

No.

IN THE

Supreme Court of the United States

CALVIN JAMES

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals (7th Cir.)

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the federal law ought to recognize a pretrial challenge to the sufficiency of the evidence against a criminal defendant as contained in the discovery materials (i.e. should there be motion for summary judgment in criminal cases).

The district court denied James' motion on the grounds that it raised an issue that must be decided at trial. The Seventh Circuit affirmed without specifically addressing the issue. The appeals court wrote that this issue (and other issues) is either controlled by opinions of the Supreme Court, foreclosed by a prior decision of the Seventh Circuit, or were just frivolous.

Parties to the Proceedings

All parties appear in the caption of the case on the cover page.

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Appendix A: Opinion of the United States Court of Appeals (7th Cir.)

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**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

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at *United States v. James*, 540 F.3d 702 (7th Cir. Wis. 2008).

Jurisdiction

The date on which the United States Court of Appeals decided this case was September 2, 2008. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Constitutional and Statutory Provisions Involved

The issue presented does not directly involve any constitutional or statutory provision. However, the issue presented indirectly involves the Speedy Trial Act, 18 U.S.C. § 3161, et seq.

Statement of the Case

On December 9, 2004 the defendant-appellant, Calvin James ("James"), was named in an indictment filed in the United States District Court (ED-Wis), along with numerous other defendants, as being part of a conspiracy to deliver cocaine in and around the Eastern District of Wisconsin contrary to 21 U.S.C. §841(a)(1) and 841(b)(1)(A).¹ (Doc. 113) James pleaded not guilty to the charge. Later the government filed a sentencing information alleging that James was subject to an increased penalty of twenty years to life in prison pursuant to 21U.S.C. §851(a), 846, and 841(b)(1)(A).

A. Pretrial Motions

James filed a number of pretrial motions including a motion to dismiss on the grounds that even if the evidence is viewed in the light most favorable to the government there was no evidence that James was part of the conspiracy alleged in the indictment. (Doc. 249). The government did not respond to James' allegation that it (the government) could not raise a material issue of fact as to James' guilt. Rather, the government flatly argued that the court could not decide the issue as a pretrial motion because the indictment properly alleged the elements of the offense and, therefore, James' motion required a trial on the general issue. (Doc. 364)

The magistrate recommended that James' motion be denied (Doc. 397) and James objected (Doc. 406). The judge adopted the magistrate's recommendation that James' motion be denied. (Doc. 563).

¹ The case was known locally as the "Cherry Street Mob" case.

B. The Jury Trial

Beginning on July 17, 2006 and continuing through July 26, 2007 the case was tried to a jury. James made a Rule 29 motion for directed acquittal at the close of the government's case. (Tr. Tran. 1554). The court denied the motion. (Tr. Tran. 1569 *et seq*) The jury returned a verdict finding James guilty of being a part of the conspiracy alleged in the indictment.

The court ordered that a presentence investigation be conducted.

C. Sentencing

James filed a number of objections to the presentence investigation report. (Doc. 953) These objections included an objection to ¶365 which suggested that the trial court impose a two point enhancement because, "[T]rial testimony established the defendant was known to carry a firearm in his role as Mr. Huff's protector and driver when the defendant accompanied him on drug deliveries and to pick up money from drug sales." (Doc. 953).

At sentencing the court held a hearing on the objections. James testified at the sentencing hearing that he did, in fact, sell "dime" quantities of drugs in Lisbon Square in the late 1980's (Sent. tran. p. 13) However, James explained that he went to prison 1991 for selling drugs and, after that, he was a user but not seller. (Sent. tran. p. 15) James admitted that during the late 1990's and the early 2000's

he was friends with Dale Huff. (Sent. trans. p. 18) James testified that although he knew that Huff was a drug dealer he (James) never sold drugs for Huff. This was primarily because Huff did not trust James (due to his drug addiction). *Id.* James would, however, drive Huff around town. *Id.*

Finally, James testified that during the entire time he lived in the Cherry Street area he never carried a gun. (Sent. tran. p. 25)

James' counsel argued to the court:

[I]f on July 13th, the day before the trial started, one were to take the time to go through the discovery materials provided, page-by-page, you would find that Calvin James' testimony from the witness stand today is practically 100 percent consistent with what was in the discovery materials provided to us.

