

MAY 15 2020

OFFICE OF THE CLERK

No. 19-8915

In The
Supreme Court of the United States

Robert Eugene Glasgow,

Petitioner

v.

United States OF America,

Respondent

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

Petition For A Writ Of Certiorari

ORIGINAL

Robert Glasgow 10983-030

Petitioner Pro Se

Federal Correctional Institution

P.O. Box 2000 unit 5702

Fort Dix NJ 08640

Questions Presented

- 1) Whether pro se defendants who file under 28 U.S.C. § 2255 and are appointed habeas counsel by the Court, have a right to have that counsel's actions, or lack thereof, reviewed under the standards held in Strickland; and if so, whether it should only be available as a second or successive motion on permission of the applicable Court of Appeals?
- 2) Whether a defendant in custody, with two separate and distinct judgments for the offense disputed, may file a separate motion under 28 U.S.C. § 2255 for each judgment as directed by the rule, or is the lower court correct in recharacterizing the motion on the second, separate judgment as a second or successive motion and refusing to grant review?
- 3) Whether an acquittal in fact, held to return ones presumption of innocence as to the specific act or offense, should also be held to demonstrate 'actual innocence' of that specific act or offense for the purposes of AEDPA?
- 4) Whether the High Court intended for the lower courts to use the holdings in Watts to punish defendants for any and all allegations leveled by the government, regardless of a jury's determination of guilt, or if the lower courts years of systematic erosion of a jury verdict of acquittal has deviated so far from the framers intent as to affect the integrity of the proceedings themselves and warrant the use of this Courts authority to reassert the power of a jury's verdict of acquittal and to clarify the holding in Watts to protect both the public and the reputation of the Court by ensuring that a path to innocence and freedom is maintained in the balance of justice?

Table of Contents

Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved, Authorities Cited	3
Statement of the Case	5
Reasons for Granting the Writ	7
Argument	8
Conclusion	19

Index To Appendices

Appendix A - Mandate 8th Circuit C.O.A in # 19-3476
(4:19-cv-00260-JEG)

Appendix B - Order denying rehearing en banc / rehearing # 193476
(4:19-cv-00260-JEG)

Appendix C - Judgment denying appeal # 19-3476
(4:19-cv-00260-JEG)

Appendix D - Judgment, decision by District Court S.D. IA
(4:19-cv-00260) Denied and dismissed

Appendix E - Order, dismissing without prejudice By the District Court S.D. IA
(4:19-cv-00260)

Appendix F - Statute § 2244, 28 USC

Appendix G - Statute § 2255, 28 USC

Appendix H - USCS - Rules governing § 2255 motions
(rule #1, #2, # 1101)

Appendix I Statute § 1651, 28 USC - All writs act

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

☒ For cases from federal courts:

The opinion of the united states court of appeals
at appendix _____ to the petition and is

☐ report at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished

The opinion of the United States Court of Appeals
at appendix _____ to the petition and is

☐ report at _____; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished

Jurisdiction

☒ For cases from federal courts:

The date on which the United States Court of Appeals
decided my case was March 05, 2020

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United
States Court of Appeals on the following date: April 17, 2020,
and a copy of the order denying rehearing appears at
Appendix _____.

☐ An extension of time to file the petition for writ of
certiorari was granted to and including _____ (date)
on _____ (date) in Application No. A

The jurisdiction of this court is invoked under 28 U.S.C.
§ 1254(1) and 28 USC § 1651 All writs act.

Constitutional Provisions

Constitution of the United States

5th amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in an actual time of War or public danger; Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; Nor shall be compelled in any criminal case to be 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.

8th amendment

Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishment inflicted

Table of Authorities Cited

<u>Cases</u>	<u>Page Number</u>
<u>Blockburger v. United States</u> 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932)	5, 6, 8, 9, 10, 13
<u>Sanabria v. United States</u> 437 US 54, 57 L Ed 2d 43, 98 S Ct 2170 (1978)	9
<u>Strickland v. Washington</u> 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052	9, 10, 11
<u>United States v. Watts</u> 519 US 148, 136 L Ed 2d 554, 117 S Ct 666	14, 16, 17, 18
<u>US - Nelson v. Colorado</u> 197 L Ed 2d 611	13

