No. _____

24-5474 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LONNIE W. HUBBARD — PETITIONER
(Your Name)

vs.

UNITED STATES — 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

LONNIE W. HUBBARD
(Your Name)
FEDERAL CORRECTIONAL INSTITUTION-MEMPHIS
P.O. BOX 34550
(Address)
MEMPHIS, TN 38184-0550
(City, State, Zip Code)
NO PHONE
(Phone Number)

QUESTION PRESENTED

QUESTION

WHETHER THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT DENIED HUBBARD'S MOTION TO RECALL THE MANDATE, POST-RUAN V. UNITED STATES, 142 S. CT. 2370 (2022), WHEN IT HELD THAT: (1) CHANGES IN STATUTORY INTERPRETATION ARE NOT THE TYPE OF UNFORESEEN CONTINGENCY WHICH WARRANTS RECALL OF THE MANDATE, AND (2) SINCE HUBBARD HAD ALREADY FILED A § 2255 MOTION TO VACATE AND COULD NOT FILE A SECOND OR SUCCESSIVE § 2555 MOTION, THEN THAT DOES NOT WARRANT A RECALL OF THE MANDATE EITHER.

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:

RELATED CASES (CHRONOLOGICALLY)

United States v. Hubbard, 2017 U.S. Dist. LEXIS 62982 (E.D. Ky., April 26, 2017)
United States v. Hubbard, 843 Fed. Appx. 667 (6th Cir. Nov. 19, 2019)
United States v. Hubbard, 2019 U.S. App. LEXIS 34435 (6th Cir. 2019)
United States v. Hubbard, 2019 U.S. App. LEXIS 36444 (6th Cir. Dec. 6, 2019)
Hubbard v. United States, 140 S. Ct. 2628 (March 30, 2020)
United States v. Hubbard, 2021 U.S. Dist. LEXIS 217626 (E.D. Ky. Nov. 10, 2021)
Hubbard v. United States, 2022 U.S. App. LEXIS 16383 (6th Cir. June 14, 2022)
Hubbard v. Brown, 2022 U.S. Dist. LEXIS 232666 (N.D. W.Va. Dec. 28, 2022)
Hubbard v. Brown, 2023 U.S. App. 19501 (4th Cir. 2023)

INSTANT CASE:

United States v. Hubbard, 2024 U.S. App. LEXIS 9855 (6th Cir. April 23, 2024)

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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

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

United States v. Hubbard,
[X] reported at 2024 U.S. App. LEXIS 9855 (6th Cir. 2024); 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 _____; 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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 23, 2024.

[X] 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: _____, 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. § 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).

TABLE OF AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V [1791] "nor be deprived of life, liberty, or property, without due process of law"

AMENDMENT VI [1791] "to be informed of the nature and cause of the accusation"

AMENDMENT VIII[1791] "nor cruel and unusual punishments inflicted"

STATEMENT OF THE CASE

In 2015, the United States filed a thirty-eight count indictment against Hubbard, a pharmacist and pharmacy owner, and six others. The indictment was superseded two times. The second superseding indictment charged Hubbard with one count of conspiracy to distribute oxycodone and pseudoephedrine in violation of 21 U.S.C. § 846; twelve counts of distribution of pseudoephedrine in violation of 21 U.S.C. § 841(c)(2) & 18 U.S.C. § 2; forty-five counts of distribution of oxycodone in violation of 21 U.S.C. § 841(a)(1) & 18 U.S.C. § 2; one count of maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1); one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h); and twelve counts of illegal financial transactions in violation of 18 U.S.C. § 1957 & 18 U.S.C. § 2; along with forfeiture allegations in violation of 21 U.S.C. § 853 & 18 U.S.C. § 982(a)(1). The total charges against Hubbard were seventy-three. An eight-day jury trial was held in February of 2017, where two counts were dismissed by government motion (7 & 47). The jury found Hubbard guilty on all the remaining counts and the district court imposed a total term of imprisonment of 360 months with three years of supervised release. The district court ordered criminal forfeiture of real and personal property. Hubbard filed a motion for a new trial, but it was denied. See United States v. Hubbard, 2017 U.S. Dist. LEXIS 62982 (E.D. Ky., April 26, 2017).

