No. 16-6852

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 28, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JASON CURTIS BROWN,

Defendant-Appellant.

ORDER

BEFORE: COLE, Chief Judge; DAUGHTREY and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX (B)

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JASON CURTIS BROWN

Defendant-Appellant.

ORDER

Before: COLE, Chief Judge; DAUGHTREY and DONALD, Circuit Judges.

Jason Curtis Brown appeals his sentence of 180 months' imprisonment for distribution of heroin. The government moves to dismiss the appeal based on an appellate-waiver provision in Brown's plea agreement. Brown argues that he did not knowingly enter his plea or waive his right to raise a Fifth Amendment challenge to his conviction. First, he contends that the entry of his plea following the denial of his motion to dismiss strongly suggests that he intended to preserve the issue for appeal. Second, he argues that the magistrate judge's and government's explanation of his appellate-waiver provision does not preclude his interpretation. Alternatively, he asserts that enforcement of his waiver would result in a miscarriage of justice, because the district court disobeyed this court's remand order by permitting him to be charged in a superseding indictment before deciding whether to dismiss his original indictment with or without prejudice.

Appellant would like this Honorable Court of Appeals for the Sixth Circuit to grant his recall the mandation mentioned. Lastly Appellant would like to be held to less stringent standards than formal pleadings drafted by attorneys. See Haines v. Kerner 407 US 519 (1972) Appellant has timely filed his recall the mandate motion once the Supreme Court of the United States ruled in Class Supra in which he placed his motion in the BOP legal mail box which is deemed timely. See Houston v. Lack 101 L.Ed 2d 245 (1988).

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United States Court of Appeals

For the Sixth Circuit

Case #: 16-6852

United States

v.

Jason C. Brown

Motion to recall the mandate in light of the Supreme Court's new ruling in Class v. United States

Comes now Jason C. Brown (hereinafter) referred to as Appellant, moves this Honorable United States Court of Appeals for the Sixth Circuit to recall its October 28, 2017 order in light of the Supreme Court of the United States new rule of law interpretation of Federal Rules of Criminal Procedure, Rule 11, which deals with what does not constitute a "plea waiver." see Class v. United States 583 US (2018)

This Court of appeals when deciding the Appellant's direct appeal regarding Federal Rules of Criminal Procedure (hereinafter) referred to as Fed.R.CRIM.P rule 11 held in pertinent part, "Our review of the transcript of Brown's hearing establishes that the district court complied with Rule 11 and that Brown's waiver was knowingly and voluntarily. Thus the appellate-waiver provision is enforceable, and that provision precludes Brown from appealing his guilty plea, conviction, and sentence. His only issue on appeal falls within the scope of that waiver and thus cannot be reviewed. See United States v. Beals 698 F.3d 248, 256(6th Circuit, 2012) see (order at page 2). (Appeals court order Oct. 26, 2017 exhibit #1)(En Banc order Feb. 28, 2018 exhibit #2)

This court has jurisdiction to recall the mandate in situations where a new Supreme Court case has changed the landscape of the law. See United States v. Saikaly 424 F.3d 514 (6th Circuit 2005) "...Although courts of appeals have the inherent authority to recall a mandate, such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate. Calderon v. Thompson 523 US 538, 549-50, 14L.Ed.2d 728, 198 S.ct.1489 (1998). Furthermore, such power "is one of last resort to be held in reserve against grave, unforeseen contingencies." Id. this court likewise has emphasized that

this power is sparingly used, and only in cases where a party can demonstrate exceptional circumstances "sufficient to override the strong public policy that there should be an end to a case in litigation..." Bellsouth Corp. v. FCC 96 F.3d 849, 851-52 (6th Circuit, 1996) quoting Hines v. Royal Indemnity Co. 253 F.2d 111, 114 (6th Cir, 1958) at 517; see also United States v. Murray 2 Fed.Appx 398 (6th Cir., 2001) ("This court has never decided if the circumstances underlying a motion to recall a mandate are sufficiently extraordinary when the United States Supreme Court issues a new rule in a separate case that affects the substantive merits of a case decided by this court but for which our judgement has not yet become final. At least one other circuit, however, has held that when an intervening Supreme Court case calls into question the "Integrity" of a separate judgement, the circumstance is extraordinary enough to warrant such an extreme remedy. See Zipfel v. Halliburton Co. 861 F.2d 565, 567 (9th cir, 1988) ("When a decision of the Supreme Court departs in some pivotal aspects from a decision of a Federal Appeals court, recall of the mandate may be warranted to the extent necessary to protect the integrity of the court of appeals' prior judgement.") (quotations omitted) at 400.

In order to grant a recall the mandate or a reconsideration motion this court have set out three basic prongs which can be used to recall the law of the doctrine. The law of the case doctrine precludes reconsideration of previously decided issues one three exceptional circumstances exist: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice. Westside Mothers v. Olszewski 454 F.3d 532, 538 (6th cir. 2006)

The mandate rule requires lower courts to adhere to the commands of the superior court and proceed in accordance with the mandate United States v. Moored 38 F.3d 1419 (6th cir. 1994)

Therefore, Appellant humbly prays that this circuit recall the mandate of October 26, 2017, and en banc opinion February 28, 2018 in light of Class's Supra ruling which held ("However, as we explained in Part II Supra Class valid guilty plea does not by itself bar direct appeal of constitutional claims in these circumstances. As an initial matter, a valid guilty plea forgoes not only a fair trial, but also other accompanying constitutional guarantees." Ruiz, 536 US at 628, 629.") see slip #7