No. 24-5303

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Eric Krieg - PETITIONER

vs.

United States of America - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
7th Circuit Court of Appeal's
Denial of Request for Certificate of Appealability (COA) From
DC IN/ND's Denial of §2255 and Denial of COA
(7CA Case No.: 23-2556/ DC IN/ND Case No.:2:19-CV-JVB)

REQUEST FOR CERTIFICATE OF APPEALABILITY FROM THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

PARTIES OF INTEREST

Petitioner:
Eric Krieg #17161-027
United States Penitentiary McCreary
P.O. Box 3000
Pine Knot, KY 42635

Respondent:
United States Attorney
for the Northern District of Indiana
5400 Federal Plaza
Hammond, IN 46320

QUESTIONS PRESENTED

1) Could so-called "jurors of reason" disagree with the district court's conclusion that precedent is made "ambiguous" when a derivative case is "remanded for reconsideration in light of Sessions v. Dimaya", and that "ambiguity" created uncertainty regarding whether the residual clause was unconstitutional in the 7th Circuit and therefore Counsel did not provide deficient performance under Strickland?

2) Is a "general sentence", where defendant was not sentenced on any individual counts, and where 3 of the 4 counts of conviction have statutory maximums lower than the general sentence, per se illegal and must it be vacated and remanded by this court sua sponte?

RELATED CASES

Krieg v. U.S., 24-1862 (7CA) - Appeal of District Court's DENIAL of Krieg's Rule 36 Motion to Correct Judgement.

Krieg v. Hazlewood, 2023 U.S. Dist. LEXIS 118721 (D.N.H. 2023) - Krieg's §2241 Petion under the Savings Clause DENIED.

Outstanding motions in USDC IN/ND 2:17-CR-00146:

Motion to Reduce Sentence Pursuant to 18 U.S.C. §3582(c)(2)/ Amendment 821/ Zero-Point Offender

Motion Pursuant to F.R.Civ.P. 60(b)(1)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

PRELIMINARY STATEMENT

Eric Krieg accepted a Rule 11(c)(3)(C) plea that provided no benefit because of Counsel's ineffectiveness, as the acceptance of a 348 month "total term of imprisonment" was in return for dropping a count (18 U.S.C. §924(c)) that Krieg was actually innocent of, as the expressly indicated predicates were not crimes of violence under the abstract categorical approach that was precedent in the 7th Circuit at the time.

The district court ruled that Counsel was not ineffective as precedent was "ambiguous", as two derivative cases were remanded for reconsideration in light of Session v. Dimaya, therefore Krieg might have gotten a benefit from the plea in the off chance that the abstract categorical approach was overturned. But this ruling violated the Doctrine of Precedent/ Stare Decisis, as remanding for reconsideration does not overturn precedent. Jurors of reason could disagree on that basis.

Krieg's 348 month "total term of incarceration" is a "general sentence", with no sentence on any of the 4 counts of conviction, where the general sentence exceeds the statutory maximums of 3 of the 4 counts of conviction. It is per se illegal and this court should vacate it sua sponte.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 9, 2024. See attached order, Appendix A.

A timely petition for rehearing was denied by the United States Court of Appeals on July 8, 2024. See attached order, Appendix B.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A and is unpublished.

There were two opinions of the United States District Court:

The initial order denying Krieg's first claim is attached as Appendix C and is reported at U.S. v. Krieg, 2022 U.S. Dist. LEXIS 129511 (D.D. In. July 21, 2022).

The final order denying Krieg's second claim is attached as Appendix D and is reported at U.S. v. Krieg,2023 U.S. Dist. LEXIS 2487 (N.D. IN. Jan. 6, 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

