

No. 17-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAMION HARDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Brendan White
524 East 20th Street, #6D
New York, NY 10009
(646) 303-0267
brendan@whiwhi.com

Attorney for Petitioner
Pursuant to Criminal Justice Act

QUESTIONS PRESENTED

1. Whether the Court should reject the unduly deferential standard applied by the Second Circuit with respect to the competency determination, and should determine whether that a less deferential standard should be applied?
2. Whether in order to be legally sufficient, evidence of a racketeering enterprise must demonstrate that the charged enterprise continued to exist throughout entirety of the alleged duration?
3. Whether, as urged in Petitioner's Pro Se motion, a defendant cannot be charged with conspiracy unless accompanied by a distinct overt act?
4. Whether, as urged by Petitioner Granton, the use of an anonymous jury violated Petitioner's Fifth Amendment right to Due Process and Sixth Amendment right to a fair and impartial jury?
5. Whether, as urged by Petitioner Granton, the admission of alleged prior bad acts violated Petitioner's right to due process and a fair trial?
6. Whether, as urged by Petitioner Granton, the district court's comments and questioning of witnesses violated Petitioner's right to due process?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Damion Hardy and Aaron Granton.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Southern District of New York. The Order of the Second Circuit denying panel rehearing and rehearing en banc is reprinted in the appendix at App. 10.

JURISDICTION

The initial order of the court of appeals was entered on August 21, 2017. The Petitioner timely filed a petition for rehearing, which was denied by the court of appeals by order filed November 9, 2017. This petition for a writ of certiorari is being timely filed within ninety days of the denial of the petition for rehearing, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides the following, in pertinent part:

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

United States Constitution, Amendment VI, provides the following, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury.

18 U.S.C. § 4241 provides the following, in pertinent part:

a) Motion to Determine Competency of Defendant--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

* * *

(d)Determination and Disposition--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of

the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

STATEMENT OF THE CASE

1. The charges arose in connection with criminal activity attributed to a racketeering enterprise called the "Cash Money Brothers" ("CMB"), that engaged in narcotics trafficking and violence, including several murders, in Brooklyn, New York, and other locations on the east coast. According to the Government, Petitioner was the leader of the Cash Money Brothers between 1991 and August, 2004, when he was arrested along with numerous other members of the alleged enterprise.

Petitioner was initially arrested on or about August 16, 2004, and was ordered detained since the outset of the case. Ultimately, he and co-defendant Aaron Granton were charged in a multiple count indictment alleging numerous racketeering and narcotics counts.

2. The ten-year period between initial indictment and trial was dominated by the question as to Hardy's competency to face trial. By order of September 23, 2004, the district court ordered that a full psychological examination be done. Protracted litigation and numerous additional forensic examinations occurred in the following years—including an interlocutory appeal to the Second Circuit as to whether Hardy could be administered anti-psychotic medication against his will, United States v. Hardy, 724 F.3d 280 (2d Cir. 2013)—

with the ultimate result being that on the eve of trial, and several years after the parties had agreed that Hardy suffered from paranoid schizophrenia and could not be tried, the district court changed its mind and concluded that Petitioner was in fact competent to proceed to trial without being medicated.

3. In addition to the extensive litigation regarding the issues surrounding Petitioner's competency to stand trial, and the potential that the death penalty would be sought, Petitioner also filed several pro se motions, arguing among other things that a defendant cannot be charged with conspiracy unless accompanied by a distinct overt act. The district court did not directly address those motions, and allowed the case to proceed to trial.

Following a four-week trial, the anonymous jury found all counts and racketeering acts proved against Hardy and Granton. Both were sentenced to life imprisonment.

4. Petitioner raised two issues on appeal, first that the district court committed reversible error in refusing to declare Hardy incompetent to stand trial, despite his lengthy and well-documented history of paranoid schizophrenia and his present inability to understand the nature of the charges against him and to assist in his own defense, and second, that the RICO and RICO conspiracy counts, and all other counts

alleged to have arisen out of racketeering activity, must be dismissed because the evidence was insufficient to show the existence of the charged enterprise or that Damion Hardy was employed by or associated with any alleged enterprise.

Petitioner was also granted permission to file a supplemental brief, in which he raised the arguments previously raised in his pro se motions to dismiss in the district court, on the grounds that .

