19-8082

No:

In the
Supreme Court of the United States

ALTIUS WILLIX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is an indictment considered duplicitous or multiplicious when it charges 2 counts occurring out of the same sequence or events that led to one episode of criminal charges and if so, does the trial court err invoking the concurrent sentence doctrine since another sentence, on an unrelated charge supersedes the sentence being challenged, or does the Fifth and Sixth amendment mandate that the challenged sentence be addressed on the merits, irrespective of the final sentence imposed.

Does a variance of the indictment occur requiring a new trial when the court removes from the jury's consideration the allegation that Willix was charged with us[ing] a deadly weapon and inflict[ing] bodily injury thus lowering the government's burden of proof at trial.

Should it be considered a structural error when a criminal defendant is not present for the reading of a jury note?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Eleventh Circuit, and the United States District Court for the Middle District of Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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Altius Willix, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *Willix v. United States*, Docket No: 19-12076 (denied December 19, 2019) and is reprinted as Appendix A to this petition.

The opinion of the District Court, (Lazzara, R.), whose judgment is herein sought to be reviewed, is an unpublished decision in *Willix v. United States*, Docket No: 8:19cv866 (denied April 19, 2019) and is reprinted as Appendix B to this petition.

STATEMENT OF JURISDICTION

The Eleventh Circuit's denial of Petitioner's Title 28 U.S.C. 2255 was entered on December 19, 2019. The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution of the United States provides:

> 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 in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifht Amendment U.S. Constitution.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution.

Title 18 U.S.C. § 111 provides in relevant part:

(a) In General.—Whoever—

> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official

duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced Penalty.—

Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

Id. Title 18 U.S.C. § 111.

Fed. R. Crim P. 43 provides in relevant part:

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. §3582 (c).

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Id. Fed. R. Crim P. 43.

STATEMENT OF THE CASE

A federal grand jury in the Middle District of Florida returned a superseding indictment against Willix charging two counts of forcibly assaulting a federal officer with use of a deadly weapon and inflicting bodily injury, in violation of 18 U.S.C. § 111(a)(1) and (b) (Counts 1 and 2). The indictment also alleged one count of conspiring to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii) (Count 3). The final count alleged that he attempted to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii) (Count 4).

On appeal, the government alleged that the two counts were for "forcibly assaulting a federal officer with use of a deadly weapon *or* inflicting bodily injury, in violation of 18 U.S.C. § 111(a)(1) and (b) (Counts 1 and 2). However, the superseding indictment alleged forcibly assaulting a federal officer with use of a deadly weapon *and* inflicting bodily injury, in violation of 18 U.S.C. § 111(a)(1) and (b) (Counts 1 and 2). The disjunctive use of the word "and" versus "or" has become a critical issue on these appeals.

Prior to trial, the government filed a Title 21 U.S.C. § 851 notice of enhanced sentence due to Willix's two prior drug convictions. The jury returned a verdict of guilty to all counts. At sentencing, several guideline enhancements were addressed

for sentencing purposes only, however, in light of the 851 notice, the court sentenced Willix to 240 months as to counts 1 and 2 and life incarceration as to counts 3 and 4. On February 5, 2018, the Eleventh Circuit Court of Appeals affirmed Willix' conviction. *United States v. Willix*, 723 F. App'x 908 (11th Cir. 2018).

Willix them proceeded via his Title 28 U.S.C. § 2255 which was denied. The Eleventh Circuit refused to grant a certificate of appealability.

STATEMENT OF THE FACTS

1. Overview of the Offense

On or about April 11, 2016, various federal and state law enforcement officers conducted an operation into an alleged conspiracy to transport narcotics through the United States Postal Service ("USPS"). They located a package shipped by the USPS that contained what they believed was methamphetamine. Law enforcement opted to conduct a monitored delivery of the package in Winter Haven, Florida. This involved an undercover federal agent posing as a postal carrier, while other officers conducted surveillance. Delivery was attempted on April 11, 2016. Since no one was available to sign for the package, an agent left a form slip indicating that a delivery had been attempted. The next day a woman contacted the local postal office and requested delivery of the package. On April 12, 2016, the authorities attempted another monitored delivery of the aforementioned package.

An undercover federal officer wired for sound, while under the observation of other agents, approached the address listed on the package and made contact with residence Johnnie Mack Brown. Brown called Willix, who arrived in a white van and also interacted with the undercover federal officer. Neither Willix nor Brown signed for the package. The undercover federal officer left with the package undelivered. Law enforcement officers observed Willix drive away in his white van, park his vehicle several blocks away, exit the van, and begin walking on the street. Three law enforcement officers - Doug Smith, Evan Miyamoto, and Justin Duralia - made contact with Willix on a residential street near the delivery location. Duralia verbally identified himself as "police" Smith wore clothing with the words "police" on it, and Miyamoto wore a vest with "police" and "DEA" emblazoned on it. Willix ran from the three into a tented carport of an adjacent residence. Duralia and Smith ordered him to exit the tented carport, but Willix ran out of the carport and around the residence. As Willix rounded the corner, he ran into Smith who was following him in the opposite direction. During the ensuing moments, Willix, who was in close proximity to Smith, allegedly, attempted to grab his weapon. Miyamoto threatened to shoot Willix and began assisting Smith with detaining Willix.