-28 U.S.C. §2255(a) - Explained in "Standard of Review".
-United States Constitution Amendment VI - Ineffective Assistance of Counsel - Explained in "Standard of Review"
-28 U.S.C. §2255(c)(2) - Issuance of Certificate of Appealability - Explained in "Standard of Review".
-Application of §2255(c)(2) Explained in "Precedent Not Made Ambiguous Under GVR"
-Application of the United States Sentencing Guidelines, specifically U.S.S.G. §1B1.1(a) and §5G1.2, and 18 U.S.C. §3553(a) - Explained in "Krieg Received a General Sentence Which Exceeded the Statutory Maximums of 3 of the 4 Counts of Conviction".
-United States Constitution Amendment V - Both the Due Process Clause and the Equal Protection Clause - Explained in "An Illegal Sentence Must Be Corrected Sua Sponte"
-An Illegal Sentence as Applied to Due Process Via Seperation of Powers is Explained in "An Illegal Sentence is a Seperation of Powers Issue".
-How the District Court's ruling violated Krieg's due process rights under Stare Decisis/ Doctrine of Precedent is Explained in "Precedent Not Made Ambiguous Under GVR".

STANDARD OF REVIEW

Title 28 U.S.C. §2255(a) provides that a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States... may move the court which imposed the sentence to vacate, set aside, or correct the sentence." §2255. Relief under §2255 is only appropriate for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Harris v. U.S., 366 F.3d 593, 594 (7th Cir. 2004) (quoting Borre v. U.S., 940 F.3d 215, 217 (7th Cir. 1991)).

Krieg claimed in his §2255 motion that Counsel was Constitutionally ineffective. Claims of ineffective assistance of counsel are analyzed under Strickland v. Washington,466 U.S. 668 (1984), where "a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial." Massaro v. U.S., 538 U.S. 500, 505 (2003).

"To satisfy the deficient performance prong, a petitioner must show that the representation his attorney provided fell below an objective standard of reasonableness." Vinyard v. U.S., 804 F.3d 1218, 1225 (7th Cir. 2015). "A court's scrutiny of an attorney's performance is 'highly deferential' to eliminate as much as possible the distorting effcts of hindsight, and we 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2011). "this test is 'highly deferential' to counsel and presumes reasonable judgment and effective trial strategy." Hays v. U.S. 397 F.3d 564, 568 (7th Cir. 2006) (quoting U.S. v. Scanga, 225 F.3d 780, 783-84 (7th Cir. 2000)).

To satisfy the prejudice prong, a petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. To show prejudice, in the contect of a plea agreement, the defendant must show "a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have instead insisted on going to trial." Lee v. U.S., 137 S. Cr. 1958, 1965 (2017). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pled but for his attorney's deficiencies" but should instead "look at contemporaneous evidence to substantiate a defendant's expressed preferences." Id. at 1967.

A petitioner's "failure to establish either element of the Strickland framework will result in denial of his claim." Daniels v. Knight, 476 F.3d 426, 437 (7th Cir. 2007). If a petitioner fails to make a proper showing under one of the Strickland prongs the court need not consider the other. See Strickland,466 U.S. at 697.

To appeal a §2255 motion, a Certificate of Appealability, either issued by the District Court, an appeals judge, the Appeals Court itself, or the Supreme Court is required. To obtain a Certificate of Appealability, the §2255 movant must satisfy the legal standard that is set forth in 28 U.S.C. §2255(c)(2): "a substantial showing of the denial of a constitutional right". As the Supreme Court has explained, this statue "codified our standard, announced in Barefoot v. Estelle, 463 U.S. 880 (1983) for determining what constitutes the requisite showing "for obtaining leave to appeal a district court's denial of habeas corpus relief. The Court has stated that this standard requires that a petitioner:

> sho[w] that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473 (2000) at 484 (quoting Barefoot, supra at 893 n. 4)... The COA determination under §2255(c) required an overview of the claims in the habeas petition and a general asessment of their merits. We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurors of reason. This threshold inquity does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it... [A] COA does not require showing that the Appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief... It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, then a COA is sought, the whole premise is that the prison r "has already failed in the endeavor." Barefoot,Supra, at 893 n. 4... [I]ssuance of a COA must not be pro forma or a matter of course. A prisoner seeking a COA must prove "something more than the abscence of frvolity" or the existence of mere "good faith" on his or her part. Barefoot,Supra at 893. We do not require a petitioner to prove, before issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petition will not prevail.

