

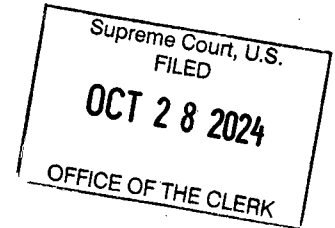
No. _____

24-6051

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



RALPH BERRY

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

RALPH BERRY

(Your Name)

U.S.P. HAZELTON

(Address)

P.O. Box 2000 Bruceston Mills, W.V. 26525

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- Does a second prosecution and trial for the same offense violate a constitutional immunity of the defendant?
- Whether the Double Jeopardy prohibition bars successive federal prosecutions of the same person for the same acts even though the prosecutions are brought under federal statutes protecting different federal interest.
- Can a defendant who pleads guilty to conduct which involved a shooting which left an individual paralyzed, and is promised 'no further prosecution' based on a written plea agreement, be re-indicted on this same conduct if the victim dies 10yrs after the infliction of the wound, or did the earlier plea invoke Jeopardy on this conduct?
- Does the Double Jeopardy Clause protect against a second prosecution for the same offense; when a defendant pleads guilty to the offense under a written plea agreement which promises no further prosecution on this conduct?

LIST OF PARTIES

- ☒ 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:

RELATED CASES

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STATUTES AND RULES

OTHER

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

☒ 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 2024 U.S. APP. LEXIS 12086; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.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

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 17, 2024.

☐ 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: July 31, 2024, and a copy of the order denying rehearing appears at Appendix N/A.

☐ 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

The Fifth Amendment to the UNITED STATES CONSTITUTION Double Jeopardy Clauseⁿ no person shall... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT OF THE CASE

On September 28, 2021 Berry was convicted by a jury on 3 counts of murder, based on a June 21, 2000 shooting. The government's proof at trial established that Berry was the leader of a drug crew that sold crack cocaine in the Bronx, N.Y. from 1995-2007, and engaged in violence to protect its operation. This violence included the above mention 2000 shooting ordered by Berry, that although the bullet struck Caprice Jones it left him paralyzed. Jones survived for another 10 yrs. and ultimately died on November 10, 2010.

In 2007 prior to this conviction, and the basis for Berry's Double Jeopardy claim, Berry was convicted in 2009 for the same drug conspiracy which now underlies all 3 counts in the subsequent prosecution. In the earlier prosecution Berry was indicted for his participation in a drug conspiracy from 1995-2007.

In preparation for trial on October 21, 2008 the government through 404(b) disclosure in a motion disclosed evidence that would be presented at trial which included acts of violence committed by Berry in furtherance of the 1995-2007 drug conspiracy, "which were necessary to complete the story at trial and were inextricably intertwined with the conspiracy.

One of these acts of violence and the one relevant to this subsequent prosecution is the shooting of Caprice Jones which left him paralyzed on June 21, 2000 on a basketball Court in the Bronx N.Y.

On November 10, 2008 Berry entered a plea of guilt to the 12yr drug conspiracy, based on a written plea agreement which included a caveat of "no further prosecution for his participation in a drug conspiracy from 1995-2007." At the government's request prior to sentencing the government asked for a (2) level enhancement based on Berry's possessing a weapon during the June 21, 2000 shooting. The Court accepted the Probation Report's finding and sentenced Berry to 252 months imprisonment.

Afterwards Berry filed a Habeas Corpus 2255 based on his then appointed trial counsel's ineffectiveness. On April 5, 2013 Paul A. Crotty District Court JUDGE ruled that counsel was not ineffective where "Berry and his Counsel

STATEMENT OF THE CASE

Negotiated a plea agreement that would immunize Berry from further prosecution on the conspiracy charge despite an initial agreement which would not have afforded Berry this benefit. Such advocacy can hardly be deemed ineffective."

Berry after serving 139 months on this sentence was released on Nov 1, 2019 when his sentence was reduced to time served based on the crack cocaine amendments of the Fair Sentencing Act which raised the statute on crack cocaine offenses from 50gr. or more to 280gr or more. Where Berry's earlier conviction fell under the old law of 50gr.

As mentioned above Berry was released from his prior sentence and commitment on the drug conspiracy on November 1, 2019, and 3 months after being released he was re-indicted on January 30, 2020 for the same conduct, ordering the shooting of Jones and the same drug conspiracy from 1995-2007, which encapsulated the Jones shooting, and a shooting which was part of the offense conduct, and used to enhance Berry's sentence in the earlier conviction.

The government had now raised the drug amount from 50gr. to 280gr. to bring forth count (2) of the new indictment; which charge 21 U.S.C. 848 (XIXA) Killing while engaged in a drug conspiracy of 280gr. or more.

At trial the government conceded that the underlying drug offense was in fact the drug conspiracy from Berry's prior conviction.

Prior to trial Berry presented the Court with a motion based on Double Jeopardy grounds and the 2008 plea agreement, which the Court denied.

On Dec 12, 2022 Berry was sentenced to life, on the above conduct.

REASONS FOR GRANTING THE PETITION

By allowing a second prosecution and trial for the same offense a constitutional immunity of Berry's has been violated, and where such a case appears on the record, the party is entitled to be discharged from imprisonment.