Nobody claimed that Calvin James was running drug houses. Nobody claimed that Calvin James was doing hand-to-hand deliveries, or having guns, or anything like that So if anybody has a right to be incredulous, it's me. Because what Mr. James had to say from the witness stand is consistent with the government's own investigation. That investigation changed dramatically once the jury was sworn and these people who are facing life sentences started testifying.

(Sent. Tran. p. 46, 47).

The trial court found that all of the drug weight should be attributable to James, placed him at a level 38, and also found that he possessed a firearm in

connection with the offense. The court reasoned:

As I have said this afternoon, the Court of Appeals will have an opportunity at the appropriate time to review the trial transcript, to review the findings that this Court has made this afternoon, and if the Court be in error, you will have at least 3, possibly 10 other Judges who will have an opportunity to reconsider all of this And on the question of the firearm enhancement, once again when we're talking about this quantity of drugs, as squared against the testimony particularly of weapons being in traps in automobiles, and associated with the drug trafficking culture, I am simply- - it defies reality, and it more to the point defies the evidence to adopt Mr. James' view that he wasn't involved with any firearms in connection with the activities that underlie this case.

(Sent. Tran. 54).

The court then sentenced James to thirty years in prison. (Sent. Tran. p. 69; Doc. 1050).

James timely filed a notice of appeal to the United States Court of Appeals (7th Cir.) On appeal James raised three issues: (1) Whether the trial court erred in denying his pretrial motion to dismiss on the grounds that, assuming all of the government's evidence to be true, the evidence was insufficient to convict James of being a party to the conspiracy alleged; (2) Whether the evidence was sufficient, as a matter of law, to support the jury's verdict finding James guilty as charged; and, (3) Whether the trial court erred, for sentencing purposes, in finding that James

used a firearm in the commission of the crime.

On September 2, 2008 the Seventh Circuit issued an opinion affirming James' conviction in all respects.

Statement of the Facts

A. General Overview of the Evidence

The evidence presented at trial was almost entirely the testimony of cooperating defendants. It is a monumental task to present this disparate and contradictory testimony in an understandable manner while at the same time making appropriate citations to the record. Therefore, as a means of putting the statement of facts into a context for the reader, this general overview is first presented.

Starting in about 1988, Calvin James, Kinyater Grant, Percy Hood, and Marlon Hood, were selling small amounts of powder cocaine in the "Lisbon Square" area of Milwaukee. Lisbon Square is near 22nd and Cherry Street. There was testimony that during this time the young men would stand on a street corner and literally sprint to the customers. The first one to arrive got the sale. Eventually, each of these young men went to prison for a time.

Beginning in about 1997, though, Dale Huff graduated to selling kilograms of cocaine in the Cherry Street area. Eventually, in about 2003, Huff opened a drug house on 23rd and Cherry. Testimony suggested that James may have assisted

Huff at that house by answering the door when customers arrived. James, though, had a severe drug problem and, therefore, he was not well trusted around drugs. Instead, Huff employed James as his driver and, in exchange, Huff gave him clothes, food, and probably crack cocaine.

The house on 23rd and Cherry closed in late 2003 when Huff went to jail. During this period of time, other drugs houses were operating in the area. They were run by Percy Hood and his associates.

Huff got out of jail in late September, 2004 and then opened a drug house at 30th and Lisbon Street in Milwaukee. Again, there was testimony that James may have assisted Huff in operating that drug house. Unfortunately, this assistance was short-lived because Huff suspected James of stealing drugs or money. Therefore, Huff beat up James and kicked him out of the house. The defendants in this case were arrested in late November, 2004.

