

18-9576

No.

in the

SUPREME COURT

of the

UNITED STATES

Term,

ALVIN WEEKLY

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondant,

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

18-3116

ORIGINAL

Supreme Court, U.S.
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QUESTIONS PRESENTED

1

Does the Court of Appeals commit clear error
when declining to hear a defendant's claim of serving
an unlawful sentence in violation of the Constitution's
Eighth Amendment ban on cruel and unusual punishment
And double jeopardy in Contrast to the Supreme Court Ruling
of Blockburger v. United States, ?

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Does a Rule 60 (b) motion give jurisdiction to a lower court
when no other remedy is available or has been denied ;
even though a claim of Actual Innocence was asserted under
"Extraordinary Circumstances"

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Is an Appeal waiver enforceable to seek relief of an Illegal Sentence
imposed by the district court or Knowingly Intelligently waived to move
the lower court of appeals for relief?

iv

Is a defendant's right violated by double jeopardy if the government
charges a violation 21 U.S.C. §841 and §860 "same conduct" relating to
a single offense within 1,000 feet of a school or includes "Duplicity"?

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OPINION BELOW

This Circuit Opinion and Final Mandate on this matter was entered
on And Petition for rehearing en banc was denied on
May 01, 2019. Attached hereto in Appendix.

JURISDICTION

The eighth Circuit denied Petitioner's Certificate of Appealability and Rehearing en banc on May 01, 2019 . This Petition is timely filed. The Jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime , unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when on actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, no be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF CASE

On or about 2011 Mr. Weekly was indicted by a federal grand Jury sitting in the Western District Of Arkansas(Texarkana-Division) for having violated federal drug law Title 21 U.S.C. §§ 841(a)(1) and 860 Possession with intent to distribute a controlled substance (crack Cocaine) within 1,000 feet of a School Zone. [Case No. 4:11-cr-40037-SOH]

At counsels advise Weekly plead guilty and On November 1,2012 the Court sentenced Weekly[Petitioner] to 140 months imprisonment; Six (6) years supervised release.

On October 9,2013, Weekly filed a motion to vacate,set aside, or correct his sentence pursuant to 28 U.S.C. §2255. However based on Weekly's appellate and post conviction waiver the United States Magistrate denied the motion . On April 30 2015 the district court adopted the magistrates report and recommendation denying Mr. Weekly's objections to the report and recommendation.

Because Mr. Weekly was asserting "Double Jeopardy" and "Actual-Innocence" Weekly filed a Rule 60(b) motion because "extarodinary Circumstances" existed of effecting the Fifth Amendment Right protections afforded a defendant were violated and effecting the reputation and integerty of the judical proceedings under the complete miscarriage of justice claims. However again the United States Magistrate denied Weekly's motion as "improperly filed successive section 2255" . On June 27,2018 the district judge adopted the Magoistrate's report and recommendation once more, and also denying a Certificate of Appealability[COA] .

On September 26, 2018 Mr. Weekly filed for a "Petition of Certificate of appealability" with the Eighth Circuit Court of Appeals [18-3116]. The Eighth Circuit denied COA and rehearing en banc On May 01, 2019. Final Mandate was issued May 08, 2019. Attachment in Appendix.

Mr. weekly filed his Rule 60(b) motion because any other remedy was inadequate due to (1) a written plea waiver of rights, (2) the claim "actual innocence" was based on "Google Map" discovered over the one year time limitations to had included it in his original §2255 motion was not considered "Newly discovered evidence" in order to meet the threshold of a second successive motion under 28 U.S.C. §2255(h)(1). as the Court of Appeals denied authorization, even though a claim was made to the Eighth Circuit of.... being actually innocent of having committed a crime within 1,000 feet of a school zone and (3) Weekly was serving an illegal sentence against the laws of the United States and the United States Constitution's Fifth Amendment of "Double- Jeopardy" and "Duplicity" of the charges, (4) That Counsel failed to properly investigate the case before suggesting Weekly enter a plea of guilty based on double jeopardy and duplicity and a crime taking place within 1,000 feet of a school zone, that counsel knew Weekly could not have committed based on the defects of the indictment that the government used to seek indictment before the grand jury in citing a street location that did not exist on the "Google Map" and that a school zone was further than 1,000 feet even by using a street that closely resembled the street location the government used before the grand jury using the "Google Map" to establish weekly's actual innocence.

