No. 19-5872

IN THE

SUPREME COURT OF THE UNITED STATES

PHILIP HUGH WENTZEL - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were petitioner's double jeopardy and due process rights violated by the sua sponte filing (at petitioner's sentencing) of an additional criminal charge identical (in statute and elements) to the previous charges, using the same evidence and course of conduct petitioner had already been investigated and prosecuted for and convicted of, thereby creating a second prosecution for the same offense, and a lack of jurisdiction at the district court level, invalidating that second conviction and the associated part of the district court's sentence of December 21, 2012 thereby infecting all subsequent proceedings to it? And, if so:

2. Did the U.S. Court of Appeals for the Seventh Circuit and the District Court in the Seventh Circuit (Eastern Dist., Milwaukee) err in denying petitioner's Certificate of Appealability when errors of constitutional magnitude are present?

3. Did the District Court err in denying petitioner's Fed. R. Civ. P. 60(b)(4) motion when petitioner has shown the rule applies in this matter - that he seeks to vacate the district court's Rule 4 order denying petitioner's § 2255 motion because that order was also devoid of jurisdiction as it was infected by an underlying illegal sentence. AND, if the court insists on re-classifying the 60(b)(4) motion as a subsequent 2255, does it regardless, still meet the 'gatekeeping' requirements for a subsequent 2255?

4. As such, would a failure to allow for collateral review in this matter raise serious constitutional questions, i.e. is the Seventh Circuit re-writing the 5th Amendment to the U.S. Constitution by allowing a clear double jeopardy violation to stand?

LIST OF PARTIES

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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 this petition and has been designated for publication but is not yet reported.

The opinion of the United States District Court appears at Appendix B to this petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals decided petitioner's case was May 8, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals on June 28, 2019, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V (Double Jeopardy, Due Process of law):

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty, or property, without due process of law..."

United States Code Chapter 18, Sect. 2251(a) (Sexual exploitation of children):

> No person "shall knowingly employ, use, persuade, induce, or coerce any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, using material that had been mailed, shipped, and transported in or affecting foreign and interstate commerce."

United States Code Chapter 28, Sect. 2255 (vacatur of illegal sentence/gatekeeping provision for second or successive motion):

> (a) A prisoner in custody under a 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 the sentence."
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --
> (1) Newly discovered evidence that no reasonable factfinder would have found the movant guilty of the offense."

Federal Rule of Civil Procedure 60(b)(4) (Relief from a Judgment or Order):

> "On motion and just terms, the court may relieve a party or its legal representitive from a final judgment, order, or proceeding for the following [reason]: (4) The judgment is void."

STATEMENT OF THE CASE

Because an abuse of the district court and court of appeals discretion is at issue in this matter, it is important that this Court be presented with the full factual record, as the court is entitled to assume that petitioner's factual allegations are true. Ervin v. Wilkinson, 701 F.2d 59 (1982); McKinney v. Boyle, 404 F.2d 632, 634 (9th Cir. 1968).

Because the jurisdictional issue of the lower court's actions as to petitioner's civil matter (14-cv-1305) is so intrinsically tied to the underlying criminal matter, a full accounting of those facts must be presented herein in order to support a substantial showing of the denial of a constitutional right. Petitioner prays this Court will act with greater latitude in considering this pro-se petitioner's presentation of the facts of the case as they pertain to the greater case itself.

There is one indictment for this matter: 12-cr-116. On May 22, 2012, petitioner was charged by a grand jury sitting in the Eastern District of Wisconsin with six (6) counts of production of child pornography (Counts 1-6), in violation of 18 U.S.C. § 2251(a), one count of distribution of child pornography (Count 7), in violation of 18 U.S.C. § 2252(a)(2), one count of advertisement of child pornography (Count 8), in violation of 18 U.S.C. § 2251(d), and one count of possession of child pornography (Count 9), in violation of 18 U.S.C. § 2252 (a)(4)(B).

On September 20, 2012 petitioner entered into a written Rule 11 plea agreement with the Government. In the agreement, petitioner agreed to plead guilty to Counts 1-6 of the 12-cr-116 Indictment. In exchange for petitioner's agreement to plead guilty to Counts 1-6, the Government agreed to dismiss Counts 7 through 9 of 12-cr-116. On that same day the parties appeared before the district court for a change of plea hearing. The court conducted a standard plea colloquy and advised petitioner of the potential penalties for each count. The court failed

to mention the possibility of consecutive sentences (which it later imposed). The District Court accpeted the plea and convicted petitioner at that hearing. The court then ordered a Presentence Report (PSR herein) be completed prior to sentencing, set for December 21, 2012.

