

NO.  
19-6576

IN THE  
SUPREME COURT OF THE UNITED STATES

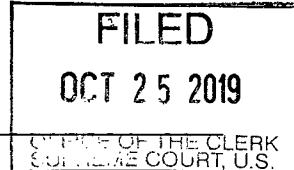
JAMES REED-PETITIONER(S)

VS.

UNITED STATES OF AMERICA-RESPONDENT(S)

ORIGINAL  
PETITION

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



PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

It is well settled that subject-matter jurisdictional challenges cannot be waived. The Eighth Circuit ruled that Reed's jurisdictional challenge(s) were "foreclosed by his guilty plea." Did the Eighth Circuit err in it's Penson review, when it ruled --without merits briefing-- that Reed waived 'the very power of the' District Court to hear his case?

Class V. United States, 138 S. Ct. 798, 800 (2017)

United States V. Cotton, 535 U.S. 625, 630 (2002)

Blackledge V. Perry, 417 Us. 21, 30 (1974)

## LIST OF PARTIES

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

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JAMES REED-PETITIONER

VS.

UNITED STATES OF AMERICA-RESPONDENT(S)

PETITION FOR WRIT OF CERTIORARI

Petitioner James Reed, respectfully request that this court issues a writ of certiorari to review a decision of the United States of Appeals for the Eight Circuit.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals is at Appendix A to the petition and is unpublished.

## II. JURISDICTION

The date on which the United States Court of Appeals decided my was was May 10, 2019. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 31, 2019. Which appears at Appendix B.

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

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises concerns regarding our adversarial criminal justice system which are enshrined in two Amendments to the U.S. Constitution, the Fifth Amendment, stating in relevant part "No person shall be ... nor be deprived of life, liberty, or property without due process of law;" and the Sixth Amendment stating in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to a public trial by an impartial jury ... and to have the assistance of counsel for his defense."

The relevant statutory provision is codified at 18 U.S.C. §3231, discussing the jurisdiction of U.S. District Courts as "The District Courts of the United States shall have original jurisdiction, ... of all offenses against the United States." Which Reed challenged said jurisdiction below under U.S. Const. Art. I, §9, Clause 3 regarding "No ... ex post facto law shall be passed."

#### IV. STATEMENT OF THE CASE

A court's failure to test its own subject matter jurisdiction, especially when raised by a party, is a structural error. When an appellate court ignores a defendant's claim of this error, because the defendant "waived raising it by pleading," there is crack in the foundation of our criminal process. If that crack is allowed to widen, it will eventually effect 90 percent, or more, of cases in the Eighth Circuit, if not the whole federal system. That crack is Reed's case, and if not repaired it will undermine the very foundation of our criminal justice system.

By declaring Reed's colorable subject-matter challenge "foreclosed" and ignoring the material questions he raised, the Eighth Circuit failed to uphold our adversarial system. Their decision threatens to collapse our justice system by allowing the Government to achieve an end run around the explicit constitutional limitations of their power to prosecute.

Those charged with upholding the integrity of the criminal justice system --the courts, defense counsel, the prosecutors-- refused to take up the matters presented below. Therefore, the adversarial system, at least in the Eighth Circuit, is in peril of collapse.

The record below is scarce due to the structural failures in the process that Reed is raising here. Where possible, Reed cites to portions of the record before the Eighth Circuit.

Reed is a pro se layman struggling to comply with the rules, while ensuring his rights are preserved. His intention is to raise the issue described herein, while preserving everything

already argued, as he believes the specific issue is proper to raise at this stage, in this Court. Reed presumes that everything presented in the supplemental brief is preserved for further review.

#### A. The Players and the Setting.

##### 1. In 1998 Reed reestablishes his home in the Philippines.

After 25 years of service in the United States Military, Reed was honorably retired from the U.S. Navy as a Senior Chief Petty Officer. On February 14, 1998 he returned to the Philippines and started his retirement. As a retired veteran living overseas Reed's U.S. mail was routed via the FPO/DPO system and delivered by the U.S. Embassy in Manila to him. (Supp. Brief<sup>1</sup> at 5.)

Reed returned to the island where he lived in 1975, reestablished his residency, worked towards his college degree, and settled in for semi-retirement. Over the next 15 years Reed accepted various contracts with the U.S. Government working both in the Philippines and other foreign countries for U.S. Military contractors. (/Id.)

