

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KELSEY JONES
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
SEVENTH CIRCUIT COURT OF APPEALS**

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QUESTIONS PRESENTED

1. Did the Government fail to prove petitioner guilty beyond a reasonable doubt where, among other things, a witness at trial identified petitioner's co-defendant as petitioner?
2. Did the district court err in determining the drug quantity for the purpose of sentencing the petitioner?

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PRAYER

Petitioner, Kelsey Jones, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals, filed on September 20, 2017.

OPINION BELOW

The unpublished opinion of the Seventh Circuit Court of Appeals, which was issued on September 20, 2017, is attached as Appendix A. No Petition for Rehearing was filed. The transcript of witness Mark Ringswald's testimony, as pertinent to this petition, is attached at Appendix B. The transcript of the district court's sentencing hearing germane to this petition is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Seventh Circuit Court of Appeals for which the petitioner seeks review was issued on September 20, 2017. No petition for rehearing was filed. This petition is filed within 90 days of the Seventh Circuit's decision, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 5:

No person... shall be deprived of life, liberty, or property, without due process of law...

United States Constitution, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

United States Constitution, Amendment 8:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Jones was convicted by a jury of Conspiracy to Possess and Distribute a Controlled Substance, in violation of 21 U.S.C. § 846 (Count One); Distribution of a Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Count Seven); Conspiracy to Kill Another Person with Intent to Retaliate for Providing Information to Law Enforcement, in violation of 18 U.S.C. § 1513(f) (Count Ten); Attempting to Kill Another Person with Intent to Retaliate for Providing Information to Law Enforcement, in violation of 18 U.S.C. § 1513(a)(1)(B) (Count Thirteen); and Carrying, Brandishing, and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Fourteen).

The district court sentenced Jones to three hundred (300) months in the Bureau of Prisons on each of Counts One, Seven, Ten, and Thirteen, to run concurrent to each other, and one hundred twenty (120) months on Count Fourteen, to run consecutive to the other counts, for a total term of four hundred and twenty (420) months in the Bureau of Prisons.

The Seventh Circuit Court of Appeals rejected Jones' arguments on the merits, and affirmed his conviction and sentence. App. 10-13. As to identification, the Seventh Circuit held as follows: The government presented sufficient evidence to establish that Kelsey was the person who shot the confidential informant on the date in question. The confidential informant, Jamie, and his brother, Mark, testified that they got a clear view of Kelsey's face on the day that they were shot and they both identified him in court as the person who shot them. Kelsey simply

challenges those witnesses' credibility, noting Mark's drug use and inconsistencies with the CI's initial description of the person who shot him. These concerns were addressed at trial, and the jury still determined that Kelsey was the shooter. App. 10-11.

Concerning drug quantity, the Seventh Circuit stated: "We have already detailed Kelsey's role in the conspiracy. (App. 2-3) We conclude that the government's evidence was sufficient." App. 12

REASONS FOR GRANTING THIS PETITION

I.

Petitioner Was Not Proven Guilty Beyond a Reasonable Doubt Where the Identification of Him as the Shooter Was Fraught With Error

There were two individuals (Jamie and Mark Ringswald) who testified at trial and identified Kelsey Jones as having fired a handgun on April 2, 2014, into the car in which they were seated. A third individual who was inside that vehicle at the time of the shooting (Christy Miskell) testified that she could not see the shooter's face. Jamie was the confidential informant who had been paid \$180,000 by the Government during the course of his informant career, and purportedly had numerous prior encounters with Kelsey. Mark, Jamie's brother, supposedly had purchased heroin from Kelsey three or four times prior to the shooting. Both of the Ringswalds were heroin addicts.

Jamie initially described the shooter as 5'10" to 5'11", 170 to 175 pounds, and 23 to 25 years of age. Kelsey is 5'6", 130 pounds, and was 37 years old at the time of

the shooting. Jamie did not identify Kelsey to the officers who responded to the hospital after the shooting to interview Jamie.

Mark told responding officers he did not know the identity of the shooter. At the time of the shooting, Mark was also coming off of a heroin high, and loses cognitive ability during that time. Mark had told the interviewing officer that the shooter had a gun in his right hand. When asked at trial to point out Kelsey Jones in the courtroom, Mark Ringswald pointed to co-defendant Mario Whitfield. Mark only revised that identification, and pointed to Kelsey, after follow-up questioning by the prosecutor. App.14-17

Jamie got caught in several lies on the witness stand. A heroin addict, Jamie admitted that he failed to disclose to his Government-agent handlers that he was using heroin while working as a confidential informant. Jamie stated that it was dark outside at the time of the shooting (9:00p.m.), and the only thing he could see was what was lit by the building and light poles. As the shooter approached Jamie's vehicle, Jamie could not see the individual's face. The shooter had tightened the drawstrings of his hoodie over his face. However, Jamie claimed that once the shooting started, he recognized Kelsey shooting with his left hand. Jamie had told Agent Labno that the shooter appeared to be heavier than Kelsey. Notably, Jamie's identity as an informant had been disclosed on at least two previous ATF investigations, so other people knew Jamie was an ATF informant who helped send people to prison (and thus would have motive to harm Jamie).