Statutes and Rules

Title 18 USC § 2252

Title 28 USC § 2244

Title 28 USC § 2255

Title 28 USC § 1651

Statement of the Case

Petitioner in this case was charged based on a two count indictment. The indictment is multiplicitous under Blockburger, but all counsels failed to take action against it, it remain uncorrected. Petitioner received two judgments following a jury trial (DCD 1:10-CR-00038-JEG, S.D. of Iowa), one acquitting the defendant of the lesser included offense of possession under 2252(a)(4)(b) and the other convicting him of the greater offense of receipt under 2252(a)(2). Petitioner's two judgments violate the double jeopardy clause under the Blockburger test, though the government has argued there can be no double jeopardy without double punishment. Petitioner's counsel filed an appeal without input from petitioner, it was denied. Petitioner then filed pro se an initial offering under 28 USC § 2255 against the conviction for ineffective assistance of counsel. The District Court appointed counsel who failed to communicate with Glasgow or take any action to meaningfully represent him in anyway. Habeas counsel filed a letter with the Court stating he had reviewed the case and found no errors, he did not wish to amend, and recommended dismissal. (4:13-CV-00124-JEG, S.D. IA) (dismissed Oct 7, 2014). Petitioner has since filed multiple filings in both the District Court and the Eighth Circuit Court of Appeals seeking review of his as yet unrepresented claim. He has been denied and dismissed at every turn without review of the merits due to procedural bars and misinterpretations. He has been denied IAC claims against his appointed habeas counsel, not on the merits, but because he didn't possess a right to habeas counsel, let alone effective habeas counsel. A Jury's acquittal does nothing to show actual innocence, and being incarcerated for an offense the jury acquitted on of is not a miscarriage of justice it seems.

In this action, Glasgow filed, pursuant to the rules found in USCS Rules governing 2255 motions (see attachment) where in he is

directed that each contested judgment must have its own separate habeas action filed. Under 28 USC §2255 (attachment) Glasgow must be in custody for the offense he is contesting. Due to the lower courts errors, he is in fact in custody for both counts indicated in the judgments. This action is filed against the judgment of acquittal on the lesser included offense. As it is completely encompassed in the conviction entered on a greater offense under Blockburger they are the same offense and he is in custody for both. Further, the 60 month minimum sentence was enhanced by the conduct Glasgow was acquitted of to 188 months, a 300% increase. Due to these facts Glasgow believes the District Courts should, at minimum, be directed to hear him and make a review of the issue presented. There is no specific restriction against filing against a judgment of acquittal, only that one must be in custody. Petitioner feels that the issues presented and the uniqueness of the case warrant further review by the High Court and exercise of their power to clarify and perhaps issue new holdings which will assist in the administration of justice and prevent the excess or unnecessary punishment of those not deserving under the law. Glasgow presents his arguments as succinctly as possible below for your review.

Reasons for Granting the Writ

Petitioners case provides a unique platform for the court due to the errors involved. It allows for the Court to make changes that would potentially effect hundreds of thousands of people without the likelihood of those cases being able to further the reach of any holdings by means of a similar case. This case presents errors and interpretations that are causing one who is deemed 'not guilty' by the jury to languish in a federal prison cell, but are much farther reaching than just this one case or class of crime. In petitioners view, as in the publics eye, the 'why' becomes irrelevant if you are holding one deemed innocent. Across the system there are many, both women and men, young and old, who are imprisoned only because the courts refuse to offer them a path to be heard. Imprisoned for procedure, not crimes. Admittedly, there are those who would flood and abuse the system given the chance, but that is hardly different than what occurs now. A temporary upswelling of filings is a minor issue when offset by the idea of relieving even one person from an unjust incarceration. Whether by evidence, error, or whatnot, if a defendant can show that they should not be incarcerated, that the Court has in some way erred. Then the Court must grant them a path to relief and ensure the lower courts allow use of that path. True justice demands nothing less.

Petitioner here is acquitted. It is the jury's determination. There are errors in virtually every case. Petitioner does not believe that the public would care what specific errors were involved in any

case so much as what effect those errors had, and what actions were taken to correct them. In the arguments below, petitioner attempts to express four of the larger issues that he and many others face and his frustration with a seemingly broken and one sided system, things this Court has the power to correct, and all the lives that would be affected if they did so.

Argument

If a court enters two judgments as to the same offense under Blockburger, a defendant must be allowed to have review to correct the error to prevent a miscarriage of justice.

