No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ERIC HAYES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE I

Whether the Third Circuit's denial/rejection that reasonable jurists would not debate the District Court's determination that Mr. Hayes convictions were not obtained in violation of the Double Jeopardy Clause, Blockburger v. United States, 284 US 299(1932); United States v. Barrington, 806 F.2d. 529(5th.Cir.1986); is reconcilable with the law of Whalen v. United States, 445 US 684, 100 S.Ct. 1432, 63 L.Ed.2d. 715(1980), and Illinois v. Vitale, 447 US 410, 100 S.Ct. 2260, 65 L.Ed.2d. 228(1980), and its progeny?

ISSUE II

Whether the Third Circuit's neglect to determine de novoly issues arising from the defendants Sixth Amendment, are reconcilable with law of Daubert v. Merrell Dow Pharms. Inc., 509 US 579, 125 L.Ed.2d. 469, 113 S.Ct. 2786(1993) and Crawford v. Washington, 541 US 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d. 177(2004), and its progeny?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

LIST OF PARTIES

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

Eric Hayes, respectfully petition the Supreme Court of the United States for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, rendered in Case No.#:18-1055 in that court on July 6th., 2018, affirming and/or denying the judgment and/or sentence entered by the District Court for the Middle District of Pennsylvania, Harrisburg Division.

OPINION BELOW

An unpublished opinion of the United States Court of Appeals for the Third Circuit, United States v. Eric Hayes, Case No.#18-1055, BLD-242, June 21,2018, CA No.18-1055, attached as Appendix A to the Petition. A published order denying rehearing and rehearing en banc was issued on August 9, 2018, and is attached as Appendix B to this Petition.

JURISDICTION

The Court of Appeals filed its Opinion in this matter on July 6, 2018, and denied rehearing and rehearing en banc on August 9, 2018. This Court has jurisdiction under 28 U.S.C.§1254(1) and 28 U.S.C.§2101(c).

STATUTORY PROVISION INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> "No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

> " In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation;...and to have the assistance of counsel for his defense."

3. The statutes involved and under review are:

> 18 U.S.C.§371:
> 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 on 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.
>
> 18 U.S.C.§1952(a)(3):
> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to-
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> 18 U.S.C.§2421:
> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.
>
> 18 U.S.C.§2422(a):
> (a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisonment not more than 20 years, or both.

4. The statute under which Petitioner sought habeas corpus relief was 28 U.S.C.§2255 which states in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct sentence.
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusions of law with respect thereto. If the courts finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment aside and shall discharge the prisoner or sentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

On December 8, 2005, Mr. Hayes was charged with fifteen others in a thirty-three count superseding indictment charging conspiracy and interstate travel in further of prostitution under 18 USC§371 and §1952(a),(Count 1&2). Count 1 specifically charge conspiracy to commit the following offenses:(1) 18 USC§2421(Transportation Generally); (2) 18 USC§2422(a)(coercion and enticement); and (3) 18 USC§1952(a)(Transportation in Aid of Racketeering Enterprises).

In addition, Mr. Hayes was charged with persuading, inducing, enticing and coercing, and causing individuals to travel in interstate commerce to engage in prostitution, under 18 USC§2422(a), in Count 18 of the indictment.

Finally, he was charged with transportation of an individual in interstate commerce with intent to engage in prostitution, in violation of 18 USC§2421, transferred and charge in Count 3 from another case, 1-CR-07-293.

Mr. Hayes and Co-defendant Terrance Williams chose to go to trial. On October 12, 2007, after a ten-day trial, Mr. Hayes was convicted on all four counts. With regard to Count 1, however; Mr. Hayes was not convicted of coercion and enticement as charge under 18

USC§2422(a).(Doc.¶1144).

The Court sentenced Mr. Hayes to 420 months imprisonment.(Doc.¶1678).

The United States Court of Appeals for the Third Circuit affirmed his conviction and sentence on June 29, 2011(Doc.¶1994).

On November 5, 2012, Mr. Hayes moved the court to vacate, set aside, or correct his sentence.(Doc.¶2048).