On direct appeal, Hubbard's counsel filed an Anders motion pursuant to Anders v. California, 386 U.S. 738, 744 (1967), requesting permission to withdraw because of a lack of good-faith issues to appeal. Hubbard filed a response brief. The Sixth Circuit ordered substitute counsel, but he also moved to withdraw without filing a supplement motion to his Anders brief. The Sixth Circuit decided to review the record on its own, but the panel

found that no appealable issues could be raised. The panel therefore granted counsel's motion to withdraw and affirmed the Judgment of the district court. See United States v. Hubbard, 843 Fed. Appx. 667 (6th Cir. Nov. 19, 2019). Hubbard filed a petition for rehearing, which was denied. See United States v. Hubbard, 2019 U.S. App. LEXIS 34435 (6th Cir. 2019). In December of 2019, Hubbard filed a motion to recall the mandate arguing that his Sixth Amendment right to appellate counsel was denied when his second appellate counsel withdrew with no statements of conscientious review, or that he consulted with the defendant; Hubbard also argued counsel failed to brief anything in the record that might support the appeal. His motion was denied. See United States v. Hubbard, 2019 U.S. App. LEXIS 36444 (6th Cir. Dec. 6, 2019). Hubbard filed a petition for a writ of certiorari with the Supreme Court, but it was denied in March of 2020. See Hubbard v. United States, 140 S. Ct. 2628 (March 30, 2020).

About a year later on March 29, 2021, Hubbard filed a 28 U.S.C. § 2255 motion to vacate based on four allegations of ineffective assistance of counsel. The district court denied the motion without an evidentiary hearing or a certificate of appealability. See United States v. Hubbard, 2021 U.S. Dist. LEXIS 217626 (E.D. Ky. Nov. 10, 2021). See Hubbard v. United States, 2022 U.S. App. LEXIS 16383 (6th Cir. June 14, 2022).

On June 26, 2022, the Supreme Court decided the Ruan v. United States, 142 S. Ct. 2370 (2022) decision which held that 21 U.S.C. § 841's knowingly or intentionally mens rea applied to the "except as authorized" clause. Hubbard then filed a 28 U.S.C. § 2241 petition with the District Court for the Northern District of West Virginia where he was confined arguing that his § 841 convictions should be reversed because of the recent gloss from the Supreme Court in Ruan v. United States (2022). The district court denied the petition.

See Hubbard v. Brown, 2022 U.S. Dist. LEXIS 232666 (N.D. W.Va. Dec. 28, 2022). Hubbard appealed to the Fourth Circuit, but the appeal was denied. See Hubbard v. Brown, 2023 U.S. App. 19501 (4th Cir. 2023). The Fourth Circuit's decision was based on the Supreme Court's recent holding in Jones v. Hendrix, 599 U.S. 465 (2023) which held that § 2255(e)'s savings clause did not permit a federal prisoner asserting a change in statutory interpretation a remedy under § 2241 when he could not file a second or successive § 2255 motion.

On July 26, 2023, Hubbard wrote a letter to the United States Attorney's Office asking the prosecuting attorney to "submit a motion to dismiss the second superseding indictment pursuant to Federal Rules of Criminal Procedure 48(a) because of the facts and Supreme Court gloss of Ruan." After a reminder letter was sent to the prosecutor again on October 9, 2023, the United States Attorney's Office responded to Hubbard's proposed motion request on October 20, 2023. There the prosecutor admitted that "neither the indictment nor the jury instructions contained the now required mens rea language as set forth in [Ruan]," but that he must decline Hubbard's request.

Hubbard filed the motion to recall the mandate in question to the Sixth Circuit on March 4, 2024, asserting that his direct appeal should be re-opened to address five issues that relate back to his direct appeal that are now in direct contravention to the Supreme Court's decision in Ruan. Specifically, in Hubbard's motion to recall the mandate, he argued: (1) that he could not collaterally attack his convictions under a second or successive § 2255 motion because Ruan was not made retroactive on collateral review and did not announce a new rule of constitutional law by the Supreme Court; (2) that the government prosecutor agreed that "neither the indictment nor the jury instructions contained the now required mens rea language as set forth in [Ruan]"; (3) that this was a "good cause" because Hubbard was suffering from a 30 year "invalid"

conviction that rested on erroneous findings of guilt made by an improperly instructed jury and, (4) that this was truly an exceptional circumstance which behooves the Court to recall its mandate because of the recent Supreme Court decisions of Ruan v. United States and Jones v. Hendrix which left Hubbard no avenue or vehicle to challenge his now invalid counts of conviction. Hubbard requested the Sixth Circuit to recall the mandate and re-open the appeal to re-judicate arguments that were previously heard, but were decided based on a pre-Ruan misunderstanding of § 841 and the lack of subjective knowledge or mens rea now required for conviction.