##### 2. In 2007, the Indictment's operative time, Reed was in the Philippines as a U.S. Government contractor, under the Visiting Forces Agreement.

At all times relevant to the accusations against Reed his immigration status was as a government contractor NOT a tourist as the indictment contends. As a U.S. Government contractor he departed and returned to the Philippines under the auspices of the

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1 - Supp. Brief references the pro se SUPPLEMENTAL BRIEF IN OPPOSITION filed in Eight Circuit Appeal No. 18-2375 on November 15, 2018.

Visiting Forces Agreement, "VFA," entered between the Government of The Republic of the Philippines and the Government of the United States of America.

(a) Visiting Forces Agreement defines treatment of United States personnel while assigned in the Philippines on U.S. Government business.

The VFA was executed by and between the Governments of the Philippines and the United States on the 10th of February, 1998 for the express purpose of "Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines." (Preamble to the VFA, Clause 6.)

'United States personnel' is expressly defined to include "United States military and civilian personnel temporally in the Philippines in connection with activities approved by the Philippine Government ... who are employed by the United States armed forces." (VFA Art. I)(emphasis added.)

Article III of the Agreement states "United States civilian personnel shall be exempt from visa requirements." (VFA Art. III at Clause 4.)

Jurisdiction over criminal matters are expressly discussed in Article V of the Agreement, where both Governments agreed that with respect to concurrent jurisdiction "Philippine authorities shall have primary right to exercise jurisdiction over all offenses committed by United States personnel," except certain exclusions which does not pertain to the conduct at issue. (VFA Art. V, Clause 3.)

The agreement delineates how and who should exercise criminal jurisdiction, primarily resting criminal jurisdiction with the Philippine Government. There is an express process for either

Government to choose to forego its primary jurisdiction. No evidence in the discovery provided to Reed indicating said notification was made.

(b) Immigration records establish that during the conduct at issue Reed, and his team, were operating under the VFA, not traveling as tourists.

As noted in Philippine immigration service and U.S. Embassy records Reed arrived back into the country on January 18, 2007. The records note his immigration status as "VFA," meaning that until his departure he was operating 'in-country' under the VFA, NOT as a tourist. (See Supp. Brief at 28 FN 13)(Discussing in detail what Reed's actual immigration status was)(/Id. at Appendix M.) Reed then departed the Philippines on another contract abroad in March of 2008. (/Id. at Appendix M.) The time in between was, as charged in the operative indictment, when the conduct in question occurred.

3. Reed was a Military Contract Employee of the United States Embassy during the operative time of the indictment.

In 2006, Reed was in the Philippines finishing a U.S. Government contract when he agreed to work on a different U.S. military contract for 16 months out of Mactan Air Base in Cebu, Philippines. (Supp. Brief at 5.)

Near the beginning of the Cebu deployment, Reed was contractually required to make a round trip from Cebu which routed through the United States, which was booked and paid for by, the U.S. Embassy. (/Id. at 6.) On the return leg of that trip, Reed's plane stopped in Minneapolis to deplane and board passengers. Reed remained on the plane the entire time it was on the ground.

(/Id.) Reed returned January 18th, 2007 to his assignment in Cebu, Philippines where official records indicate Reed was admitted into the country under the VFA. (/Id.)

## B. Investigation of Accusations.

On and off for a ten year period the accusations against Reed were investigated by various agencies of both Governments. All but the 2012 investigation were closed as unfounded.

Reed has been proclaiming he is innocent of the allegations from the moment he learned of them. Unlike his accuser, and the government stories, Reed's version of events has never changed, he has steadfastly stated to anyone who asked that he believed his accuser was 18, as she, and others, told him.

1. Almost a decade after attempts to extort him failed, Reed is charged with having underage sex with a woman who had been locally known as an adult registered commercial sex worker.

In 2008, Reed's accuser filed a complaint with the local Philippine authorities claiming that when she was underage, Reed had raped her "each of the ten times" she claims to have visited his apartment eventually getting her pregnant. (Supp. Brief at 8-9.) Months previously, Reed's accuser and her co-conspirators were targeting another sextortion victim, Mr. Larry Johansen, who ended up paying tens of thousands of dollars to terminate his prosecution for rape<sup>2</sup>. (Rehearing Brief<sup>3</sup> at 4.) After hearing

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2 - In Asia sextortion is where a legal and consensual --by that country's laws-- sex act occurs between a Westerner and an Asian national. The national, or their cohorts, then extort the Westerner for money or threaten to file charges for rape, underage sex, etc. The ring of racketeers in Reed and Johanson's separate cases were the same group of locals. (See (Supp. Brief at 9 FNs 5 & 6)(See Also Rehearing Brief at 4.)