STATEMENT OF THE CASE

Petitioner Eric Krieg, pro se, an inmate with the Federal Bureau of Prisons currently incarcerated at United States Penitentiary McCreary in Pine Knot, Kentucky, who is currently serving a 348 month "total term of incarceration" in USDC IN/ND Case No. 2:17-CR-00146-JVB (Northern District of Indiana), who is requesting a Certificate of Appealability from the District Court's denial of his motion to vacate sentence pursuant to 28 U.S.C. §2255, submits this Petition for Writ of Certiorari/ Request for Certificate of appealability and states the following.

In an order by the 7th Circuit Court of Appeals dated July 8, 2024, the 7th Circuit denied panel rehearing of their May 9, 2024 denial of Krieg's request for Certificate of Appealability. This Writ of Certiorari is timely as a result.

Krieg was arrested on October 12, 2017, detained on October 17, 2017, and indicted on October 8, 2017, charged with 5 counts: (1) 26 U.S.C. §5861(f) and §5845(a) & (f) - making an unregistered destructive device; (2) 18 U.S.C. §1716(j)(2) - mailing a destructive device; (3) 18 U.S.C. §844(i) - malicious use of explosive materials; (4) 18 U.S.C. §924(c) possession of a destructive device in a crime of violence; and (5) 18 U.S.C. §876(c) - mailing threatening communications. See USDC IN/ND 2:17-CR-00146 DE 9, Attachment E. Note that Count 4 was expressly predicated on Counts 2 and 3.

Krieg and the government came to an agreement for Krieg to plead guilty to Counts 1, 2, 3, and 5. In return for accepting a 348 month "total term of imprisonment" via Rule 11(c)(1)(C), Count 4 was dropped via Rule 11(c)(1)(A). See DE 28, Attachment F.

Krieg was sentenced to a total term of imprisonment of 348 months at the sentencing hearing on April 4, 2019. However, at the sentencing hearing, Krieg was not sentenced on any count of

conviction, in violation of United States Sentencing Guidelines §5G1.2, which states that the defendant SHALL [emphasis added] be sentenced on each count of conviction. See Sentencing Transcript, DE 58, Attachment G. See also Judgement, DE 43, Attachment H, which shows that no sentence was imposed on any count of conciction, and Krieg received a "general sentence" of a "total term of 348 months".

Krieg filed a timely §2255 motion to vacate sentence on July 29, 2019. See DE 44. After United States v. Davis, 134 U.S. ____ (2019), Krieg became aware that neither of the two expressly indicated predicates for the 924(c) count (§1716(j)(2) and §844(i)) were crimes of violence under the elements clause of 18 U.S.C. §924(c)(3)(A). See, for example, U.S. v. Salas, 889 F.3d 681, 684 (10th Cir. 2018) (invalidating §844(i) as a crime of violence after finding the so called "residual clause of §924(c)(3)(B) unconstitutional, because it can be committed against ones'own property. See Torres v. Lynch, 136 S. Ct. 1619, 1629-30 (2016)).

Although Krieg has a comprehensive appeal waiver in his plea agreement, and expressly gave up the right to argue changes in the law, at all times in his case (arrest, arraignment, detention, indictment, change of plea, sentencing) the residual clause of §924(c)(3)(B) was unconstitutional in the Seventh Circuit. See U.S. v. Cardena, 842 F.3d 681, 684 (7th Cir. 2016). Indeed, Salas itself relied on Cardena in finding §924(c)(3)(B) unconstitutional. Additionally, §1716(j)(2) can also can be committed against ones' own property, and by the plain reading of the statute and Salas is not a crime of violence. Therefore, Krieg was and is actually innocent of §924(c), and therefore accepting to plead guilty and accept a sentence of 348 months, when the PSR calculated Guidelines sentence grouping Counts 1, 2, 3, and 5 together was only 92 - 121 months, provided Krieg no benefit. Counsel was ineffective in advising Krieg to accept the plea agreement as he was ignorant of the law at the time of sentencing and before. Indeed, in his affadavit, Counsel admitted that he believed that both §1716(j)(2)

and §844(i) were crimes of violence. Yet the government itself conceeded that §844(i) was not a crime of violence. Also note that in other circuits, the government has conceeded after Davis that §1716(j)(2) is not a crime of violence under the elements clause. See, e.g. Waters v. U.S., 2021 U.S. LEXIS 63549 (E.D. Tenn. 2021). See also Bullis v. U.S., 2022 U.S. Dist. LEXIS 167207 (E.D.N.C. 2022) (finding §1716(j)(2) not to be a crime of violence under the elements clause because, although it contains the mens rea "to kill or injure another, or the mails, or other property", the act of mailing an unmailable object does not contain the element of the use or the threat of use of force against the person or property of another.)