B. Testimony of Government Witnesses

By almost all accounts, Dale Huff was a large-scale cocaine dealer in the Milwaukee area dating back to as early as 1999. (Doc. 1082: 483) After being arrested, Huff cooperated with the government and testified at trial. Huff claimed that when he opened a drug house in 2003 he recruited James to sell drugs for him. (Doc. 1082: 548). Huff explained that James also worked at a car wash and that he would wash cars and sell his (Huff's) drugs (Doc. 1082: 554). Huff believed that

James was not a good drug dealer because he tended to use most of the drugs he was supposed to sell. (Doc. 1082: 566)

In 2003 Huff went to jail and his plan became that, when he got out, he would go to Texas. Once Huff got back onto the street, though, he learned that several of his friends (Mokie, Calvin James, JJ, and Kinyater Grant) were not doing well while, at the same time, some others in the area (Percy Hood, Marlon Hood, and Joseph Gooden) were selling a lot of crack cocaine out of a nearby house. (Doc. 1082: 585 to 587).

Huff gave numerous interviews to law enforcement concerning his involvement with selling cocaine. Huff admitted that he spent as much as six hours talking to government agents and never once mentioned Calvin James. (Doc. 1082: 662) The first time Huff ever told anyone that James was involved in selling drugs was one week before the trial started. (Doc. 1082: 663)

Kinyater Grant testified for the government that in 1996 he and James were "partners" in selling drugs out of James's mother's house on 22nd and Cherry Street in Milwaukee. According to Grant, they were only partners for several weeks because James was always "messing the money up" by buying clothes or by smoking marijuana. (Doc. 1083: 900). Grant told the jury that later, in 2003 or 2004, he was involved in opening the drug house on 23rd and Cherry. Grant claimed that James was involved in that house also; however, Grant, like the others, never mentioned James in his initial debriefings. (Doc. 1083: 965)

Grant was clear, though, that when it came to money on Cherry Street it was not "all for one and one for all." (Doc. 1083: 983)

According to Marlon Hood, James was Huff's driver and, in return, Huff took care of him by buying him clothes and food. (Doc. 1083: 1074). Again, Hood gave a six page pretrial debriefing statement to agents and in that entire statement he never mentioned James. (Doc. 1083: 1079)

Percy Hood concurred that Calvin James was a poor drug dealer because he was "doing more drugs than selling them." (Doc. 1084: 1375) Specifically, Hood told government agents that, "Tab (James) is a low level worker for Dale Huff who performs minor tasks. Huff doesn't trust Tab to do anything else because Tab is a dope fiend." (Doc. 1083: 1418)

Kevin Arnett testified that he knew James in the early Eighties but he never knew James to be selling drugs. (Doc. 1080: 51) Much later, after Arnett relapsed into drug use, he claimed there were occasions when he bought drugs at a house run by "Team" (Huff), "Heavy", and "Yat" (Kinyater Grant). (Doc. 1080: 76). Arnett claimed that from time-to-time during this period he would see James at the house (Doc. 1080: 77). Arnett also claimed that there were occasions on which he would buy cocaine directly from James. *Id.* Significantly, though, on the day Arnett was arrested on this case he was interviewed by the police and never told them that he bought cocaine from James. (Doc. 1080: 120). Arnett claimed that this was because he did not know who Calvin James was at the time (i.e. suggesting that

Arnett knew James by his nickname "Tab"). *Id.* However, this misconception was promptly clear up:

Q Just so we're clear, Mr. Arnett, you told police in December, 2004, when your memory was clear, that you never purchased cocaine from Tab, right?

A Correct.

(Doc. 1080: 121, 122) Arnett also agreed that the first time he ever told anybody that he bought cocaine from James was two weeks before the trial started. (Doc. 1080: 127) However, Arnett insisted that he had seen James with cocaine on at least three occasions and, on one of them, it was a "golf ball" sized wad. (Doc. 1080: 187)

Joseph Gooden also testified for the government. Generally, Gooden claimed that he met Huff in the summer of 2003 and shortly thereafter Huff took Gooden to the drug house on 23rd and Cherry. At this drug house Gooden, who did not know James at the time (Doc. 1081: 345), claimed to have observed a scene in which James was "bagging up" cocaine at the kitchen table but, then, whenever the door bell rang, James would run to the door and serve the customers all the while on the living room floor "Paul and Kilo" were playing dominoes (Doc. 1081: 346, 350) Gooden claimed that James was one of the people who made money selling cocaine out of the house on 23rd and Cherry Street. (Doc. 1081: 237)