Recently discovered F.B.I. records never provided petitioner via discovery reveal that on September 21, 2012, one day after petitioner was convicted by the district court as to 12-cr-116, namely six (6) counts of violating 18 U.S.C. § 2251(a), the F.B.I. met in a McDonald's parking lot in Racine, WI. with the parents of a potential victim connected to petitioner. Law enforcement met with the parents of alleged Victim "G" and learned that several months prior, "G"'s mother had learned about petitioner's arrest and the nature of the charges against him. Nothing in the government's records indicates the reason "G"'s mother waited months from the time she became aware of "G"'s potential victimization to contact law enforcement. "G"'s parents confirmed in that parking lot meeting that images of "G" they were shown by officers were images of their daughter. One of those images was later used as the basis for the prosecutor's Information filed December 21, 2012 at petitioner's sentencing hearing. That image came from the same evidence and source gathered and investigated pertaining to the course of conduct for 12-cr-116.

Nothing in the record indicates why the government was in possession of the evidence regarding "G" from the time they seized petitioner's computer equipment seven (7) months prior and made no effort to pursue the matter (including in the PSR completed for 12-cr-116) until the day of petitioner's sentencing. Nothing in the record indicates why the government did not provide any discovery to petitioner as to "G," however the parents of "G" were the only ones who attempted (unsuccessfully) to sue petitioner for civil monetary damages utilizing a well-known and advertised personal injury firm in Racine, Wisconsin, roughly one month after petitioner was sentenced.

The Probation Department utilized the 2012 edition of the Guidelines Manual in preparing the PSR and completed it for the six (6) counts of 2251(a) petitioner had been convicted of by the district court. The PSR also makes no reference to a potential seventh 'victim' or any additional pending or possible charges or ongoing investigation continuing in regards to the petitioner. The PSR was completed on November 26, 2012 and revised once on December 10, 2012, still without any mention of any additional victim or charges.

On December 18, 2012 petitioner filed a Sentencing Memorandum under seal requesting a 25 year (or fewer) sentence. Petitioner attached a psychological examination completed by Dr. Patricia Coffey along with a social history report prepared by Deborah Conta, MSW/LCSW in support of his sentencing position. Both reports indicated petitioner was at low risk to reoffend and was very amenable to treatment.

Sentencing was scheduled to take place on December 21, 2012. On that date, just prior to the start of the hearing, the government filed, sua sponte, a stand-alone Information also captioned under 12-cr-116 alleging an additional charge of violation of 18 U.S.C. § 2251(a). The alleged victim was Minor Female "G," a seventh individual who was not mentioned in any of the counts of conviction as to the 12-cr-116 Indictment and it's associated plea - or any other place of record.

At the onset of the sentencing hearing, the court began by calling case "12-cr-116," wherein all further proceedings that day were accomplished under that case number. The sentencing court, for whatever reason, already had an expectation that the petitioner was to plead guilty to "seven counts" (Tr. 12/21/12, p3, lines 10-12), not the six counts the court was scheduled to sentence petitioner on that day. The court then conducted what amounted to an initial appearance (actually an impossibility since petitioner's actual initial appearance as to 12-cr-116 had already been conducted over seven months

prior, on May 3, 2012) on the additional 12-cr-116 "count."

The allegations of the prosecutors information used the same evidence, charged the same conduct and exact same criminal statute, 18 U.S.C. § 2251(a), and cited the exact same elements to those contained in counts 1 through 6 of the already prosecuted and convicted 12-cr-116 indictment. Despite the jurisdictional issue that had just materialized, the district court allowed the proceedings to continue and advised petitioner he could 'waive' indictment. As the matter before the court at that moment was 12-cr-116, it was also impossible (just as in the 'initial appearance') for petitioner to waive indictment. Petitioner had already been indicted as to 12-cr-116 on May 22, 2012 and convicted as to that Indictment on September 20, 2012.

The "waiver," signed unknowingly by petitioner on December 21, 2012 (as petitioner was not then, nor is he now an attorney) is clearly captioned under 12-cr-116, an impossibility since indictment for 12-cr-116 had already been completed seven months prior. In the body of the "waiver" document, the government even emphasized "Friday, December 21, 2012" (emphasis in original) as the date this "waiver" as to the already indicated, prosecuted and convicted 12-cr-116 was signed.

Neither the government nor the sentencing court advised petitioner that jeopardy had attached (nor did his public defender for that matter) to the prosecution of additional § 2251(a) matters on September 20, 2012 (3 months prior) and that if the government had wished to add another charge to 12-cr-116 it was required, prior to September 20, 2012, to abandon the Rule 11 plea agreement (as it had now been fundamentally altered by the government by adding a new count seven instead of dismissing it) and re-indict (via an actual superceeding indictment) petitioner to include the now seven (7) 2251(a) charges it was seeking, OR bring an Information captioned under a new and different case number - again, prior to September 20, 2012 - to petitioner for his consideration.