3 - Rehearing Brief references the pro se PETITION FOR REHEARING EN BANC filed on Eighth Circuit Appeal No. 18-2375 signed June 12, 2019.

about Johansen's charges Reed, when contacted for payment, refused to be blackmailed maintaining that the woman in question was at least 18 at the time. (Supp. Brief at 8.)

Based on the accusers' statements, and those of others, Reed was led to believe the accuser was registered with the Health Department of the Philippine as a commercial sex worker, who was over 18, and working to pay her way through college. (/Id.) As a counter point to Reed's steadfast version, at each telling over the 11 years of investigations, the accuser and her cohorts facts, places, dates, and people changed at each telling. (/Id. at 7-9.)

Once it became apparent that Reed would not be blackmailed, the sextortion ring stepped up their game, filing complaints with the U.S. officials. The Department of Homeland Security opened an investigation, which lasted for four years before being closed with no charges filed. New investigators opened new cases, based on the same set of false allegations, changing the official focus to an investigation of child sex tourism. This second investigation led to an indictment being filed in the U.S. District Court of D.C. (/Id. at 12.)

Despite the mounds of mitigating discovery which support Reed's version of what happened; only the accusers' versions --which were changed over the 10 years of investigations-- are what has been put in the record of the case. (Rehearing Brief at 2.) This is due to the "Believe the Victim" investigative methodology<sup>4</sup>, which is the law enforcement version of the #MeToo

movement and has been the global policy of the Department of Homeland Security, Department of State, and Department of Justice investigative agencies for more than 10 years. (/Id. at FN 1.)

2. Reed's purported 'fugitive status' was a ruse by investigators to entice local authorities to arrest him.

On December 15, 2015 the District Court for the District of Columbia issued a sealed Indictment and an arrest warrant for Reed. Without explanation or a simple computer search (Supp. Brief at 10-11) DHS declared Reed a fugitive because as they testified in the Minnesota Court they "could not locate him." (Page 20-21 September 15, 2017 Detention hearing transcript.)

Contrary to the Government's deliberate misrepresentations, discovery documents establish that at no point was Mr. Reed a fugitive. His constant information and current address(es) were continually available to numerous Philippine and U.S. Government Agencies. (See Supp. Brief at pages 10-12.)

The misrepresented fugitive status, was a ruse perpetrated by the DHS team to get Reed falsely arrested by the Philippine officials on a nonexistent immigration violation claiming that Reed's passport had been revoked, even though he had not received the notice implementing the revocation until the day after his arrest by Philippine officers. (Rehearing Brief at 4.)

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4 - "Start by Believing" the victim shifts the focus of the investigation from that of a neutral fact finder to that of an advocate for the accuser. It calls for the investigator to start their inquiry by believing everything the accuser states, and to minimize any inconsistencies. This methodology was developed in the mid 1990's and has been adopted and mandated by all the Executive Departments involved in Reed's case. (See Center for Prosecutorial Integrity "Believe the Victim: The Transformation of Justice," white paper located at [HTTP://www.saveservices.org](http://www.saveservices.org)) ([www.dhs.gov/blue-campaign/](http://www.dhs.gov/blue-campaign/) victims-centered-approach) (U.S. DHS directives regarding investigations of this nature.)

C. Initial Arrest and Reed's journey through the U.S. Court System.

1. Philippine Custody.

Reed was imprisoned, under horrendous conditions, for nonexistent immigration violations by the Philippine Government for 43 days starting on August 3, 2016. Violating several Government Agreements; the Philippine & U.S. Constitutions; and the laws of both countries Reed was presented by Philippine officials for rendition to U.S. soil.

2. Reed is first restrained in the U.S. District Court for the Central District of California but the case was initially litigated in the District of Columbia.

September 16, 2016 Reed's indictment is unsealed in U.S. District Court for the Central District of California at Los Angels where he made his first appearance after being turned over to United States Custody. (Rehearing Brief at 4.) Over his objection he and the case were promptly transferred to the U.S. District Court for the District of Columbia. (/Id.)