The Sixth Circuit denied Hubbard's motion to recall the mandate on April 23, 2024. See United States v. Hubbard, 2024 U.S. App. LEXIS 9855 (6th Cir. 2024). Appendix A. The Court held this case did not have an exceptional circumstance. Moreover, the Court held that changes in statutory interpretation are not the type of unforeseen contingency which warranted a recall to permit yet another round of appellate review. Id. The Court held that the proper remedy to attack a conviction in a criminal proceeding that has become final is a motion to vacate under § 2255, and the fact that such remedy is no longer available does not behoove the Court to recall its mandate. Id.

Hubbard now petitions the Supreme Court for a writ of certiorari to reverse the Sixth Circuit's Order denying Hubbard's Motion to Recall the Mandate & to Re-open the Direct Appeal because it abused its discretion in narrowly and nearsightedly following the Supreme Court's holding and dicta in Calderon v. Thompson, 523 U.S. 538 (1998).

REASONS FOR GRANTING THE PETITION

It was the Supreme Court in Calderon v. Thompson, 523 U.S. 538 (1998), that held that federal courts of appeals have an inherent power to recall their mandates, subject to a review for an abuse of discretion. Further, this power to recall is held in light of the profound interests in repose attaching to the mandate of a Court of Appeals. The recall power can be exercised in only extraordinary circumstances, one of last resort, and to be held in reserve against grave and unforeseen contingencies. Id.

But that was a state habeas corpus case. There, a federal court of appeals granted a state prisoner's motion to recall a mandate on the basis of the merits of the underlying decision, only to be subjected to the restrictions in 28 U.S.C. § 2244(b) as amended by the AEDPA of 1996, concerning second or successive federal habeas corpus applications. The Supreme Court has also held that a motion to recall the mandate or the court acting to recall its mandate sua sponte, should be treated as a successive application if the underlying basis for the recall is to consider a claim not raised in a previous petition.

Unfortunately, the Supreme Court's Calderon decision has sharply divided the circuit courts on the question of what constitutes a good cause to grant a recall of the mandate and what constitutes an extraordinary circumstance without abusing its discretion.

The First, Second, Sixth, Seventh and Tenth Circuits hold recall of the mandate threatens important interests in finality and is only to be granted in the most unusual circumstances. "Recall of a mandate -- other than to correct a clerical error -- threatens important interests in finality and 'is a step to be taken only in the most unusual circumstances.'" Conley v. United States, 323 F.3d 7, 14 (1st Cir. 2003). These circuits hold that a

criminal defendant cannot evade the successive petition restrictions of 28 U.S.C. § 2255 by framing his claims as a motion to recall the mandate. See Bottone v. United States, 350 F.3d 59 (2d. Cir. 2003) (Bottone cannot evade the successive petition restrictions of 28 U.S.C. § 2255 nor the holding in Coleman, which say a motion that questions the merits of the underlying decision must present newly discovered evidence and be a new rule of constitutional law made retroactive to cases on collateral review, by framing his claims as a motion to recall the mandate.); United States v. Ford, 383 F.3d 567, 568 (7th Cir. 2004) (per curiam) (We have held that motions to recall the mandate in a direct appeal cannot be used to avoid the successive petition restrictions of 28 U.S.C. § 2255); United States v. Falls, 129 Fed. Appx. 420 (10th Cir. 2005) (The inmate's motion to have the appellant court recall an earlier mandate on the basis of the Blakely and Booker decisions was denied because the circumstances was not grave or unforeseen. The inmate's proper avenue for consideration was via habeas corpus). These circuits hold changes in statutory interpretation by higher courts are not the unforeseen contingency the Supreme Court outlined in Calderon which warrant recall of the mandate. These circuits hold that a Court of Appeals abuses its discretion if it recalls its mandate unless the Supreme Court's holdings and dicta are strictly applied making virtually any granting of a motion a rare occurrence. United States v. Fraser, 407 F.3d 9 (1st Cir. 2005) (We hold that the normal and extremely rigorous standards for recalling mandate established in Calderon v. Thompson, applies to cases seeking to recall mandate under Booker); United States v. Saikaly, 424 F.3d 514, 517-18 (6th Cir. 2005) (In a motion to recall the mandate under Apprendi, Blakely and Booker, the Sixth Circuit would not allow defendant to avoid the restriction that his Booker claims in a § 2255 motion did not apply

retroactively to cases already final on direct review. The Sixth Circuit held the proper remedy to attack a sentence in a final criminal proceeding was under § 2255, and the fact that such a remedy was no longer available did not warrant a recall of the mandate).