PRECEDENT NOT MADE AMBIGUOUS UNDER GVR

The District Court denied Krieg's claim. It found that Counsel was not unconstitutionally ineffective in his assistance because Cardena had been made "ambiguous" when two derivative cases (U.S. v. Jackson, 856 F.3d 946, 954 (7th Cir. 2017) and U.S. v. Jenkins, 849 F.3d 390, 394 (7th Cir. 2017) were "remanded for reconsideration in light to Sessions v. Dimaya,138 S. Ct. 1204 (2018), (See U.S. v. Jenkins, 138 S. Ct. 1204 (2018) and U.S. v. Jackson, 138 S. Ct. 1983 (2018)) and this "ambiguity" created "uncertainty regarding whether [Count 2 - 18 U.S.C. §1716(j)(2) - mailing a destructive device] could be a predicate offense through either the residual clause or the elements clause" (the court having found §1716(j)(2) to be a crime of violence under the elements clause) and that this was "sufficient to find that [Counsel] did not provide deficient performance for the Strickland standard." Opinion and Order, DE 114, pg. *11. See Appendix D.

Jurors of reason not only could disagree with the conclusory statement made by the District Court without a shred of case law backing it up, but have:

> [Ross v. RBS Citizens, NA, 667 F.3d 900 (7th Cir. 2012) has now come under scrutiny in light of the Supreme Court's recent decision in Comcast Copr. v. Behrend, 133 S. Ct. 1426

(2013). In Comcast, an antitrust class action, the Supreme Court held hat the plaintiff's expert could not demonstrate that damages could be measured on a classwide basis, thereby falling short of Rule 23(b)(2)'s predominance requirement. Id. at 1432-33. Without such evidence, the Court held, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." Id. at 1433. The Supreme Court subsequently issued a "grant/ vacate remand order" ("GVR") expressly directing the Seventh Circuit to reconsider Ross in light of Comcast.

Since that time, the parties in Ross have settled their dispute, and the Seventh Circuit stayed the appeal. Butbe that as it may, GVRs are not orders vacating decisions, nor do they "indicate, or even suggest, that the lower court's decision was erroneous." Communities for Equity v. Michigan High School Athletic Ass'n,459 F.3d 676, 680 (6th Cir. 2006); see also Gonzalez v. Justice of the Municipal Court of Boston, 420 F.3d 5, 7-8 (1st Cir. 2005) ("a GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device tht allows a lower court that has rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision, and if warranted, to revise or correct it..."); U.S. v. Norman, 427 F.3d 537, 538 n. 1 (8th Cir. 2005) (GVR "not the equivalent of a reversal on the merits..."). Although the weight of Ross may be in doubt [i.e. "ambiguous"], it remains precedential authority for the time being.

Tamas v. Family Video Movie Club, Inc. 2013 U.S. Dist. LEXIS 114130 (N.D. Ill. Aug. 13, 2013).at LEXIS 20-21. This is exactly the same situation as with Cardena vis a vis Jackson and Jenkins. The cases were GVR'd, but they were still precedent. And, in fact, neither case was reconsidered before Davis affirmed Cardena and forever discarded the residual clause upon the dustbin of history, joining 8-track tapes, Communism, and other unfortunate ideas.

By logical deduction, if another judge has made a decision 100% opposite to another judge, "jurors of reason could disagree". Thus, this must meet the standard necessary to be issued a Certificate of Appealability. While this is an unpublished decision by a district court, it was the only on-point case on the issue of GVR and precedent in the 7th Circuit. Also note that the Tamas court resorted to out of circuit precedents, as the 7th Circuit has never directly addressed the issue. Apparently, neither has the Supreme Court.