This house stayed open for only two or three months, though, because Huff

went to jail in October, 2003. (Doc. 1081: 357) After the Cherry Street house closed Gooden went to work selling drugs for "Rick D and Ted Robertson." (Doc. 1081: 358) Then, in July, 2004 Gooden switched jobs and started working out of a house on Vliet Street with "P Dog" (Percy Hood). (Doc. 1081: 358)

In September, 2004, Huff got out of jail, and Gooden testified that he, Gooden, Kinyater Grant, and Calvin James went to a house on 30th and Lisbon and, while there, Grant pulled a "nine piece" (nine ounces of crack cocaine) out of a garbage can. (Doc. 1081: 283). According to Gooden, they let James "try it out" to see whether it was good. (Doc. 1081: 284). Then, "Me, Yata (Grant), Calvin James, and Kilo (Perkins), we walk around on 23rd, around the neighborhood on Juneau, and tell them we got a new house on 30th and Lisbon, come through, you know . . . " (Doc. 1081: 284)

James' stay at the house on 30th and Lisbon was very short-lived, though. Gooden explained that on one occasion shortly after the house opened Huff discovered that some crack was missing. Although James denied being the culprit Huff "punched him" a little and kicked him out of the house. (Doc. 1081: 297-298) James then went to live at his girlfriend's house.

Thereafter, no one allowed James to work selling drugs because "he would smoke it or mess it up." (Doc. 1081: 299)

The house on 30th and Lisbon stayed open for a very short period of time also and, according to Gooden, he was working closely with James during that period of

time (Doc. 1081: 361); nonetheless, when police arrested Gooden on December 1, 2004 and interviewed him, Gooden never mentioned anything about meeting Huff at the house on Cherry Street nor anything about seeing James bagging up cocaine there. (Doc. 1081: 366). In fact, Gooden never mentioned at all that James had any involvement in selling drugs for the Cherry Street Mob. (Doc. 1081: 368)

Reasons for Granting the Petition

I. The Supreme Court should grant review for the purpose of establishing a pretrial procedure by which a criminal defendant may challenge the sufficiency of the evidence against him.

The time has come for the Supreme Court to reconsider the long-standing philosophy that a criminal defendant ought not be able to challenge the grand jury's probable cause finding. As will be set forth in more detail below, large, multiple defendant conspiracy cases, present a challenge to the existing rules of criminal procedure. The protection afforded by a grand jury in such cases is minimal. This is because such cases almost always warrant a "complex" designation under the speedy trial statute. Thus, a defendant may be indicted on the barest of probable cause and he will then be detained for years awaiting trial. During that waiting period, the the evidence against the defendant tends to accumulate as a number of the codefendants settle their cases and begin cooperating with the government. In a very real sense, then, the defendant is detained while the government builds a case against him. A procedure, such as the one suggested by James in his pretrial motions, would offer protection against such governmental over-reaching.

In its effort to address the illicit drug problem in this country, the government has increasingly used the tactic of indicting numerous individuals in large drug conspiracy cases. In the Eastern District of Wisconsin it is not unusual for thirty to fifty persons to be joined as codefendants in a single indictment. In the present case there were approximately thirty individuals joined. These large

conspiracy cases present numerous procedural challenges for the courts.

Firstly, the cases are almost always designated as complex cases and, therefore, the speedy trial provisions of 18 U.S.C. § 3161, *et seq.*, are tolled. Given the large amount of cocaine that typically passes through such large conspiracies the statutory minimum penalties and the potential sentencing guideline ranges are usually extremely high. Consequently, many defendants are detained pending trial. Unfortunately, the period of detention prior to trial in a complex case is on average one to three years. Thus, those defendants who cannot be released on bail are jailed for up to three years based only on a grand jury finding of probable cause.