On the other hand, the Third, Fourth, Ninth and Eleventh Circuits allow recall of the mandate to "prevent an injustice" or in other special circumstances that protect the integrity of the courts. There are subtle differences between these circuits. The Third, Fifth and Eleventh Circuits allow recall if a previous decision is "demonstrably wrong" or if a previous decision directly conflicts with a subsequent decision by the Supreme Court to prevent an injustice. See United States v. Montalvo Davila, 890 F.3d 583 (5th Cir. 2018) (holding recall of the mandate was appropriate when a subsequent decision of the Supreme Court or the appellate court rendered a previous decision demonstrably wrong, and a subsequent decision directly conflicted with the appellate court's previous decision affirming defendant's sentence. When faced with a motion to recall its mandate, the court must balance two opposing interests: the interest in "preventing injustice" and the interest in maintaining the finality of the judgment. Id. at 586. The Fifth Circuit calls a previous decision "demonstrably wrong" if it "directly conflicts with" the subsequent decision by the Supreme Court. United States v. Tolliver, 116 F.3d 120, 123 (5th Cir. 1997). See also 5th Cir. R. 41.2 that states that a mandate shall not be recalled "except to prevent injustice."; United States v. Lamothe, 2014 U.S. App. LEXIS 19833 (11th Cir. 2014), see also 11th Cir. R. 41-1(b) that states a mandate "shall not be recalled except to prevent injustice."; see Michael v. Horn, 144 Fed. Appx. 260 (3rd Cir. 2005) (Where the Court stated that recall may be warranted for good cause, to prevent injustice, or in special circumstances identified in five situations:

1) clarification of the mandate, 2) where misconduct affected the integrity of the judicial process, 3) where there is danger of incongruent results in cases, 4) where necessary to revise an "unintended" instruction by a trial court that has produced an unjust result, and 5) where a Supreme Court decision showed that judgment was demonstrably wrong.).

Whereas, the Fourth and Ninth Circuits are the most generous in granting recalls of the mandate to prevent an injustice or to impart changes in the legal landscape. See In re Robinson, 694 Fed. Appx. 132 (4th Cir. 2017) "[T]his court may recall the mandate to avoid injustice only in exceptional cases."; United States v. Smith, 357 Fed. Appx. 518 (4th Cir. 2009) ("In light of the vast changes in the legal landscape that have occurred in the seven years since the district court resentenced Smith, we vacate Smith's sentence and remand for resentencing in light of Booker and its progeny"); Bryant v. Ford Motor Co., 886 F.2d 1526, 1529 (9th Cir. 1989) (recognizing the court's "inherent power to recall its mandate to prevent injustice or to protect the integrity of the process."). Both subgroups allow recall due to recent intervening changes in the law by the Supreme Court that depart from the decision of the federal appeals court to protect the integrity of the court's prior judgment. See Zipfel v. Halliburton Co., 861 F.2d 565, 567-68 (9th Cir. 2005) (Where the Court stated "When a decision of the Supreme Court 'departs in some pivotal aspects' from a decision of a federal appeals court, recall of the mandate may be warranted to the extent necessary to 'protect the integrity' of the court of appeals' prior judgment."; see United States v. Neidinger, 2023 U.S. App. LEXIS 31318 (9th Cir. 2023), at LEXIS *2, "Prior recalls of the mandate have typically concerned intervening statutory or Supreme Court authority that undermined the basis of the court's decision."; United States v. Fraga-Araigo, 2001 U.S. App. LEXIS 31016 (5th Cir. 2001).

