No. 17-6680

In the Supreme Court of the United States

William M. Eaton, Petitioner

v.

United States of America

A Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Eighth Circuit

Petitioner's Response to the United States

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Petitioner's Response to the Solicitor General

Comes now, William M. Eaton, pro se, responding to the Solicitor General's opposition to granting certiorari in this case. The opposition primarily argues that the waiver should be extended to bar claims clearly outside its scope. The objections to the merits of the case rely on misrepresentations of the facts and law. If anything, the opposition helps illustrate why certiorari is warranted.

Procedural Bars/Waiver

The Solicitor General urges this Court to find that all of the raised claims are waived by the plea agreement. Standing against this is that the 8th Circuit found no such bar.

The Solicitor General offers nothing to this Court to let it come to a different conclusion. The waiver prevents Petitioner from challenging "a finding of cuilt," but none of the grounds here challenge that finding. The waiver precludes challenges to a sentence unless that sentence is claimed to be illegal. So, although two claims challenge imposed penalties, they do so on those penalties being unconstitutional.

Moreover, certain claims have always been held to fall outside the scope of a waiver. Indeed, in Class v United States, 200 L.Ed.2d 37, 44-46 (2018) this Court noted that the Blackledge/Menna doctrine-claims that, on the face of the record, a conviction or sentence is one which the State may not legally prosecute-generally are not barred.

The Solicitor General tries to avoid the force of this argument by claiming that this Court has approved the waiver of such constitutional rights

and that none of the cited cases involved waivers. Both claims are plainly false. Only rights explicitly mentioned, or logically or legally reserved, in a plea are retained. So, when a defendant pleas unconditionally, they retain nothing, United States v Harrison, 456 Fed.Appx. 626, 629-30 (8th, 2011). Not only did Class involve such a waiver, the Solicitor General tried to construe the waiver to bar the claim as he is doing here. This Court rejected that construction as both wrong and impermissible, id at 47.

Neither of the cases the Solicitor General cites contradict this. Claims involving 42 USC §1983 are irrelevant here. At first blush, Ricketts v Adamson, 482 US 1 (1987) seems to suggest that a double jeopardy claim may be waived, but this is only if we ignore the reasoning behind the ruling. Ricketts involved a plea deal where, if the defendant refused to testify, the plea would be declared null and void and he would be returned to trial without the ability to claim double jeopardy.

Though the Court upheld the waiver, they did so because there would be no valid basis to claim a violation of the clause. He had chosen to breach his plea and was in the same shoes as someone who vacated their conviction on appeal. Jeopardy had never attached, and there was no Constitutional problem in requiring him to go back to trial. So Ricketts simply has no application to this case.

Since defendants cannot agree to let the Court expand itself beyond the limits of the Constitution, Freytag v Commissioner, 501 US 868, 896 (1991), even if we assume that these claims were waived, they simply cannot be. And, while the Solicitor General disputes the entitlement to relief, the questions underlying these claims do not affect whether they can be raised, Bond v United States, 180 L.Ed.2d 269, 278 (2011).

So the lower Court's handling of the case is indefensible. It cannot

be pretended that the 8th Circuit complied with the procedures for Anders review, and the Solicitor General does not even try to defend the handling of the matter. Instead he issues a bald, ipse dixit that there were "no viable claims" (p. 18) and that there was no "error, let alone plain error" shown below (p. 12). Again, the 8th Circuit never found this. They simply declined to brief or address these issues.

As shown both here and below, these claims are routinely briefed for plain error. The 8th Circuit refused to apply plain error review, however, because the issues had not been preserved below-which is why the plain error standard and is supposed to apply to begin with. As this Court just reminded the Courts of Appeals in Rosales-mirales v United States, 138 S.Ct. 1897, 1909 (2018), just because plain error review uses permissive rather than mandatory language does not mean a Court can just refuse to correct errors for no reason; correction **should** occur.

