No. 23-5734

IN THE

SUPREME COURT OF THE UNITED STATES

Lawrence Flack — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lawrence Flack #48172-039
(Your Name)

Federal Correctional Institution Loretto
(Address)

P.O. Box 1000, Cresson, PA 16630
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. Whether Appellant counsel Anders brief was inadequate were evidence exist that Appellant Constitutional rights were violated, double jeopardy rights, which the plea agreement and the indictment still contain duplicative charges? See Exhibit A, B, C, D, E

II. Whether the Appellate court erred in failing to address and make factual finding on all Appellants evidence and arguments?

III. Whether the interest of justice requires invalidate of the appellate waivers because of violations of double jeopardy and plain errors? See Exhibit A, B, C, D

IV. Whether Appellant's guilty plea and appellate waivers are invalid due to double jeopardy violations remaining in the plea and indictment alone with counsel's ineffective assistance in the prior and present proceedings? See Exhibit A, B, C, D

V. Whether the Sixth Circuit panel decision is conflicting with the Supreme Court and the prior three panel orders ruling in Appellant favor due to double jeopardy violations? See Exhibit A, B, C, D

VI. Whether Mr. Flacks case should be vacated due to the plain error, constitutional violations, double jeopardy, compounded with the intervening changes in the laws Concepcion v. United States, 597 U.S. (S.Ct. 6/7/2022)? See Exhibits A, B, C, D, E

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

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 appears at Appendix Ex to the petition and is

[ ] reported at United States v. Lawrence Flack case#22-1854 (May 12, 2023); or,

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

[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at U.S. v. Flack, 941 F.3d 238, 241-42 (6th Cir. 2019); or,

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

[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

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

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported 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 23, 2023.

[ ] 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: May 12, 2023, and a copy of the order denying rehearing appears at Appendix Yes.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment of U.S. constitution
6th Amendment of U.S. constitution
14 Amendment of U.S. constitution
Fed. R. CRIM. P. 52 (b)
§ 18 U.S.C. § 2252 A (a)(2)(b)(1)
§ 18 U.S.C. § 2252 (A)(a)(5)(b)(2)

STATEMENT OF THE CASE

On or about 2014, Appellant Mr. Lawrence Flack pleaded guilty to Receipt of Child Pornography, in violation of 18 U.S.C. §2252A(a)(2), (b)(1), and Possession of Child Pornography, in violation of 18 U.S.C. §2252A(a)(5)(B), (b)(2). He was sentenced to 262 months to run concurrently to a sentence of 262 months of imprisonment for the receipt-of-child-pornography conviction to run concurrently to a sentence of 240 months for the possession-of-child-pornography conviction.

Appellant, subsequently, collaterally attacked his convictions resulting in "Three" orders see Exhibits A. B, C, from the Sixth Circuit Court of Appeals, remanding the matter for resentencing. Appellant was last resentenced on September 19, 2022. A Notice of Appeal was filed in the District Court on September 23, 2022. A Petition for Rehearing en-banc was filed thereafter which are specifically authorized by 28 U.S.C. §1291, which authorizes appeals from final judgments of district courts. The Petition for Rehearing en-banc was denied on or about May 12, 2023.

REASONS FOR GRANTING THE PETITION

ARGUMENTS

INTEREST OF JUSTICE REQUIRES INVALIDATE THE APPELLATE WAIVERS BECAUSE OF THE PLAIN ERRORS AND VIOLATIONS OF DOUBLE JEOPARDY

A reviewing court may grant relief for "plain error" even if the error was not raised and preserved at trial or sentencing. See Fed.R.Crim.P. 52(b), see Davis v. U.S., 140 S.Ct. 1060, 1061 (2020) (plain error review applies to unpreserved factual agruments); Puckett v. U.S., 556 U.S. 129, 133-34 (2009) (plain error applied to claims that government failed to meet plea agreement obligations); U.S. v. Olano, 507 U.S. 725, 731 (1993) (plain error review provides appellate courts limited power to correct error not refer specifically to a sentence's "reasonableness"), see Holguin-Hernandez v. U.S., 140 S.Ct. 762, 766 (2020) (defendants are not required to refer "to the reasonableness" of a sentence to preserve such claims for appeal"), see Olano, 507 U.S. at 734; see also U.S. v. Dominguez Benitez, 542 U.S. 74, 82 (2004) (burden for establishing plain error is on defendant claiming it); see U.S. v. Pitts, 997 F.3d 668, 697 (6th Cir. 2021).