In petitioner's case, he was indicted and tried on multiplicitous counts, uncorrected by trial counsel. Jury confusion is an old argument in these instances, if the Court wishes to discuss that further petitioner is not opposed but it is not the basis here. The jury was presented with two separate and unique crimes where only one existed, giving the government the proverbial two bite at the apple. The jury handed down two distinct verdicts for that one offense as directed by the District Court in its instructions. The Court accepted and entered both judgments. This violates the Double Jeopardy doctrine of the Fifth amendment. This Court, in Blockburger v. United States (284 US 299, 76 L Ed 306, 52 S Ct 180 (1932)) handed down the test to be applied to determine if both counts are in fact and law the same and therefore violate Double Jeopardy. Unfortunately,

the availability of this path to remedy is not always forthcoming dependant upon the performance of counsel. In petitioners case, the argument was not preserved by trial counsel, nor was it made by appellate counsel or habeas counsel. The lower courts do not appear willing to view any of counsels failures as Ineffective Assistance of Counsel. While petitioner disagrees, he proposes an alternative solution that allows a pathway to relief in such situations while leaving the Courts holdings in Strickland v Washington (466 US 668, 80 L Ed 2d 674, 104 S Ct 2052) unscathed.

The two primary issues are those cases where a defendant receives two convictions for the same single offense, potentially doubling the punishment in addition to any social stigma resulting from being convicted of multiple crimes. It could potentially even affect ones status as a repeat offender. The second issue is presented in more rare cases like petitioners. Here the defendant was acquitted of the least included offense of the statute, then convicted of a greater offense containing all the elements of the lesser based on the same act as described in Blackburger due to error and improper charging. "Petitioner here was acquitted for insufficient proof of an element of the crime which both such counts would share [...] This finding of fact stands as an absolute bar to any further [proceeding]." Sanbria v US 437 US 54, 57 L Ed 2d 43, 98 S Ct 2170 (1978). Two convictions for the same offense violate both the fifth and the eighth amendment for twice being subject to jeopardy and for excessive fines / cruel and unusual punishments. Where one is acquitted of one offense, then convicted as to a separate count charging the same offense of greater severity, as described

in the Blockburger test, one has been twice put in jeopardy in violation of the fifth amendment. Any member of the public would agree, punishing one for something they were deemed 'not guilty' of is both cruel and unusual as well as excessive.

This Court, in holding that a claim of a "Blockburger error" represents a miscarriage of justice requiring review opens a pathway to remedy for those with a legitimate claim under that rule that may not be otherwise available. A pathway that operates only for that narrow claim and therefore does not weaken any existing holdings merely enforces this court's desire that only those deemed deserving are punished under the law.

Defendants who are appointed habeas counsel must be allowed review of that counsel's performance under Strickland.

Defendants at trial have a sixth amendment right to counsel, in order to protect the fundamental right to a fair trial, since access to counsel's skill and knowledge is necessary to accord defendants the opportunity to meet the case of the prosecution. The Court has held that a defendant does not have a right to counsel for the purpose of habeas motions under 28 USC § 2255. Petitioner does not seek to alter either that holding or the two part test under Strickland. Strickland held that the right to counsel is the right to effective assistance of counsel; That a person who happens to be a lawyer is present at proceedings alongside the accused is not enough to satisfy the Sixth amendment; and that Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render adequate legal

assistance. At current, lower courts hold that review under Strickland requires that one first have a right to counsel, as such, any appointment of habeas counsel is not eligible for review of IAC. This removes any pathway to remedy from a federal defendant. If one received ineffective assistance from trial counsel, that must be raised for the first time in a §2255 motion, but if that action fails due to deficient representation by an appointed habeas counsel that door closes and defendants are left with no recourse or resolution. Further, it allows habeas counsels to take the same action over and over potentially harming thousands without redress.

In petitioner's particular case, trial counsel dropped the ball, appellate counsel stood looking at it, and habeas counsel kicked it off the court with none of them even considering picking it up or taking a shot. Due to the actions of Counsels, petitioner is denied review of his legitimate claim. Due to the lower courts interpretations regarding right to counsel and IAC, petitioner has been denied any review of that claim as a pathway as well. All attorneys are not equal, and appointed counsels are 'grab bag', you never know what you get. Defendants appointed counsel have their very lives handed over to someone else with no option of review. Putting lives in peril with such safety nets is tantamount to no net at all, betting ones life on anothers roll of the dice. This Court can rectify this increasingly common problem simply by holding that while defendants do not have the right to counsel in every action, in any action where counsel is appointed or retained, the sixth amendment rights to effective assistance of counsel as tested under Strickland apply, even if that challenge must be made pro se.