The Constitution protects a defendant against a conviction based on evidence of questionable reliability by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963); compulsory process, *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988), and confrontation plus cross-examination of witnesses, *Delaware v. Fensterer*, 474 U.S. 15, 18-20 (1985) (per curiam). Apart from these guarantees, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. *See Kansas v. Ventris*, 556 U.S. 586, 594, n. *, (2009) (Our legal system is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses...). Only when evidence is so extremely unfair that "its admission violates fundamental conceptions of justice," *Dowling v. United States*, 493 U.S. 342, 352 (1990), is the due process clause implicated.

This Court held in *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012), that the fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness. Nonetheless, safeguards of our adversarial system that caution juries against placing undue weight on eyewitness testimony of questionable reliability include the Sixth Amendment's right to confront eyewitnesses. *See Maryland v. Craig*, 497 U.S. 836,

845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.”). Another is the defendant’s right to the effective assistance of an attorney, who can expose the flaws in the eyewitness’ testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony during opening and closing arguments. *See Perry*, 565 U.S. at 244-46. The constitutional requirement that the Government prove the defendant’s guilt beyond a reasonable doubt is meant to impede convictions based on dubious identification evidence.

Due process requires that a conviction be reversed if, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). This Court held in *In Re Winship*, 397 U.S. 358 (1970), that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 364. This standard plays a vital role in the American scheme of criminal procedure, and that standard provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. *Id.* at 363, *quoting Coffin v. United States*, 156 U.S. 432, 456 (1895).

Here, the identification evidence presented against Kelsey was more than dubious. Three persons were fired upon in a vehicle. One of those individuals, Christy Miskell, testified that the shooter had a hood tied tightly around his face,

and it was impossible to see his face. The other two occupants, the heroin-addict Ringswald brothers, initially described an individual markedly larger than Kelsey. While both had prior interactions with Kelsey, neither named him as the shooter when first questioned. It was not until subsequent interviews that they identified Kelsey as the perpetrator of the shooting.

Notwithstanding, at trial Mark was asked to identify Kelsey. He pointed to Kelsey's co-defendant, Mario Whitfield. Only when pressed by the prosecutor did Mark modify his identification. On cross-examination, Kelsey's trial counsel asked Mark if he was 100% sure of his identification of Kelsey, then moved on to the rest of his cross-examination. With such a critical piece of evidence, though, greater emphasis needed to be placed on the mis-identification of Kelsey by one of the two men claiming Kelsey was the shooter.

Confrontation plus cross-examination, when vigorous, can effectively protect a defendant's rights to a fair trial. An effective attorney would have exposed the flaws in the Ringswalds' testimony during cross-examination, and focused the jury on the fallibility of that testimony during closing argument. Kelsey's rights under the Fifth and Sixth Amendments to the Constitution were violated when the identification testimony at trial was not effectively challenged. The jury should have been persuaded to discount the identification of Kelsey as unworthy of credit. Had the identification evidence been properly called into question, the Government would not have been able to establish guilt beyond a reasonable doubt on Counts Ten, Thirteen, and Fourteen.

II.

The Drug Quantity Credited to Petitioner Was Unreasonable

The jury's verdict indicated that Kelsey had distributed 28 grams or more of heroin. During the jury instructions conference, Kelsey requested a buyer/seller instruction, as there was testimony that Kelsey had regularly procured drugs for himself. The court denied that request, instead giving an instruction that evidence that Kelsey obtained drugs for his own personal use could not be used to prove the existence of a conspiracy. The jury decided that Kelsey had participated in the drug conspiracy. The evidence at trial established that Kelsey was present for one recorded transaction with the confidential informant, during which 42 grams of crack cocaine was delivered.

At sentencing, the district court found that Kelsey, having been found guilty of being a member of the conspiracy, was responsible for 200 grams of heroin and 425 grams of crack cocaine. App.22 That finding was not supported by the evidence.