While waiting for trial in D.C., Reed discussed with his attorneys the district court's ability to hear the case, considering his VFA status, the length of delay, where the accusation occurred, and the fact he should be charged in the Philippines like Johansen was.

After 10 months of litigation and failure to follow Reed's instructions, his appointed attorney agreed to a Government requested change of venue. On motion by the Government the charges were dismissed in D.C. and a complaint was filed in the U.S. District Court for the District of Minnesota effectively moving the case for a second time. (/Id.)

3. Reed and his case arrive in the U.S. District Court for the District of Minnesota.

An indictment was secured against Reed for what the Government termed "child sex tourism." The Minnesota District Court appointed Deputy Federal Defender Reynaldo Aligada to represent Reed.

While awaiting trial Reed had various ailments that need to be tended to, and the V.A. Hospital, with the permission of the district court, performed two surgeries on Reed. The first, for his hernia, was handled as an outpatient, the second, for his eyes, was handled as in-patient.

D. The Drug Induced Plea.

1. Outpatient hernia surgery requires escort due to side effects of anesthesia and narcotic pain medication.

April 13, 2018 the VA outpatient facility performed a hernia surgery on Reed. (Supp. Brief at 14.) For the week following the operation the surgeon ordered Reed be given oxycodone and over the counter Tylenol on an as needed basis. Before scheduling surgery the VA required Reed be provided an escort because of the side effects of the medications administered during and after the operation. (/Id.)

Oxycodone+Tylenol is referred to as Percocet and is known to impair a person's ability to think, concentrate, or remember as it can induce euphoria along with disorientation. These effects are more pronounced for those over 60, such as in Mr. Reed's case. In most areas, if a person is on these types of narcotic pain pills they are not competent to enter into contracts. Nor, according to the Code of Federal Regulations, allowed to operate certain vehicles, or perform certain duties. (Supp. Brief at 15 FN 9.)

2. Defense Counsel seeks list of specific medications and their effects prior to surgery.

A few days prior to Reed's surgery defense counsel specifically contacted the pre-op nurse to get a list of what medications Reed would be receiving both pre and post the operation. He specifically asked for the side effects of the medication. (Rehearing Brief at 5.)

3. For the 20+ months before surgery Reed's instructions were to take the case to trial. Only days after surgery Reed, while still on opioids, changes his plea.

Since his first restraint in the Los Angles Court, Mr. Reed has been asking for, demanding, and insisting on a trial for the false allegations. At every meeting with attorneys in both D.C. and Minnesota he clearly and unequivocally articulated his intent to go to trial because any guilty plea would require him to lie. (Supp. Brief at 13) (Accord Rehearing Brief at 4.)

4. All of the Government actors, and the presiding judge, were readily aware of Reed's opioid use --prior to and-- at his change of plea, but did nothing to stop or postpone the plea.

At the time of Mr. Reed's change of plea hearing the record below establishes that the Prosecution, the U.S. Probation Office, the Federal Defender, and the District Court Judge were aware that Reed had just had surgery six days before, was on prescription pain killers during the whole plea process. (Plea discussion, executing the agreement, and at the hearing) (Supp. Brief at 15.)

Despite this knowledge, no one inquired into the details of what Reed had taken, when, or at what dosage. They simply set mute and allowed a known drug impaired man to plead guilty. (/Id.) Start to finish --after 20+ months of demanding to go to trial--

in less than seven days while on narcotic medications Reed allegedly flipped 180 degrees on his desire to go to trial. This strains credulity, especially when after the drug fog dissipated, Reed started insisting the impaired plea be withdrawn. (/Id. at 16.)

#### E. Appeal Process Failures.

From his very first appearance in the U.S. District Court located in Los Angeles Reed has been asking questions about the Government's case and it's ability to prosecute him. At each stage of the process Reed communicated to his attorneys; to the various district courts; and to the Eighth Circuit his concerns regarding both the Court's --and the Government's-- lawful authority to prosecute these unfounded charges.

##### 1. Motion to Dismiss Same Defense Counsel due to probable conflict of interest.

After Reed was transferred to federal prison and started researching what had happened to him verses the law, he realized Mr. Aligada, his defense counsel --and now appellate counsel-- should no longer be representing him.

As noted in Reed's Motion to Dismiss appellate counsel, Aligada appeared to be operating under a conflict of interest due to his direct involvement and/or orchestration of the drug induced change of plea process. (See Supp. Brief at 19-20) (See Also Rehearing Brief at 5-6.)