Miyamoto testified that Willix then attempted to take his weapon and that Willix pushed him against the wall of the residence while they struggled. The

Government contended that after several moments of resistance, Willix ran from the three agents, but was shortly thereafter handcuffed and taken into custody in a parking lot. Willix was not initially arrested for any narcotics-related offense. On April 13, 2014, Willix was charged by criminal complaint with assaulting, resisting, and impeding federal law enforcement officers while using a deadly and dangerous weapon. The Government alleged that Willix grabbed the weapons of Smith and Miyamoto. At the time of the offenses, 18 U.S.C. §11 l (b) provided an enhanced penalty *if* a defendant "inflicts bodily injury" upon a federal officer in the course of an assault. Willix requested that, pursuant to *United States v. Zabawa*, 719 F. 3d 555 (6th Cir. 2013), the jury be instructed on the difference between "cause" and "inflict" concerning Counts 1 and 2. In particular, Willix requested that the jury be instructed that they must find beyond a reasonable doubt that "Defendant actually and directly applied the physical force to the Federal officer that resulted in the physical harm to the Federal officer." The district court disagreed and specifically prohibited Willix from arguing to the jury that there is a difference between "cause" and "inflict" (Doc. 123, at 49-50) relying on *United States v. Garcia-Camacho*, 122 F. 3d 1265 (9th Cir. 1997) and *United States v. Jackson,* 310 F. 3d 554 (7th Cir. 2002). Willix subsequently renewed his request for the "inflict"-related instruction prior to the jury being read the instructions. The district court also ruled that there was insufficient evidence to support a finding

that Willix used a deadly or dangerous weapon under 18 U.S.C. §111(b), leaving the issue of whether Willix inflicted bodily injury the sole ground upon which the jury could have convicted him under 18 U.S.C. § 111 (b).

REASONS FOR GRANTING THE WRIT

This court should issue a writ of certiorari because the United States Court of Appeals for the Eleventh Circuit has interpreted federal statutes in a way that conflicts with applicable decisions of this court

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
> >
> > (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. Is an indictment considered duplicitous or multiplicious when it charges 2 counts occurring out of the same sequence or events that led to one episode of criminal charges and if so, does the trial court err innvoking the concurrent sentence doctrine since another sentence, on an unrelated charge supersedes the sentence being challenged, or does the Fifth and Sixth amendment mandate that the challenged sentence be addressed on the merits, irrespective of the final sentence imposed.

The grand jury charged Willix within count 1 with "knowingly and intentionally forcibly, assault, oppose, impede, intimidate and interfere with an officer and employee of the United States, as designated in 18 U.S.C. § 11114, that is D.S, a United States Postal Inspector, while he was engaged in, and on account of, the performance of his official duties, and in committing said offense, *used a deadly weapon **and** inflicted bodily injury*[1] and count 2 with the same offense, however, for assaulting "E.M. a Drug Enforcement Administration Special Agent." (Doc. 10). Both charges occurred from the same incident and a result of the same charge when Willix attempted to flee the agents and resist arrest. *Both agents attempted to arrest Willix a the same time, on the same scene and were involved with the struggle and Willix simultaneously.* Counsel had an obligation to request

[1] The government alleged in their appellate brief that Willix was charged with two counts of forcibly assaulting a federal officer with *use of a deadly weapon **or** inflicting bodily injury*, in violation of 18 U.S.C. § 111(a)(1) and (b). That is an error, the indictment was returned by the grand jury that Willix has violated both elements of the charged offense.

that one of the charges be dropped as multiplicious since they addressed the same incident.

Courts have clarified that counsel has an obligation to familiarize himself/herself with the relevant case law on the matter. See, *United States v. Beckner*, 983 F.2d 1380, 1386 n.1 (6th Cir. 1993) (asserting that we cannot separately sentence defendants for injuring multiple federal officers when injuries are caused by single act). There was no justification for the charges in the manner they were presented. Neither can the number of charges be determined by the number of officers involved in the arrest. *United States v. Theriault,* 531 F.2d 281, 285 (5th Cir. 1976) ("The test is whether there is more than one act resulting in the assaults, not whether more than one federal officer is injured by the same act."); *United States v. Hood,* 210 F.3d 660, 663 (6th Cir. 2000). Willix's conviction of both counts violated Willix's constitutional rights, regardless of whether one sentence was imposed. *Ball v. United States,* 470 U.S. 856, 864-65, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985).