On November 16, 2012, and February 11, 2013, he filed supplemental memoranda in support of his §2255.(Doc.¶2089). The United States filed a response on April 22,2013.(Doc.¶2122).

On May 6, 2013, Mr. Hayes filed for a continuance, to rebuttal to government response to his §2255.(Doc.¶2126).

On May 23, 2013(Doc.¶2126) was granted(Doc.¶2129), but Mr. Hayes was given to file his response by June 30, 2013.

On June 1, 2013, Mr. Hayes filed for extension to properly prepare and research his case, and requested to subpoena important documents in preparation for his rebuttal motion.(Doc.¶2136 & ¶2137).

On April 2, 2014, the district court ordered the United States shall submit copies of government Exhibit 2.1A and 2.1B to the Court within seven days of the date of this order.(Doc.¶2145).

On June 13, 2014, Honorable Judge Yvette Kane denied as moot, motion for free sentencing transcript and the

thirty(30) day extension of time(Doc.¶2054 & ¶2136).

On August 5, 2014, Mr. Hayes §2255 and related documents were denied, but his §2255 on grounds that counsel provided faulty advice(Doc.¶2139@3), is timely, but denied on the merits; and COA shall not issue.(Doc.¶2157).

On August 22, 2014, Mr. Hayes filed a motion reconsideration of Doc.¶2157, denial.(Doc.¶2159).

On February 17, 2015, Mr. Hayes while awaiting the status of his motion to reconsider, filed supplement motion.(Doc.¶2193).

On October 17, 2016, Mr. Hayes once again trying to inform himself with the status of his case filed a letter.(Doc.¶2222).

On September 7, 2017, the Honorable district court judge denied the motion to reconsider.(Doc.¶2246).

On November 13, 2017, Mr. Hayes filed for a copy of his docket sheet to once again inform himself with the status of his case, due to being transferred to another prison.

On November 20, 2017, Mr. Hayes filed for an extension of time to file Appeal.(Doc.¶2260).

On or about January 16, 2018, an Order to stay, pending disposition of the motion, for extension of time to file a notice of appeal pursuant to Fed.R.App.P. 4(a)(5) was issued by the United States Court of Appeals for the Third Circuit, Exhibit I.

On or about February 7, 2018, Mr. Hayes, submitted his C.O.A.,-This document exists within the court files.

On or about February 14, 2018, the United States Court of Appeals for the Third Circuit, granted the extension, see: Exhibit II.

On or about June 21, 2018, the United States Court of Appeals for the Third Circuit, denies Mr. Hayes, C.O.A. for lack of jurisdiction because jurists of reason would not debate the district court's determination that Hayes' claims lack merit, see: Appendix A.

On or about July 18, 2018, Mr. Hayes, files for an rehearing en banc.

On or about August 9, 2018, the United States Court of Appeals for the Third Circuit denies Mr. Hayes, SUR Petition for rehearing en banc, see: Appendix B.

REASON FOR GRANTING THE WRIT

The Court should grant the writ because the circuit court departed from the established rules of Whalen v. United States, 445 US 684, 100 S.Ct. 1432, 63 L.Ed.2d. 715(1980), and Illinois v. Vitale, 447 US 410, 100 S.Ct. 2260, 65 L.Ed.2d. 228(1980), requiring the Supreme Court modified abstract approach to the double jeopardy clause that was employed by the court on direct and/or collateral appeal. The law of the Third Circuit Court of Appeals represents a radical departure from Whalen, Vitale and its progeny, on questions of extreme importance. The Third Circuit failed to recognize that, Whalen and Vitale, the Court modified the analysis and meaning traditionally given to Blockburger. The Blockburger test has traditionally focused "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Illinois v. Vitale, 100 S.Ct. at 2265. Whalen and Vitale make clear, however; that the requisite elements must be examined from the vantage point of the particular case before the Court.

