No. 24-5893

In the Supreme Court of the United States

MAHLON PRATER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Introduction

This Court has long held that the Double Jeopardy Clause "forbids successive prosecution and cumulative punishment" for a "greater" offense after a defendant is convicted of a "lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). In the conspiracy context, however, the Sixth Circuit has deviated from that rule, assessing double jeopardy claims based not on the overlap between the greater and lesser offenses but on an amorphous balancing of "differences" between the two. That approach improperly allows the government to carve a single conspiracy into a larger and a smaller conspiracy—and then to convict the defendant of both charges, including the lesser included offense. This case is an excellent vehicle to resolve the circuit split and vindicate the Double Jeopardy Clause's protections in conspiracy cases.

In asserting that the circuits have all adopted roughly the same five-factor test to assess multiple-conspiracy double jeopardy claims, the government misses the main point. What matters is that the circuits use those five factors to test for different things. The Fourth Circuit uses them, correctly, to determine the degree of overlap between two charged conspiracies, asking whether a smaller conspiracy is a subset of a larger conspiracy. The Tenth Circuit, by contrast, uses the factors to determine whether two conspiracies have "a single unlawful objective." And, as it did here, the Sixth Circuit uses those factors in a balancing test, primarily asking whether the two conspiracies are sufficiently "different" in some way.

Those different approaches have significant implications. The Sixth Circuit's improper focus on the degree of difference between the charged conspiracies,

for example, leads it to miss the core inquiry under the Double Jeopardy Clause. Just as a defendant may not be convicted of both a substantive offense and its lesser-included offense, a defendant may not be convicted of both a large conspiracy and a smaller conspiracy that is wholly encompassed by the larger one. Yet—as Prater's circumstances make plain—the Sixth Circuit's focus on check-listing the differences between two charged conspiracies allows the government to do precisely that. The government does not even know who Prater's coconspirators in the smaller conspiracy were and cannot rule out that they were the same Vice Lords with whom he was indicted in the larger conspiracy. Yet the Sixth Circuit held that the government met its burden of proving that the smaller conspiracy was not a subset of the larger one. If Prater had been prosecuted in the Fourth Circuit, this case would have come out the opposite way.

Further, as the government acknowledges, the circuits are likewise split over how to allocate the burden of proof in the context of a multiple-conspiracy double jeopardy claim. That split makes a difference here. Other circuits do not ordinarily allow the government to carry its burden of proving that two conspiracies are distinct for double-jeopardy purposes without even knowing who the coconspirators in one of the conspiracies are. The petition should be granted.

Argument

I. The circuits are split on how to assess double jeopardy challenges to multiple conspiracy charges.

A. The circuits disagree on what the purpose of the five-factor test is.

The government emphasizes that most of the circuits employ a similar set of five factors when assessing double jeopardy challenges to multiple conspiracy charges. But the identity of the five factors is not the relevant problem. The problem is that the circuits disagree on what they are using the five factors for.

The Sixth Circuit uses the five-factor test to assess whether there are differences between the two charged conspiracies. As the majority opinion put it, two conspiracies are usually separate and distinct offenses "[i]f at least a few factors differ between the conspiracies." Pet. App. 5a. That tracks Sixth Circuit authority holding that charged conspiracies are separate offenses if "several of these factors differ between the conspiracies." *United States v. Meda*, 812 F.3d 502, 508 (6th Cir. 2015) (citation omitted). It also parallels the majority opinion's repeated reliance on *Wheeler*, which emphasized that the "most significant factor" in the analysis is whether "the scope of the activity that the government sought to punish under each conspiracy charge is different." *United States v. Wheeler*, 535 F.3d 446, 457 (6th Cir. 2008).

The Fourth Circuit, by contrast, uses the five-factor test for a very different purpose. It uses the factors to assess not whether there are differences between the two indictments but instead whether the smaller conspiracy is a subset of the larger conspiracy. *United States v. Scott*, 760 F. App'x 151, 155 (4th Cir. 2019).

The Fourth Circuit, in other words, employs the five-factor test to assess "the *degree of overlap*" between the two charges, "not the *degree of similarity*" between them. *United States v. Jones*, 858 F.3d 221, 226 (4th Cir. 2017). That is vastly different than a degree-of-difference test, which *Jones* rejected as a "glaring, fundamental flaw" in the analysis when the government tried to advance it. *Id*.