With the above facts now in play, notably what was not mentioned, petitioner waived 'indictment' not knowing as a non-attorney with no access to legal material at the time that he (or his public defender) should have challenged the jurisdictional issue that had arisen.

After accepting petitioner's now unknowing plea of guilty to the 12-cr-116 Information, accepted despite the double jeopardy implications now present, the district court immediately proceeded to sentencing on both the new 2251(a) charge and the six counts of conviction of 2251(a) in the 12-cr-116 Indictment. At no time did the district court acknowledge that the new 2251(a) charge would have an effect on petitioner's statutory minimum or maximum penalties. The court also did not mention that the addition of a new charge would change the calculation of the Sentencing Guidelines. Instead, the district court adopted the facts contained in the PSR and found petitioner's Guidelines "range" to be life imprisonment. At the conclusion of allocution, evidence, and other procedural matters, the district court sentenced petitioner to 300 months imprisonment on counts 1 through 6 of the 12-cr-116 Indictment, concurrent with each other, and added another 180 months (15 years) imprisonment for the added 2251(a) charge in the prosecutor's information of the day - to run consecutive to the sentence imposed for counts 1-6 of the 12-cr-116 Indictment.

A timely Notice of Appeal was filed on January 7, 2013 but withdrawn by appointed counsel on June 13, 2013. On October 17, 2014 petitioner filed a motion to vacate his sentence under 28 U.S.C. § 2255, raising a variety of claims, including a jurisdictional one. On October 30, 2014 the district court denied the motion on a Rule 4 screening and dismissed the case. On September 13, 2018 petitioner filed a Fed. R. Civ. P. 60(b)(4) motion challenging the jurisdiction of the district court's rulings in these matters, but specifically as to the 2255, the judgments as void as they were infected by the underlying jurisdictional issue created by the same court at sentencing. The district court

denied and dismissed the 60(b)(4) motion on September 24, 2018.

Petitioner took appeal of that dismissal on October 5, 2018, seeking a Certificate of Appealability from the Seventh Circuit Court of Appeals. The court of appeals denied that motion without comment on May 8, 2019.

On May 17, 2019 petitioner filed a petition for rehearing with suggestion for en banc review pursuant to Fed. R. App. P. 35(b). The Seventh Circuit Court of Appeals denied that petition without comment on June 28, 2019, making this matter now ripe for Supreme Court review.

REASONS FOR GRANTING THE PETITION

This is a case that involves abhorrent behavior, child pornography and the dark web of the internet. It involves a petitioner struggling at the time with alcoholism and prescription pill abuse as he tried to come to terms with job related PTSD and the impact of his own childhood sexual abuse at the hands of a parish priest. It involves a very public case with a public figure on trial for essentially his life, in an emotionally charged setting, conducted under intense public scrutiny - with the victims' family, press, and the public screaming for blood (or worse).

All of this appears to have clouded the better judgment of the Assistant U.S. Attorney, the District Court, the Court of Appeals and even Petitioner's public defenders at the trial and appellate levels, all of whom seem mired in the nature and circumstances of the offenses and not the law of the land or the Constitution that all people in the United States are entitled to receive the protections thereof.

Fairness is a fundamental element of American justice. That fairness in criminal and civil matters is embodied in the U.S. Constitution and our courts have insisted ever since that our people's liberties and rights not be infringed upon without due process, regardless of who is accused or what they are accused of. This system is also designed to reflect that doctrine of fairness in that various forms of relief are available to those who have been wronged or treated unfairly by those in power who, for whatever reason, seek to circumvent the law and procedures of the land.

Petitioner will show herein that this petition should be granted because the second part of his sentence (180 months consecutive to the original 300 months) is void because the district court did not have jurisdiction to accept the prosecutor's 'information' presented sua sponte at petitioner's sentencing

hearing that charged another violation of 18 U.S.C. § 2251(a), despite the fact that petitioner had already been convicted of six counts of violating § 2251(a) - a Double Jeopardy violation, that created a second prosecution for the same offense (exact same, no less), and a second punishment for the same offense. The illegal sentence created by the district court on December 21, 2012 infected every proceeding related to it, namely petitioner's original § 2255 petition and the subsequent Federal Rule of Civil Procedure (Fed. R. Civ. P.) 60(b)(4) motion.

Petitioner will show that the government knew it had missed it's window of opportunity to add additional § 2251(a) charges, but did so anyways in order to presumably assist an alleged victim's family in suing (albeit unsuccessfully) petitioner for civil monetary damages. Petitioner will show that the government hid the existence or possibility of additional charges from petitioner and his public defender, instead creating an 'oh, by the way...' surprise moment at petitioner's sentencing hearing, to which petitioner showed up that day expecting the government to make good on its end of the signed plea agreement (legal contract), which it clearly did not, giving only the government the opportunity to prepare and reherse.