5. In rejecting the arguments with respect to Hardy's competence to proceed to trial, the panel stated the following, in pertinent part:

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." Drope v. Missouri, 420 U.S. 162, 171 (1975). To find a defendant competent to stand trial, a district court must find that the government has shown by a preponderance of the evidence that the defendant has "(1) 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and (2) 'a rational as well as factual understanding of the proceedings against him.'" United States v. Morrison, 153 F.3d 34, 46 (2d Cir. 1998) (quoting United States v. Nichols, 56 F.3d 403, 410 (2d Cir. 1995)); see 18 U.S.C. § 4241(d); Brown v. Warden, Great Meadow Corr. Facility, 682 F.2d 348, 353-54 (2d Cir. 1982).

"We [will] uphold a district court's finding that a defendant is competent to stand trial unless that finding is clearly erroneous. Where the record on competency may plausibly be read to indicate the defendant may not have been competent, we still defer to the judgment of the district court, which

had the benefit of examining the defendant and hearing from the fact and expert witnesses in person." Morrison, 153 F.3d at 46 (internal quotation marks, citation, and brackets omitted).

"[D]eference is owed to the district court's determinations based on observation of the defendant during the proceedings." United States v. Vamos, 797 F.2d 1146, 1150 (2d Cir. 1986).

Applying those standards here, we find no clear error in the District Court's determination. Hardy does not appear to argue that he lacks the ability "'to understand the nature and consequences of the proceedings,'" and his challenge focuses on his ability "'to assist properly in his defense.'" Hardy Br. 27 (quoting 18 U.S.C. § 4241). As the District Court observed, however, after being medicated, Hardy was able to file pro se motions that "reflect[ed] Hardy's ability to present logical (if incorrect) legal arguments in an articulate manner," Hardy App'x 211, and his demeanor in court significantly improved. Additionally, in certain ways, Hardy exhibited a sophisticated understanding of the dynamics of a criminal case, including the advantages of cooperation with the Government. Finally, Dr. Leanne Preston-Baecht, a psychologist with the United States Bureau of Prisons—who was assigned to be Hardy's primarily clinical psychologist for four months in 2008 and from November 2011 to December 2014—deemed him competent to stand trial in November 2014, after he had been receiving medication for nearly a year (in contrast with Dr. Preston-Baecht's 2008 evaluation, undertaken prior to Hardy's being medicated, in which she had concluded that Hardy was not competent to stand trial).

It is true that the defense expert still found Hardy incompetent to stand trial—due, primarily, to Hardy's still harboring delusions about a supposed Supreme Court case that had ordered his release under Ethou law, and Hardy's insistence that, consequently, prosecutors would release him if he spoke to them. Such beliefs were clearly unsound and may have been a product of mental illness, but "[i]t is well-established that some degree of mental illness cannot be equated with incompetence to stand trial." Vamos, 797 F.2d at 1150. Moreover,

as noted, Hardy does not argue that he was unable to understand the nature and consequences of the proceedings, but argues that he was unable to assist in his defense. Although Hardy may have harbored delusional beliefs about a fictional Supreme Court case, Hardy's counsel has not asserted or even suggested that it was not possible to have Hardy consider and assist with other defenses.

Even if the question may have been a close one for the District Court deciding the matter in the first instance, it bears emphasis that, here, we are not deciding the matter in the first instance.

Giving the deference due the District Court's decision, and reviewing for clear error, the question presented on appeal is not a close one. See, e.g., United States v. Gigante, 166 F.3d 75, 84 (2d Cir. 1999) (describing competency review as "highly deferential," and observing that choosing between "two permissible views of the evidence" does not manifest clear error (internal quotation marks omitted)).

Accordingly, the District Court did not clearly err. (Summary Order at 4-5)

The panel also concluded that the evidence as to the existence of the charged enterprise was legally sufficient, stating as follows, in pertinent part:

Here, there was sufficient evidence that CMB constituted an associated-in-fact enterprise. Indeed, Defendants do not even dispute that CMB existed as an enterprise through approximately 1999. Instead, relying on United States v. Morales, 185 F.3d 74, 81 (2d Cir. 1999), Defendants argue that the enterprise did not continue, as charged in the indictment, through 2004. In particular, Defendants emphasize the following points: (a) Hardy sometimes installed others to run the enterprise while he was imprisoned and CMB's membership changed generally; (b) Hardy also became a member of another gang, the "Bloods," in 1999; and (c) the racketeering acts were committed with personal motives.

