

No. 16-4710

IN THE
SUPREME COURT OF THE UNITED STATES

Mark Anthony James — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court Of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Anthony James
(Your Name)

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N/A
(Phone Number)

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QUESTION(S) PRESENTED

1.) Did the Fourth Circuit Court of Appeals erred in denying the appellant's pro se motion with proposed supplemental brief, because the appellant was challenging the government's allegation that other investigative techniques has been tried, and/or they were too dangerous as applicable by the necessity requirement under 18 U.S.C. 2518 (1)(c.) as the investigative techniques utilized prior to the June Affidavit and Application were proving successful and there was no necessity to issue any wiretaps at that time ?

2.) Did the district court and the Fourth Circuit Court of Appeals erred in allowing the appellant's coconspirators to testify at trial to their unrelated prior bad acts even though the elements would be exactly the same, in violation of Fed. R. Evid. 404 (b.)(1.), without proper notice, in violation of Fed. R. Evid. 404 (b.)(2.), Rule 403, using the past criminal activities as direct evidence when they were not within the time frame specified in the indictment, and because the government's decision to limit the time frame of the conspiracy effectively eliminates the use of the character evidence as direct evidence when the government decided to charge the conspiracy as beginning at Least in or around July 2013 it cannot escape the evidentiary ramifications of that choice ?

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STATUTES AND RULES

18 U.S.C. 2518 (1.)(c.)

Rule 404 (b.)

Rule 404 (b.)(1.)

Rule 404 (b.)(2.)

Rule 403

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 _____; 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☒ is unpublished.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 October 11, 2017.

☐ 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: November 28, 2017, and a copy of the order denying rehearing appears at Appendix B.

☐ 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).

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:

Charlie Cade

Jerome Johnson

Reginal Alexander

Natorris Woodard

Vernon Edwards and others

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2518 (1.)(c.)

Amendment 5

STATEMENT OF THE CASE

The appellant is challenging the affirmed judgment of the Fourth Circuit Court of Appeals, and the appellant asserts that the court of appeals erred in denying his pro se motion with proposed supplemental brief. The appellant's pro se motion was challenging the government's allegation that other investigative techniques had been tried, and/or they were too dangerous as applicable under 18 U.S.C. 2518 (1.)(c.) as the investigative techniques utilized prior to the June affidavit and application were proving successful and there was no necessity to issue wiretaps at that time. The appellant's appeal attorney was presented the same materials that the attorney the appellant had in the district court which was an adopted motion, and both of the attorneys deliberately raised their own grounds and not the same grounds from the successful motion. They challenged an affidavit that they knew appeared sufficient, so the appellant states that the wiretaps should have been suppressed, because there was no necessity for them as of the June affidavit and all subsequent applications were invalid.

The district court used the admission of testimony from the appellant's co-conspirators of their brief prior bad acts, and used them as direct evidence. See U.S. v. Bertuglia, 1993 U.S. App. Lexis 30968 . The prior bad acts the co-conspirators testified about at trial were unrelated prior bad acts, in violation of Fed. R. Evid. 404(b), 404(b.)(1.) , and without proper notice , in violation of Fed. R. Evid. 404 (b.)(2.). All of the government's witnesses testified to the time frame of 2012, because they were asked about that time frame. To allow such a conviction would place the appellant in double jeopardy should charges be thereafter filed for that crime, and the defendant would then be being convicted of a crime that he wasn't indicted for. That would be a fatal variance between the indictment and the evidence, as to when the crime occurred. A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged. He is entitled to fair notice of what he is accused of, and not to be twice put in jeopardy on the accusation. See U.S. v. Berger, 295 U.S. 78, 82, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). The indictment at hand specifically states that this conspiracy began by the indictment it charges that at a time unknown to the Grand Jury but beginning at Least in or around July of 2013 to the date of the indictment