Petitioner will show that the district court judge was then and is now, well versed in double jeopardy and, by assenting to the double jeopardy violations at petitioner's sentencing, was complicit in the constitutional violations created on that day, as was the Seventh Circuit Court of Appeals who, without offering any reasoning or support, have upheld the district courts ruling on the 60(b)(4) and the petitioner's application for a certificate of appealability, thereby implicating themselves in the errors of constitutional magnitude present before this court today. As a void sentence can be attacked at any time, this court now has the opportunity to correct these errors and send a message that all persons are entitled to the equal protections of law and that the government and lower courts cannot simply and convienently skirt the law to meet it's own 'win-at-all-costs' mentality.

Before petitioner discusses the underlying Double Jeopardy issues, he must first address some procedural issues. This petition results from petitioner's filing of a Fed. R. Civ. P. 60(b)(4) motion with the district court in the Seventh Circuit, Eastern Division (Milwaukee) before the Honorable Judge Lynn Adelman, District Court Judge, who also presided over petitioner's criminal (12-cr-116) and resulting civil (14-cv-1305) matters. Petitioner filed the 60(b)(4) motion seeking vacatur of the civil judgment against him, the District Court's Rule 4 Order dated October 30, 2014, as it was infected by the illegal sentence created by the district court on December 21, 2012. Because the underlying illegal part of the December 21 sentence was inherent (infected) to the civil § 2255 matter, the district court was essentially forced to acknowledge the double jeopardy (and breach of contract) issues it allowed at petitioner's sentencing and to correct - that is vacate, the second part of its sentence. Instead, the district court re-characterized petitioner's 60(b)(4) motion as a subsequent 2255 petition and denied it for lack of jurisdiction.

As such, some further discussion of Rule 60(b)(4) and second or successive 2255 petitions is warranted. Rule 60 should be liberally construed for purposes of doing substantial justice. United States v. Gould, 301 F.2d 353 (1962); Ervin v. Wilkinson, 701 F.2d 59 (1982), citing Gould. To that end, in the district court's reasoning in denying petitioner's Rule 60(b)(4) motion it concluded "Petitioner's ... motion challenges the validity of his conviction and sentence, rather than some procedural irregularity in the handling of his first 2255 motion." That said, "...a proper Rule 60(b) motion attacks, not the substance of a federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas corpus proceeding." Gonzalez v. Crosby, 162 L.Ed.2d 480, 54 U.S. 524 (emphasis added). The district court is mistaken in its belief that petitioner's 60(b)(4) motion constitutes a second or successive § 2255 motion. The district court indicated in its denial of the

60(b)(4) that it was confused by petitioner's arguments and the order of September 24, 2018 seems to reflect that.

While petitioner's motion is couched in the criminal matter, it seeks to void the judgment of the district court as to the procedural irregularities, that is, continuing lack of jurisdiction pertaining to petitioner's civil matter. Simply put: a district court ruling on matters without subject matter jurisdiction is about as 'irregular' as it gets. This court now has the opportunity to correct these errors, reaching back to the sentence handed down to petitioner on December 21, 2012.

A motion under Fed. R. Civ. P. 60(b) is addressed to the sound discretion of the district court and will be reversed for abuse of such discretion. See, Ervin at 61. In the matter at hand, jurists of reason could find that just such an abuse has occurred. "The question posed in the immediate case is whether there was such an abuse." Defilippis v. United States, 567 F.2d 341, 343 (7th Cir. 1977). Clearly, as will be illustrated below, a district court acting without jurisdiction and contrary to the U.S. Constitution is most certainly an abuse. "Where moving party has been prevented from presenting the merits of his case by the conduct of which he complains, Rule 60(b) relief is most appropriate." Ervin supra, quoting Clarke v. Burkle, 570 F.2d 824 (8th Cir. 1978). (Emphasis added). Rule 60(b)(4) exists for a specific reason, void sentences. The arguments herein provide clear proof that the Rule applies in this case and he has been 'prevented' from presenting the merits of his case - jurisdictional issues stemming from clear and plain error at the district court level.

More important, although relief under Rule 60(b) is subject to review for abuse of discretion, if a judgment is void, i.e. a 60(b)(4) motion, it is a per se abuse of discretion for a district court to deny a movant's action to vacate the judgment. See, Price v. Wyeth Holdings Corp., 505 F.3d 624 (2006), quoting United States v. Indoor Cultivation Equipment, 55 F.3d 1311, 1317

(7th Cir. 1995). A judgment is void and should be vacated pursuant to Rule 60 (b)(4) if 'the court that rendered the judgment acted in a manner inconsistent with due process and law.' Id at 1316 (citations omitted).