The Blockburger test, as modified in Whalen and Vitale, comes into play only after other techniques of statutory construction have proven to be inconclusive. The first step is for the court to inquire "whether Congress intended to punish each statutory violation separately," Jeffers v. United States, 432 US 137, 155, 53 L.Ed.2d. 168, 97 S.Ct. 2207(1977). To determine the congressional intent it is necessary to examine the statutory language and the legislative history, as well as to utilize other techniques of statutory construction. See Whalen, 100 S.Ct. at 1437. The Court reaches the Blockburger test only when those prior techniques of construction have failed to resolve the question

of whether the legislature intends to allow cumulative punishment for violations of two statutes.

In Whalen v. United States, 445 US 684, 100 S.Ct. 1432, 63 L.Ed.2d. 715(1980), decided in April, the Supreme Court reviewed cumulative punishments imposed under District of Columbia rape and felony murder statutes. The two violations arose out of the same criminal episode. The rape statute in question was a single purpose statute, prohibiting no crime other than rape. The felony murder statute was written in the alternative. It defined felony murder as any homicide perpetrated during the course of any of six specific felonies, including rape, robbery, kidnapping and arson. Had the Court applied the Blockburger test to the statutes as they stood, it would have found that they created distinct offenses, because each statute required an element that the other did not. But before it applies the test to a multi-purpose criminal statute, the Court reasoned, it must construct from the alternative elements within the statue the particular formulation that applies to the case at hand. It should rid the statute of alternative elements that do not apply. It must, in other words, treat a multi-purpose statute written in the alternative as it would treat separate statutes. The theory behind the analysis is that a criminal statute written in the alternative creates a separate offense for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would. After this process of statutory reformulation is applied to the statutes in the case before it, a court then determine whether the two offenses in question should be characterized under Blockburger as distinct offenses authorizing cumulative sentences.

After reformulating the felony murder statute before it in Whalen, the Court found that rape is a lesser offense included in felony murder, because all the elements of rape are included within the elements required in a felony murder case based on rape. Because the statutes merged under the revised formulation of the Blockburger test and because of the established rule of construction that ambiguity concerning the force of criminal statutes should be resolved in favor of lenity, the Court held that cumulative punishment would offend the Double Jeopardy Clause. 100 S.Ct. at 1439.

Illinois v. Vitale, 447 US 410, 100 S.Ct. 2260, 65 L.Ed.2d. 228(1980), a double jeopardy case decided in June that involved successive trials rather than cumulative punishment, contains a similar approach to the Blockburger question. The Court extended the Whalen analysis as it reformulated the statutes at issue in order to isolate the alternative applicable to the particular case before it. In Vitale, the state had prosecuted the driver of an automobile involved in a fatal accident for involuntary manslaughter after convicting him of failing to reduce speed to avoid the collision, a misdemeanor. The involuntary manslaughter statute in question criminalized "reckless" homicide. The Illinois Supreme Court held that the second prosecution constituted double jeopardy.

The United States Supreme Court recognized, as did Illinois Supreme Court, that the Illinois involuntary manslaughter statute, unlike felony murder statutes, is not a statute expressly written in the alternative. But the Court noted the word "reckless" contains possible alternative elements beyond the mere failure to slow sufficiently to avoid an accident. The Court pointed out

that the word could contain as well, for example, a failure to keep a proper lookout. 100 S.Ct. 2266-67. The Court thus extended the process of statutory reformulation first set out in Whalen. In Whalen it identified alternative formulations of a felony murder statute by separating the felonies listed in the statute from each other. In Vitale it recognized that that process of reformulation could be applied to distinguish multiple possible meaning contained within a single word. The two cases redefine the task faced by courts reviewing double jeopardy claims: before applying the Blockburger test they must narrow the statute to be analyzed until it includes only the alternatives relevant to the case at hand.

The Court states in each opinion, however, that the Blockburger test in its modified form still "focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial," Vitale, 100 S.Ct. at 2265, or "the facts alleged in a particular indictment." Whalen, 100 S.Ct. at 1439(emphasis added). Courts have always looked to the law the indictment claims the defendant violated. If they did not do so, they would not know even what statutes are at issue under the Blockburger rule. What the reviewing court must do now in applying Blockburger is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.