2. Conflicted counsel files Anders v California Brief, unilaterally raising a single issue regarding length of sentence despite Reed's instruction to raise jurisdictional questions.

Reed gave various instructions via quite a few written requests and a couple of phone calls to his appellate counsel regarding issues and his case file records. Reed copied many of these requests to the appellate docket to preserve them, and keep the court informed of the brewing representational problems. After multiple extensions Aligada filed a Motion to Dismiss Reed's Appeal and a 13 page brief pursuant to Anders v California, 386 U.S. 738 (1967). Aligada did not raise any of the jurisdictional, prosecutorial misconduct, impaired plea, or venue challenges that Reed had requested nor did Aligada mention the possible conflict he was operating under..

During the period between Reed's arrival at FCI Sandstone, and a few weeks after the docketing of Aligada's Anders brief, Reed had been requesting the defense team's entire case file. Reed finally starting receiving box after box of the case file from Aligada after the Anders brief had been filed with the final box arriving in December of 2018. The boxes contained discovery, notes, and some of the court filings of Reed's case. In total the content amounted to approximately 5 feet of paper. Much of the material was in no particular order and documents Reed had never seen before or knew about.

It has taken Mr. Reed close to 10 months to get through most of the material, there is still some missing items such as the promised video and audio discovery. However, prior to completing

his review he was required to file a pro se Supplemental Brief with the reservations noted, he filed his brief in opposition to Aligada's Anders brief.

3. Reed's pro se Opposition Brief raised multiple issues, including questions regarding subject matter jurisdiction.

Reed's Supplemental Brief in Opposition raised, and argued, the following issues: 1) Plea process was involuntary, unknowing, and unintelligent due to the narcotic induced impairment (Supp. Brief at 23 - 25); 2) U.S. District Court for Minnesota was the improper Venue for Reed's case (/Id. at 25-26); 3) Reed's speedy trial rights were violated (/Id. at 26-27); 4) Both Commercial Nexus and Temporal ex post facto subject matter jurisdiction was challenged (/Id. at 28-33); 5) Reed's case is "riddled with Prosecutorial Misconduct" (/Id. at 33-28); and 6) Reed's Due Process Rights were violated by the improper handling of his PSR (/Id. at 38-39.)

(a) Recently discovered Motion to Dismiss Indictment raising subject-matter issues was filed in the Minnesota District Court.

Reed recently completed his review of the materials provided by Aligada, in those records he discovered a Motion to Dismiss Indictment, where it appears Aligada raised some of the subject matter and venue challenges Reed had requested all along. (MN Doc<sup>5</sup>. 46.) Unfortunately the matter was mooted by Reed's drug induced plea BEFORE it was decided upon by the District Court.

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5 - MN Doc. references a document on the U.S. District Court for the District of Minnesota, docket for case #0:17-cr-216-DWF.

#### 4. Circuit Panel Affirms Conviction and Sentence.

Rebuffing Reed's contentions as irrelevant and "foreclosed" the Eighth Circuit's panel affirmed the the district court's handling of the the plea process, and the ultimate sentence. (See Appendix A of this petition, United States v Reed, 770 Fed Appx 305, 306 (8th Cir. 2019).)

Relying on a prior circuit precedent regarding prescription heart medication, the Panel rejected Reed's claims that "his plea was involuntary," holding that because "his prescribed medications" did not cause him to be "cognitively impaired." (Id. at 305.)

After determining the guilty plea was valid, the panel disposed of the claims raised by Reed's pro se brief as "barred" by the appeal waiver, specifically stating "that Reed's speedy trial, venue, prosecutorial misconduct, and jurisdictional claims --while outside the scope of the appeal waiver-- are foreclosed by the guilty plea." (Id. at 306.)

#### 5. Reed's pro se Petition for rehearing en banc focuses on the Jurisdiction and Conflict issues.

When the whole Circuit is given an opportunity to correct the errors via a Petition for Rehearing en banc, but abrogates its supervisory duty, the foundation which the Eighth Circuit's criminal justice system is built upon is exposed as rotting.

Due to the many failures of those sworn to up hold the constitution, Reed's multiple subject-matter jurisdictional challenges went unheard, despite his best efforts to get anyone (his attorneys, the district court(s), or the appellate court) to consider them.