Without this holding, current interpretations by the lower courts combine with AEDPA to defeat the paths to remedy for those untrained in law when presented counsel fails to properly represent defendants.

The Court allows that 'actual innocence' is a 'gateway' to remedy, but fails to provide any pathway to demonstrate that innocence.

American jurisprudence used to espouse "innocent until proven guilty", and it used to be accurate, at least legally. Today's Courts operate on a different pretense, however, so that once one is alleged to have committed a crime, one is guilty until proven otherwise. The defendant must prove a negative, that beyond all doubt he did not perform the alleged act or offense. Even a verdict of not guilty has been held not to demonstrate innocence, but rather a failure of the government to prove guilt beyond a reasonable doubt. Once an allegation has taken a defendant's innocence, there is no path to have it returned. Petitioner here seeks to rectify this imbalance in the scales, giving back 'actual innocence' to those a jury determine to be innocent of the alleged offense. This not only allows those with errors like petitioner a gateway to remedy, but allows our justice system to have both 'guilty' and 'innocent' defendants instead of proven guilty, and guilty but not proven. A justice system with both guilt and innocence rings of balance, whereas guilty and not proven but still considered guilty sounds more of a police state. Petitioner

here prays the Court will take this opportunity to return us to a system of innocent until proven guilty.

In petitioners case, he was acquitted by jury of a lesser included offense, then was given a conviction as to a greater offense on the same act under Blockburger. The two counts both include the same elements. As petitioner was acquitted for insufficient proof of at least one element of the lesser included count, then he must have been innocent of any greater count with those same elements. Juries are instructed to base their decision on the government proving each and every element of an alleged offense. Juries are presumed to follow the instruction the Court gives them. If the government did not prove guilt, a defendant is still presumed innocent. Despite this, the lower courts still refuse to allow any use of the "actual innocence gateway" as a juries acquittal is currently not held as proof of innocence of wrongdoing. An acquittal in fact is not reviewable. As such, petitioner proposes, that an acquittal of a specific offense, rendered by a jury, be equated to actual innocence of that specific offense and those greater offenses that share all of the elements of the acquitted offense when based on the same acts, evidence, and timeframes as in Blockburger.

Such a holding would provide at least one attainable path to 'actual innocence' without requiring defendants to prove a negative, and does so without hindering other holdings of this Court. This Court has recently reaffirmed that an acquittal returns ones presumption of innocence (see generally US Nelson v Colorado 197 L. Ed 2d 611) Petitioner believes that a holding regarding acquittal in fact and

actual innocence is both needed and a natural continuation of this Courts previous holdings. It will provide a pathway to prevent miscarriages where no other may exist while simultaneously reaffirming; the high Courts belief in a juries authority in acquitting defendants; positively impacting the public reputation of the Court by demonstrating this Courts continuing belief in innocence unless proven otherwise; and by allowing that those accused are not merely, not proven guilty, but are actually innocent if so determined by the jury.

The lower Courts misconstrue the holdings of the High Court in Watts by using All alleged conduct to increase sentences of defendants.

In United States v Watts (519 US 148, 136 L Ed 2d 554, 117 S.Ct 666) the High Court held several things. The following are all cited from that landmark case:

"In a federal criminal case in which a defendant has been convicted on one charge and acquitted on another charge, the juries verdict of acquittal does not prevent the sentencing court from considering the conduct of the defendant that underlies the acquitted charge, so long as that conduct has been proved by the federal government by a preponderance of the evidence"

"under the Double Jeopardy clause of the fifth amendment, sentencing enhancements do not punish a criminal defendant for crimes of which the defendant was not convicted, but rather increases

the defendants sentence because of the manner in which the defendant committed the crime of conviction"

"An acquittal does not preclude the government from relitigating an issue when it is presented in a subsequent action by a lower standard of proof; An acquittal on criminal charges does not prove that a defendant is innocent, but merely proves the existence of reasonable doubt as to the defendants guilt; without specific jury findings, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge; thus, a jury cannot be said to have necessarily rejected any facts when it returned a general verdict of not guilty."

"An acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual inferences."