In the instant matter, a double jeopardy violation occurred and the district court acted without jurisdiction as to 12-cr-116 and the resulting 14-cv-1305. The same court was without jurisdiction, therefore, to issue the Rule 4 order dismissing petitioner's § 2255, as that court clearly still considered the six plus one sentenced 'counts' of 2251(a) to all be valid. A miscarriage of justice ensued at sentencing on December 21, 2012 that has affected all subsequent proceedings related to 12-cr-116, in turn affecting the public reputation and integrity of the district court.

Should the court persist in this matter as if it were a second collateral attack, petitioner argues that it can still meet the requirements of 28 U.S.C. § 2244 and § 2255(h)(1) as newly discovered evidence, as petitioner is not and never has been an attorney and has done due diligence in pursuing the matter to the best of his ability (keeping in mind that jurisdictional issues/void judgments can be attacked at any time). Each point and argument herein can be construed as 'new evidence' discovered by petitioner's own work and investigation, namely a glaring double jeopardy violation, that would lead any reasonable factfinder to not find petitioner guilty of the additional 2251(a) offense because it is impossible to do so given the double jeopardy implications.

Having now established that Petitioner's Rule 60(b)(4) motion is, indeed, a bona fide one, we can now turn to the heart of this matter: double jeopardy. Petitioner brings forth questions concerning errors of constitutional magnitude, most notably and underscoring everything else, double jeopardy violations which the sentencing court and subsequently the court of appeals in the 7th Circuit allowed that represent a clear departure from the 7th Circuit's own decisions and all precedent regarding double jeopardy nationwide. The matter boils down to this: The District Court allowed a second prosecution for the

exact same offense after conviction. It compounded the problem by punishing the petitioner a second time and adding 15 years to his prison sentence.

The Double Jeopardy clause of the United States Constitution, Amendment V provides, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Supreme Court has repeatedly explained that "the clause serves the function of preventing both successive punishment, and successive prosecutions." Witte v. United States, 132 L.Ed 2d, 351, 115 S.Ct 2199, 22014 (1995) (quoting United States v. Dixon, 509 U.S. 688, 704, 113 S.Ct 2849 (1993)). The Court's decision in Grady v. Corbin, 495 U.S. 508, 110 S.Ct 2084 (1990) also held a subsequent prosecution was prohibited if, to establish an essential element of an offense charged in that prosecution, the government would prove conduct that constituted an offense for which the accused had already been prosecuted that subsequent prosecutions were barred by double jeopardy.

This is such a case. The "Information" presented sua sponte at petitioner's sentencing hearing was not framed as a superceeding indictment, a new case of any type or presented as "relevent conduct," or otherwise enjoined in any legal way by the district court. Presumably, because none of these things were possible because petitioner had already been convicted of the same 2251(a) charge and jeopardy had attached upon that conviction.

Grady, supra also provides that "successive prosecutions, however, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence." Green v. United States, 355 U.S. 184, 187, 78 S.Ct 221 (1957) provides additional insight: The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its powers and resources should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

In petitioner's previous pleadings on this matter, he has directed the courts to the Blockburger Test, the general standard for determining if charges violate the double jeopardy clause. While it would seem redundant to apply the test to a case in which the exact same statute was charged, with the exact same elements, we can, however, still apply the Blockburger test to make the point that much clearer, providing a novel and unique approach to Blockburger. The district court in this matter, Hon. Lynn Adelman, confirms two years after this petitioner's sentencing he knows Blockburger is the test applied to double jeopardy claims: "...multiple punishments can presumptively be assessed after conviction for two offenses that are not the same. In determining whether two statutes proscribe the same offense, a court applies the test from Blockburger." (emph. added) Crenshaw v. Humphreys, 2014 U.S. Dist. LEXIS 135365, September 25, 2014. Yet, when this petitioner presented the same court with a double jeopardy claim, this statement was ignored. Perhaps that was because the same judge also opined in his own order of Boyd v. Tienstra, 2015 U.S. Dist. LEXIS 125103, September 18, 2015, citing Heck v. Humphrey, 512 U.S. 487 (1984), "claims of double jeopardy, if resolved in plaintiff's favor, would necessarily invalidate plaintiff's conviction."