Besides Krieg's 5th Amendment right to effective assistance of counsel, there are other Constitutional issues at play. Krieg has a due process right under the Doctrine of Precedent/ Stare Decisis. A precedent is precedent until a higher court says that it isn't. By GVRing Jackson and Jenkins, the Supreme Court did not overturn Cardena. It was still precedent, and Counsel was ineffective as a result. But the District Court (and the 7th Circuit) both violated Krieg's 5th Amendment due process rights by failing to enforce Cardena under the Doctrine of Precedent/ Stare Decisis. This ruling cannot stand. Krieg respectfully requests that this Supreme Court issue him a Certificate of Appealability as a result.

KRIEG RECEIVED A GENERAL SENTENCE WHICH EXCEEDED THE STATUTORY MAXIMUMS OF 3 OF THE 4 COUNTS OF CONVICTION

Krieg received a "general sentence" of 348 months, with no sentence on any count of conviction. 348 months exceeds the statutory maximum sentence of 3 of the 4 counts of conviction (Count 1: 10 years max.; Count 2: 20 years max.; Count 5: 5 years max.) Note that all 4 counts of conviction were grouped together and a Guidelines range of 97-121 months was found. See DE 35, PSR, ¶50.

Under United States Sentencing Guidelines §5G1.2(a), defendants "SHALL" [emphasis added] be sentenced on every count of conviction. Under U.S.S.G. §5G1.2(b), (c), and (d), the guidelines

sentence is compared to the statutory maximum sentence. If the statutory maximum can "accomodate" the guidelines sentence, the guidelines sentence "SHALL" [emphasis added] be the sentence on that count. If not, the statutory maximum becomes the sentence on that count. Sentences run concurrently unless the count with the greatest statutory maximum is less that the guidelines sentence, in which case the counts run consecutive, but only to the point necessary to meet the guidelines sentence.

In Krieg's case, the Guidelines Range was 97 - 121 months. PSR, ¶81. Count 5's statutory maximum was only 60 months, therefore that was supposed to be the sentence for count 5. The other 3 counts of conviction had statutory maximums that could accomodate the guidelines sentence (Count 3's statutory maximum was 40 years for causing "personal injury"). Thus, their sentences should have been in the guidelines range of 97-121 months.

The district court did not completely follow the guidelines. Under U.S.S.G. §1b1.1(a), there are very specific procedures to follow in sentencing someone. Before the sentencing factors of 18 U.S.C. §3553(a) are considered (U.S.S.G. §1b1.1(a)(8)), the sentences on each count must be considered (U.S.S.G. §1B1.1(a)(6)). That was not done in Krieg's case. Although the guidelines are advisory only, their correct calculation must be completed before the sentencing factors are considered and the court varies from the sentence: Under the statutory system, sentencing courts are not permitted to use their discretion to bypass the Guidelines. Rosales-Mireles v. U.S., 138 S. Ct. 1897 (2018). Courts may reject the Guidelines advisory sentencing range, but when they do, they are required to explain the final sentence and state which of the permissable sentencing considerations it relied upon in doing so. See Kimbaugh v. U.S., 552 U.S. 85 (2007). Krieg has attached his sentencing transcript's pertinent sections to show that, not only was he not sentenced on any count of conviction, but the analysis under §3553(a) was "boilerplate", without the level of detail required for such a large variance. It appears that the reason

variance is that the Rule 11(c)(1)(C) plea agreement required it. Sentencing Transcript, DE 58, 36:3-4. See Attachment G.

CIRCUITS FINDING GENERAL SENTENCES PER SE ILLEGAL

Unfortunately, in the 7th Circuit, general sentences are not only not illegal, much less per se illegal, they're not even "general sentences":

> Ellis further claims that his sentence was improper because general sentences are per se illegal. Ellis did not raise this argument when he challenged his sentence on direct appeal. [U.S. v. Ward, 211 F.3d 356, 365-67 (7th Cir. 2000)] at 365-67. As such, this claim is procedurally defaulted. Even if it was not, the case upon which Ellis relies comes out of the Eleventh, not the Seventh Circuit. Jones v. U.S., 224 F.3d 1251, 1256 (11th Cir. 2000). In addition, a sentence given on more than one count can exceed the maximum for one count as long as it does not exceed the maximum aggregate of all counts. U.S. v. Woykovsky, 297 F.2d 179 (7th Cir. 1969). The sentence imposed in this case is well below the maximum aggregate for the two counts on which Ellis was convicted. 18 U.S.C. §§ 371, 1956(a)(2). Therefore, Ellis' argument that the sentence he received was illegal would fail even if it was procedurally sound.