The Court's modification of the Blockburger test in its original, abstract form arises from a pervasive change in the criminal justice system noted by the Court in previous opinions- the increasing volume, complexity, vagueness and overlapping nature of criminal statutes. The purpose of the Double Jeopardy

Clause is to prevent trials and punishment that do not advance the deterrent and retributive purpose of the criminal justice system. Multiple punishment for multiple crimes or different criminal events advance those ends. Cumulative trials and punishments under several statutes that punish the same basic elements of wrongful conduct have little additional deterrent value but simply impose unnecessary additional pain on the defendant and wasteful costs on society.

When statutes have a single deterrent purpose and are well drafted and simple, it is fairly easy to determine the category of conduct to be deterred. All that is necessary is to look at statutes themselves in the abstract, for the statutory range of possibilities is easy for the mind to grasp.

On the other hand, a statute that is multi-purposed and written with many alternative, or is vague and unspecific, may have many meanings and a wide range of deterrent possibilities. Its meaning is more difficult to grasp in the abstract. The meaning of the statute, the precise definition of the criminal cause of action, depends more heavily on prosecutorial and judicial interpretation. The content and relationship of various criminal causes of action created by complex, overlapping, and vague statutes are worked out over time by successive judicial decisions made in response to the theories of prosecutors and defense lawyers in the cases at hand. It therefore makes more sense to ascertain the operation and deterrent purpose of such statutes for double jeopardy purposes by determining-the legal theory-that constitute the criminal causes of action in the case at hand.

In applying this mode of double jeopardy analysis to the case before us, the Court must first isolate the applicable elements of the Travel Act, a multi-purpose statute written with alternative jurisdictional elements and identifying alternative

wrongs. It is obvious after Whalen and Vitale that the Supreme Court must eliminate the inapplicable alternative jurisdictional provisions(use of interstate facilities) and the inapplicable substantive provisions(narcotics, extortion, bribery, etc.).

The same problem in a different form arises because of the governments use of section 2(b) of Title 18, the aiding and abetting statute. The government seeks to expand the reach of the Travel Act in this case by using that section, which states that whoever "causes an act...which if directly performed by him...would be an offense...is punishable as a principal." Use of the abettor statute eliminates the requirement that the defendant travel so long as he causes another to travel. Here the One Travel Act count do not charge that the defendant traveled in interstate commerce himself, as the statute requires on its face. Rather, they charge that he "caused" a woman to travel with the intent to carry on prostitution. The woman he caused to travel across state lines was the alleged prostitute named in the Mann Act count. Thus, the defendant is effectively charged in both the Mann Act and the corresponding Travel Act counts with transporting a woman across state lines for purposes of prostitution. Furthermore, the Travel Act count then adds an additional element in order to conform to the statute: the performance of an additional unlawful act connected with prostitution once across the state line.

Therefore, the eliminating of the inapplicable alternative elements of the Travel Act conjoined with the aiding and abetting statute, this Court should find that the elements of the Travel Act offense are identical to the Mann Act offense except that they add the additional element of conduct in furtherance of prostitution after transportation across state lines for that purpose. The offense therefore merge for purpose of the double

jeopardy prohibition, and the cumulative sentences are forbidden.

B. This Court should further rectify errors committed by the lower courts, and grant the writ on the premises established in Daubert v. Merrell Dow Pharms. Inc., 509 US 579, 125 L.Ed.2d. 469, 113 S.Ct. 2786(1993), Crawford v. Washington, 541 US 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d. 177(2004), and the Federal Rules of Evidence, Rule 701, 702, 901, and/or 1002, because the lower courts have wavered from these established rules by the Supreme Court.

In Daubert v. Merrell Dow Pharms Inc., 509 US 579, 125 L.Ed.2d. 469, 113 S.Ct. 2786(1993), the Supreme Court set the standards for determining the admissibility of scientific or technical evidence. The Supreme Court outlined the inquiry driven primarily by the Federal Rules of Evidence 402, 403, 701, 702, and 1002. Under the Daubert inquiry the district court is required to determine whether the evidence in question possess sufficient evidentiary reliability to be admissible as scientific, technical, or other specialized knowledge, and that the evidence is relevant in the sense that will assist the trier of facts to understand the evidence or to determine a fact in issue. Daubert, 113 S.Ct. 2796.