## V. REASONS TO GRANT THE WRIT

Subject-matter jurisdictional challenges go to the heart of the Government's power to prosecute its citizens and a court's ability to hear the charges. To allow the Eighth Circuit's decision to stand will permit unchecked prosecutorial power of the Federal Government, the antithesis of our country's founding principles.

[O]ur criminal justice system is no longer the jury-trial-based adversarial system that it once was. We have noted that '[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. Missouri v Frye, 566 U.S. 134, 182 L. Ed. 2d 379, 389 (2012). We have added that today " 'plea bargaining is "not some adjunct to the criminal justice system; it is the criminal justice system." (Southern Union Co. v United States, 567 U.S. 343, 183 L. Ed. 2d 318, 350 (2012)(Dissent by Justice Breyer, which Justices Kennedy and Alito joined).)

If left to stand the outcome below, combined with the state of our criminal justice system, will lead to the Government being able to prosecute anyone they choose, whether or not the Constitution grants them the power to do so.

Reed's petition presents a straight forward application of this Court's supervisory powers to 'nip in the bud' a Constitutional aberration, that if left unchecked, could taint the majority of the criminal cases within the federal system.

A. The Eighth Circuit abrogated its duties under Penson when it neglected 180 years of this Court's rulings which have held: "[a]rguments attacking a Court's subject-matter jurisdiction can neither be waived, nor forfeited." (Class 138 S. Ct. at 811.)

1. From 1832 forward, this Court has held no party can waive, or forfeit a challenge to a court's power to hear a case.

Blacks law defines "subject-matter jurisdiction" as "Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." (Jurisdiction: Subject-Matter, Blacks Law Dictionary, 10th Ed. at pg 983.) In numerous cases the Supreme Court has ruled, using varying language, that it --and by extension the lower courts-- must test its own jurisdiction irrespective of either party raising the question. Further refining the definition of Subject-matter jurisdiction to "the courts statutory or constitutional power to adjudicate a case." (Cotton 535 U.S. at 630)(Quoting Steel Co. V Citizens for a Better Environment, 523 U.S. 83, 89 (1998).)

This Court's requirement to test its own, or the lower court's jurisdiction, was first discussed in M'Kinney v Carroll, 37 U.S. 66, 9 L. Ed 1002, 12 Peters 66 (1838). Where the Court ruled the "jurisdiction of this Court over this cause, not questioned at the bar, but the question appears necessarily to arise on the record and **must therefor be decided by the Court.**" (M'Kinney, 9 L Ed at 1003, 12 Peters at 68)(emphasis added.) The court dismissed the case "for want of jurisdiction." (McKinney at 1004, 12 Peters at 71.)

For the most part this Court will not hear questions not properly before it, except for questions of it's own, or the lower court's, power to hear the case. (42 L. Ed. 2d 946, "Issues Not Raised-Supreme Court," by Ernest H. Schopler at II, §4.)

It has long been held that, because a court MUST assure itself of it's own jurisdiction to hear a case, the right to challenge subject-matter jurisdiction can never be waived. (Gonzales v Thaler, 565 U.S. 134, 181 L Ed 2d 619, 630-31 (2012).)

(a) It is well settled that a valid guilty plea waives most claims, but CANNOT waive constitutional challenges to the very power of the court to hear a case.

The concept of the inability to waive subject-matter jurisdiction, as differentiated from personal jurisdiction, was first articulated in The State of Rhode Island v The State of Massachusetts, 9 L Ed 1233, 1258; 12 Peters 657, 719, a 1838 decision of this Court. This concept has been formalized and applied to federal criminal cases, so that as of 2017 a guilty plea, by itself, cannot bar "a claim that implicates 'the very power of the [Government]' to prosecute a defendant." (Class, 200 L Ed 2d 37, 40; 138 S. Ct. 798, 800)(emphasis added.) In fact every Circuit has recognized the simple axiom: That non-jurisdictional claims are waivable by plea, but subject-matter jurisdictional challenges are not. (See Harris v United States, 149 F.3d 1304, 1308 (11th Cir. 1998)(Collecting Cases).)

When Rodney Class asked this court to answer "[w]hether in pleading guilty, a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction," (Class at 803) the Court responded by finding "[a] guilty plea,

by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction." (Id. at 800.) Applied here, Reed's plea of guilty, by itself, cannot be used to foreclose his challenge to the very power of the court to hear the case, nor can it waive an as applied challenge to the constitutionality of his statute of conviction.