U.S. v. Ellis, 2001 U.S. Dist. LEXIS 16864 (N.D. Ill. 2001). While this is another unpublished district court case, it is once again the really only on-point case in the 7th Circuit. Remarkably, this case is 23 years old, and the precedent regarding what is a general sentence is from 1969! Obviously, sentences like Krieg's are very rare in the 7th Circuit, and even poor Ellis did not appeal this verdict. Needless to say, a 1969 case, well before the Guidelines and their mandate that defendants "SHALL" [emphasis added] be sentenced on each count of conviction, is ripe for review.

This is not the situation in other circuits. "We note, however, that we have stated that '[t]he proper procedure ' is to render a separate sentence on each count." U.S. v. Zavala-Marti, 715 F.3d 44 (1st. Cir. 2013).

> In [U.S. v. Ward,626 F.3d 179 (3rd Cir. 2010)], the defendant had been given a general sentence of 25 years, a sentence that exceeded the statutory maximum sentence for three of the five counts to which he had pled guilty. On appeal, the Ward court vacated the sentence and remanded the case, stating '[w]e do not know whether the [district] court intended to impose a 25 year sentence on each count to run concurrently - which would clearly be illegal considering the statutory maximums on certain counts - or whether the [district] court had some other sentence in mind, and accordingly, we cannot adequately review the sentence. We will therefore remand for resentencing.

U.S. v. Martsrano, 697 F.3d 216 (3rd Cir. 2012) at *6. The decision in Ward turned on the unmistakable proscription of general sentences in the Sentencing Guidelines. "§5G1.2 of the Guidelines indicate that sentencing courts must [emphasis in original] impose a sentence on each count." Ward, 626 F.3d at 184. Given the clarity of §5G1.2's prohibitory language, the Ward Court gave little shift to the government's argument that earlier cases gave to sanction general sentence in instances in which the claim of Double Jeopardy might come into play. But the Supreme Court rejected that approach in Rutledge v. U.S, 517 U.S. 292 (1996).

General sentences are per se illegal in the 3rd Circuit (U.S. v. Ward, 626 F.3d 179, 184 (3rd. Cir. 2010), 5th Circuit (U.S. v. Smith, 869 F.2d 835, 836-27 (5th Cir. 1989), 11th Circuit (U.S. v. Moriarty,429 F.3d 1012, 1025 (11th Cir. 2005), and D.C. Circuit (U.S. v. Hall, 610 F.3d 727, 754 (D.C. Cir. 2010).

Other circuits have remanded cases to clarify the individual sentences when there is a general sentence. See e.g. U.S. v. Mackay, 715 F.3d 807 (10th Cir. 2013), U.S. v. Smith, 715 Fed App'x 30 (2nd Cir. 2017). Although these cases do not go so far as to ule that all general sentences are per se illegal, they did address sentences like Krieg's,, where the general sentence exceeded at least one of the counts of conviction.

Even the 7th Circuit has done so in U.S. v. Cummings, 395 F.3d 392, 400 (7th Cir. 2005), where the 7th Circuit remanded a case with an ilegal sentnece to the district court on each count of conviction to resolve the general sentence in the case where the general sentence did exceed the statutory maximum of some counts of conviction. It appears that Cummings is the controlling case in the 7th Circuit, cited by the similar U.S. v. Lipppert, 401 Fed App'x 137 (7th Cir. 2010). However, Krieg made the appeals court aware of these cases in a notice to take judicial notice, but still was not awarded a Certificate of Appealability.