None of those points refutes the existence of the associated-in-fact enterprise in this case. Associated-in-fact enterprises need not have a fixed hierarchy as "different members may perform different roles at different times." Boyle, 556 U.S. at 948; see, e.g., Coonan, 938 F.2d at 1560 (rejecting argument that RICO enterprise ceased to exist upon leader's imprisonment because "even while in jail [he] continued to act as leader of the [enterprise] and the [enterprise's] criminal activities continued without significant disruption"); cf. Morales, 185 F.3d at 81 (concluding, upon review of an alleged nine-year enterprise, that the government "did not present sufficient evidence to show that the enterprise continued during the seven-year period . . . [in which all of] the defendants were incarcerated"). As for Hardy's joining the Bloods in 1999, the evidence indicated that Hardy joined the Bloods largely as a ruse to manipulate others; in any event, membership in one group does not disprove the existence of another group or one's membership in, or even one's leadership of, that other group—here, CMB.

Finally, even assuming it is correct that CMB members sometimes acted out of personal motivation, individuals can act with personal motivation while being a part of—and acting in furtherance of—an enterprise. (Summary Order at 6-7)

In addition to the issues raised by Hardy, co-defendant and co-appellant Aaron Granton raised three issues, in which Mr. Hardy joined: 1) that the defendants' fifth and sixth amendment rights had been violated by the district court's granting of the Government's motion for the trial to be heard by an anonymous jury; 2) that the district court had improperly admitted irrelevant and unduly prejudicial evidence of prior bad acts; and 3) the district court deprived the defendants of their right to due process through its

improper comments and questioning of the trial witnesses. Each of these arguments were rejected by the Court of Appeals in its summary order. (Summary Order at 5, 7-9) The Court did not expressly address the issue raised in the supplemental brief, but did state that “[w]e have reviewed all of the arguments raised by Granton and Hardy on appeal and find them to be without merit.” (Summary Order at 5, 7-9)

6. In his Petition for rehearing, Petitioner argued that the panel’s opinion conflicted with several other circuits with regard to both the voluntariness of the guilty plea and the effectiveness of counsel. As noted above, the Second Circuit declined to grant either panel or en banc rehearing.

REASONS FOR GRANTING THE PETITION

The Court Should Reject The Unduly Deferential Standard Applied by The Second Circuit with Respect to The Competency Determination, And Should Determine Whether That A Less Deferential Standard Should Be Applied.

1. As the Court has long recognized, to be competent to proceed to trial, it is not enough to determine that “the defendant is oriented to time and place and has some recollection of events.” Dusky v. United States, 362 U.S. 402 (1960). Rather, as the Court noted in establishing a two-pronged test for competency, the defendant must exhibit “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as a factual understanding of the proceedings against him.” Id. at 402 (1960); see also United States v. Nichols, 56 F.3d 403, 410 (2nd Cir. 1995) (applying Dusky test).

While it is true that in determining competency, the district court must focus on the defendant’s mental state at the time of trial, Nichols, 56 F.3d at 410; United States v. Vamos, 797 F.2d 1146, 1150 (2d Cir. 1986), the court may nevertheless take into account the defendant’s psychological history. Newfield v. United States, 565 F.2d 203, 206 (2d Cir. 1977). Moreover, since competency at the time of trial

is not fixed in stone, courts must remain “alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” Drope v. Missouri, 420 U.S. 162, 181 (1975); United States v. Arenburg, 605 F.3d 164 (2d Cir. 2010) (applying Drope, and remanding after concluding that district court committed legal error in applying 18 U.S.C. § 4241). A district court’s application of 18 U.S.C. § 4241 must be reversed if it “is based on either a clearly erroneous factual finding or an incorrect view of the law, or if its ruling cannot be located within the range of permissible decisions.” Id.