This premise is supported by the Class Court when it discussed the "nature of guilty pleas which, in broad outline, stretches back nearly 150 years. In 1869 Justice Ames wrote for the Supreme Judicial Court of Massachusetts:

'The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged.' Commonwealth v Hinds, 101 Mass. 209, 210.

Decisions of federal and state courts throughout the 19th and 20th centuries reflect a similar view of the nature of a guilty plea." (Class at 803.)

Class continues a long standing universally accepted doctrine that a plea waiver waives all nonjurisdictional defects. Reed's Panel erred when it declared his colorable jurisdictional challenges, which fell outside the appeal waiver, as "foreclosed by the guilty plea." (Rehearing Brief at 8.)

The Eighth Circuit's conclusion is simply not reconcilable with court precedence. In Cotton, this Court unanimously held "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." (Cotton's

Syllabus; at 535 U.S. 630.) Chief Renquist, went on to determine that "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in the District Court." (/Id)(emphasis added)(Relying On Louisville & Nashville R. Co v Mottley, 211 U.S. 149 (1908).)

2. The Eighth Circuit erred when conducting their Penson v Ohio review of Reed's case by claiming Reed's colorable subject-matter jurisdictional challenge was "foreclosed" and then summarily dismissing his Appeal.

(a) Penson v Ohio requires that any "non-frivolous" issues be briefed; An issue going to the heart of the court's power to hear a case is not frivolous.

This Court has long held that an appellant is "entitled to a single minded advoca[te]" who conducts a "conscientious examination" of the record and raises any issues that "might arguably support [an] appeal." Such advocate should only reject an issue if it is "so frivolous that it might be decided without adversarial presentation." (See Penson v Ohio, 488 U.S. 75, 82 (1988))(Quoting Anders, 386 U.S. at 744-45.)

Penson was decided to ensure that crucial matters --such as colorable subject-matter jurisdictional challenges-- do not fall through the cracks due to an overburdened appointed appellate attorney. This Court commanded that the appellate courts conduct their own independent review of the record to surface any "substantial legal and factual arguments" which are of "paramount importance in our adversarial system of justice." (Penson 488 U.S. at 80-84.)

By failing to act in accordance with Penson's mandate and ordering merits briefing on Reed's colorable subject-matter challenge the Eighth Circuit failed to uphold our adversarial

system. Their decision allows the Government to readily convict anyone they choose, the very antithesis of our adversarial system of justice.

(b) Subject-matter Jurisdictional challenges CANNOT be summarily dismissed.

During oral arguments in Class the Government put forth the same proposition that the Eight Circuit relied on to affirm Reed's sentence and conviction. The Solicitor General stated that Mr. Class had "inherently relinquished his constitutional claim" by entering a guilty plea. (Class, 138 S. Ct. at 805.) This court rejected that contention holding that a valid guilty plea does not "bar direct appeal of constitutional claims." (/Id.) The Federal Government's third contention, that Mr. Class had "expressly waived" his right to appeal constitutional matters, was also rejected by this Court, ruling that a Fed. Rule Crim. Proc. 11(b)(1)(N) plea colloquy by the district court, was nothing more than the district court abiding by the rules, and any interpretation otherwise was plainly "wrong." (Class at 806-07.)

Justice Breyer, further elaborated that rights not relinquished by a guilty plea include "a waiver of the privileges which exist beyond the confines of the trial." (/Id.) (Quoting Mitchell v United States, 526 U.S. 314, 324 (1999).) This most assuredly includes checking the power of the Government to prosecute in a limited central government system, such as our own.

In his pro se capacity Reed was able to identify various constitutional challenges that fell outside those that exist solely within the "confines of the trial," he is confident that due to the complexities of his case there are others, but he lacks the training and experience to surface them.

3. Reed has identified two valid challenges to the Government's power to prosecute his case, which were not developed below due to the Circuit's improper application of this Court's precedence.

Reed presented below two colorable subject-matter jurisdictional challenges based on the bare record that was available to him. None have been developed due to the representational issues noted in Part IV §§'s (D) and (E), supra and the Eighth Circuit's unwillingness to uphold the adversarial system in their Circuit.

- (a) Reed challenged the district court's power to hear his case based on a temporal ex post facto violation.

In his Supplemental Brief Reed expressly raised an as applied ex post facto challenge to the Government's ability to prosecute him, and the district court's power to hear the case, based on the intersection of the temporal facts of his case and the timing of when Congress made significant changes to his charging statute. (Rehearing Brief at 9.)