Here there was one assault that occurred at the same time against 2 officers that were trying to arrest Willix. In differentiating whether an attack against multiple officials is a single assault or multiple assaults, federal courts have inquired whether officers were injured by "distinct successive criminal episodes, rather than two phases of a single assault." *United States v. Segien*, 114 F.3d 1014, 1022 (10th

Cir. 1997) (internal quotations and citation omitted); accord *United States v. Lewis*, 140 U.S. App. D.C. 345, 435 F.2d 417, 420 (D.C. Cir. 1970) (citation omitted); *United States v. Hood*, 210 F.3d 660, 663 (6th Cir. 2000). It has been explained that an indictment is multiplicious if it charges a single offense in multiple counts. Multiple punishments for the same criminal offense are barred by the Double Jeopardy Clause of the Fifth Amendment. In order to show a violation of that clause, a defendant must show that the two offenses charged are in law and fact the same offense. *Id.*

The court never inquired from the government on their position. The district court's reasoning was that because Willix has only challenged his convictions and sentences for forcibly assaulting a federal officer inflicting bodily injury for which he was sentenced concurrently with the methamphetamine offenses, the Court will invoke the concurrent sentence doctrine and decline to address the merits of his motion to vacate. *See Streator v. United States*, 431 F.2d 567, 568 (5th Cir. 1970) (affirming denial of § 2255 motion to vacate under concurrent sentence doctrine where defendant only challenged one judgment of conviction for which he received a concurrent sentence with other unchallenged convictions)

Here, since the same exact charges were charged by the government on the same incident that occurred on the same day. Trial counsel failed to even mention the error, much less object to the error. Based on the lack of performance, this

Court's *Strickland v. Washington,* 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) standard has been easily overcome.

II. Does a variance of the indictment occur requiring a new trial when the court removes from the jury's consideration the allegation that Willix was charged with us[ing] a deadly weapon and inflict[ing] bodily injury thus lowering the government's burden of proof at trial.

Willix was charged in counts 1 and 2 in that he "used a deadly and dangerous weapon and inflicted bodily injury." The charged statute permits the charging of an alternative theory *for an enhanced penalty* if a defendant either "(a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury..." Id Title 18 U.S.C. § 111. The keyword "or" as used in the statute, penalizes the violation for either "using" a deadly weapon or [in the alternative] "inflicts bodily injury." Willix was charged with both elements of the offense, the use of a deadly weapon *and* the inflict[ing] bodily injury. The government's burden was set with the charges returned by the grand jury. The government's complete theory during the trial was that Willix used the deadly weapon to assault the agents, causing bodily injury. After a Rule 29 motion was requested, the court determined that it would strike the "used the deadly weapon" element (although charged in the indictment) after the government conceded that the element could not met. The government's burden of proving beyond a reasonable doubt both elements of the charged offense was lowered. The government had the option of

charging the elements of the offense in the alternative as an "or" however, the grand jury chose to charge both elements of the statute. The variance was devastating to Willix. In this case, a variance permitted the government to charge a violation of "both" elements of the offense and then, after the proof of the evidence was presented, limit the charges that would proceed to the jury. A variance occurs when the facts proved at trial deviate from the facts contained in the indictment but the essential elements of the offense are the same. The allegations in the indictment and proof at trial must correspond so that Willix may present a defense and so that he is protected against a subsequent prosecution for the same offense. Unlike a constructive amendment, a variance requires reversal when Willix can establish that his rights were substantially prejudiced. *United States v. Miller*, 471 U.S. 130, 144-45, 105 S. Ct. 1811, 1819 (1985). Willix's rights were substantially affected based on the government's burden being lowered based on the government's presentation of the evidence. As the case currently stands, Willix was convicted on a changed element than that charged by the grand jury. As such, Willix's charges must be set aside.

III. Should it be considered a structural error when a criminal defendant is not present for the reading of a jury note?

During the trial, the United States Marshall's service ("USM") were responsible for assuring the Willix was available at all times for trial. After the jury instructions were given, Willix was taken into the holding cell where he remained until a verdict was returned. (See Exhibit A, Sworn Affidavit of Willix). Willix was never told that a jury note was submitted, nor did he know of the jury note until he started preparing his Title 28 U.S.C. § 2255. The matter was just overlooked and not addressed. Under Federal Rule of Criminal Procedure 43(a), the defendant must be present unless Rule 43, Rule 5, or Rule 10 provides otherwise. *United States v. Jaquinet,* 2019 U.S. Dist. LEXIS 42726, at *1 (D. Mont. Mar. 15, 2019). A judge's responding to a jury note outside the presence of counsel and defendant violates Rule 43 of the Federal Rules of Criminal Procedure, which states that the stages of a trial at which the defendant must be present include "every trial stage, including jury impanelment and the return of the verdict[.]" Fed. R. Crim. P. 43(a)(2).

Here there was no reason (except an oversight of the USM), why Willix was not present for the reading and responses to the jury note. Although the matter may be reviewed under Rule 52, *Rogers v. United States,* 422 U.S. 35, 45 L. Ed. 2d 1, 95 S. Ct. 2091 (1975), here based on what was at stake (a life sentence), Willix required to be present at this critical stage.

As such, the court must agree that not having Willix present during the reading and addressing of the jury note, warrants a reversal of his conviction and a new trial.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Eleventh Circuit.

Done this 4, day of March 2020.

I hereby do certify that pursuant to penalty of perjury Title 28 U.S.C. § 1746 that on this 4 day of March 2020 I signed and mailed this document via the Federal Bureau of Prisons' Legal Mail System.

Respectfully submitted,

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