2. As the Court of Appeals acknowledged in its Summary Order, the issue regarding Petitioner’s competency for trial involved a long-term and undisputed serious mental illness that, at the very least, led him to continue to entertain delusional beliefs directly related to the case against him and, necessarily, to his ability to assist in defending against those charges. (Summary Order at 4) Moreover, the Court of Appeals seemingly recognized that the circumstances here made the ultimate decision on whether to have the trial proceed “a close one” for the district court, particularly in light of the competing expert testimony regarding the continuing nature of his delusions, even after being

medicated. (Summary Order at 4) Ultimately, however, the Court of Appeals acknowledged that its own precedent makes clear that considerable deference must be afforded to the district court's determination. (Summary Order at 3-4, citing United States v. Gigante, 166 F.3d 75, 84 (2d Cir. 1999); United States v. Vamos, 797 F.2d at 1150).

In light of the increased recognition of the role mental illness can play in the sphere of criminal justice, the fundamental question of how to determine whether a criminal defendant is able to assist in his own representation is an issue of great importance under any circumstances. It is particularly so here, where not only was it a close case, and where there was the highly unusual situation of federal Bureau of Prisons examiners having declared the defendant incompetent to go to trial over an extended period of time, unlike the scenarios in such cases as Gigante and Vamos. The full Court should re-examine whether the existing standard, which affords great deference to district court judges, is appropriate. Significantly, the decision here came only after the judge who had long determined Hardy to be incompetent passed away, and the judge who took over the case took a different view, thus highlighting the degree to which the nearly unreviewable degree of deference will depend principally on the accident of which judge happens to be

assigned to the case. Such an important determination should not be left to random fate, and the full Court should make that clear.

The Court Should Grant Certiorari To Make Clear That, In Order To Be Legally Sufficient, Evidence Of A Racketeering Enterprise Must Demonstrate That The Charged Enterprise Continued To Exist Throughout Entirety Of The Alleged Duration.

3. If the lengthy trial showed anything, it was that in a community plainly overrun by open-air drug dealing and the inevitable accompanying violence, at any time, any number of individuals banded together during the alleged 14-year pendency of the purported enterprise to commit a wide assortment of criminal activity. The evidence did not show, however, that the "enterprise" was an "organization" functioning as "a continuing unit." See United States v. Turkette, 452 U.S. 576, 583 (1981). In United States v. Morales, 185 F.3d 74, 80 (2d Cir. 1999), where the charged enterprise was not proved to have existed through the entire period charged in the indictment, the Second Circuit reversed racketeering conviction on the grounds that a continuing unit had not been established beyond a reasonable doubt, as required under United States v. Turkette.

Here, as in United States v. Morales, the jury was instructed that it could convict on the RICO counts and other

counts based on racketeering activity only if the specific enterprise set out in the indictment existed. (A-265-66; T-2985-86 (requiring that government prove beyond a reasonable doubt with respect to count one "first, that between approximately 1991 and August 2004, an enterprise existed").) Likewise, the prosecution acknowledged in its summation that it was required to prove the existence of a single enterprise operating between 1991 and 2004. (A-264; T-2776) The evidence at trial, however, established at most an assortment of alliances of convenience among alleged drug dealers and other criminals, working in their own self-interest, and often at cross-purposes, not the continuing "enterprise" alleged in the indictment.

And to the extent that there was evidence of violent crime committed in the latter half of the alleged time period, the evidence showed that any such crimes arose from personal disputes and efforts to avenge the murder of Petitioner's brother. Ultimately, whatever group may have come into existence in the early 1990s, during the scourge of crack cocaine the gripped the community during that time, that group had long ceased to exist by the late 1990s-early 2000s. Since that is not sufficient to satisfy to prove the existence of the RICO enterprise, the evidence was legally insufficient.

4. In addressing the sufficiency point, the Court of Appeals stated that "Defendants do not even dispute that CMB existed as an enterprise through approximately 1999," and characterized the Appellant's argument as being that the proof only failed to show that the enterprise continued all the way through 2004. (Summary Order at 6) This characterization misstated Hardy's actual argument, which was that the charged enterprise never in fact existed, that the Government sought to conjure out the evidence out of a variety of groups and individuals working in their own self-interest, and often at cross-purposes, without ever constituting a continuing group for RICO purposes. (Hardy Brf. at 54-57) Nevertheless, for purposes of this Petition, Petitioner does emphasize that the Court should grant Certiorari establish conclusively that the enterprise must have been proven to exist throughout the entirety of the alleged time period, even if there was some evidence tending to show its existence at some points during that time period.

