Appendix A

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2024 U.S. App. LEXIS 9855
No. 17-5853
April 23, 2024, Filed

Editorial Information: Prior History

United States v. Hubbard, 2019 U.S. App. LEXIS 34435 (6th Cir., Nov. 19, 2019)

Counsel **{2024 U.S. App. LEXIS 1}**For UNITED STATES OF AMERICA, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY; Ron L. Walker Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY.

LONNIE W. HUBBARD, Defendant - Appellant, Lonnie W. Hubbard, F.C.I. Hazelton, Pro se, Bruceton Mills, WV.

Judges: Before: MURPHY, Circuit Judge.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, moves to recall the mandate in this case, which was issued on November 19, 2019, after this court granted counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and affirmed Hubbard's convictions and 360-month sentence. *United States v. Hubbard*, 843 F. App'x 667 (6th Cir. 2019).

In 2015, the United States filed a thirty-eight-count indictment against Hubbard, a pharmacist; his company, Rx Discount of Berea, PLLC; his wife; and six others. The indictment alleged that the defendants conspired to distribute oxycodone and pseudoephedrine, distributed oxycodone and pseudoephedrine, distributed hydrocodone, failed to obtain proper identification from persons purchasing pseudoephedrine, maintained a drug premises (the pharmacy), and conspired to commit money laundering and other fraudulent financial transactions. Two superseding indictments were subsequently**{2024 U.S. App. LEXIS 2}** filed, bringing the total number of charges against Hubbard to seventy-three. An eight-day trial was held in February 2017, and two counts were dismissed by the government. The jury found Hubbard guilty on the remaining seventy-one charges, and the district court imposed a total term of imprisonment of 360 months, to be followed by three years of supervised release. The district court also ordered criminal forfeiture of real and personal property, as well as cash. Hubbard filed a motion for a new trial, which was denied.

On appeal, Hubbard's counsel filed an *Anders* motion, requesting permission to withdraw because of a lack of any good-faith issues to appeal. Hubbard filed a response. Substitute counsel was thereafter appointed, moved to withdraw, but did not supplement his motion with an *Anders* brief. After a review of the record, 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. A petition for rehearing was also denied.

In December 2019, Hubbard filed a motion to recall the mandate, arguing that his right to appellate

counsel was denied when this court allowed his second appellate{2024 U.S. App. LEXIS 3} counsel to withdraw. His motion was denied, and the Supreme Court subsequently denied a petition for a writ of certiorari. *Hubbard v. United States*, 140 S. Ct. 2628, 206 L. Ed. 2d 509 (2020). Hubbard filed a 28 U.S.C. § 2255 motion to vacate, which the district court denied. This court denied a certificate of appealability. *Hubbard v. United States*, No. 21-6114 (6th Cir. June 14, 2022).

In the current motion to recall the mandate, filed March 4, 2024, Hubbard asserts that his direct appeal should be reopened to address certain issues stemming from the Supreme Court's decision in ***Ruan v. United States***, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). In *Ruan*, the Supreme Court held that the crime of unauthorized distribution includes as an element that the defendant subjectively knew that the distribution was unauthorized; it is not sufficient that the distribution was objectively unauthorized. *Id.* at 2375. Given the decision in *Ruan*, Hubbard raises the following issues: (1) whether sufficient evidence existed to convict him of Counts 49-59 (distribution of oxycodone), (2) whether the district court erred by instructing the jury on the elements of distribution of oxycodone, (3) whether sufficient evidence existed to find him guilty of maintaining a drug premises and money laundering, (4) whether the district court erred by ordering criminal forfeiture of criminally derived property, and (5) whether the district court{2024 U.S. App. LEXIS 4} erred by denying Hubbard's motion for a new trial. Hubbard argues that he cannot collaterally attack his conviction under § 2255 on the basis of *Ruan* because it was not made retroactive on collateral review and did not announce a new rule of constitutional law. He therefore asserts that he has no avenue to challenge his now "invalid" convictions and these extraordinary circumstances warrant the recall of this court's mandate.