To make the point one more time, the same district court also confirms two years after petitioner's sentencing that "The Double Jeopardy clause protects against multiple punishments for the same offense." See Jones v. Clements, 2014 U.S. Dist. LEXIS 151444, October 24, 2014, citing Jones v. Thomas, 491 U.S. 376, 381 (1989). And, as recently as May 1, 2019, the 7th Circuit held in Boyd v. Warden, 2019 U.S. Dist. LEXIS 74225, that the Double Jeopardy clause "protects individuals against ... prosecuting a defendant for the same crime after conviction; and subjecting a defendant to multiple punishments for the same crime." That same case also tells us "in a guilty plea case, jeopardy attaches only when the trial court accepts the guilty plea." See also, U.S. ex rel. Stevens v. Circuit Court

of Milwaukee County., Wis., Branch VIII, 675 F.2d 946, 948 (7th Cir. 1982). Needless to say, the 7th Circuit is well-versed in double jeopardy claims and had set certain standards for approaching them - all of which both the district court and courtsof appeals have ignored in the instant matter.

In it's order denying petitioner's Rule 60(b)(4) motion, the district court adds an interesting footnote to which it, and the Seventh Circuit Court of Appeals by it's silent assent, seems to hang it's hat on: "it [Double Jeopardy] does not prevent multiple punishments when the defendant commits the same type of crime against different victims at different times."

This statement is true - but only to a point. The government missed its window of opportunity to add what it classifies a "7th count" as to 12-cr-116. That "count" is really a second prosecution for the same exact charge, 2251(a) captured in the course of conduct of 12-cr-116. When petitioner was convicted of 6 counts of 2251(a) violations on September 20, 2012, the government and district court was foreclosed from bringing any further charges of 2251(a) against the petitioner, as jeopardy had attached with conviction, as noted in Boyd, supra. It is the timing and the way the government presented the additional charge that forecloses the district court's different victim, multiple punishment theory.

To this same point, it is important to note that it was the government who approached this petitioner with the plea deal offer as to 12-cr-116, not the other way around. Petitioner could only assume at the time the plea offer was made to him that the government had completed it's case and investigation against him and sought finality to the matter in agreeing to the plea as to six counts of 2251(a). Didn't that suggest completion in the matter? Yes. What would be the point of presenting the deal to the petitioner if they weren't? Any other answer besides 'yes' to the above would suggest the government intended to violate its own plea agreement with the petitioner. We now know in hindsight of course, that is exactly what they did. Compounding this troubling fact is that the govern-

-ment hid the existence of a possible additional victim and/or charges from the time they learned of this person until moments before petitioner's sentencing hearing, when they filed their Information. No discovery was provided until that moment and the potential additional victim/charge is conspiciously missing altogether from the PSR completed in the exact same time frame the government knew of the potential for an additional victim.

The additional 2251(a) charge brought at sentencing was part of the same course of conduct captured in the 12-cr-116 Indictment and Plea Agreement. The alleged date of offense, October 10, 2010, falls squarely within the dates of offense captured in that plea and indictment to which petitioner had already been convicted. There can be no doubt that the events captured in the 12-cr-116 Indictment and Rule 11 plea capture a defined course of conduct, a/k/a, "spree," "episode," etc. The sentencing court seems to agree in that it combined its sentence for the course of conduct , counts 1-6, into one concurrent sentence of 380 months (25 years). The 7th Circuit addresses "course of conduct" in U.S. v. Tucker, 982 F.Supp. 1309, October 31, 1997: "[Offenses] are sufficiently connected ... to each other as to ongoing series of offenses. Factors that are considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." Not all of those factors need be present as the same opinion adds: "When one of the above factors is absent, a stronger presence of at least one of the other factors is required."

In the current matter, it should be clear that a well-defined "course of conduct" was created and captured in counts 1-6 of the 12-cr-116 Indictment and Plea. Petitioner lived for nearly 40 years without any criminal behavior. Then, as documented in his PSR, experienced a period of hardship and disarray in his life in which he became an alcoholic and drug abuser. During this approximate 24 month period of an otherwise exemplary life, petitioner created the images he was charged with. Petitioner then regained his sobriety and was once again

living an honest, crime-free and drug-free life, continuing his life of service in law enforcement, for a year before his eventual arrest for the conduct described in 12-cr-116's Indictment and Plea Agreement. The six counts of 2251(a) occured at regular intervals during the 24 month period of time. Nothing before. Nothing since. The alleged conduct of the prosecutor's information to which petitioner unknowingly pled guilty to is dated October 10, 2010, squarely in the middle of the established course of conduct for 12-cr-116, yet charged AFTER conviction for the course of conduct for 12-cr-116 using the exact same criminal statute and same evidence that was foreclosed on September 20, 2012 when petitioner was found guilty of the other counts of 2251(a) he had accepted responsibility for and pled to.