As explained in his Supplemental Brief pages 29-33, and expanded upon in his Petition for Rehearing (Pages 9 - 11) the ex post facto clause of the U.S. Constitution (Article I, §9) prohibits the 2003 and 2013 changes in the reach and evidentiary

standard of Reed's charging statute from being applied to him. Because, jurisdictionally speaking the operative travel was Reed's travel to establish residency, which occurred in 1998 five years before the statue was amended<sup>6</sup>.

From the founding of our country, one of the very first criminal decisions issued by this Court was the seminal ex post facto case, Calder v. Bull. Our ex post facto jurisprudence sprouts from this case and was last summed up in Carmel v. Texas, 527 U.S. 513 (2000) when Justice Stevens said:

It is settled, by decision of this Court so well known that their citations may be dispensed with, that any statue which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. (/Id. at 537) (Quoting Collins v. Youngblood, 497 U.S. 37, 42 (1990) (Relying On Beazell v. Ohio, 269 U.S. 167 (1925).))

The Carmel Court went on to add one additional category of retrospective law, that of "legal rules of evidence" which fall within "the clause's scope as described by Justice Chase in Calder." (Carmel at 537-38.)

Applying the controlling law to the case at bar, the statutory changes in 18 U.S.C. §2423(c) --Reed's charging statute-- occurred after one of two jurisdictional events a) either the 1998 establishment of Reed's Philippine residence (supra at Part IV §(A)(1)); or b) the 2007 encounter in contention.

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6 - In 2003 Congress amended Title 18 U.S.C. 2423 by adding the subsection Reed is charged under, this new subsection (c) expanded the reach of the statute to encompass events that previously were not a crime. (Rehearing Brief at 10.) 2013 saw Congress expand the reach of 2423(c) further by making it applicable to U.S. Citizens, who like Reed, reside outside of the U.S. (/Id.) Finally, in 2015 Congress adjusted the evidentiary standard applicable to Reed's affirmative defense. (/Id.)

Lacing Reed's temporal facts with the legislative enactment dates drives this case foursquare in the retrospective application territory prohibited by the ex post facto clause.

The temporal reach of Reed's charging statute is, and always has been, one of his primary claims:

The district court lacked the authority to hear this case because 1) Reed's travel to establish residence occurred five years BEFORE the statute was amended; 2) The language incorporating Reed's residency was added AFTER the jurisdictional trigger occurred; and 3) The evidentiary standard was increased on Reed's affirmative defense, making it more difficult for him to show he was legally innocent of the charge.

(Rehearing Brief at 11)(Relying On Supp. Brief at 29-33)(Accord DMN ECF No. 46, Motion to Dismiss Indictment.) These material questions to the subject-matter jurisdictional power of the district court to hear, and the Government to prosecute, the case against Reed has always been raised, but has never been addressed by the U.S. District Court for the District of Columbia, by the U.S. District Court for the District of Minnesota nor by the Eighth Circuit.

4. Left unchecked the Government will further tip the scales of justice against the founding principles of this country.

Our country was founded on the principles of a limited Federal Government, one with specific and enumerated powers. One such power NOT given the Federal Government was that of plenary police power. Yet, today one cannot turn on a TV and not hear about the latest Federal prosecution of such and such for a laundry list of "offenses against the United States."

To allow the Eighth Circuit's sophistry that Reed's colorable subject-matter jurisdictional challenges are "foreclosed by [his] guilty plea," will permit the Federal Government unchecked prosecutorial power to charge, and convict, its citizens regardless of whether the Constitution permits such action.

Anders and Penson call for appellate counsel and the reviewing Circuit panel to surface issues "that might arguably support [an] appeal." (Anders 386 U.S. at 744; Penson 488 U.S. at 75.) The Circuit Panel is realistically a criminal defendant's last bulwark in the protection of his Constitutional rights at any stage of our "adversarial system of justice." (Penson at 83-84.)

The Eighth Circuit failed in their obligations to surface issues of "paramount importance to the adversarial system." (Penson 488 U.S. at 80-84) Reed respectfully requests this Court not allow the unchecked power of the Government to prosecute at will to spread, and nip this anathema to our system of justice in the bud.

## VI. CONCLUSION

The petition for writ of Certiorari should be granted.

Dated: Sandstone, Minnesota

Respectfully Submitted,

October 23, 2019

  
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