The court has the inherent authority to recall its mandate. *Patterson v. Haskins*, 470 F.3d 645, 661-62 (6th Cir. 2006). But "such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate." *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005). The power to recall a mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). The party "'seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances,' including, but not limited to 'fraud upon the court, clarification of an outstanding mandate, [or] correction of a clerical mistake.'" *Patterson*, 470 F.3d at 662 (quoting *BellSouth Corp. v. FCC*, 96 F.3d 849, 851 52 (6th Cir. 1996)).

Such exceptional circumstances do not exist in this case. *Ruan* was decided five years after Hubbard was convicted. This court has recognized that changes in statutory{2024 U.S. App. LEXIS 5} interpretation are "not the type of unforeseen contingency which warrants recall of the mandate to permit yet another round of appellate review." *Saikaly, 424* F.3d at 518. The proper remedy to attack a conviction in a criminal proceeding that has become final is a motion to vacate under § 2255; "the fact that such remedy is no longer available does not warrant a recall of the mandate." *Id.* at 517-18 (citing *United States v. Fraser*, 407 F.3d 9, 10-11 (1st Cir. 2005); *United States v. Ford*, 383 F.3d 567, 568 (7th Cir. 2004) (per curiam); *Bottone v. United States*, 350 F.3d 59, 64 (2d Cir. 2003); *United States v. Falls*, 129 F. App'x 420, 420-21 (10th Cir. 2005)).

Hubbard's motion to recall this court's mandate is **DENIED**.

ENTERED BY ORDER OF THE COURT

Appendix B

Case No. 17-5853

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.	)	REGARDING THE APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (LEXINGTON)

MOTION TO RECALL THE MANDATE & TO RE-OPEN THE DIRECT APPEAL

Defendant-Appellant Lonnie W. Hubbard, pro se, MOVES this Honorable Court to recall its mandate and to re-open the direct appeal to address five questions of law: (1) Whether there was sufficient evidence to convict Hubbard on Counts 49 through 59 in violation of 21 U.S.C. § 841(a)(1), in light of the recent gloss of the Supreme Courts's decision in Ruan; (2) Whether the district court plainly erred when it instructed the jury on the essential elements of 21 U.S.C. § 841(a)(1) & (c)(2); (3) Whether there was sufficient evidence, as a matter of law, to satisfy the elements of maintaining a drug-premises, 21 U.S.C. § 856(a)(1), and the money laundering counts, 18 U.S.C. §§ 1956(h) & 1957; (4) Whether the district court plainly erred in ordering criminal forfeiture of criminally-derived properties listed in the indictment relating to violations of 21 U.S.C. § 841(a)(1) & (c)(2) and 18 U.S.C. §§ 1956(h) & 1957, pursuant to forfeiture statutes 21 U.S.C. § 853 and 18 U.S.C. § 981(a)(1); and (5) Whether the district court erred when it denied Hubbard's motion for a new trial.

Standard of Review

A court of appeals has inherent authority to recall its own mandate "only in extraordinary circumstances." Calderon v. Thompson, 523 U.S. 538, 549-550 (1998). That power "is one of last resort, to be in reserve against grave, unforeseen contingencies." Id. at 523 U.S. at 550. Moreover, the party "seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances ... not limited to fraud ... clarification [or] correction." BellSouth Corp. v. FCC, 96 F.3d 849, 851-52 (6th Cir. 1996).

I. INTRODUCTION

The trial court's Judgment rested on erroneous findings of guilt made by a jury who were not properly instructed on the essential elements of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(c)(2). Moreover, as a matter of law, there was not sufficient evidence to convict on the charges of maintaining a drug-premises, the money laundering counts and criminal forfeiture.

The Supreme Court in Ruan v. United States, 142 S. Ct. 2370 (2022), held that § 841's knowingly or intentionally mens rea applies to the "except as authorized" clause. This means that once a defendant meets the burden of producing evidence that his conduct was authorized, the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. Ruan at 142 S. Ct. at 2382. In other words, the crime of unauthorized distribution includes as an element that the defendant subjectively knew the distribution was unauthorized, that is, it is not sufficient that the distribution was objectively unauthorized.