The District Court would seem to rely on statements such as "The Double Jeopardy clause is not implicated when multiple separate violations of the same provisions are charged in multiple counts," as opined in United States v. Snyder, 189 F.3d 640, 647 (7th Cir. 1999). In this matter, however, it cannot do so because Snyder, and cases like it, dealt with a "superceeding indictment." There is no superceeding indictment in petitioner's case - merely an "Information" capturing one "count" of 2251(a). By the Snyder standard, the six counts of 2251(a) captured in the 12-cr-116 Indictment and plea and PSR were captured correctly, as multiple counts and petitioner does not challenge them. Rather, he challenges the 'oh, by the way...' event that occured at his sentencing where the government presented a new charge sua sponte and the dictrict court allowed a second prosecution for the same charge that used the same evidence and course of conduct for which petitioner had already been convicted. As presented clearly in Ashe v. Swenson, 397 U.S. 436 (1970), "the double jeopardy clause ... barred the second prosecution because it grew out of the same criminal episode as the first." The government and district court were foreclosed on September 20, 2012 from further prosecuting petitioner as to 2251(a), as he had already been found

guilty of the charge.

Keeping in mind that the Blockburger Rule is the bulwark for determining double jeopardy (i.e. 'same offense') not just in the 7th Circuit, but the entire federal system, visiting it here, certainly presents a novel issue and issue of importance for the country and therefore review by this Court.

This case presents, certainly, a novel approach to interpreting Blockburger because of the circumstances present. While Blockburger is generally applied to cases involving different statutes, the core principles and spirit of Blockburger can still (and should be) applied to the petitioner's case because of the WAY the government pursued the additional 2251(a) charge, suggesting that the Blockburger Rule fits here as we are presented with a 'Crime 1' and a 'Crime 2.' The government made no attempt to: 1. Inform the defendant (or provide discovery) until sentencing, 2. Cancel the 12-cr-116 plea agreement, 3. Bring a new or superceeding indictment or information (PRIOR TO conviction on 9/20/12), 4. Include any references to a possible additional charge in the 12-cr-116 PSR. This leaves us with the functional equivilant of needing to address the subsequent prosecution as a 'different' statute. In this case it clearly fails Blockburger.

The essence of Blockburger is that if offenses have identical statutory elements ... then the inquiry must cease [as double jeopardy applies] and subsequent prosecution is barred. See, Grady v. Corbin, 495 U.S. 508, 516. That is, if Crime 1 (course of conduct) requires proof of elements A,B, and C, and Crime 2 (course of conduct) requires proof of the same elements of A,B, and C, these crimes constitute the "same offense" for double jeopardy purposes.

In the matter at hand, petitioner was convicted of 6 violations (counts) of 2251(a) on September 20, 2012. The elements necessary to prove for conviction of 2251(a) are that the defendant did knowingly use, persuade, induce or coerce any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, using material that had been mailed,

shipped,, and transported in or affecting foreign and interstate commerce. (See, 18 U.S.C. § 2251(a)). On petitioner's day of sentencing, the government brought an additional charge, after petitioner had been convicted on September 20, 2012 of 2251(a) counts, of a subsequent 2251(a) charge, captioned under 12-cr-116 and citing the exact same elements required to prove guilt (which makes sense since it was the exact same statute). Because Blockburger reveals that offenses that have identical statutory elements cannot be pursued, proceeding with another charge the way it was done in this matter could not be a bigger failure of the Blockburger Rule. Petitioner never should have been put in the untenable situation of having to proceed with anything further on his date of sentencing other than sentencing for the matter he was there for originally.

The acceptance of petitioner's guilty plea as to 12-cr-116 and it's 6 counts of 2251(a) was a judicial act distinct from the acceptance of the plea itself. Once the district court accepted the guilty plea as to those 6 counts of 2251(a), the petitioner was now convicted and jeopardy attached. The district court lacked authority (jurisdiction) to hale petitioner into court to face a subsequent prosecution via prosecutor's information. See, eg. Dawson v. United States, 77 F.3d 180, 182 (7th Cir. 1996). In Dawson, the court held a defendant is considered to be convicted by entry of his guilty plea just as if a jury found a verdict of guilt against him. While a guilty plea (even if it were made knowingly and intelligently in regards to the additional charge) generally forecloses most antecedent constitutional deprivations,... double jeopardy is not one of them. See, e.g. Gomez v. Berg 434 F.3d 940 at 943 (7th Cir. 2006) and Menna v. New York, 423 U.S. 61, 63 and United States v. Adame-Hernandez, 763 F.3d 818 (7th Cir. 2013). As in Adame-Hernandez, petitioner claims that the district court's acceptance of a second guilty plea by way of prosecutor's information at sentencing was an act the district court had no jurisdiction to perform once the petitioner was found guilty on September 20, 2012.

The Double Jeopardy analysis focuses on the individual offense charged. See, Smith v. Massachusetts, 543 U.S. 462, 125 S.Ct 1429 (2005). Thus, Petitioner makes a solid argument that the district court conviction for the subsequent filing of an information after petitioner had pled guilty and been convicted to the Indictment's 6 2251(a) counts subjected petitioner to a second prosecution and/or proceeding that enhanced the sentencing penalty. The initial acceptance of a guilty plea, i.e. conviction was judgment for purposes of the double jeopardy clause AND submission of the Information subjected petitioner to further fact-finding proceedings and stiffer penalties going to guilt that were generally prohibited by the double jeopardy clause.

