

No. 17- _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

UNITED STATES OF AMERICA,

Respondent,

v.

MATTHEW DAVIS,

Petitioner

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

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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December 22, 2017

QUESTIONS PRESENTED

1. Whether the failure of the District Court after conviction but before pronouncement of sentence to inquire of petitioner consistent with 21 U.S.C. § 851(b) whether the petitioner affirmed or denied that he had been previously convicted as alleged in § 851, the Prior Conviction Information filed in this criminal action, and further inform him that any challenge to the prior conviction identified in the Information, may not be raised to attack his sentence, should result in the vacation of petitioner's sentence.
2. Whether the filing of a Prior Felony Information pursuant to § 851 approximately seventy days before trial and eight months after the original indictment and only after petitioner had made it clear he wished to exercise his constitutional right to go to trial demonstrated vindictive prosecution and entitles petitioner to re-sentencing or reduction of sentence to a mandatory ten years not the sentence as doubled by the § 851 filing.
3. Whether the admission of the hearsay statements of the deceased alleged co-conspirator "Pudge" was error in that it was neither in furtherance of the conspiracy nor trustworthy.

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MATTHEW DAVIS,

Petitioner,

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

Petitioner Matthew Davis petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit, *United States v. Davis*, 15-3578, 687 Fed. Appx. 75, (2d Cir., April 18, 2017), is Appendix A to this petition. The Second Circuit's order denying panel rehearing and rehearing en banc is Appendix B to this petition. The Opinion and Order of the U.S. District Court for the Southern District of New York, dated April 15, 2015, is Appendix C to this petition. The judgment of the U.S. District Court for the Southern District of New York, dated October 29, 2015, is Appendix D.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on October 29, 2015. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, entered

judgment on April 18, 2017 and denied a timely petition for rehearing and rehearing en banc on September 28, 2017.

RELEVANT STATUTORY PROVISIONS AND RULES INVOLVED

21 U.S.C. § 851

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial: written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter finds of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any

challenge to a prior conviction, not raised by the response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Federal Rule of Evidence 801

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is consistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it

or

acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (D).

STATEMENT OF THE CASE

This case arises from an appeal following a judgment of conviction and sentence of 240 months of imprisonment and 10 years of supervised release entered on October 29, 2015 in the United States District Court for the Southern District of New York after a two week trial before the Honorable Katherine B. Forrest, United States District Judge, and a jury.

Procedural History

Matthew Davis was arrested on March 11, 2014 on a sealed complaint, unsealed on March 12, and indicted on May 8, 2014, and charged, in addition to forfeiture allegations, with four counts: narcotics conspiracy, murder-for-hire conspiracy and substantive charges plus firearms charges in connection with the prior two counts. Trial date of March 30, 2015 was set on December 5, 2014. An amended prior felony information describing a January 30, 2002 New York State narcotics conviction was filed on January 20, 2015 as was Superseding Indictment S2 14 Cr. 296 (KBF) which added a Count Five additional firearms count pertaining to the same September 10, 2010 murder-for-hire. The indictment upon which the case was tried, S3 14 Cr. 296 (KBF) was filed on March 3, 2015 and added yet another Count, Count Six, murder in connection with a drug crime thus even further enhancing the likelihood of a possible sentence of life imprisonment. The Government expressly acknowledged a potential disposition of the

case, as guided by *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), “would have resulted in far less time than the defendant would receive if he were convicted after trial”. (Tr. 3/12/15, pp.46-47)