Petitioner believes that the intention of the Courts holdings here were to allow the lower Courts to punish those offenses that by themselves may have only been elements of a greater whole or lesser included offenses, so that while a defendant may have been acquitted of a particular offense it did not mean he was necessarily free from all wrongdoing at a lower standard. While petitioner finds

the lower courts current "preponderance of the evidence" standard to equate to "the government alleged and the defendant failed to disprove" and disagrees with the lack of criterion or guidance involved in it, especially in a system of justice where one is supposed to be innocent until proven guilty, he understands the Courts need to punish those offense clearly shown to have occurred. This is not, however, the limit to how the government and the lower courts are utilizing this holding.

First, petitioner brings forward his challenge to the assertion in Watts that sentencing enhancements do not punish a defendant for crimes he was not convicted of but merely increases the sentence for how he committed the crime he was convicted of, and does not violate the fifth amendments prohibitions. As enhancement drastically increase sentence duration they most definitely punish a defendant. If those enhancements are based on elements of a greater offense that were clearly shown to have occurred then petitioner would agree with their application. Often times, those enhancements are for acts that by themselves stand as a separate count of offense conduct. When the government fails to prove guilt as to those counts, they utilize Watts to insist that the Court still punish the defendant despite the jury's verdict. Petitioner believes in those instances that Double jeopardy is offended and that this Court should utilize its authority to clarify its intent in Watts.

Second, petitioner would assert that an acquittal IS a finding of fact, at minimum, that the government failed to prove at least one element of the offense in question. So that in a system where one is allegedly

innocent until proven guilty, a defendant who is acquitted of an offense is innocent as to that offense. One cannot justly be punished for something he is innocent of. Yet the lower courts will, at the governments behest utilize every enhancement available to increase the sentence of a defendant who exercises their right to trial as a 'trial penalty' of sorts. A jury's acquittal is not reviewable, but it is pollable. If defendants are to be punished for conduct a jury acquitted them of, then the court should require the jury inform the Court by jury form or by poll in open court which elements the government failed to prove, thereby allowing the Court to enhance punishment for the acts the jury found occurred while eliminating those punishments for both acquitted and unchanged conduct. The government must not be allowed to continue having sentences increased on their word alone that act occurred whether charged or not by use of the current interpretation of Watts.

Petitioners particular case is unique, making it both ideal for a holding to clarify the Courts intent and to highlight the misinterpretation of the lower courts. After being tried on a multiplicitous indictment, he was acquitted of the lesser included offense and then convicted on a greater offense fully encompassing the lesser one. This has enough problems of its own, just on its face. However, after convicting petitioner of receipt, the greater offense, the petitioner was enhanced for possession. While possession is an element of the receipt count, it is also the lesser included count of which petitioner was acquitted. So while the jury did make a factual determination as to that conduct, petitioner had his sentence enhanced under Watts increasing his punishment for what a jury necessarily

determined he did not perform. Allowing the lower courts to continue to utilize their interpretation of Watts allows the government to completely circumvent the purpose of a jury or the right to trial. Whereas a defendant like petitioner is acquitted of a specific act in a separate count the lower courts need to be restrained from using that conduct to increase the defendants sentence. In this case, Glasgow, the petitioner, had a base sentence of 60 months for an unauthorized conviction increased to 188 month by use of enhancements for the actual offense he was acquitted of, not mere elements of or conduct pertaining to an acquitted count.

Recently, the lower courts uses of acquitted conduct have drawn the public eye and that of lawmakers. Petitioners case exemplifies the need for reform in this area. The Court does not write law, but they can examine the way their holding in Watts is being interpreted and utilized in the lower courts, then use the Courts authority to clarify their intent, allowing tens of thousands relief from sentences made excessively long, yet within guidelines, due to the use of conduct a jury rejected for one reason or another.

The systematic erosion of the holdings in Watts has caused the lower Courts to deviate so far from public acceptance and the original intent of the High Court as to affect the integrity of the proceedings themselves and warrant the use of the High Courts power to intercede, placing the lower courts back on course.

Conclusion

The petitioner here, Robert Glasgow, believes he has presented issues to the Court in the above filing that require this Courts attention and action to better serve the people and maintain the fundamental fairness required in our jurisprudence. He prays that the High Court will review the matters presented and grant the above petition for a Writ of Certiorari.

Respectfully submitted

05/15/2020

Robert Glasgow

Date mm/dd/yyyy

Robert Glasgow - Pro Se