There is, of course, a way for the defendants to gain release on bond. Many times this involves cooperation with the government. The defendant agrees to be "debriefed" and, thereafter, the government withholds any objection to a bond motion. The problem with this procedure ought to be obvious. Those defendants with the most information (i.e. those defendants who are most guilty) are the ones best able to secure their pretrial release. Whereas, those defendants with little information or those who are actually innocent are beggarly in the currency necessary to secure their pretrial release (i.e. information for the government). These are the individuals, then, who tend to stay in custody.

While they wait in custody for their trial date, though, the situation invariably worsens for them. The debriefing defendants, anxious to provide the government with "valuable" information so as to secure their release, are busy

building the government's case against those in-custody defendants who cannot or who will not cooperate. All but the most naive of persons ought to be extremely skeptical of the credibility of such "witnesses."

The reluctance of the trial courts to grant bills of particulars exacerbates the problem. Where a defendant, such as James, moves for a bill of particulars he is usually denied it on the grounds that the indictment itself fairly apprises the defendant of what it is that he must defend against. Of course, this is only partially true. Certainly, indictment informs the defendant of *what* he is charged with; however, it gives little or no insight as to what evidence there is to suggest that the defendant is guilty. Thus, defendants are left in custody to wonder what the evidence against them will be.

This is precisely what happened to the petitioner, James, in this case. Years went by where it appeared that there was little or no evidence to suggest that he was part of the conspiracy alleged. Then, only weeks before trial, James was provided with a number of statements from "cooperating" defendants who, on their fourth, fifth, or sixth debriefing, finally "remembered" that James was part of the conspiracy.

For his part, James did his best to avoid his fate. At the very outset of the case he scrutinized the evidence against him, as provided to him in the discovery materials; and, finding no evidence against him, moved to dismiss. The basis of the motion was that even if everything contained in the discovery materials was

absolutely true there was no evidence that he played any role in the conspiracy alleged. The district court denied the motion with little analysis, ruling that this was an issue that must be decided at trial not in a pretrial motion. The Seventh Circuit was even more dismissive, refusing even to address the issued.

Despite the important role that the grand jury serves in protecting against prosecutorial over-reaching, more is required in large conspiracy cases such as the present one. Where there are fifty defendants it is difficult to believe that the grand jury's decision to indict is little more than a rubber stamp of the wishes of the government prosecutors. The grand jury certainly cannot carefully scrutinize the entirety of the evidence in making its probable cause determination.

Each defendant, though, ought to be comprehensively scrutinizing the evidence. If, at the outset, he finds that there is no evidence against him, why should he not be able to short-circuit the process with a motion to dismiss? Responding to such a motion would certainly not be a burden to government prosecutors. The prosecutors must know the evidence against each person they have indicted. Such a motion to dismiss could be defeated by the government, then, by merely demonstrating that there is a material issue of fact for trial. Likewise, ruling on such motions would not be a burden for the district court. The judge would not be required to review the entirety of the discovery. Rather, the judge would only have to review the submission of the parties and determine whether there was any material issue of fact for the jury to consider at trial.

This procedure would permit the defendant to obtain a dismissal- and his release from custody- unless and until the government gathers enough evidence to establish probable cause. Likewise, the procedure would better put the defendant on notice as to what it is he must be prepared to defend against in the event there is a material issue of fact.

Conclusion

For the foregoing reasons it is respectfully requested that the Supreme Court grant this petition of certiorari.

Dated this _____ day of November, 2008.

Law Offices of Jeffrey W. Jensen
Attorneys for Petitioner

By: _____
Jeffrey W. Jensen

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Proof of Service

I, Jeffrey W. Jensen, attorney for the petitioner, do swear or declare that on the _____ day of December, 2008, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Michelle Jacobs, Asst. United States Attorney
United States Courthouse
517 E. Wisconsin Ave., Suite 1515
Milwaukee, WI 53202

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D. C. 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at Milwaukee, Wisconsin, this ____ day of December, 2008.

Jeffrey W. Jensen

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3,697 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at Milwaukee, Wisconsin, this ____ day of November , 2008.

Jeffrey W. Jensen