In an appeal based on "plain error", the defendant must show (1) there was an error (2) that is "clear or obvious"; see U.S. v. Barcus, 892 F.3d 228, 234 (6th Cir. 2018) and (3) the error affected the defendant's "substantial rights", see U.S. v. Olani, 507 U.S. 725, 734-35 (1993), see Rosales-Mireles v. U.S., 138 S.Ct. 1897, 1907-08 (2018) (sentencing guidelines error resulting in "necessary deprivation of liberty" affected defendant's substantial right to determine if a ruling affected the defendants substantial rights), an appellate court analyzes the alleged error in the context of the entire record. See Jones, 527 U.S., at 390-91, see U.S. v. Montgomery, 998 F.3d 693, 701 (6th Cir. 2021). Even if the defendant can satisfy these three requirements, relief

is only available if the court determines that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings"; see Jones, 528 U.S. at 390-91.

Rights or objections that were explicitly waived will not be reviewed for "plain error, but those that were merely" forfeited may be reviewed. See Fed. R.Crim.P. 52(b) ("A plain error that affects substantial rights may be considered though it was not brought to the court's attention."). See Johnson v. U.S., 520 U.S. 461, 465-66 (1997) (failure to assert right usually results in forfeiture but plain error rule mitigates this result).

"[F]orfeiture" is defined as "the failure to make the timely assertion of a right". Olano, 507 U.S. at 733. A right is "forfeited" if counsel "fail[s] to raise the arguments, as counsel did not raise the arguments in Mr. Flack's case. An appellate court may also review for plain error if an objection is unspecific, see. U.S. v. Propst, 959 F.3d 298, 303 (7th Cir. 2020). Here, this court should correct the plain error and hear Appellant's case on its merits. See Exhibit A.

ARGUMENTS

APPELLANT GUILTY PLEA AND APPELLATE WAIVERS ARE INVALID DUE TO DOUBLE JEOPARDY VIOLATIONS REMAINING IN THE PLEA AND THE INDICTMENT, ALONE WITH COUNSEL'S INEFFECTIVE ASSISTANCE IN THE PRIOR AND PRESENT PROCEEDINGS

A guilty plea does not foreclose, nor does it waive jurisdictional challenges to conviction; see Menna v. New York, 423 U.S. 61, 63 (1975). In Menna, the Supreme Court noted that because a guilty plea is an admission of the facts alleged, it removes the issue of factual guilty from the case and renders irrelevant constitutional violations logically consistent with established factual guilt and "which do not stand in the way of convition if factual guilt is validly established". Id. at 62 n.2. Jurisdictional issue, therefore, are rights that are justified as protecting something other than the truth-seeking process. Id. at 62-63 (guilty plea did not waive double jeopardy claim because government may not prosecute defendant regardless of factual guilt). Here, the seriousness of Appellant's constitutional injury combined with his ineffective assistance of counsel warrants Appellant's appeal to be heard on its merits. The double jeopardy violations and Appellant's ineffective assistance of counsel which the government agreed: Appellant's ineffective trial counsel prejudiced him during his criminal proceedings. (Dkt. 46, order P. 13, Exhibit B - trial counsel's ineffectiveness undermined the integrity of Appellant's criminal proceedings by allowing the double jeopardy violation to stand without objection at the prior and present sentencing hearing. See U.S. Sixth Circuit orders rulings that Appellant constitution rights double jeopardy were violated. Exhibit A, B, C.

The government offered Appellant a constitutionally defective plea agreement. "[T]he prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure." U.S. v. Davenport, 519 F.3d

940, 947-48 (9th Cir. 2008). Government conduct subjecting a defendant to double jeopardy therefore "threatens the fairness, integrity, and public reputation of our judicial proceedings". Id. at 984. By offering Appellant a plea agreement premised on a double jeopardy violation, the government exposed him to "serious collateral consequences that cannot be ignored". U.S. v. Bubb, 577 F.3d, 1366, 1372 (11th Cir. 2009). See Exhibit A, B, C D, E.

This Honorable Court should consider the ineffectiveness of Appellate's counsel when deciding to hear this appeal on its merits. The Sixth Circuit's order emphasizes the importance of this court exercising its judgment when deciding which argument to hear on there merits. "especially in light of the ineffective assistance performed by prior counsel below". (Dkt. 46. (Order p. 2) emphasis added).

Appellant's sentence should not be corrected simply by striking the possession conviction - this would not be a remedy tailored to the constitutional injuries he suffered. See U.S. v. Morrison, 449 U.S. 361, 364 (1981) ("Sixth Amendment deprivations...should be tailored to the injury suffered...") See Sixth Circuit court orders marked Exhibits A. B. C.

In addition to the collateral consequences inflicted on Appellant the government unjustly benefitted from a stronger position during sentencing because of the double jeopardy violation bringing multiple charges gave the an government an advantage in sentencing because of the appearance of guilt accompanying numerous charges. See Missouri v. Hunter. 459 U.S. 359. 372 (1983). Here. this court should invalid the waivers and hear these arguments on its merits. see Exhibit A. B. C. D. E.