AN ILLEGAL SENTENCE MUST BE CORRECTED SUA SPONTE

Krieg did not bring up the issue of the illegal general sentence in his §2255 motion. Krieg is pro se, and did not even know that it was an issue at the time. It was only over the years that he has been fighting his case that he has come to realize that he has an illegal general sentence. But he has also come to realize that, in at least some circuits, a general sentence can be vacated sua sponte, without the defendant even asking for it to be done. Krieg asked the 7th Circuit to do so, or to at least remand the case to the district court to consider the issue, to no avail.

The 7th Circuit has noted that "[o]f course, the sentence for any individual count cannot exceed the statutory maximum for any individual count..." U.S. v. Esposito, 1 F.4th 484 (7th Cir. 2021). "we can and have predetermined that, if

the defendant has been prejudiced by an illegal sentence, then allowing that illegal sentence to stand would constitute a miscarriage of justice." U.S. v. Pawlinski, 374 F.3d 536, 541 (7th Cir. 2004).

In the 6th Circuit, a court does not even have jurisdiction to sentence above a statutory maximum: A "district court is without jurisdiction to impose a sentence exceeding the statutory maximum" and denying a defendant's ability to appeal a sentence above the statutory maximum would constitute a miscarriage of justice. U.S. v. Caruthers, 458 F.3d 459, 471-72 (6th Cir. 2006).

The constitutional violation of a general sentence in excess of the statutory maximum on any one charge is not subject to harmless error. An error is harmless only if the government can prove that it did not effect the defendant's substantial rights. See U.S. v. Zahursky, 580 F.3d 515, 527 (7th Cir. 2009). But in Krieg's case, the general sentence did affect Krieg's constitutional rights, as "[t]he court's error [the general sentence] affected Ward's substantial rights and resulted in manifest injustice, as a result of the general nature of the sentence, neither we nor Ward can determine whether it was legal as to the particular counts." Ward, 626 F.3d at 184. Cf. U.S. v. Purgatore, 910 F.2d 1084, 1135 (3rd Cir. 1990)(explaining that a "general verdict of guilt does not disclose whether the jury found the defendant guilty of one crime or both. Conceivably, this could prejudice the defendant in sentencing and appellate review."

Krieg's argument is that the district court itself should have recognized the illegal general sentence during its review of Krieg's §2255 motion and sua sponte vacated the sentence, while verifying its jurisdiction.

Other circuits have corrected illegal sentences sua sponte . "The parties both assert that this could court should

review [defendant's] illegal sentence [in this case, one that should have been enhanced under the Armed Career Criminal Act] for plain error pursuant to Rule 52(b) of F.R.Crim.P. See U.S. v. Sanistevan, 39 F.3d 250, 256 (10th Cir. 1994) ("our case law unquestionably recognized our inherent power to raise an issue sua sponte as plain error..."), U.S. v. Moyer, 282 F.3d 1311 (10th Cir. 2002) at *18. See also U.S. v. Brown, 855 Fed App'x 176 (5th Cir. 2021) ("[f]inally, while unraised by the parties, this court takes sua sponte judicial notice that the term of supervised release to which Brown was sentenced upon revocation exceeds the statutory maximum... thus, the length of the term of supervised release constitutes an illegal sentence and must be corrected....").

AN ILLEGAL GENERAL SENTENCE IS A SEPERATION OF POWERS ISSUE

Sentencing in excess of a statutory maximum is a separation of powers issue, and is thus Constitutional in nature:

> The strength and endurance of our federal government structure results from the foresight of the framers of the Constitution in creating a secure separation of power among and between the three branches. The framers of the Constitution assigned to each of the three district branches (legislative, executive, and judicial) distinct powers and responsibilities, devising a system of checks and balances to "diffuse power the better to secure liberty". Youngstown Steel and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring). As James Madison noted:
>
> Where the power of judging joins with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator..." Federalist No. 47

> Thus, the necessity of maintaining each branch free from the control or dominating influence of the other branches is of paramount legal and historical importance. See e.g. Humphrey's Executor v. U.S., 295 U.S. 602, 630 (1935). Whether it be the judicial branch seeking to determine public policy... the tendency of one co-equal branch to tresspass upon the clear constitutional powers of another branch threatens the stability of that delicate scheme of checks and balances devised through the genius of the Framers as the foundation of a permanent federal system.