The Supreme Court further held that the district court should determine whether the theory or technique can or has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error of the technique if applicable, and while not dispositive, the extent to which a particular theory or technique has received general acceptance may be relevant to whether it is scientifically valid. Id at 2796-97.

The Federal Rules state a simple principle of authentication. F.R.E. Rule 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This general principle controls all authentications and identifications, including those involving real evidence, demonstrative evidence, writings, and even intangible events(e.g. telephone conversations).

The telephone conversation of Mr. Hayes and codefendant Robinson was not properly authenticated into evidence, for demonstration that the call between both men was the number assigned to either of the phone was to its rightful owner, at the time by the telephone company to either of the defendant's, as to show the person answering or calling to be that person.

Voice identification, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker, is one of the standards requiring authenticating into evidence.

The district court allowed witness D.F. to identify the voices on the recorded telephone call.(Doc.No.2049@7). Furthermore, the United States responded that D.F. was competent to identify the voices of the men she identified, because she had known them for several years. (Id.@41). Additionally, the United States argued that D.F.'s history and experience in prostitution rendered her competent to define its associated slang.(Id.). In determining whether a voice identification bears sufficient indicia of reliability, the Court may apply some or all of the Neil factors,

which were initially fashioned to test the reliability of eyewitness identifications. See: Gov't of the Virgin Islands v. Sanes, 57 F.3d. 338, 340, 32 V.I. 462(3rd.Cir.1995). As applied to voice identification, the Neil factors are: (1) the witness' opportunity to hear the individual; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the witness' level of certainty at the time of the confrontation; and (5) the length of time between the confrontation and the purported crime. See id.; Neil v. Biggers, 409 US 188, 198-200, 93 S.Ct. 375, 34 L.Ed.2d. 401(1972). In Sanes, the Third Circuit found the "indicia of reliability" standard satisfied when a witness' identified a defendant to whom she had spoken twice for approximately ten minutes each time. 57 F.3d. @340-41.

Contrary, to the Neil factor findings, the courts based upon the "indicia of reliability" findings for voice identification is a matter after the facts once the authentication of the evidence took place pursuant to the Federal Rules of Evidence. Because D.F. was not one of the sponsoring witness,-the witness/callers identification of the voice on neither end, this evidence should had not sufficed, instead she should have been rendered as a qualified expert instead of a lay witness' because of her specialized knowledge that meet the Daubert standards/test.

The recorded conversation and voice identification admitted into evidence that was allowed by the courts to have the witness' D.F. identify was troubling, because the possibility of tampered or distorted evidence existed without the authentication of it. See United States v. McKeever, 169 F.Supp 426(S.D.N.Y.1958),

requiring that before a sound recording is admitted into evidence, a foundation for it must be established by showing all of the following: (1) that the recording device was capable of recoding the conversation, (2) that the operator of the machine was competent to operate it; (3) that the recording is authentic and correct; (4) that changes, additions, or deletions have not been made in the recordings; (5) that the recording has been preserved in a manner shown to the court; (6) that the speakers are identified; and (7) that the conversation elicited was made voluntarily and good faith.

The Federal Rules explicitly expanded the Best Evidence to include all "sound recordings" whose contents are to be proved. FRE 1002. The Rule applies even according to most common-law courts, because the Best Evidence rule applies only where what is sought to be proved are the "terms" or "contents" of the writing or other communication.

Therefore, D.F. testimony qualified under expert testimony because it involved specialized knowledge to the extent that it was coming out of a technical device(a phone recording) that was scientific in nature. Qualifying her testimony to be subjected to the standards/test of Daubert, and the Federal Rules of Evidence. Protocols and the chain of custody of the due process were violated by the district court, the third circuit court of appeals departed from applying the proper standards of review warranting the rectification of this Supreme Court.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the writ.

Respectfully submitted,

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