which was April 2014 for the appellant. See Trail Transcript pg. 6 lines 18-21, and pg. 504 lines 15-19. The lead agent testifies that the appellant's time frame of involvement on pg. 82 lines 22-25, and on pg. - 83 lines 1-13 were specifically between August and October of 2013. The government questions all of their witnesses about 2012 to 2013 occasions when the appellant was only charged and indicted with crimes that was supposed to occur from July 2013 to November 2013 by what the indictment charges. See Trial Transcript pg. 504 line 17. The evidence about any involvement with the appellant from 2012 could not be admitted because they were not within the time frame of the indictment . See- U.S. v. Bertuglia, 1993 U.S. App. Lexis 30968 (9th Cir. 1993). The government's substantial evidence was from the wiretaps that they had on their witness (Wright) the whole time the government was investigating this particular conspiracy, and there was no evidence or testimony to corroborate that the appellant was distributing any drugs during that time frame. The only evidence they produced from the wiretaps and their witnesses testimony were that the appellant brought a kilo each time he came to them, and the appellant only came to them on 3 occasions to equal to a total of 3 kilos that he did not even intended to distribute, nor distributed. To help a willing buyer to locate a willing seller, standing alone, is insufficient to establish the existence of an agreement between the facilitator and the seller. See U.S. v. Tyler, 758 F.2d 66 (2nd Cir.- 1985). A conspiracy to traffic drugs requires an agreement to advance further distribution. See U.S. v. Jones, 763 F.3d 777 (7th Cir. 2013). Evidence that defendants worked hand in hand throughout the process of transporting and distributing drugs is sufficient to support the inference that the two had agreed to work together to accomplish the goal of cocaine distribution. See U.S. v. Rivas, 1994 U.S. App. Lexis 2248 (7th - Cir. 1993). The evidence of the prior acts that the appellant wasn't indicted for fell under rules 404, and 403. The rule 404 is designed to avoid a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving punishment. See U.S. v. Hill, 953 F.2d 452 (9th Cir. 1991). Rule 403 excludes relevant evidence for prejudice, confusion, waste of time, or other reasons. The rule states the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair prejudice, confusing the issues, misleading-

the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The witness Steven Graham testified at trial that the last time he went to the appellant's mother house prior to his arrest to pick up cocaine was approximately maybe 6 months before his arrest. See Trial transcript pg. 283 lines 10-14, which would place him at the appellant's mother house in May or June 2013. Again the indictment states that the conspiracy began on pg. 504 Trial transcript line 17 at Least in or around July of 2013 and continuing thereafter up to and including the date of the superseding indictment, which for the appellant was April 2014. The witness Darby could not even identify the defendant, so the prosecution pointed to the appellant, and then Darby says, oh yeah I see him now . See Trial transcript pg. 215 lines 19-25, and pg. 216 lines 1-13. Even though the witness Darby could not even identify the defendant when asked do he see him in the court room he also never testifies to a timeframe of any deals that he said he had with the appellant. The witness Kelvin Alexander-Johnson testified to prior occasions with the appellant also before the conspiracy began, the first was at a trailer that Wright was renting and that was around about the month of March, April 2013, Three months before the alleged conspiracy. See Trial transcript pg. 317 lines 1-25. The second time was when Kelvin Johnson said the appellant brought a kilo to the apartment in columbia in August 2013. See Trial transcript pg. 313 lines 20-25, pg. 314 lines 1-2. Then when the prosecution asked him the questions over on pg. 318 lines 5-8 he gives a different date which was June 2013 one month before the alleged conspiracy began. The witness Randy Johnson testifies first to 2012 occasions with (Wright), specifically september of 2012. See Trial transcript pg. 335 lines 16-23. Randy Johnson also testifies in trial transcript pg. 356 lines 12-18 that they had stopped going to Eutawville to sell drugs or to see the appellant around about June 2013 one month before the investigation began. Randy-Johnson said its been a period of time with him like around June they all stopped going down to Eutawville, so thats why the appellant started bringing the drugs to Wright after Wright purchases them. Randy Johnson also testifies in trial transcript pg. 356 lines 16-25, that he only saw the appellant in columbia three times, and each time the appellant was delivering the drugs, and the date of those occasions were June 2013 until the date of their arrest in November 2013, which in all came up to a total of 3 kilos. Also See pg. 357 lines 3-15. Even though those occasions were during the time frame of the conspiracy one of the occasions wasn't it happen to occur in June of 2013 a month before what this indictment