A couple of decades-old cases from this Court establish that a conspiracy is not formed by a relationship between a buyer and a seller. *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940). The Seventh Circuit has stated: "The relationship of a buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy... In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." *United States v. Ford*, 324

F.2d 950, 952 (1963). Proof that the co-conspirator has a stake in the venture and therefore exhibits informed and interested cooperation is necessary to prove a conspiracy. *Direct Sales Co.*, 319 F.3d at 713.

A conspirator is liable for the substantive offenses of his co-conspirators only if those offenses are, among other things, reasonably foreseeable to him. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). Yet this Court has affirmed repeatedly that conspiracy is a distinct offense from the completed object of the conspiracy, *Garrett v. United States*, 471 U.S. 773, 778 (1985), and that conspiracy is an inchoate offense that needs no substantive offense for its completion. *Ianelli v. United States*, 420 U.S. 770, 777 (1975); *see also United States v. Jimenez Recio*, 537 U.S. 270, 274-75 (2003) (conspiracy may be proved based on the unlawful agreement, regardless of whether the substantive offense is committed); *United States v. Shalbani*, 513 U.S. 10, 13-14 (1994) (holding that no overt act is necessary for conspiracy liability under Section 846).

Proof that Kelsey entered into a conspiracy with his brother, Toby, and Wesley Fields, rested on conjecture, an insufficient foundation on which to sustain a conspiracy conviction. This Court noted in *Anderson v. United States*, 417 U.S. 211, 224 (1974), that it scrutinizes the record for evidence of intent with special care in a conspiracy case, for charges of conspiracy are not to be made out by piling inference upon inference, thus... fashioning a dragnet to draw in all substantive crimes.

In *Edwards v. United States*, 523 U.S. 511, 513-14 (1998), this Court held that as long as the jury finds beyond a reasonable doubt that the defendant

participated in a conspiracy and the Court sentences him within the statutory maximum applicable to that conspiracy, the court may determine both the amount and the kind of controlled substances for which the defendant should be held accountable, and then impose a sentence that varies depending upon that amount and kind.

However, but for the district court's findings of fact, Kelsey's sentence would have been substantively unreasonable and therefore illegal. *See Rita v. United States*, 551 U.S. 338, 372 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. ___, ___, (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 483, n. 10, 490 (2000), and "must be found by a jury, not a judge," *Cunningham v. California*, 549 U.S. 270, 281 (2007). A substantively unreasonable penalty is illegal and must be set aside. *Gail v. United States*, 552 U.S. 38, 51 (2007). It follows that any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing a defendant to a longer sentence – is an element that must either be admitted to by the defendant or found by the jury. It may not be found by the judge.

Because of the importance of the drug quantity to calculating the sentence in a narcotics case, the Seventh Circuit has held that district courts must make an

explicit finding as to the drug quantity and offense level supporting the sentence. *United States v. Wagner*, 996 F.2d 906, 913 (7th Cir. 1993). In making such a determination, the sentencing court is required to state reasons why each individual defendant was aware of or reasonably foresaw the particular amount of drugs for which he will be held accountable, with reference to supportive evidence. *United States v. Goines*, 988 F.2d 750, 775 (7th Cir. 1993). Here, the sentencing court did make an express finding of drug quantity, but did not adequately explain the reasoning behind that quantity at Kelsey's sentencing hearing. The district court's failure to explain its reasoning as to the amount of drugs attributable to Kelsey was erroneous and calls into question the fairness and integrity of Kelsey's sentence. *See United States v. Hawk*, 434 F.3d 959, 963 (7th Cir. 2006).

To convict Kelsey of conspiracy, the Government engaged in piling inference upon inference. The evidence that pointed to Kelsey's involvement was mere conjecture, at best. At no point was it definitively established that Kelsey had undertaken a joint objective with his co-defendants. Rather, it was evident that Kelsey was a habitual drug user who often procured narcotics for himself. The trial court should have thus granted Kelsey's request for the buyer/seller jury instruction.

Kelsey was charged with Conspiracy to Possess and Distribute Controlled Substances. The jury found him guilty of distributing more than 28 grams of a controlled substance. He was sentenced for a drug quantity more than 20 times what the jury actually found, based on findings made by the district court. Those

findings were erroneous, as Kelsey's connection to the conspiracy was tenuous. Accordingly, Kelsey's sentence was substantively unreasonable, and therefore illegal.

CONCLUSION

For the foregoing reasons, Petitioner Kelsey Jones requests that this Court grant the petition for certiorari, vacating the judgment of the Seventh Circuit Court of Appeals, and remanding this case for further proceedings as necessary.

Dated: December 15, 2017

Respectfully submitted,

/s/ William S. Stanton
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