CONCLUSION

As petitioner has expressed to the lower courts in his previous pleadings, 'a void sentence is a void sentence, is a void sentence.' This matter resolves back to the essential doctrines of fairness in the American justice system. In this case, a Double Jeopardy violation has denied petitioner his due process and the right to be free from duplicitious prosecution and punishment for the same offense. One cannot rule on any part of this matter without recognizing the double jeopardy implications created by the district court on December 21, 2012.

The Fifth Amendment to the United States Constitution embodies three protections, (1) It protects against a second prosecution for the same offense after acquittal; (2) It protects against a second prosecution for the same offense after conviction; and (3) It protects against multiple punishments for the same offense. See, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct 2072 (1969). The case at bar violates 2 of the three double jeopardy tenets, a second prosecution for the same offense after conviction and multiple punishments for the same offense. The sentencing court in petitioner's matter has opined in United States v. Buske, 2012 U.S. Dist. LEXIS 10412, July 26, 2012,

case no. 09-cr-65 when it reiterated the exact same protections: "The Double Jeopardy Clause protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense imposed in a single proceeding." Yet, in December of that same year that same court ignored two of the three double jeopardy implications that materialized before it in petitioner's matter and issued a sentence without jurisdiction to do so, making that portion of it illegal.

The District Court seeks to avoid the matter altogether by employing the standard tactic of many courts of simply recharacterizing petitioner's Rule 60(b)(4) motion as a second 2255 petition and denying it on jurisdictional grounds, despite the fact that the same motion, re-classifed or not, can arguably still meet the 'gatekeeping' requirements for a subsequent § 2255 petition.

Some important provisions of 28 U.S.C. § 332(d)(1), 351-364, CANON 1 bear reminding: An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor, although judges should be independent, they must comply with the law and comply with this code (Canon 1). Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this code diminishes public confidence in the judiciary and injures our system of government under law.

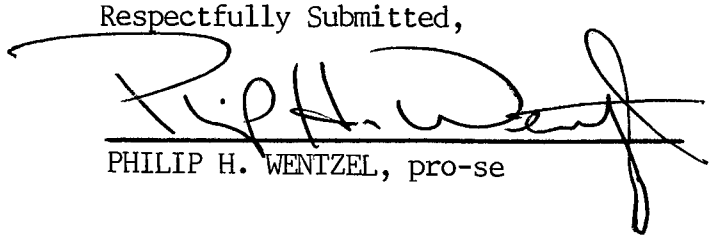
The matter before this Court goes to the heart of that Canon. To date, each

court sworn to uphold this canon and the constitution has conspiciously ignored or ruled contrary to established precedent on (including their own) the errors of constitutional magnitude presented. All of this certainly would erode public confidence in the judiciary if left to stand, and a continued failure to allow for collateral review in this matter would raise serious constitutional questions as the Seventh Circuit is taking it upon itself to re-write the 5th Amendment regarding the unambiguous rights protecting people from double jeopardy. "A sentence is illegal if it violates the double jeopardy clause of the Fifth Amendment to the constitution." United States v. Gray, 1990 U.S. Dist. LEXIS 19107, Sept. 4, 1990, citing United States v. Bentley, 850 F.2d327 (7th Cir. 1988); United States v. Cataldo, 832 F.2d 869, 874-75 (5th Cir. 1987); United States v. Ruvetuso, 840 F.2d 363, 367 (7th Cir. 1987). And a court is not prohibited from correcting an illegal sentence, even one that has been 'bundled.' See cf. United States v. Bass, 310 F.3d 321, Oct. 16, 2002; Gray supra, f.n. 2, citing United States v. Difrancesco, 449 U.S. 117, 132 (1990); United States v. Denson, 603 F.2d 1143 (5th Cir. 1979).

Petitioner prays this court will recognize the errors of constitutional magnitude as they apply not just to this petitioner but to the nation as a whole, how petitioner's mandated right to finality was violated and how the illegal sentence created as a result infected all subsequent proceedings related to it, grant this petition for certiorari and in the interests of justice, remand this case to the district court for correction - that is, vacatur of the illegal conviction and sentence (180 months) for the duplicitous 2251(a) charge, leaving stand the conviction for the finalized course of conduct petitioner had accepted responsibility for, pled to, and was sentenced to 25 years (plus 10 years supervised release) for.

Dated this 29th day of August 2019.

Respectfully Submitted,



PHILIP H. WENTZEL, pro-se