To be sure, there was evidence that in the early 1990s, when Hardy and some of his friends were teens influenced by popular culture, they referred to themselves as the "Cash Money Boys." But, as stated in Hardy's brief, there was no continuity in that group, and within even a few years, as the drug business in Lafayette Gardens changed, and as those who

had been part of the original CMB group either left town or were imprisoned, the various individuals alleged to have been part of the enterprise worked with any number of different people in their own efforts to make money or to settle personal scores. (Hardy Brf. at 56-57)

The years in the late 1990s were significant, not because they marked the end of the enterprise, but rather because the evidence of numerous violent crimes occurring at that time, could be shown to have arisen at most from personal disputes—principally the murder of Hardy’s brother Wise—and not from enterprise-related reasons. (Hardy Brf. at 57-58) That the charged enterprise plainly did not exist by this time was further demonstrated by testimony regarding Hardy and others having allegedly become members of the ascendant “Bloods” gang at around this time. (Hardy Brf. at 58-59) While the Court of Appeals observed that “membership in one group does not disprove the existence of another group or one’s membership in, or even one’s leadership of, that other group,” (Summary Order at 6), that observation carries less weight when it is recognized that Hardy’s argument is that the charged group did not exist at all, not that he could not theoretically belong to two groups at the same time.

5. In this context, it becomes all the more problematic that the Court of Appeals failed to detail the proof that

might have demonstrated the existence of an enterprise, beyond the conclusory pronouncement that "there was sufficient evidence that CMB constituted an associated-in-fact enterprise," and failed to apply its own precedent in Morales properly to conclude that the evidence was insufficient as a matter of law as to the existence of that specifically charged conspiracy. (Summary Order at 6)

The Court should grant Certiorari to make clear that the "continuity" requirement in Turkette does in fact require proof of the existence of the enterprise throughout the charged time period, and to conclude that such requirement was not satisfied here.

The Court Should Grant Certiorari To Directly Address Petitioner's Argument In His Pro Se Motion That A Defendant Cannot Be Charged With Conspiracy Unless Accompanied By A Distinct Overt Act.

6. In a pro se motion to dismiss the fifth superseding indictment filed in the district court on March 14, 2014, Mr. Hardy alleged the following:

My name is Damion Hardy. This letter is addressing case 04-cr-00706-FB-2. If the court observes the criminal complaint, the court will see the arrest and the procedure was illegal which in result makes this whole criminal procedure illegal. In the case of an arrest, the common practice is for the procedure to start from the complaint as in this case. If the court observes the criminal complaint the court will see a narcotics conspiracy from the time period of 1992-2004, which is basically alleging there were multiple narcotics

acts committed in this one charge, there is no individual narcotics act or overt narcotics act listed. A person has to be arrested for an individual act or an overt act, not a conspiracy from one time period to another as in on the criminal complaint. As the First Session of the 113th Congress (Public Law 113-1 to 113-13) United States Code Service Title 18 Part 1 Chapter 19 Conspiracy § 371. Conspiracy to commit offense or to defraud United States reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." This law applies to a individual (single) act or a overt act but also covers this current weird and bizarre illegal arrest and procedure. I was arrested for a narcotics conspiracy from one time to another time period not a individual (single) act which would have a specific place, a specific date, and a specific time meaning location (address), year, month, day, hour, and minute the alleged crime (offense) occurred.

A person cannot be arrested for a narcotics conspiracy ranging from one time period to another alone. This charge must be accompanying a individual act or overt act which would be the "case," the narcotic conspiracy ranging from one time period to another is support for the individual or overt act which is the "case" as the narcotics conspiracy ranging from one time period to another is a "support charge."