The Tenth Circuit, for its part, uses a similar set of factors—but does so in order to assess whether two conspiracies are "interdependent." *United States v. Mier-Garces*, 967 F.3d 1003, 1011 (10th Cir. 2020). This test appears to use the factors to assess whether two charged conspiracies have "a single unlawful objective," as demonstrated by "commonalities" between the two. *Id*. at 1014, 1018. The government does not even address *Mier-Garces*, much less explain how the Tenth Circuit's analysis can be reconciled with the other circuits' approaches. The Fourth Circuit, for instance, has found a single conspiracy where there was "one overall agreement with multiple objects"—which is different than determining whether there was a single unlawful objective. *United States v. Slocum*, 106 F.4th 308, 315 (4th Cir. 2024).

In short, the difference between the circuits is not the identity of the factors that are included in their respective five-factor tests. The difference is in what the circuits are using those factors for. They may be using similar factors, but they are using those factors to answer very different questions.

B. The Sixth Circuit's approach is incorrect.

For several reasons, the Sixth Circuit's approach does not mesh with the proper inquiry under the Double Jeopardy Clause. And despite the government's

arguments otherwise, this case shows that the distinctions between the circuits' approaches matter in practice.

First, by focusing on the factual differences between the two charges, the Sixth Circuit took its eyes off the possibility that the smaller conspiracy could have been carved out of the larger conspiracy. That failure cuts against one of the core protections of the Double Jeopardy Clause: a defendant may not be prosecuted and punished for both an offense and a lesser-included offense. *Illinois v. Vitale*, 447 U.S. 410, 421 (1980). The Fourth Circuit's focus on the degree of overlap, by contrast, aligns with this Court's double jeopardy jurisprudence, because it properly focuses the inquiry on precisely that question: whether the government has carved a single large conspiracy into multiple smaller ones. *See, e.g.*, *Scott*, 760 F. App'x at 155 ("[W]e look to whether the 2016 indictment seeks to punish any of the conduct already covered under the 2006 indictment.").

Part of the difficulty may stem from the heavy weight that the Sixth Circuit places on the "overt acts" factor, which it calls the "most significant" one. *United States v. Wheeler*, 535 F.3d 446, 457 (6th Cir. 2008). This factor assesses "the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case." *Id*. at 449–50 (citation omitted).

But, as with many federal conspiracy statutes, an overt act is not an element of a conspiracy under 21 U.S.C. § 846. *See United States v. Shabani*, 513 U.S. 10, 15 (1994). As the Fourth Circuit recognized in *Slocum*, the absence of that element

"undermine[s], if not render[s] untenable" any "emphasis on overt acts" in the analysis of whether multiple conspiracy charges violate double jeopardy. *Slocum*, 106 F.4th at 314. The Sixth Circuit, in other words, is using as its "most significant" indicator something that is not an element of the conspiracy offenses and that the Fourth Circuit has specifically de-emphasized. Perhaps the majority on the Sixth Circuit panel below cannot be faulted for following its own precedent in *Wheeler*; but its precedent is wrong.

The government does not even address *Wheeler*, much less attempt to defend it. That is no surprise, because *Wheeler* is clearly wrong. If the double jeopardy analysis turns on whether the "activity that the government sought to punish under each conspiracy charge is different," *Wheeler*, 535 F.3d at 457, then the government can simply charge one unique overt act in each conspiracy indictment, while otherwise charging the same or overlapping conspiracies. *See United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988) (noting government incentives). The Double Jeopardy Clause cannot be so easily circumvented.

As Judge Griffin's dissent explained, if the Sixth Circuit had considered the proper question under the Double Jeopardy Clause, it would have come to a much different conclusion in Prater's case. Pet. App. 21a-27a. The smaller conspiracy with which Prater was charged was simply carved out of the larger one. The timeframe of the former fits wholly within the latter; the geography of the former is a subset of the latter; and the same offenses were charged in both. The smaller crack cocaine conspiracy was also a subset of the Vice Lords' larger, polydrug distribution

conspiracy: several Vice Lords were known crack distributors, and trial testimony indicated that they would traffic any drug that they could get their hands on. And the government failed to identify any of Prater's coconspirators in the smaller conspiracy, leaving as the only viable option his fellow Vice Lords, with whom he was indicted in the larger conspiracy. Pet. App. 24a.

Even the government conceded in the Sixth Circuit that the majority of the relevant factors—three of the five—favored Prater and suggested a double jeopardy violation. But because the majority was constrained to follow *Wheeler*, it did not account for the government's concession. Pet. App. 6a-8a. Instead, following *Wheeler*, the majority erroneously focused its gaze on the differences between the two charges rather than on whether the smaller conspiracy was a subset of the larger one. Pet. App. 6a, 7a, 8a, 9a, 10a (citing *Wheeler*).

C. The circuits disagree about how to assess whether the government has the burden of proof and when the government has carried it.