Ruan was decided after both Hibbard's direct appeal and 28 U.S.C. § 2255 motion were denied. Hibbard filed a 28 U.S.C. § 2241 petition with the district court where he was confined, arguing that the § 841 convictions should be vacated in light of Ruan. The district court denied the motion. Hibbard appealed to the Fourth Circuit, but was denied because of the Supreme Court's decision in Jones v. Hendrix, 599 U.S. 465 (2023), which held that 28 U.S.C. § 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. Unfortunately, the Supreme Court did not make Ruan retroactive on collateral review and Ruan is not a new rule of constitutional law which prevents Hibbard from collaterally attacking the invalid counts of conviction under a second or successive § 2255 motion. See § 2255(h).

Hibbard, therefore, has no avenue or remedy to challenge the invalid counts of conviction unless the Sixth Circuit recalls its mandate. Moreover, Hibbard cannot file a motion for reduction in sentence pursuant to 18 U.S.C. § 3582, Amendment 821 U.S.S.G. § 1B1.13 UNUSUALLY LONG SENTENCES, because he has not served at least 10 years of the term of imprisonment.

Hibbard asserts that this is "good cause" and an "extraordinary circumstance" to a "grave

unforeseen contingency" that behooves this Honorable Court to GRANT relief by recalling its mandate, so that Hubbard may challenge his convictions under 21 U.S.C. § 841 & 856(a)(1), the money laundering convictions under 18 U.S.C. §§ 1956(h) & 1957, the district court's criminal forfeiture order, and the district court's denial of Hubbard's motion for a new trial.

II. FACTS AND PROCEDURAL HISTORY

On direct appeal, Hubbard's counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), notifying the Court of issues of possible merit. Relevant here are: (1) "the evidence was insufficient to convict Hubbard of crimes where he was merely acting as a pharmacist and no conspiracy was demonstrated," (2) "the district court otherwise failed to instruct the jury properly as to ... deliberate ignorance," (3) "the district court erred in ... ordering criminal forfeiture," and (4) "the district court erred by denying his motion for a new trial." See United States v. Hubbard, 843 Fed. Appx. 667, 669 (6th Cir. 2019). The Court granted counsel's motion to withdraw and appointed new counsel and allowed supplemental briefs. New counsel later filed a motion to withdraw pursuant to Anders filing no supplemental motion. Hubbard filed a response brief pro se and the Court independently examined the record pursuant to Penson v. Ohio, 488 U.S. 75, 82-83 (1988), and the briefs of counsel and Hubbard, then granted counsel's motion to withdraw finding no grounds for appeal could be sustained.

Hubbard filed a petition for writ of certiorari to the Supreme Court, No. 19-7797, which was denied on March 30, 2020. See Lonnie W. Hubbard, Petitioner v. United States, 140 S. Ct. 2628 (2020).

On March 29, 2021, Hubbard filed a 28 U.S.C. § 2255 motion with the district court alleging four instances of ineffective assistance of counsel, No. 5:21-cv-00090, asking the district court to vacate, correct or set aside his convictions. The district court denied the motion on November 10, 2021, without granting 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).

On June 27, 2022, the Supreme Court decided Ruan v. United States, 142 S. Ct. 2370 (20220, which held: (1) 21 U.S.C. § 841's knowingly or intentionally mens rea applied to the "except as

authorized" clause, and (2) that in a § 841 prosecution, in which a defendant met his burden of production under 21 U.S.C. § 885, the government had to prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

On August 17, 2022, Hubbard filed a 28 U.S.C. § 2241 petition with the Northern District of West Virginia (Clarksburg) district court requesting relief from his § 841 convictions under 28 § 2255(e)'s savings clause. Hubbard argued that the new statutory interpretation of Ruan and Hubbard's inability to raise the issue in a second or successive § 2255 motion warranted the district court to reverse his § 841 convictions because the acts for which he was convicted are no longer a crime. On Dec. 28, 2022, the district court denied the petition. See Hubbard v. Brown, No. 5:22-cv-196, 2022 U.S. Dist. LEXIS 232666 (N.D. W.Va. Dec. 28, 2022). Hubbard appealed that ruling to the Fourth Circuit.