ARGUMENT B

COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO FILE A MOTION TO DISMISS THE INDICTMENT BASED ON MULTIPLICITY COUNTS WHICH VIOLATED PETITIONER"S RIGHT TO DUE PROCESS.

Petitioner's counsel's knew or should have known that he could have filed a Pretrial motion and argued for dismissal of the indictment based on Multiplicity. "Multiplicity" when an indictment charges multiple offenses that Congress intended to be separate crimes, the defendant can be made to answer for each offense separately, see Callanan v. U.S. 364U.S. 587 391-95 (1961). However, indictments charging a single offense in different counts are "multiplicitous." See U.S. v. Tann, 577 F. 3d 533,537 (3d cir. 2009); U.S. v. Leftenant, 341, F. 3d 338, 347-48 (4th cir. 2003). Multiplicitous indictments are generally improper because they may prejudice the defendant or result in multiple sentences for a single offense in violation of the Double Jeopardy Clause, see U.S. v. Lilly, 983 F. 2d. 300, 303-05 (1st cir. 1992); U.S. v. Kerley, 544 F. 3d. 172, 178-79 (2nd cir. 2008) (Multiplicitous indictment violated Double Jeopardy clause by punishing single offense multiple times) U.S. v. Ehle, 640 F. 3d. 689,693 (6th cir. 2011). Also see Ball, 470 U.S. at 864-65; Miller, 527 F. 3d. at 74; Sellers, 840 F. 2d. at 355. Here Petitioner suffered prejudice by counsel failing to file a motion to dismiss the indictment based on multiplicity counts. See Exhibits A Counsel overlooked that the Government is precluded by the U.S. Constitution from hailing a defendant into the court on a charge; see Indictment Exhibit A . When on the face of the record the Government may not prosecute those charges on its face. See Menna v. New York, 423 U.S. 61, 62 96 S. Ct. 241, 46 L. Ed. 795 (1975); See United States v. Broce, 488 U.S. 563 (1989). Here but for counsel's errors and omissions that caused Petitioner prejudice, there's reasonable probability that the results of the proceeding would have been different.

ARGUMENTS

COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO INFORM PETITTIONER OF THE TRUE NATURE OF THE CHARGES, CONSEQUENCES AND ERRONEOUSLY ADVISING PETITTIONER TO PLEAD GUILTY. PETITTIONER PLEA AGREEMENT WAS NOT KNOWINGLY NOR VOLUTARILY ENTERED

Applying the same standards used by the Supreme Court in Lee v. United States, U.S. No. 16-327 (2017), to Petitioner's case, the Court records and circumstances surrounding Petitioner's case, Petitioner has demonstrated that he received ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Hill v. Lockhart, 474 U.S. 52, 56, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). Moreover, in light of Lee v. United States, U.S. No. 16-327 (2017).

In Lee, the Supreme Court held that Lee had indeed demonstrated that he was prejudiced by his counsel's erroneous advice. In Petitioner's case, he asserts that he has suffered the same prejudice which is corroborated by the Court's records, counsel's erroneous advice affected Petitioner's decision making at the plea hearing. Thus there's a reasonable probability that, but for counsel's errors and erroneous advice that lead Petitioner to enter into the ambiguous plea agreement, Petitioner would not have pleaded guilty. Thus would have insist on going to trial.

The Sixth Amendment guarantees a defendant the effective assistance of counsel at critical stages of a criminal proceeding including when he enters a guilty plea. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced as a result.

In the case at hand, Petitioner asserts that based upon the United States Supreme Court recent decisions in Lee v. United States, 2017 BL 216471, U.S. No. 16-327 (June 23, 2017). Petitioner is entitled to relief because of Petitioner and the court records demonstrated that Petitioner was

in fact prejudiced by counsel's erroneous advice and failing to inform Petitioner of the true nature of the charges to which Petitioner was pleading guilty to. Moreover, counsel's erroneous advice affected Petitioner decision making and understanding of the consequences of Petitioner guilty plea. Petitioner would not have plead guilty but would have insisted on proceeding to trial. Additional, upon the same standards presented in Lee, based upon the fact that Lee was decided on June 23, 2017 under the holdings established by the Supreme Court in "Lee". Since Lee constitutes now binding precedent, thus is applicable to Petitioner claims herein.