Hubbard moved the Sixth Circuit Court of Appeals to recall its mandate and to re-open the direct appeal to address five questions of law due to the recent gloss of the Supreme Court's decisions in Ruan v. United States, 142 S. Ct. 2370 (2022) and Jones v. Hendrix, 599 U.S. 465 (2023). In Hubbard's motion to recall, he argued that the "good cause" for this motion was to prevent an "injustice" by the trial court's Judgment that rested on erroneous findings of guilt made by an improperly instructed jury that lacked the requisite mens rea as described in Ruan. Moreover, said district court sentenced Hubbard to 360 months' imprisonment. Further, Hubbard argued that the government now agreed with Hubbard that "neither the indictment nor the jury instructions contained the now required mens rea language as set forth in [Ruan]." Truly, Hubbard asserted that these events were exceptional circumstances which behooved the Court to recall its mandate because it was one of "last resort" to a "grave, unforeseen contingency" due to both Supreme Court decisions. See Appendix B, page 5.

The Supreme Court should grant certiorari to clarify the holding in Calderon v. Thompson in light of Jones v. Hendrix. The end result of Jones v. Hendrix was that there would remain federal prisoners who are statutorily innocent of their convictions and are left with no avenue to contest the invalidity of their convictions because most inmates would have already filed an initial § 2255 motion to vacate before the intervening change in law occurred. What Justice Jackson stated in the dissent of Jones v. Hendrix rings true and is applicable here as reasons to support broader more uniform reasons to recall the mandate. Justice Jackson opined: "What emerges from a review of the debates over the successive petition restrictions is a clear sense that Congress wanted to prevent manipulation of the system through relitigation of previously presented claims ... for later presentation,

while still creating a mechanism that would allow prisoners to have one full, fair chance to present their meritorious ... claims to the federal courts." Id.

Hubbard asserts that by allowing courts of appeals, for a good cause and for an exceptional circumstance, to recall the mandate to correct an injustice caused by a conviction due to an incorrect understanding of the law would not violate AEDPA's prohibition about multiple habeas corpus claims because the review would still fall under the purview of a direct appeal. The reason the courts of appeals would not relitigate previously presented claims is because those claims were decided under a misunderstanding of the law. Such review would ensure that one full, fair chance to present an appellant's meritorious claims under the correct understanding of the law is not impinged. Thus, intervening changes in the law by the Supreme Court would qualify as an "exceptional circumstance." Principles such as harmless error review under Neder v. United States, 527 U.S. 1 (1999), would still apply.

The United States Constitution mandates through three amendments what a federal prisoner constitutionally is entitled to. The Fifth Amendment's "due process of law" clause ensures fair treatment through the normal judicial process. If a law was misinterpreted and misunderstood by the district court, then permitting a court of appeals to apply the correct application of that law to the prisoner's case is fair treatment and follows a normal judicial process. The Sixth Amendment's right "to be informed of the (correct) nature and nature of the accusation" ensures that one will be tried and convicted under the correct understanding of the law. Fairness keeps the integrity of the courts in check. Lastly, the Eighth Amendment's protection against "cruel and unusual punishment" prohibits the incarceration of innocent individuals. See also In re Davis, 557 U.S. 952, 953 (2009).

Truly, Congress did not speak as to what should happen if a prisoner who has previously filed a § 2255 motion realizes a new claim of innocence due to an intervening change in law by a higher court. But the obvious answer is to allow, even encourage, courts of appeals to grant recall of the mandate for a good cause in an exceptional circumstance to re-open the direct appeal and re-adjudicate the claim anew to prevent injustice. An injustice is allowing a federal prisoner to waste away in prison while innocent having no avenue for relief. "[T]here is nothing so finely perceived and so finely felt, as injustice." Great Expectations, Charles Dickens (1861).

Hubbard is experiencing such an "injustice." He was convicted by a jury who were improperly instructed on the mens rea requirement of 21 U.S.C. § 841 as required by Ruan. As a registered pharmacist and pharmacy owner, Hubbard was convicted like a common street drug dealer because the jury was not instructed to consider his subjective knowledge before he dispensed the medications from his pharmacy. Hubbard is innocent following the Supreme Court's ruling in Ruan v. United States, 143 S. Ct. 2370 (2022). This Court should grant this writ of certiorari and rule that courts of appeals do not abuse their discretions by recalling their mandates for good cause in the exceptional circumstance of an intervening change in law by a higher court that results in a statutorily innocent federal prisoner who has already filed an initial § 2255 motion to vacate and cannot file a second or successive § 2255 motion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lonnie Hubbard

Date: 7-1-2024