The tacit admission that error occured but refusing to hear, let alone correct it, is bad enough, but that this refusal is the result of an Anders proceeding is unacceptable. It compounds one violation with another. Petitioner was not just denied a ruling, he was effectively denied an appeal altogether.

The Solicitor General urges this Court to simply affirm the lower court's blatant disrespect of its precedent. A similar request was made, and rejected, in Penson v Ohio, 488 US 75 (1988). The Anders process is not merely for its own sake, it is a way to ensure that claims aren't overlooked, and to preserve fairness by adversarial presentation of issues. Without this, the result is questionable, id at 86-88. For this reason, failure to comply with it is presumed prejudicial, Robinson v Black, 812 F.2d 1084, 1086 (8th, 1997).

By encouraging this Court to deny certiorari, the Solicitor General

is promoting disrespect of its precedents, allowing lower courts to disregard this Court's rules without correction, Hutto v Davis, 454 US 370, 374-75 (1982). Worse, it disregards individual rights by turning a blind eye to the summary dismissal of serious claims by pro se litigants. Petitioner has waited almost two years for review, and now the Solicitor General would have him go through the §2255 process to vindicate rights that should have been satisfied last year.

This fails to promote judicial economy, requiring a multiplicity of suits instead of promptly addressing them the first time around. This needless waste of Petitioner's life and the system's scarce resources is not needed. No compelling reason is given for such a practice.

Time and time again the idea of ignoring this or that requirement of due process because the defendant is "obviously guilty" gets trotted out, and this Court is forced to reject this illegitimate suggestion, see Williams v Illinois, 183 L.Ed.2d 89, 151 (2012). This is more of the same. Because he is convinced that the result should be upheld, it is irrelevant that the law was not followed. Even were his analysis of the issues not incorrect, it should be rejected for that reason alone. It is just as unacceptable today as it was every other time.

As a last ditch effort, the Solicitor General urges that this Court should consider equitable principles. If the Court does not allow the plea waiver to be expanded beyond its terms to dismiss the instant appeal, this will somehow weaken pleas and deprive the Government of the benefit it obtains. Expanding the plea beyond its terms, of course, deprives the defendant of his benefit, but apparently that doesn't matter. Also irrelevant is whether the benefit is a lefitimate one or whether it should have been obtained to begin with.

Though it is not relevant to the legitimacy of Anders proceedings or the ability to raise these claims, this demand for equitable relief raises a troubling trend in the way plea waivers are increasingly being handled. One of the side effects of United States v Booker, 543 US 220, 289-91 (2005), which was recognized by the dissent, was to introduce this very uncertainty into the plea process, leaving it wholly up to the Judge's discretion whether a defendant got the benefit this plea promised.

So long as an appeal is reserved, this is not automatically a disaster. But, with an increasing number of waivers of all sentencing claims, the defendant is left without recourse on even the most blatant errors. This can make pleading a trap, and leave the defendant in a worse position than if he went to trial. Where, as here, the Judge deliberately disregards the facts and bases a sentence on constitutionally suspect facts, it calls into question the legitimacy of the whole process. If pleading is to be governed by principles of contract law, it is hard to believe that a contract with these results between two private parties would be upheld.

The Government is not entitled to a defendant's plea, nor is pleading and end to itself. Ther eis something very wrong with our system if people are being tricked into waiving their rights in this manner, Escobedo v Illinois, 378 US 478, 490 (1964). This is somewhere the system never should have reached, and the Solicitor General is in the wrong to demand it remain here, Montgomery v Louisiana, 193 L.Ed.2d 599, 617 (2016).

Since the Solicitor General's procedural posturing fails, we move to the claims themselves.