charges. The witness Lamario Vincent Wright testifies on pg. 187 lines 2-15 to the time frame outside of the indictment just as he was asked. Wright was asked on pg. 187 line 9 about the time frame of August or so of 2012 all the way through November of 2013, when the indictment specifically charges, beginning at Least in or around July of 2013, and the witness was arrested on November 7, 2013. See Trial transcript pg. 187 line 12, Wright testified that between that time frame the appellant stored between like 50 kilos for him meaning from 0, or 1 to 50, the witness never testifies to any higher amount with the appellant, so the district court also erred in sentencing the appellant. The problem lies where the government used the 404 evidence as direct evidence, and for the district court to convict and sentence the appellant to the amount which was testified about before the specified date of the conspiracy and the appellant's defense was in fact prejudiced by disparity between the date charged and the evidence. The Grand Jury did not indict the appellant with 2012 crimes, so all the testimony of storing, distributing, and recompressing which was from the time frame of 2012 was inadmissible. The appellant argues that there was insufficient evidence to prove that he conspired to distribute any drugs on the dates specified in the indictment. See U.S. v. Tsinhnahjinnie, 112 F.3d 988 (9th Cir. 1997). The witness Wright was asked in trial on trial transcript pg. 157 lines 1-14, in addition to running dope for you to some of your customers, did the defendant have any customers of his own, the witness answered yes. Then he was asked on pg. 157 line 8, prior to your arrest in 2013 from around August of 2012 to 2013, approximately how many times do you think you fronted the defendant with kilos, and on pg. 157 line 14, the witness said like 10 to 15 times. With the substantial evidence from the wiretaps there was no fronting of any kilos, no distribution of any drugs to any customers from the appellant, and no storing of any drugs during that time frame. It is impossible for those crimes to have happened within the time frame specified in the indictment. None of the witnesses testimony of the prior acts dealing with the 50 amount, or the 10 or 15 amount was within the time frame of the specified date of the indictment, or the entire wiretap investigation.

REASONS FOR GRANTING THE PETITION

Therefore the appellant states that the reason why this petition should be granted is, because if the government cannot satisfy the necessity or meet the requirement the wiretaps would be invalid. The appellant also states that without the government using Rule 404 evidence as direct evidence there would be insufficient evidence of a conspiracy with the appellant and the coconspirators alleged in this indictment.

Therefore, the evidence of the time frame before July 2013, was inadmissible, confusing the issues, cumulative, and misleading the jury, which encouraged them to convict the appellant. The government did in fact used the 50 kilo amount to sentence the appellant when that evidence of the witness testimony was from a time frame before the indictment, which would amount to a fatal variance between indictment and evidence. The testimony of the government witnesses that involved the appellant in that time frame was to three occasions with a kilo each time from July to November 2013, and that was transporting it to the witnesses, the appellant was not acting in concert to distribute the drugs, so the appellant did not place himself in a conspiracy. For a court to allow a conviction on that evidence would have placed the appellant in danger of double jeopardy should charges be thereafter filed for that crime, and the evidence was insufficient to prove that the appellant conspired to distribute any drugs on any date within the period specified in the indictment. See U.S. v. Tsinhnahjinnie, 112 F.3d 988 (9th Cir. 1997). The problem in this case is the government failed to prove an element of the crime, and it failed to comply with the requirements of the constitution.

The appellant is seeking a reversal for insufficient evidence to convict him of the conspiracy specified in the indictment that began at Least in July 2013 to the day of the witness arrest or date of indictment which was April 2014. The witness was arrested on November 7, 2013, and the lead agent testified in Trial transcript pg. 83 lines 5-13, that the appellant did not show up on any other wiretaps or other radar of theirs for criminal activity after Lamario Wright's arrest in November 2013. The agent said that the appellant was specifically intercepted between August 2013 to October 2013. Without the evidence that the appellant was not indicted for even though the elements were the same, there was insufficient evidence to convict the appellant of a conspiracy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark Anthony James

Date: 2-7-2018