Weekly filed his Rule 60(b) motion giving the court proper jurisdiction to correct the defect in his criminal proceedings, unlawful sentence, ineffective assistance of counsel based on Supreme Court precedent in *Buck v. Davis*, 137 S.Ct. 759, 763 197 LEd 2d 1(2017) .

Weekly was charged by the government under §841(a)(1) and §860 for having allegedly distributing "Crack Cocaine" near "North Hights Junor High School". The government presented evidence to the grand jury that Weekly possessed a controlled substance on "woodlawn Drive", the address was "unknown" of where exactly Weekly was at the time and by these discribed locations the government argued to the jury ... "was within 1,000 feet of North Hights Junior High School". The district court used this information to also enhance Weekly's base offense level.

In Weekly's Rule 60(b) motion Weekly argued that based on new information "Google Map" , shows that he was actually innocent of having committed a crime on "Woodlawn Drive" because [Woodlawn Drive] does not exist. Furthermore, according to the same Google Map shows several subdivision homes on several streets between a street closely resembling Woodlawn Drive on the Google map that is named "Woodland Drive" and at the closest point on the street to the school [North Hights Junior High] is much futher than 1,000 feet away. However the government did not have the address of where Weekly was at the time the crime was committed so the closest point is giving the government extreme grace.

As Weekly had argued in his motion that misleading informaion given to the grand jury by the government to issue an indictment against him could not have been a typagraphical error or mistake on the indictment to of had shown "Woodlawn Drive" rather than "Woodland Drive" because the same street

[Woodlawn Drive] was written again in the U.S.P.O.'s Presentence Report [PSR] by the officer after fully conducting its own independant investigation by the use of government evidence against Weekly.

Mr. Weely's Rule 60 (b) motion also asserted that counsel was deficient because counsel failed to properly investigate the case and charges against him, more specifically the [defected] indictment... being [insufficient] as to the indictment included [duplicity] of the charged offense. In violation Federal Rules of Criminal Procedure 7(c)(1), and Weekly's Fifth Amendment and Sixth Amendment Rights protected by the United States Constitution.

Weekly's continued argument in his Rule 60 (b) motion was that counsel failed to reasearch the Statutory Provisions of Title 21 U.S.C. §841(a)(1) and §860(a), because if counsel would had properly researched the Statutory Provisions Counsel would have found that the indictment was "Duplicitous" in which Duplicitous defines "duplicity" as the "joining of a single Count of two or more seperate and distinct offenses. Quoting United states v. Gerberding, 471 F.2d 55, 59 (8th Cir. 1979); United States v. Street, 66 F.3d 969, 974 (8th Cir. 1995); United States v. Moore, 184 F.3d 790, 793 (8th Cir. 1999); United States v. Natter, 127 F.3d 655, 657 (8th Cir. 1997).

Counsel would have also found that Title 21 U.S.C. §841(a)(1) is a lesser included offense of Title 21 U.S.C. §860(a). United States v. Carpenter, 422 F.3d 138 (8th Cir.); United States v. Underwood, 364 F.3d 956 (8th Cir.); United States v. Freyre-Lozaro, 3 F.3d 1496, 1507 (11th Cir. 1993); United States v. Scott, 987, F.2d 261, 266 (5th Cir. 1993). Also see the United States Supreme Court holding in Ball v United States, 470 U.S. 856, 859-61 84 L.Ed 2d 740 105 S.Ct. 1668 (1985). For These reasons the High Court should remand weekly's case as being Unconstitutionally imposed.