Merits of the Questions

1. Interstate Commerce is Jurisdictional

The Solicitor General labels the jurisdictional ground an "attempt

to avoid the waiver by incorrectly labeling interstate commerce as jurisdictional," which he labels as "unsound" (p. 10). He fails to note that his own case, United States v Williams, 341 US 58 (1951) supports this approach. Certain facts must be alleged to make a crime cognizable in federal court. It cites Bowen v Johnson, 306 US 19, 23 (1939) which explicitly stated that that fact-in that case commission of a crime in a federal park-is the jurisdictional basis. These cases distinguish common law powers (which Congress does not have) and state crimes, from federal ones. Though the wording is different, the linking of a crime to a constitutional power still identified in cases like United States v Comstock, 176 L.Ed.2d 878, 889 (2010) remains the same.

To say that 18 USC §3231 is the beginning and the end of the inquiry as the lower court did, and the Solicitor General now supports, disregards this Court's precedent and Constitutional limitations on the jurisdiction of both the Courts and Congress, Luna-Torres v Lynch, 194 L.Ed.2d 737, 741 (2016). To say that being hauled into federal court is enough, no facts need be alleged at all, is to say the federal government has a general police power. This conclusion is unavoidable; there is no limit to federal power.

This confusion alone is worthy of certiorari. In recent years, the Court has granted certiorari to settle whether a requirement is, or is not, jurisdictional, see Henderson v Shinseki, 179 L.Ed.2d 159 (2011); Sebelius v Auburn Reg'l Med. Ctr, 184 L.Ed.2d 627 (2012). The §3231 test is, for the reasons stated in the original petition, and not addressed by the opposition brief, completely wrong. But it is worse than that, because it is inconsistently applied; it is arbitrary, erratic, and unpredictable.

This is nost just a matter of minor inconsistency in the 4th, 8th, and 10th Circuits. Rather those are merely examples of the problem. Every Circuit has explicitly treated interstate commerce as jurisdictional, and every Circuit has claimed that only §3231 matters. Even if the Solicitor

General's version is correct, the question should be heard.

The Solicitor General moves to the merits, which the Court below refused to reach, and concludes there was "clearly" interstate commerce. His proof for this is rather anemic. 18 USC §1466A has a jurisdictional element, and the plea agreement stated that the files "travelled across both state and national borders" (p. 11). While it is not at all clear that this is unchallengeable, see Henderson at 166, even accepting these facts as true does not confer jurisdiction.

The presence of a jurisdictional element is relevant to whether the statute is constitutional, but the presence of an element does not insulate it from attack, see United States v Rodia, 194 F.3d 465, 472 (3rd, 1999). Moreover, it does not mean that the instant case fails within its grasp. That Congress may criminalize arson of buildings used in commerce does not automatically mean that any arson is of such a building, Jones v United States, 529 US 848, 855-57 (2000).

Nor does a blanket statement that the files crossed state lines, even if true, confer jurisdiction. There is no statement of **when** the files moved. This Court has repeatedly rejected that **any** connection to commerce, no matter how long ago, sufficies for federal jurisdiction. The defendant himself must be involved in any interstate movement or affect on commerce, United States v Lopez, 514 US 549, 567, 580 (1995); Jones at 855. It is absurd to say that, because a car has been made in another state 40 years ago, it was still in commerce today, United States v Cortner, 834 F.Supp. 242, 243 (MD Tenn, 1993). If that suffices to make a case federal, any case may be made federal, and there is still a federal police power.

Ultimately, while wrong, this defense is irrellevant to the importance of the original question. The merits of jurisdiction were never argued or

reached because the 8th Circuit engaged in the cursory §3231 analysis.

2. The Prosecution Was Abusive Enough to Violate Double Jeopardy

The Solicitor General then argues that jeopardy does not attach because a jury was never "empanneled and sworn in." Though the State of Missouri dragged out proceedings for two years only to drop the charges the day of trial and immediately transfer him to federal court, his rights were not affected (p. 13). This is a dangerous fiction.