Berry's former conviction under 21 U.S.C. 846 a drug conspiracy; which spanned from 1995-2007, to which he entered a plea of guilt in 2009, under a written plea agreement, which promised no further prosecution for his participation in such, has now been used to bring forth the subsequent prosecution. Berry's participation in the earlier conviction (drug conspiracy) included a June 21, 2000 shooting that left an individual paralyzed, this victim although paralyzed lived 10 yrs, and died Nov. 10, 2010. Berry has now been charged in the subsequent prosecution with the death, after being promised no further prosecution. In Berry entering into the earlier agreement and entering a guilty plea invoked jeopardy on the earlier conduct and could not be punished twice for the same offense in light of the Double Jeopardy Clause and its protection against subsequent prosecutions for the same offense.

As this Court noted in *Ex Parte Nielsen* 33 Fed 118, 120 (1889) "a constitutional immunity of the defendant was violated by second trial and judgement... he was protected by a constitutional provision securing to him a fundamental right." id "[T]he Court had no jurisdiction to pass judgement against him upon more than one of the indictments, and... he was being punished for one and the same offense," id at 120. In *Nielsen* this Court concluded "that the Court was without authority to give judgement and sentence in the latter case... where the former is an essential element and principal ingredient," of the earlier offense. id.

Berry's former conviction under 21 U.S.C. 846 drug conspiracy which underlined all 3 counts in the subsequent prosecution was an essential element and principal ingredient in the latter prosecution.

REASONS FOR GRANTING PETITION

The Jury was instructed "Therefore...I am going to first instruct you regarding the elements of narcotics conspiracy, because they will be relevant to each of the 3 counts. [Jury Instructions] p. 19

The Supreme Court has long held that a guilty plea constitutes a conviction, *Kercher v. U.S.*, 274 U.S. 220, 223 71 L.Ed 1009, 47 S.Ct. 582 (1927) "Given that a guilty plea constitutes a conviction, "Johnson 467 U.S. at 498 the Clause prohibits a second prosecution for the same offense after a guilty plea."

The Second Circuit Court of Appeals in affirming Berry's appeal, erroneously stated in their opinion "Berry was charged with conduct in this case that was not part of his prior drug conviction; the earlier drug offense did not encompass all the multilayered conduct both to time and place involved in this case." *U.S. v. Berry* (2024 U.S. App. Lexis 12086) i.d. at *8. The 'earlier drug offense' the government claims was a 12yr drug 'conspiracy' from 1995-2007 in the Bronx N.Y. The June 21, 2000 shooting now the basis of the latter prosecution is clearly encompassed as to time, and the government at trial itself conceded that the drug conspiracy underlying the counts in the latter conviction was in fact the 1995-2007 drug conspiracy, in contrast to what they now raise on appeal.

Berry points out that his earlier sentence on the drug conspiracy was enhanced two levels for possessing a weapon and ordering the June 21, 2000 shooting, at the government's request and adopted by the Court, in handing down the 252 month sentence on Mar 19, 2009. The Second Circuit Court of Appeals based their decision without any fact-finding to establish evidence that Berry's prosecution did not violate Double Jeopardy. This is in contrast with what several "Court of Appeals that have addressed the question" as to fact finding "have held that the government bears the burden to establish by a preponderance of the evidence that a second indictment does not violate Double Jeopardy. See e.g. *U.S. v. Loyd*, 743 F.2d 1555, 1563 (11th Cir 1984); *U.S. v. Kalish* 690 F.2d 1144, 1147 (5th Cir 1982); *U.S. v. Booth* 673 F.2d 27, 30-31 (1st Cir); *U.S. v. Jabara* 644 F.2d 574, 576-77 (6th Cir 1984); *Inman* 568 F.2d 326, 332-33. citing *U.S. v. Verrasio*, 803 F.2d 885, 895 (7th Cir 1986). In *Verrasio* the Court held "a defendant's interest in enforcement of a plea agreement resembles his privilege against Double Jeopardy... by entering into the plea agreement, defendant required similar protection against the risk of conviction for the same offense

REASONS FOR GRANTING PETITION

arising out of the participation in the drug conspiracy." U.S. v. Verruso, 803 F.2d 885, 895 (7th Cir 1986).

Finally, Berry cites *Whalen v. U.S.*, 455 U.S. 684, 693 (1980) where "the Court rejected the government's claim that a rape charge and a felony murder charge based on the death of the rape victim constituted offense sufficiently separate to support consecutive punishments. The Court recognized that the statutory offense of felony murder could be proven in some cases by conduct wholly unrelated to rape (e.g. robbery) but nonetheless that separate offenses were not present because in the present case rape is a necessary element of the felony murder." *id.* at 694.

Berry's prior conviction of 21 USC 846 in the present case is a necessary element (and used to convict) on the felony murder.

For the reasons stated above Berry humbly and prayerfully asks this Honorable Court to grant his writ of Certiorari.

Sincerely,
Ralph Berry
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U.S.P. Hazelton
P.O. Box 2000
Bruceston Mills, W.V. 26525

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ralph Berry

Date: October 27, 2024