REASONS FOR GRANTING THE WRIT

1. When the appellet court denied Weekly COA from a district court's clear error of not considering Weekly's claim of a Constitutional Right being effected by an unlawful sentence of double jepordy and serving a sentence against the laws of the United States Constitution, that was brought before the district court under Rule 60(b)'s "extraordinary-circumstances" The Eighth Circuit also made error by refusing to review the claim of double jeopardy requiring remand.

Mr. weekly submits that because the Eighth Circuit failed to review his claims of being imprisoned unlawfully ,and Unconstitutionally that he brought before the court[district Court] pursuant to Rule 60 (b)'s extrodinary circumstances, The Eighth Circuit made clear error that requires remand to fully consider the Unconstitutional reasons outlined in the Motion.

Weekly's Unconstitutional claim of double jepordy of being charged for and further enhanced for the same offense is in violation of his Fifth Amendment Right . Even this Court has held in Blockburger, v. United States, 284 U.S. 299,304 52 S.Ct. 180 76 L.Ed 306(1932)..."for double jeopardy purpose... Two crimes are to be treated as the same offense unless each crime requires proof of an additional [element] that the other does not require". Under this Supreme Court test Title 21 U.S.C. §841(a) and Title 21 U.S.C. §860 Constitute the same offense for the purpose of "Double jeopardy". Furthermore, The government unconstitutionally applied U.S.S.G. §2D1.2 to Weekly's offense level . Weekly was convicted of possession of "Crack Cocaine" with intent to distribute . However where

Weekly's enhancement under the subsection[U.S.S.G. §1B1.3(a)]"relevant conduct" provision does not authorize the application of §2D1.2 enhancement for a drug offense occurring near protected locations i.e. "School-Zone" . Weekly was never charged or convicted of a more serious drug offense within 1,000 feet of a school zone that is required under a violation of 21 U.S.C. §860. In-stead §2D1.1 Guideline that is listed in the Statutory Index"applies"to one convicted of 21 U.S.C. §841(a)(1) Which Weekly was convicted of. see United States v. Salery, 836 F.Supp. 812(M.D. Ala.1993).

Mr. Weekly asserts that §2D1.2 is not intended to identify specific offense characteristic in which, where applicable would increase the offense level over the base level assigned by Subsection 2D1.1 ,but rather to define the base offense level in violation of 21 U.S.C. §§859, 860 and 861. United States v. Locklear 24 F.3d 641(CA.4.NC 1994). Because of the error made by the district court during sentencing the Honorable Court should remand.

2. Does a defendant claiming "Actual Innocence" of having had committed a crime within 1,000 feet of a school zone .by offering evidence to the Court such as a "Google map" that had proven "No School"was within the area where a drug possession case allegedly took place and was charged by the government's indictment , and that the Street "Named" by the government in the charging indictment and further presented to the grand jury, seeking indictment such street existed. offer "extraordinary-circumstances " to invoke Rule 60(b) because no other relief could be sought ,pursuant to 28 U.S.C. §2255 ?