It has long been recognized, however, that repeated filings and dismissals of a charge can be abusive and that judges may prevent it, United States ex rel Rutz v Levy, 268 US 390, 394 (1925). As the Double Jeopardy clause is to prevent against the use of repeated harassing trials to wear down a defendant, North Carolina v Pearce, 395 US 711, 732-35 (1969) recognizing that the use of dismissal and refiling can be just as oppressive, if not more so, for the defendant than retrial after jury resolution is both consistent with the purpose of the clause and precedent. This is not a game where prosecutors should be able to evade Constitutional limitations by technical rules.

The real world consequences for defendants remain the same. Being arrested again, having to post bail, or endure pretrial incarcertain, and retaining a lawyer, still have the same costs. Restrictions on pretrial activities and the risks of incarceration if those restrictions are not complied with are every bit as onerous and stressful. If we are truly concerned with the substance of a matter, it is impossible to truly distinguish in many cases between the impact on a defendant's rights, and the same dangers are inherent in both.

Since we already acknowledged that bad faith dismissals and refilings of charges count against the Government for Speedy Trial purposes, United States v MacDonald, 456 US 1, 7 (1982), applying the Rutz exception is not

a radical step. It merely prevents the Government from dismissing and refiling charges to gain an unfair advantage. If the end is forbidden, the means are irrellevant. It would also create parity with civil law, where similar rules apply, especially as relating to the Government, Abbott Laboratories v Gardner, 387 US 136, 155 (1967).

Though there may be differences between this case and Gamble, it is incorrect to say that the dual sovereignty issues is not implicated. Had the State dismissed and refiled all on its own, a number of Constitutional limitations would have remained in play. Instead, using a variation of the "silver platter" doctrine, Petitioner was passed off to federal authorities so the two governments could do together what neither could do separately, Abbate v United States, 359 US 187, 203 (1959). This important issue needs to be heard.

3. 18 USC §1466A is Plainly Overbroad and Violates Free Speech

In asking the Court to ignore the obvious application of Ashcroft v Free Speech Coalition, 535 US 234 (2002), the Solicitor General misleads on the facts of this case, deliberately distorts the law and inverts this Court's precedent. Ultimately, he inverts the overbreadth doctrine, asking this Court to uphold the plainly illegitimate sweep of §1466A because his view of this case makes it a valid use of the statute.

According to the Solicitor General's view of the statute, subsection (b)(1) requires use of an actual minor (p. 16). However, section (c) specifically disclaims it, "It is not a required element of **any** offense under this section that the minor actually exist." Not surprisingly, Courts routinely rejected this defense as completely irrelevant, see United States v Peel, 595 F.3d 763 (7th, 2009); United States v Schales, 546 F.3d 702 (9th, 2008). It seems that §1466A is primarily used, if not exclusively used, in cases where a minor is plainly not involved: United States v Ferrar, 876 F.3d 702 (5th,

2017)(hand drawn prison pictures); United States v Bowersox, 71 MJ 561 (ACCA, 2012)(cartoons); United States v Eychaner, 2018 US Dist LEXIS 139636 (ED Va, 2018). Because the requirement of minors or obscenity is absent from statute, one court has already struck down a subsection in United States v Handley, 564 F.Supp.2d 996 (SD Iowa, 2008).

Since this recitation of statute is hopelessly dishonest, the Solicitor General focuses isntead on a funhouse mirror version of this case. Whatever the failing of the law in general, it is valid here because Petitioner "admitted real children were involved" and the PSR stated with no proof that children were posed for the images. Of course, this "admission" is a fabrication, as the Solicitor General admits in footnote 4. Petitioner objected, but withdrew that objection (p. 15).

The prosecutor over that case certainly felt different. Since Petitioner denied this early and often, he concluded "the defendant has expressly denied 'knowingly receiv[ing] or possess[ing] images of child pornography'..." (Government Sentencing Memorandum p. 5). Also, the Solicitor General fails to explain why this "admission" of non elements has meaning, Descamps v United States, 186 L.Ed.2d 438, 454, n3, 457 (2013). Moreover, if the statute is overbroad, Petitioner's case certainly cannot save it.

Really then, what the Solicitor General is asking this Court is to parse a statute that doesn't exist, on the basis of a fictitious verion of this case. That is not an acceptable reason to deny certiorari. To the extent that he wishes to argue this as a §2252 case, Petitioner addressed that in the 8th Circuit, and is willing to raise it again here.

4. SORNA May Not Be Upheld on Dicta

The Solicitor General wishes to avoid the arguments against SORNA's illegality by invoking broad dicta from United States v Kebodeaux, 186 L.Ed.2d

540 (2013) (p. 16). However, as that case noted, no one was challenging Congress' power to pass the requirements at issue, at 548. Since no one briefed or argued the point, resting on this as precedent is inappropriate, Johnson v United States, 192 L.Ed.2d 569, 583-84 (2015). Likewise, the reliance on Smith v Doe, 538 US 84 (2000) for the claims that SORNA is not punishment (p. 18) ignores that Smith rested that determination that none of the disabilities challenged here existed in that law, id at 100. This is probably why lower courts no longer accept Smith's conclusion, Milliard v Rankin, 265 F.Supp.3d 1211, 1224 (D Colo, 2017).

Certainly nothing in Smith supports the idea that the burdens imposed by the registry are "besides the point." If he is arguing, as he seems to be, that none of the cases cited matter because they deal with the power of the Government in general, and not the registry in specific, that position is impossible to square with, Packingham v North Carolina, 198 L.Ed.2d 273 (2017), which cited some of those very cases. The registry, like other laws affecting Constitutional rights, is not immune just because the Government asserts a valid interest, id at 281.

There is no historical precedent to justify the registry, as Courts have often ntoed, Smith at 97. Such novelty usually shows Constitutional informity, Nat. Fed. Ind. Bus. v Sebelius, 183 L.Ed.2d 450, 474 (2012). For the first time in our history, a group is being told that the State may make their basic day to day lives forever contingent on the whim of society and legislatures, and that they may do it on a basis that is incorrect as to 95% of those regulated, Craig v Boren, 429 US 190, 214 (1976). Determining where this novel power comes from, if it exists, is definitely a Certiorari worthy issue.

5. Releasee's Constitutionality is not Determined by Labeling

Using a creative citation from Ohio v Johnson, 467 US 493, 499 (1984), the Solicitor General states that the issue of multiple punishments is resolved solely by reference to Congressional intent. Since Congress intended for a release to be "part of a sentence of imprisonment" there is no violation! Two penalties become one yb creative labeling (p. 17).

All Ohio did, however, was apply the different elements test of Blockburger v United States, 284 US 299 (1932). Since the double jeopardy prohibition against multiple punishments only applies if they are for the same offense, finding numerous statutory violations defeat this protection. Here, there is only one offense, so it does not apply.

This Court has already rejected that Congress may evade the Double Jeopardy bar by creative labeling, Sebelius at 471. It is the substance of the matter, not nomenclature, that controls, Smith v Massachusetts, 543 US 462, 468 (2005). That supervised release is a separate punishment instead of "part of" a bifurcated sentence cannot be denied after United States v Johnson, 529 US 53 (2000). And lower courts have no problem admitting that violation of release adds a **new** term of imprisonment, United States v Wilkins, 684 Fed.Appx. 595, 596 (8th, 2017) and a new term of release, United States v Harris, 715 Fed.Appx. 590, 592 (8th, 2017).

In Ex Parte Lange, 85 US 163, 173 (1874), a case from nearly 150 years ago, this Court recognized the danger of this practice, allowing a judge to resentence a defendant over and over for the same crime. The Court should recognize that it is just as dangerous and just as violative of the Double Jeopardy clause today as it was then.

Conclusion

The Solicitor General's reasons for declining to grant certiorari are without merit. Petitioner respectfully requests that the Writ be granted

on all issues.

Respectfully submitted this 23rd

day of November, 2018,

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