U.S. v. Ricado Perez et al,, 685 F. Supp. (W.D. Tex. 1988) at *14-15. Krieg cites this district court case for its pursuasive authority.

> The right to be free from the physical coercison and control embodies in a prison sentence is one of the most important rights enjoyed by citizens of a free nation. If this Court were to uphold judicial action extinguishing those rights in the guide of procedural rule making, historical limitations on the power of the court becomes meaningless.

Perez, 685 F. Supp. at *17.

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under law supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. Keller v. Potomac Electric Power, 261 U.S. 428, 440-41 (1923) (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908). The responsibility to develop new and general rules for application outside of any specific case or controversy clearly fits the Supreme Court's definition of legislative action. Alternatively, it is possible to

construe the Commision's tasks as executive. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law". Bowsher v. Synar, 478 U.S. 714 (1986).

Perez, 685 F. Supp. at *17-18. Thus, the statutory maximum of any sentence, being part of the statute itself, is rightly the domain of the legislature. The Court does not have the power under the Constitution to sentence anyone above the statutory maximum for any charge. Krieg's sentence must be vacated as a result.

> As James Madison cautioned, when the power to legislate is combined with the power to judge, life and liberty are exposed to arbitrary control... Federalist No. 47. The need to protect the separate and distinct powers of each branch is evidenced by what the Supreme Court has described as "the hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power." Immigration and Naturalization Service v. Chandra, 462 U.S. 919, 951.

Perez, 685 F. Supp. at *18-19. Again, in terms of Krieg's rights, execution of legislative powers by the judicial branch violates Krieg's due process rights, if for no other reason than that he has a liberty interest in being free from prison. His 5th Amendment due process right has been violated. The general sentence must be vacated as a result.

Krieg will speak briefly about harmless error. Krieg's liberty interest is not subject to harmless error unless the government can prove a "historical analogue" to this regulation. It cannot. At the Founding, there was no harmless error standard. Harmless error is a creation of Congress via statute, not Amendment, circa 1905. If this court wishes to dismiss Krieg's claim based on harmless error, he respectfully requests to be allowed to brief the issue.

REASONS FOR GRANTING THE PETITION

A Certificate of Appealability should issue because Krieg has shown that "jurors of reason" could (and have) disagreed with the district court's conclusion that precedent is made "ambiguous" when a derivative case if remanded by the Supreme Court for reconsideration. To rule toherwise is a violation of Krieg's 5th Amendment due process right under the Doctrine of Precedent/ Stare Decisis.

Krieg has a "general sentence", having not been sentenced on any count of conviction, and the general sentence exceeds the statutory maximums for three (3) of the four (4) counts of conviction. This is per se illegal, and this court should sua sponte vacate the illegal general sentence, as has been done in some circuits in similar situations.

If this court is inclined to rule that either Krieg's 5th Amendment due process right or his illegal sentence is subject to harmless error analysis, he respectfully requests to be allowed to brief the issue that harmless error is an unconstitutional regulation of Krieg's natural due process right (as opposed to the Due Process Clause), this right pre-existed the Constituion, harmless error was not known to the Founders, and the Government cannot prove a "historical analogue" to this regulation of Krieg's right under the Constitution.

CONCLUSION

As Krieg has shown that jurors of reason could disagree with the district court's conclusions, and that he has an illegal general sentence that must be addressed sua sponte, he respectfully requests issuance by this court of a Certificate of Appealability and/ or that his sentence be vacated on a sua sponte basis by this court.

Respectfully Submitted,

x_____

Eric Krieg, pro se
BOP #: 17161-027
USP McCreary
P.O. Box 3000
Pine Knot, KY 42635
July 30, 2024

I swear that on this 30th day of July, 2024, as required by Supreme Court Rule 29, I have served the enclosed motion for leave to proceed in forma pauperis and petition for writ of certiorari on the U.S. Attorney for the Northern District of Indiana by depositing an envelope containing these documents in the U.S. Mail, via the USP McCreary Legal Mail Sysytem, with first-class postage prepaid, at the address below:

U.S. District Court
5400 Federal Plaza
Hammond, IN 46320

I declare under the penalty of perjury that the foregoing is true and correct. Executed on July 30, 2024.

x_____