Mr. Weekly presented evidence to the district court["Google Map"] that showed the complete area of where the government claimed Mr. Weekly was at the time he allegedly possessed "Crack Cocaine" on a street Named "Woodlawn Drive" as it was presented to the Grand Jury by the government when the government sought indictment against Weekly. The Google Map offered to the court in support of Weekly's Rule 60(b) motion, proved to the court that there was no such street named "Woodlawn Drive" as the government claimed, and that the only closely related street was Named "Woodland Drive". If the court would have properly reviewed the Map, the court might have determined that street was a "clarical error". However, the court did not consider the Map and denied Weekly's Rule 60(b) motion construing the motion as a second and successive §2255. If Weekly would have been able to reply to the assumption of a "Clarical Error" he would have argued that the street name was not a clarical error. Because not only did the government present to the grand jury "Woodlawn Drive" as part of there evidence to seek the indictment, but the name "Woodlawn Drive" was drafted by the goverment's written plea agreement contract. Furthermore, the Google Map proved, that the School ["North Hights junour High"] was located from the street named "Woodland Drive" was further than 1,000 feet and between the street [Woodland Drive] layed several subdivision Homes and several other cross streets. Establishing Weekly was in fact innocent of committing a crime of possessing "Crack Cocaine" within 1,000 feet of a School Zone. However because the court failed to review the evidence presented by Weekly 's Rule 60(b)'s motion and denying it the court made an error of reviewing (1) the Evidence, (2) the claim of actual innocence, (3) the Rule of "Extarodinary Circumstances". Which was no more than a complete miscarriage of justice that effected the integrety,

reputation of the judicial proceedings and process itself. See Gonzalez v. Crosby, 545 U.S. 524, 532, 125 S.Ct. 2641, 162 L.Ed 2d 480 (2005); Buck v. Davis, 137 S.Ct. 759, 733, 197 L.Ed 2d 1 (2017). Mr. Weekly's Rule 60 (b) motion met the "extraordinary circumstances" and should have been reviewed by the "Circuit panel". See DeAndre Smith, 13 F.3d 380 (Sixth Cir. 1993) And due to the error effecting Weekly's Fifth Amendment Right, This Honorable Court should remand.

3. When the government charges a defendant with two or more distinctive offenses in a single count. Is the indictment duplicitous and obscures the specific charge, in violation of the Constitution's right to notice?

In Blockburger the United States Supreme Court held that for "double-jeopardy" purposes, two crimes are to be treated as the same offense... unless each crime requires proof of an additional "Element" that the other does not require. The Supreme Court Ruled... "under the test presented in Blockburger" 21 U.S.C. §841(a) and 21 U.S.C. §860 constitutes the same offense for [double jeopardy] purposes. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed 306 (1932).

Mr. Weekly was charged in his indictment by the government for having violated Titles 21 U.S.C. §841(a)(1) and Title 21 U.S.C. §860 and Weekly asserts "Double Jeopardy" had occurred in his case affecting his right of protections guaranteed by the United States Constitution Fifth... Amendment.

Pursuant to Title 21 U.S.C. §860(a). There is no evidence that Congress intended to impose the §860 punishment in addition to the §841 punishment that Weekly recieved. See United States v. Hunter, 459 U.S. 365-66, 103 S.Ct. at 677-78. The Supreme Court belived that Congress intended to apply §860 in lieu of §841(b) when the offense occurs within 1,000 feet of a school. Accordingly , while the government may charge a defendant with both a greater and lesser included offense the court may not enter separte convictions or impose cumulative... punishments for both offenses unless the legislature has authorized such punishment. United States v Kaiser, 893 F.2d 1300, 1303 (11th Cir 1990); United States v Scott, 9897 F.2d 261, 266 (5th Cir. 1993). A §841(a) violation is a lesser included offense of §860. And given the Supreme Court's own Ruling in Ball v. United States, 470 U.S. 856, 864, 105 S.Ct. 1668, 1673, 84 L.Ed 2d 740 (1985). The Court should remand.

4. If a charge contains the same elements set out in another charge. Is it a lesser included offense barred by the double jeopardy clause of the United States Constitution ?

Mr. Weekly's indictment charges a lesser included offense because both §841(a)(1) and §860(a) containe the same "elements" set out in another charge, that is barred by the double jeopardy clause of the united States Constitution. it is firmly established that provisions for a lesser included offense be given under Rule 31(c) instructions even to a jury ,that benefits even the defendant. As in a jury trial the jury may suspect that a defendant is plainly guilty of some offense but one of the elements of the charged offense remains in doubt, in the adsence of a lesser offense instruction ,the jury will likely fail

to give full effect to the reasonable doubt, then resolving its doubt in favor of conviction. *Keeble v United States*, supra 844,93 S.Ct. 1993 Id at 212-213, 36 L.Ed 2d. The availability of a lesser included offense instruction protects the defendant from such improper conviction.