Also a person can be arrested for multiple individual or overt acts but all or at least one of those individual or overt acts must be used or listed in the headline meaning heading of the complaint for the arrest to be legal, and to show that's what the person is being arrested for. I ask how can the person defend himself adequately when the person doesn't know what he is being charged with because there is no case meaning individual act or overt act in the criminal complaint? As proof I will give this example:

there are pretrial hearings such as the identification hearing and the Wade hearing, these hearing apply to a individual or overt act such as narcotics possession or sale, how could these pretrial hearings be conducted in such instance and situation, the pretrial hearing does not apply to the support charge, which is a narcotics conspiracy ranging from one time period to another. This is why I have been saying I don't have a case, the individual (single) or overt act is the "case." I was arrested for a simple narcotics conspiracy, which means the arrest and criminal proceeding though illegal is limited to narcotics, any RICO or other charge brought at a later time through superseding indictments can only be legal if the arrest is justified and lawful, the arrest being illegal makes anything that comes after and from that "poisonous fruit," fruit from the poisonous tree as it is ill-gotten and cannot be used. I have been superseded around 7 or 8 times and there is still no individual narcotics act produced on any of the court documents or from the government. I ask this question: why was I arrested? This shows and proves I never should've been arrested or placed in jail. I ask what makes the charges that was brought after the illegal arrest federal? Had the Government not arrested me illegally and just placed me in a federal jail they could not have tried to make any of these charges that came after the illegal arrest federal. I was not arrested for a RICO charge I was illegally arrested for an illegal narcotics conspiracy ranging from one time period to another, which is a "support charge."

There is no act (which is the case) on the criminal complaint for the charge to support. Also, as for the U.S.C.S. conspiracy statute, I ask how can this be applied to the "support charge"? It cannot be applied to the "support charge." So, if the law cannot be applied to a "charge" that the person was solely arrested for, how could the arrest be legal? A person would have to be arrested for a individual (single) narcotics act or a overt narcotics act that falls within the 5 year federal statute of limitations then there would have to be allegations along with evidence that this conduct was taking place for a certain time period to try

to bring a narcotics conspiracy ranging from one time to another which is the "support charge." For a person to be arrested for a narcotics conspiracy ranging from one time period to another there would have to be some sort of government proof ("such as wiretap, phone call, recorded conversation, etc.) that two or more are deliberately and explicitly saying and conspiring to possess, sell, or distribute narcotics from the year of 1992 to 2004, then "one or more of such persons do any act to effect the object of the conspiracy, each shall be ... imprisoned not more than five years." This must be listed and established in the heading and body of the criminal complaint, this proof cannot be used as discovery material or trial material, this proof is the cause and basis (base) of the criminal complaint and arrest. Furthermore, there is nothing in the discovery material such as recorded conversations, phone conversations, or anything incriminating to dilute the severity of the illegal arrest. I was not arrested for a individual or overt narcotics act but for a support charge which is illegal. All this proves I never should have been arrested or put in jail. The conspiracy la applies to the individual act and the overt act. This is why I have been saying I do not have a case because of the illegal arrest, which stems from there being no case (act) on the complaint which makes any criminal procedure after that illegal as everything stems from the criminal complaint, which makes it ill-gotten, poison fruit, fruit from the poisonous tree. I have explained all of this clearly to the attorneys with no results, as they cannot execute the clear, legal, truthful procedure given to them.

For the attorneys can't adequately defend me for all they know is trial defense. Furthermore, on pages 3 and 4 of the criminal complaint, there are two previous arrest that I am not being charged with, one from the year of 1993, the other from the year of 1998. These two previous arrest are on the criminal complaint illegally and are there for rap sheet like purposes as the two arrests are not headlining or in the heading of the criminal complaint, instead they are in the end of the criminal complaint close to the conclusion and are

used as examples and the two previous arrests cannot be used in federal court as they do not fall under the five year federal statute of limitations. The federal government and the U.S. Attorney cannot try to use the two previous arrest with the narcotics conspiracy ranging from 1992-2004 (one time period to another) that is on the criminal complaint to try to establish a pattern of behavior to justify the illegal arrest as the two previous arrest on pages 3 and 4 of the criminal complaint do not fall under the 5 year federal statute of limitations as I was arrested August 15, 2004. Furthermore if the court observes the first criminal complaint and the first indictment the court will see the faults and discrepancies that contributes and exposes this illegal criminal procedure. I have been requesting a copy of these documents from the attorneys for several years but have yet to receive them. I filed papers to the US. Supreme Court which may have been a writ of certiorari round the time of July 28, 1998, through September 1998, addressing the issues listed in this letter.