The Court should also grant Prater's petition because the circuits are split on whether the defendant or the government bears the burden of proof in the context of a multiple-conspiracy double jeopardy claim. The government does not disagree that the circuits are split on this question. (Response, at 11-12). It asserts instead that, because the Sixth Circuit has adopted the most defendant-friendly standard, Prater has nothing to complain about. Again, that is incorrect.

Although the majority opinion stated that the government had the burden of proof, it ruled that the government discharged this burden without relying on affirmative evidence for several of its core assertions. For example, the majority

opinion endorsed the district court's decision that the government could meet its burden of proof by relying solely on the indictment. The majority opinion agreed with the magistrate judge's assertion that "the [g]overnment's proferred evidence preponderates in favor of the existence of two conspiracies" (Pet. App. 9a; *see* Pet. App. 72a) even though the government had not actually offered any evidence to the magistrate judge and instead relied solely upon the language of the two indictments. Pet. App. 64a-72a. None of the other circuits hold that the government can carry its burden of proof without introducing any evidence. *See, e.g.*, *Slocum*, 106 F.4th at 316 (double jeopardy violation where "the government identifies no evidence to support a contrary finding").

To defend this aspect of the majority opinion, the government is forced to take a position that is even further afield. The government argues that the majority opinion's analysis is correct because a motion to dismiss an indictment should be reviewed only to determine whether the indictment is valid "on its face." (Response, at 12). But no court agrees with that suggestion in the context of multiple-conspiracy double jeopardy claims. *See Ragins*, 840 F.2d at 1192 (discussing necessity for proof beyond the indictment). The only court that comes close is the Tenth Circuit, which imposes the burden of proof on the defendant instead of the government. *See Mier-Garces*, 967 F.3d at 1015. And even the Tenth Circuit recognizes that "courts must conduct extensive factual analyses of the charged conspiracies in order to assess whether the conspiracies at issue are in fact one." *Id.* at 1020. The government can

bolster the correctness of the majority opinion below only by relying on a rule that no other circuit has agreed with.

Likewise, the majority opinion stated that the government sufficiently proved that the smaller conspiracy involved "lower-level east Knoxville crack dealers," not Vice Lords. (Response, at 6; Pet. App. 9a). But that description of the conspiracy is not based in any evidence. It is found solely in a brief that was filed by the government, which stated that Prater was "working with a limited number of lower-level east Knoxville crack dealers." (R. 231, at 51). There is no evidentiary support for that statement in the brief, other than a citation to the plea agreement that was entered in Case No. 152. (*Id.*). And that plea agreement does not support the factual assertion, either. It says only that "the defendant worked with others to sell crack cocaine." (Case No. 152, R. 15, at 2). There is no factual evidence in the record supporting the assertion that the smaller conspiracy did not involve Vice Lords or that the "lower-level" dealers were not reporting up the chain to Prater and his fellow Vice Lords.

In fact, as Judge Griffin pointed out in dissent, the government admitted at oral argument on appeal that it does not actually know who Prater's coconspirators in the smaller conspiracy were. Pet. App. 21a. There is no evidence suggesting that Prater—who was squarely in the midst of a polydrug conspiracy with other Vice Lords—was running another crack cocaine operation on the side, entirely separate from the Vice Lords with whom he was trafficking everything else.

The Sixth Circuit, in other words, adopted a version of the burden of proof under which the government can carry its burden without any evidence at all. If that is what it means in the Sixth Circuit for the government to carry its burden of proof, then it has employed a different meaning of the term than exists anywhere else. *See, e.g.*, *Slocum*, 106 F.4th at 316.

The government also complains about what it characterizes as a "baseless accusation" that it "withheld evidence at trial." (Response, at 12). But nobody is accusing the government of engaging in a *Brady* violation. The point instead is that the government chose not to pursue a crack cocaine theory at trial against the Vice Lords—even though several members of the conspiracy were known distributors of crack cocaine. (Pet. App. 21a-22a). The government may, of course, pick and choose how it wants to prove a conspiracy at trial, focusing on some overt acts instead of others. But the government cannot (1) highlight only some overt acts while sidelining others and then (2) use the distinctions that the government itself created as a way to turn a single conspiracy into two conspiracies. *Cf. Jones*, 858 F.3d at 227 ("We give little weight to a difference the government itself manufactures."). That, however, is precisely what the Sixth Circuit's approach incorrectly allows.

II. This case is an excellent vehicle.

The government does not dispute that the issues presented are frequently recurring or that their resolution would affect the outcome in this case. Nor does the government dispute that Prater fully preserved all of the issues presented in the courts below. This case is an ideal vehicle for deciding the questions presented.

Conclusion

The Court should grant the petition.

Respectfully submitted,

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