In *Gilis v United States*, 144 F.2d 860(1944) the court of appeals for the Ninth Circuit unequivocally applied an elements test to ... determine the propriety of a lesser included offense. As the court held ."to be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser". Quoting *House v. State*, 186 Ind 593, 595-596, 117 NE 647, 648(1917). The Supreme Court of Maine concluded that a practically universal rule prevails ,that the verdict of a trial may be for a lesser included offense included in a greater charge in an indictment , the test being that the evidence required to establish the greater would prove the lesser offense as anecessary element. *State v Henry*, 98 Me 561, 564, 57 A 891, 892(1904). To be included in the offense charged ,the lesser offense must not only be part of the greater ,but it must be embraced within the legal definition of the greater offense as a part thereof. see *State v. Marshall*, 206 Iowa, 373 375, 220 NW 106(1928); *People v . Kerrick*, 144 Cal 46, 47, 77 P 711 (1904) Therefore , because of the lesser included offense was charged in the indictment filed agaisnt Weekly double jeopardy bars prosecution from charging weekly with both 21 U.S.C. §841(a)(1) and §860(a). See Colorado Supreme Court Ruling in *Reyana-Abarca v .People* 2017 BL 59224, Colo., No 13SC725 ; quoting *Schmuck v United States*, 489 U.S. 705, 712, 109 S.Ct 1443, 103 L.Ed 2d 734(1989). ..."[I]f a charge contains the

same [elements] set out in another charge. Then it has to be a lesser included offense that is barred by the double jeopardy clause of the United States Constitution, rendering Weekly's conviction and sentence based on the inclusion of the charge in which he plead too unconstitutional unlawful, inviolation of the laws of the United States and the Fifth Amendment Right protections. Wherefore, the High Court should remand for resentencing.

Mr. Weekly Respectfully Request this Honorable High Court for relief of his Unconstitutionally imposed sentence and conviction because he has no other remedy available to him except through Rule 60(b)'s "extarodinary-circumstances" in which the lower Courts have denied or declined to fully review the merits brought before them . a Writ of Certiorari should be granted.

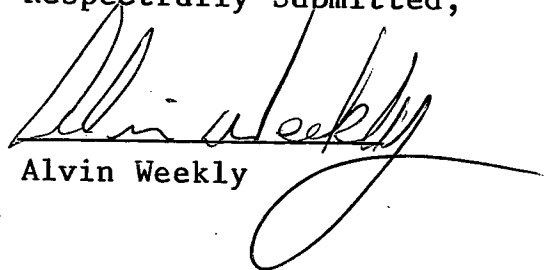
This Court has held Under Ex-Paarte Lang Id, Waley v. Johnson Id., and Frank v. Mangum, Id. ... "[W]here a prisioner shows that he is being held under judgement made without proper authority of law, it will by Writ of Habeas Corpus and Certiorari look into the record so far as to asertain that fact and if it is found to be so as herein will discgarge a prisoner".

CONCLUSION

Therefore, for all the forgoing reasons IT IS PRAYED that the Honorable High Court Remand this matter back to the Eighth Circuit Court of Appeals to have the Court fully review the merits of the Rule 60(b)'s Unconstitutional claims that had previously brought before the court based on clear and plain error of the district Court.

So IT IS also PRAYED that the Honorable Supreme Court grant the Writ of Certiorari to the Petitioner because of "extrodinary Circumstances" exsist that a Constitutional Right was violated under the protections of the United States Constitution and laws of the United States. SO IT IS then PRAYED for Relief by this Court .

Respectfully Submitted,


Alvin Weekly