy violation but not also giving her the reason why that remedy was denied to her, leaving her unable to effectively appeal the apparently erroneous granting of the motion.

The Fifth Circuit has ruled, in effect, by granting the government's motion to dismiss petitioner's appeal, that a defendant has no right to appeal a double jeopardy violation where her plea agreement has a waiver of appeal provision, no matter that a number of courts have said that a court's power to prosecute a defendant if the double jeopardy claim is successful, is extinguished. Yet there is a lack of clarity on this issue and this Court should settle this important question of federal law as to whether a double jeopardy violation overrides an appeal waiver clause in a plea agreement or are there restrictions on the use of double jeopardy in such situations weaken the power of double jeopardy. If a double jeopardy violation is not sufficient to protect a criminal defendant's right to an appeal, what are the requirements in order to protect this right.

CONCLUSION

Petitioner has a significant Double Jeopardy claim that remains unaddressed and unresolved by reason of the action of the court below in granting a motion to dismiss petitioner's appeal without giving any reason or explanation for the granting of the

government's motion, and without providing any basis for its action so as to allow petitioner and without consideration of her facially valid claim of a Double Jeopardy violation. The dismissal of her appeal, without comment, deprived petitioner of her opportunity to advance her defense in her appeal, and right to have her Double Jeopardy challenge considered. Petitioner is being deprived of her right to have the court below consider the merits of her claim that a colorable claim of a violation of the Double Jeopardy Clause allows an appeal, despite a waiver of appeal provision in her plea agreement, as clearly allowed under *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975).

This Court should grant the petition, vacate and remand this case to the court below as may be just under the circumstances, an appropriate remedy when the court below provided no reasons or explanation for the granting of the motion to dismiss petitioner's appeal, which appears to be error, in light of this Court's decisions in *Blackledge* and *Menna v. New York*.

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: August 19, 2023

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