There papers were granted by unanimous decision. The case was decided between July 28, 1998, and July 1999. This is why the U.S. Supreme Court published in the New York Law Journal and the Criminal Law Reporter in the U.S. Supreme Court journal of proceedings section of the publications that case 04-cr-00706 (EDNY) (FB) is dismissed on January 8, 2009, and that any pending cases is dismissed on January 23, 2009. This information was published in one of the two publications on one of the following dates: January 8, January 15, January 18, January 23, January 28, all of 2008, in either volume 2, 2(a), 2(b), 3, 3(a), 3(b), 4, 4(a), or 4(b), in issue 271 or 217. I have been requesting these documents along with others from the attorneys for several years but have yet to receive them, as the attorneys can't carry out the clear, legal, truthful procedure given to them. For the attorneys cannot adequately defend me, for all they know is trial defense. Would the court obtain these documents and look into all these matters immediately so I can be released from prison immediately. (SA 5-11)

Several months later, no action having been taken by the district court with respect to the motion, Mr. Hardy filed a substantially identical motion to dismiss the indictment, accompanied by a memorandum of law in support. (SA 14-16) Mr. Hardy citing a number of cases relating to 18 U.S.C. § 371 and its predecessor statutes to argue that a conspiracy cannot be established pursuant to § 371 without proof of an overt act. (SA 14, citing United States v Rabinowich, 238 U.S. 78 (1915); Grunewald v United States, 353 U.S. 391 (1957); and numerous cases related to § 371)

To be sure, Mr. Hardy was not charged pursuant to § 371, but rather 21 U.S.C. §§ 841 and 846, and other statutes, but should the Court agree with Mr. Hardy that the principles governing § 371 properly apply here, either dismissal of some or all of the counts, or remand to the district court for further proceedings with respect to the pro se motions and the documents described in them, would be warranted, for the reasons urged in the pro se motion, including that 1) the original arrest was defective for failing to allege an overt act or a substantive offense in which the existence of an identifiable quantity of a controlled substance could be shown, and all related and subsequent counts were likewise defective; and 2) since no overt act was alleged within five

years of the date of charges being filed, all charges fell outside the statute of limitations and must be dismissed. The Court should use this opportunity to address these issues, and if it agrees with Petitioner, ultimately dismiss the charges against him.

The Court Should Grant Certiorari With Respect to The Three Issues Raised by Petitioner and Co-defendant Aaron Granton.

a) REVIEW IS WARRANTED AS THE SECOND CIRCUIT ERRED IN FINDING THAT THE ANONYMOUS JURY DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHT AND SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY

8. This Court has never expressly upheld the constitutionality of trial by anonymous jury. For the reasons discussed in greater detail in the Petition of co-Petitioner Granton, the Court should take this opportunity to address this important issue and conclude that the Petitioners' constitutional rights were violated by the unwarranted decision to try them in front of an anonymous jury.

b) REVIEW IS WARRANTED BECAUSE THE DISTRICT COURT (AND SECOND CIRCUIT) ABUSED ITS DISCRETION IN ADMITTING OVER PETITIONER'S OBJECTION NUMEROUS ALLEGED PRIOR BAD ACTS OF THE PETITIONER (ALONG WITH THE "BAD ACTS" OF OTHER INDIVIDUALS) AND SUCH ERROR WAS NOT "HARMLESS"; THE EVIDENCE WAS IRRELEVANT UNDER FEDERAL RULES OF EVIDENCE 401 AND UNFAIRLY PREJUDICIAL UNDER FEDERAL RULE OF EVIDENCE 403 AND RESULTED IN A DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL

8. To the extent that Petitioner granted raises a meritorious issue with respect to the evidence of prior bad acts, such an issue would necessarily benefit Petitioner as well.

c) REVIEW IS WARRANTED SINCE THE DISTRICT COURT MADE IMPROPER COMMENTS AND QUESTIONING OF WITNESSES BY THE TRIAL JUDGE DEPRIVED DEFENDANT OF HIS FIFTH AND SIXTH AMENDMENT RIGHT TO DUE PROCESS

9. As with the above issues, should the Court agree that Certiorari should be granted with respect to this issue, it would necessarily affect Petitioner as well, and he therefore urges the Court to grant Certiorari on this issue as well.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

Brendan White
WHITE & WHITE
524 East 20th Street
New York, NY 10009
(646) 303-0267

Attorney for Petitioner
Damion Hardy