The effect of a guilty plea, courts have generally held that a guilty plea waives most non-jurisdictional constitutional rights and challenges to non-jurisdictional defects prior to entry of plea. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); see also Tollett v. Henderson, 411 U.S. 258, 267 (1973). However, a guilty plea does not foreclose a subsequent claim, nor does it waive jurisdictional challenges to convictions. See Menna v. New York, 423 U.S. 61, 63 (1975). As here, Petitioner challenges his plea on jurisdictional grounds. In Menna, the Supreme Court noted that jurisdictional issues, therefore are rights that are justified as protecting something other than the truth seeking process. Id at 62-63 (guilty plea did not waive double jeopardy claim because government may not prosecute defendant regardless of factual guilt). In Petitioner's case the Government may not prosecute the charge on the face of the indictment. See Indictment marked as Exhibit A . Moreover, no jurisdictional basis existed for haling Petitioner into court.

The Supreme Court held in Lee v. United States, No. 16-327, June 23, 2017 that a claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding". For example, that counsel failed to raise an objection at trial or to present an argument on appeal. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. at 482, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674; internal quotation marks omitted).

Prior to entering the plea agreement, counsel failed to inform Petitioner of the true nature of the charges which Petitioner was pleading guilty to. Counsel never informed Petitioner that in order for the Government to sustain its burden of proof as to the two charges against Petitioner, that the Government would need to prove beyond a reasonable doubt the instant charges in the indictment. Counsel failed to inform Petitioner, before entering into the plea agreement and at the plea hearing, that the two charges which Petitioner was being charged with are multiplicity counts violating the Double Jeopardy Clause. Counsel never informed Petitioner that Count One and Two were really one crime. Counsel failed to inform me that the statutes under which Petitioner was charged proscribed the same offense. Counsel failed to inform Petitioner that "a guilty plea to a charge does not waive a claim that judged on its face of the record or indictment". The

charge is one which the Government may not constitutionally prosecute under the Double Jeopardy Clause. Plea agreement was not knowing nor voluntarily entered. Based on counsel failure to inform Petitioner of the true nature of the charges and erroneously advising Petitioner to plea guilty. Moreover, when Your Honor questioned Petitioner at the plea hearing as to his understanding of the plea agreement, counsel erroneously advised Petitioner as to the answers. But for counsel's errors and erroneous advice that led Petitioner to enter into the plea agreement and plea guilty, Petitioner would not have plead guilty. But would have insisted on going to trial.

When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea. The defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial". (See: Hill v. Lockhart, 474 U.S. 52, 56, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)). Also see (Lee v. United States, U.S. No. 16-327 (2017) Pp. 5-8).

But in this case counsel's deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. Flores-Ortega, 528 U.S. at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings", wee

cannot accord "any such presumption" to judicial proceedings that never took place. Id. at 482-483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (internal quotation marks omitted).

ARGUMENT

THIS HONORABLE COURT SHOULD VACATE AND REMAND APPELLANTS SENTENCE IN LIGHT OF THE INTERVENING CHANGE IN THE LAW CONCEPCION V. UNITED STATES. 597 U.S. (S.CT. 6/27/2022)

The sentence that Mr. Lawrence Flack received yesterday would surely be different today. based on the new intervening charges in the laws. the United States Supreme Court ruling Concepcion v. United States. 597 U.S. (S.Ct. 6/27/2022). The Supreme Court clarifies how district courts should access prisoner's requests for reduced sentences under the First Step Act. SCOTUS rules that district courts may consider new development (such as evidence of a prisoner's rehabilitation or intervening changes in the law) exercising their discretion to reduce a sentence pg 6-18. Federal courts historically have exercised broad discretion to consider all relevant information at initial sentencing hearing. consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. District courts' discretion is bounden only when Congress or the Constitution expressly limits the type of information a district may conisder in modifying a sentence. pg. 6-11. There is a "long and durable" tradition that sentencing judges enjo[y] discretion in the sort of information they may consider" at an initial sentencing proceeding. Dean v. United States, 581 U.S. 62, 66. Accordingly, a federal judge in deciding to impose a sentence may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. United States v. Tucker, 404 U.S. 443, 446, pg. 6-8. The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings the court in Pepper v. United States, 562 U.S. 476. Resentencing district courts must calculate new guide-lines ranges - as prt of resentencing proceedings, courts have also exercised

their discretion to consider nonretroactive guidelines changes. Thus the court therefore holds that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence; see Golan v. Suada, 596 U.S. such as the United States Attorney General Merrick Garland New Memorandum instructing all federal prosecutors on changes in departmental policies in all cases (December 16, 2022). Along with other intervening changes in the laws that applies to Mr. Flack's case. Thus, this court should remand Mr. Flack's case to the Sixth Circuit Court of Appeal for consideration in light ot the new Supreme Court rule.

CONCLUSION

For the foregoing reasons set forth it is in the interest of justice to invalidate the appellate waivers in the guilty plea due to double jeopardy violations remaining in the indictment and plea agreement, alone with counsel's ineffective assistance in the prior and present proceeding, sua-sponte.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lawrence Flack

Date: August 10, 2023