Superseding Indictment S3 14 Cr. 296 (KBF), filed on March 3, 2015, charged Matthew Davis in six counts with narcotics conspiracy, murder-for-hire, firearms charges and drug crime murder. Count One charged Davis with conspiracy to distribute 5 kilograms or more of cocaine and 280 grams or more of crack in or about 2010 through 2013. Count Two charged Davis with conspiracy to murder-for-hire Terry Harrison, and Count Three charged him with the substantive murder-for-hire of Mr. Harrison, both in violation of 18 U.S.C. § 1958. Count Four charged Davis with use of a firearm in the murder-for-hire of Harrison in violation of 18 U.S.C. § 924 (j)(1). Count Five charged the use and possession of a firearm relating to the murder-for-hire counts, Two and Three, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Count Six, again on or about September 10, 2010, alleged Davis participated in killing Mr. Harrison as part of the narcotics conspiracy of Count One, this in violation of 21 U.S.C. § 848 (e)(1)(A). Counts Three through Six also charged aiding and abetting liability under 18 U.S.C. § 2, and the Indictment contained Forfeiture Allegations under 18 U.S.C. § 981, 28 U.S.C. § 2461 and 21 U.S.C. § 853(p).

Trial

Trial commenced before Judge Forrest and a jury on March 30, 2015. From the Government’s opening, the primary theory of the Petitioner’s guilt was that he was an enforcer of a large drug trafficking organization; a man of violence, a role that made him a member of the narcotics conspiracy charged, and only secondarily that he was even in the presence of drugs, much less specific quantities of same. (Tr. 3/30/15, pp.35-44).

The defense made its Fed.R.Crim.Proc. 29 Motion, on April 8, 2015 which was in large part granted by the Court on April 15, 2015 determining that no rational juror could find the “pecuniary value” element of the murder-for-hire crimes and acquitting Mr. Davis of Counts Two, Three, Four and Five. The jury found the Petitioner guilty of Count One, the narcotics conspiracy, but was unable to reach a verdict on the remaining Count Six on April 20, 2015, and the Count was dismissed at sentencing by the Government.

Sentencing

On October 28, 2015 Judge Forrest sentenced Petitioner Davis principally to 240 months of imprisonment and ten years of supervised release.

Matthew Davis is incarcerated and serving his sentence.

REASONS FOR GRANTING THE PETITION

POINT I

THE PETITIONER WAS VINDICTIVELY PROSECUTED FOR HIS REFUSAL TO COOPERATE AND INSISTENCE ON TRIAL, AND THE COURT COMPOUNDED THE INJUSTICE BY FAILING TO FOLLOW THE PROCEDURES SET FORTH IN 21 U.S.C. § 851(b)

Under 21 U.S.C. § 851 (b), “[at] some point before sentence is imposed, the district court must address the defendant personally and (1) inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information” and (2) inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.” If Petitioner contests any allegation in the information or claims any conviction alleged is invalid – which he would have in this case had the court given him the required 851(b) colloquy – a hearing would have been held to determine any contested issues. §851(c)(1). At the hearing, the

government has the burden of proof beyond a reasonable doubt on any disputed issue of fact. §851(c)(2). *United States v. Rodriguez*, 851 F.3d 931, 946 (9th Cir. 2017).

Indeed, the courts require strict compliance with the procedural aspects of § 851(b). *Rodriguez*, 851 F.3d at 946 (“The §851(b) colloquy is not merely a procedural requirement. It serves a functional purpose to place the procedural onus on the district court to ensure defendants are fully aware of their rights”); *United States v. Ocampo-Estrada*, 873 F.3d 661, 667 (9th Cir. 2017) (vacating sentence based on failure to comply with the colloquy requirements under the statute, which renders the sentence illegal).

Here, the district court’s failure to comply with the detailed procedures of § 851 and the serious impact that the statutory mandatory minimum had on the sentence imposed on Petitioner cannot be “harmless error.” *Id.* Petitioner never ceased his continuing objections to the government’s § 851 filing and would have done so directly on the specific underlying 2002 charge because of its uncertainties had the District Court directly addressed Petitioner personally regarding the Information’s description of the specific state crime.

The trial record is clear. Petitioner Davis was arrested on March 11, 2014 on the eve of the Roger Key, a/k/a/ Luchie, trial, confronted with the most serious such charges carrying possible death or life sentence without parole coupled with law enforcement pressure to cooperate and testify for the Government. Possible cooperation and his right to a jury trial necessarily implicate his Fifth and Sixth Amendment constitutional rights.

When it became clear to the Government that he was not going to cooperate and was insisting on his right to proceed to trial, approximately seventy days before the set trial date of March 30, 2015, a Prior Felony Information under 21 U.S.C. § 851 was entered and Superseding

Indictment S2 14 Cr. 296 was filed, all on January 20, 2015. Furthermore, on March 3, 2015, twenty-seven days before trial, S3 14 Cr. 296 was filed. Crucially, before sentence, the record does not reveal any affirmation or denial of previous conviction under § 851(b).

The Prior Felony Information could have been filed at any time in the prior eight months after the first Indictment and of course, immediately doubled the Mandatory Minimum Sentence of the Petitioner facing on Count One, the narcotics conspiracy, under 21 U.S.C. §§ 841(a), 841(b)(1)(A), 846. The S2 Indictment added yet another Firearms Count for the very same murder-for-hire crime of killing Terry Harrison on September 10, 2010. Of course, that Count upon conviction requires a mandatory minimum sentence of 10 years. Finally, the S3 Indictment filed on March 3, 2015 added Count Six, yet another Terry Harrison murder count, this time under 21 U.S.C. § 848(e)(1)(A), which carries with it another Mandatory Minimum 20 years, and, by that date, only a possible life sentence but not death.

We understand the leniency the Second Circuit has shown the Government in last minute filings of superseding indictments, *United States v. Grossman*, 843 F.2d 78, 84 (2d Cir. 1988), but surely this case must test that principle. Here there was no need to add defendants, no new evidence could have supported the new Counts Five and Six because the charges pertained to the very same murder on the very same date. This was just vindictive prosecution conduct designed to punish Matthew Davis for refusing to cooperate and insisting on trial.

We recognize the broad scope of prosecutorial discretion, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1989). However, when prosecutive piling on results from retaliation for the Petitioner's exercise of his legal rights, *United States v. White*, 972 F.2d 16, 19 (2d Cir. 1992), citing *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), *Bordenkircher*, 434 U.S. at 363, this is

unacceptable. Vindictiveness must play no part in a prosecutorial or sentencing decision, *United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997), *Bordenkircher*, 434 U.S. at 363. Indeed, the Government expressly stated that a potential disposition of the case, as guided by *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), “would have resulted in far less time than the defendant would receive if he were convicted after trial”. (Tr. 3/12/15, pp.46-47). This is a presumptive vindictiveness case where there is a reasonable likelihood that vindictiveness exists, and the Government has yet to provide a reason at any stage of this criminal action or explain its violation of then Attorney General Eric Holder’s Proscriptive Policy Mandate [check cite - whether 2d Cir. affirmance] for adding the Prior Felony Information and Counts Five and Six to the charges against the Petitioner on the eve of trial. *United States v. Goodwin*, 457 U.S. 368, 373, 380 (1982).

The fundamental unfairness of this prosecutorial conduct has been fiercely criticized with reason in *United States v. Kupa*, 976 F.Supp. 2d 417 (E.D.N.Y. 2013), *aff’d* 616 Fed.Appx. 33, 2015 WL 5805096 (2d Cir. 2015).

POINT II

THE ADMISSION OF THE UNRELIABLE HEARSAY TESTIMONY OF KARRIEM THOMAS REGARDING STATEMENTS MADE BY THE DECEASED DECLARANT JERMAINE SMALLS, A/K/A PUDGE, WAS IMPROPER AND REQUIRES A NEW TRIAL FOR PETITIONER

The one count conviction of Petitioner rests virtually entirely on the hearsay testimony of government cooperator Karriem Thomas, who repeated statements allegedly made by Jermaine Smalls, a/k/a/ Pudge, an unavailable murder victim in 2012, about the Petitioner. These hearsay statements were admitted without a judicial determination of their being made as part of the same conspiracy and lack trustworthiness.

The lower court and the Second Circuit ruled admission of the hearsay testimony was allowable as a coconspirator statements under Fed.R.Evid. 801(d)(2)(E). Petitioner Davis has challenged at every stage of this prosecution that he was a member of any drug conspiracy much less than one that included either Karriem Thomas or Jermaine Smalls, a/k/a Pudge. The admission of such evidence under a Fed.R.Evid. 801 co-conspirator exception must rely on the Court's preliminary question of fact ruling under Fed.R.Evid. 104(a), *Bourjaily v. United States*, 483 U.S. 171 (1987), Fed.R.Evid. 801(d)(2)(E). The Government bears the burden of demonstrating that the exception applies, and, in doing so, must produce evidence independent of the statement showing the conspiracy and the declarant and the defendant are co-venturers in that particular conspiracy. *Federal Evidence*, 4th Edition, § 8, 60-8.62 (2013, Supp. 2015). That means Thomas, Pudge and Petitioner. Once one acknowledges that Thomas hardly knows Petitioner much less is a co-venturer and this claim relies entirely on maybe two inchoate, confusingly recounted encounters, the participation of Petitioner as a co-conspirator is a stretch too far to permit to stand. Once one discounts Thomas's hearsay testimony about Pudge's alleged statement itself, precious little remains to justify a judicial finding that Pudge or Thomas were co-conspirators with the Petitioner much less that the hearsay was in furtherance of the DTO rather than verbal chit-chats to explicate visits around the neighborhood. *See Fuson v. Jago*, 773 F.2d 55 (6th Cir. 1985) (admission of deceased co-defendant's oral statements under the co-conspirator exception violated defendant's right to confrontation and was error).

The Circuit Court concluded that there was enough evidence to determine that Petitioner was a member of a Roger Key conspiracy but the only evidence which arguably supported that theory were the challenged co-conspirator hearsay statements themselves. Petitioner's post-

arrest statements did nothing but hint that he knew Key from the neighborhood. The Circuit keeps referring to witness testimony as showing certain aspects of Petitioner participation in a drug conspiracy but it is only one witness, Karriem Thomas, that the government has to rely on, and he knows nothing about Petitioner and in a subsequent trial does not even include him among his narcotics associates.

Thomas's testimony is internally inconsistent, imprecise, self-contradictory and confusing with all the earmarks of a stitched together, manufactured narrative. He never sees Petitioner with drugs, cash or even has a direct conversation with Petitioner during the time the latter is supposed to be dealing or storing drugs.

The Jermaine Smalls (a/k/a "Pudge") comments to Thomas served no organizational conspiratorial purpose as it never caused Thomas to take any narcotics conspiratorial action in serving the interests of the drug organization. Even if one credits Thomas's testimony, the most that can be said for it, is that it might have simply identified who Davis was or might have been but served no conspiratorial purpose, because Thomas never acted with Petitioner in performing any actual narcotics behavior, at most, he was an observer and non-participant.

Finally, the Circuit relies on a purported meeting in which Petitioner allegedly acted as a narcotics conspiracy enforcer, again Thomas the source of such proof, but which is the subject of a pending new trial motion and which even the District Judge rejected at sentencing.

In other words, there is no credible evidence beyond the hearsay statements of a heavily compromised government cooperator relating the unlikely musings of an unavailable deceased drug dealer to support the "in furtherance of the conspiracy" evidentiary argument. These

lacunae fail to satisfy the *Bourjaily*, Rule 104 obligation and the requirements of Rule 801(d)(2)(E).

Petitioner maintained that even co-conspirator hearsay deserved a preliminary finding of the Petitioner's participation in the charged conspiracy and a requirement of some reliability. Simply put, the hearsay statements of the deceased Pudge as reported by cooperator Karriem Thomas are not sufficient or trustworthy enough to carry the single count guilty verdict against Petitioner.

CONCLUSION

In light of the foregoing, Petitioner requests that this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed his conviction and sentence.

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