On June 22, 2023, the Supreme Court decided Jones v. Hendrix, 599 U.S. 465 (2023), which effectively ended 2255(e)'s savings clause relief for federal prisoners who wished to assert a change in statutory interpretation via § 2241 petitions. On July 27, 2023, the Fourth Circuit affirmed the district court's judgment relying entirely on Jones v. Hendrix. See Hubbard v. Brown, No. 23-6023, 2023 U.S. App. LEXIS 19501 (4th Cir. July 28, 2023).

On July 26, 2023, Hubbard wrote a letter (See Exhibit A, Hubbard Letter 1) to the Lexington, Kentucky AUSA Attorney's Office, Ron L. Walker Jr., asking him to dismiss the indictment pursuant to Fed. R. Crim. Proc. 48(a), due to the fact that the jury could not have found the essential elements of the § 841(a)(1) convictions under the Supreme Court's gloss in Ruan. Hubbard explained to AUSA Walker that Jones v. Hendrix left Hubbard no avenue or remedy to dispute his invalid § 841(a)(1) convictions. A little over two months later, on October 9, 2023, Hubbard sent AUSA Walker a reminder letter (See Exhibit B, Hubbard Letter 2) again asking the government "to file a motion to dismiss the second superseding indictment pursuant to Fed. R. Crim. Proc. 48(a)."

On Oct. 20, 2023, AUSA Walker responded with a letter (See Exhibit C, AUSA Walker Response) to Hubbard declining Hubbard's request. AUSA Walker admitted that "neither the indictment nor the

jury instructions contained the now required mens rea language as set forth in United States v. Ruan (sic), 142 S. Ct. 2370 (2022). However, recent Sixth Circuit decisions have ruled that dismissal is not required for cases tried before Ruan where a deliberate ignorance instruction was also given. United States v. Anderson, 67 F.4th 755 (6th Cir. 2023)" and its progeny.

Hubbard cannot file a motion for reduction in sentence pursuant to 18 U.S.C § 3582, Amendment 821 U.S.S.G. § 1B1.13 UNUSUALLY LONG SENTENCES, because he has not served at least 10 years of the term of imprisonment.

Hubbard now files this motion to recall the mandate and to re-open the direct appeal to address five questions of law.

Reasons to Grant Hubbard's Request

1. Hubbard has asserted, and the government agrees, that "neither the indictment nor the jury instructions contained the now required mens rea language as set forth" in Ruan. Further, Hubbard asserts that the jury verdict forms did not aid the jury to understand the requisite essential elements of conviction under 21 U.S.C. § 841(a)(1) & (c)(2).
2. Hubbard asserts that the "good cause" for this motion is that the Sixth Circuit can grant relief to an injustice of a trial court's Judgment that rested on erroneous findings of guilt made by an improperly instructed jury, which sentenced Hubbard to 360 months of prison.
3. This is truly an exceptional circumstance behooving the Court to recall its mandate and to re-open the direct appeal to address four questions of law, which is one of last resort to a grave, unforeseen contingency due to both Supreme Court decisions in Ruan v. United States and Jones v. Hendrix, which left Hubbard no remedy or avenue to challenge the invalid counts of conviction.

Hubbard now presents his five proposed questions of law in argumentum to support his assertion that the Court should reverse his convictions and criminal forfeiture and grant a new trial in light of the recent gloss of Ruan.

QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT HUBBARD ON COUNTS 49 THROUGH 59 IN VIOLATION OF 21 U.S.C. § 841(a)(1) IN LIGHT OF THE RECENT GLOSS OF THE SUPREME COURT'S DECISION IN RUAN.

Standard of Review

When reviewing a conviction for insufficient evidence, the Court must inquire "whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia,