

IN THE
SUPREME COURT OF THE UNITED STATES

CASE: _____

Gary Allan Schlake
Petitioner,

-VS-

United States Of America,
Respondent.

Petition for a writ of certiorari
to the united states court of apeals
for the ninth circuit

Gary Allan Schlake
Po box 7007
Marianna, FL. 32447

QUESTIONS PRESENTED

1. Whether a Jurist 'of Reason' would find it debatable whether the District Court abused its discretion in denying Rule 60(b), and whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right, whether the Court "EXCEEDED" its jurisdiction over petitioners uninvestigated allegation by allowing the federal prosecution of petitioner?
2. Whether a Jurist 'of Reason' would find it debatable whether the District Court Committed a Procedural Error in denying Rule 60(b) by failing to address petitioners claims of a constitutional violation where the Court and the Government Constructively Amended the petitioners Indictment in jury instructions requiring reversal and failing to address petitioners claims in regards to the false stipulated agreement petitioner knew nothing about?
3. Whether the Federal Statute 18 U.S.C. § 2422(b) standing alone 'Superceeds' the "UNINVESTIGATED" local allegation, where FBI accepted & took control over a purely local complaint from local police?
4. Whether the Language of the District Courts ruling in petitioners case that stated, "The government is not required to prove E-Mails traveled across state lines to satisfy the jurisdictional element," And that of the 3rd Circuits ruling in US V. MACEWAN 445 f3d at 245 is in 'DIRECT CONFLICT' with other Lower Court decisions in US V. MCCOY 323 f3d 1114(9th C)2002, US V. Schaefer 501 f3d 1197(10th 2007), US V. Wright 625 f3d 583(9th 2010) that states the complete opposite?
5. Whether a jurist 'of Reason' would find debatable whether the District Court Committed a Procedural Error on whether the petitioners prosecution was illegal in federal court--had a jurist known through jury instructions the rules governing the requirements for federal intervention into local police matters? And had jurist known the motive of the government in creating a stipulated agreement for the sole purpose of creating federal jurisdiction? Could a jurist of reason conclude the federal government was outside its jurisdiction over petitioner in this case?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
INDEX TO APPENDICES.....	ii
TABLE OF AUTHORITIES.....	iii
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2-7
REASON TO GRANT PETITION.....	8-13
The district Court violated petitioners constitutional rights by committing a procedural error when the court <u>"EXCEEDED"</u>its jurisdiction by allowing the federal prosecution & conviction of the petitioners purely local uninvestigated allegation where local police had no intention to gather evidence, they never came to any conclusion the petitioner had violated any interstate commerce clause prior to warranting federal intervention which <u>"set a bad precedent NATIONALLY"</u>.....	
CONCLUSION.....	14

INDEX TO APPENDICES

APPENDIX A	Memorandum opinion of the US Courts of Appeals for the 9th Circuit, Unpublished <u>United States V. Gary Allan Schlake</u> No:17-35611, & 17-35612 (9th cir Dec 18, 2017).....	A1
APPENDIX B	Constitution of the US Amendments 5th, 6th, 10th, 14th.....	B1
APPENDIX C	Order of the United States District Court Missoula, Mt. Unpublished order <u>United States V. Gary Allan Schlake</u> No:CR-04-13-M-DWM & CR-06-51-M-DWM July 18, 2017.....	C1

TABLE OF AUTHORITIES

Table of Cases

US v. Lewis, supra 401 US at 812, 91 S. Ct at 1059.....	13
Hernandez v. Campbell 208 F3d 861, 865(9th 2000).....	9
Schwartz v. US 97 L.ed 231, 344 US at 199	9
US v. Lopez 514 US at 549	9
US v. McCoy 323 F3d 1114(9th 2002)	9, 10
US v. Lopez 514 US at 561 n3	9
US v. Wright 625 F3d 583(9th 2010)	10, 11
US v. Schaefer 501 F3d 1197(10th 2007)	10, 11
Julian v. US (1956 CA6 MICH) 236 F2d 155	10
Johnson v. Zerbst 304 US 458, 464, 468(1938)	11
US v. Macewan 445 F3d at 245 (3rd cir)	11
US v. Coates 949 F2d 104, 106(4th 1991)	11
US v. Archer 486 at 680 id at 681	11
US v. Dayton 672 F3d 891(10th 2012 en banc)	11
US v. Miranda 384 US at 449-456.....	4
US v. Wander 601 F2d 1251(3rd 1979).....	13

Statutes and Rules

United States Code

*18 U.S.C. § 2422(b).....	2, 3, 5, 6, 10
*28 U.S.C. § 1254.....	2
*18 U.S.C. § 2701 et seq.....	12
*18 U.S.C. § 1952.....	13

Montana Code Annotated

*§45-5-503.....	55
*§45-5-503D.....	5

United States Constitution

Fifth Amendment (Due Process).....	B1
Sixth Amendment (Trial by jury-proof beyond reasonable doubt.....	B1
Tenth Amendment (State rights issues).....	B1
Fourteenth Amendment (Fair and equal protection under state law).....	B1

IN THE
SUPREME COURT OF THE UNITED STATES

No: _____

GARY ALLAN SCHLAKE

VS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Mr. Gary Allan Schlake, respectfully petitions for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the 9th Circuit is unpublished
US V. Schlake No: 17-35611, & No: 17-35612 (9th cir 12-18-2017)

JURISDICTION

The judgement of the 9th Circuit was entered on 12-18-2017. This Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners arguments necessarily implicates his constitutional rights under the 5th & 6th amendments that 'all elements in petitioners indictment be proven beyond a reasonable doubt. Petitioners 10th & 14th amendment rights to fair and equal protection under Montana Laws were violated as well.

therefore the relevant provisions of the 5th & 6th & 10th & 14th amendment to the US constitution are reproduced at APP B.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. INTRODUCTION

This is an appeal from a criminal conviction illegally entered into the US Dist. Court because the Court "EXCEEDED" its jurisdiction over the petitioner. Petitioner was unlawfully convicted of the Federal statute 18 USC §2422(b). The charge is alleged in indictment. Jury found forfeiture to be true even though it was not.

2. Course of the Proceedings

On Sept. 21, 2006 petitioner was unlawfully charged by indictment and filed in district court for the district of Montana, Missoula Mt. division in Cause #:06-51-M-DWM in violation of 18 USC §2422(b) as before. the indictment alleges petitioner violated the statute in 3 separate locations, 1. in missoula, mt, 2. at whitefish, mt, 3. and elsewhere. Yet the government failed to allege criminal conduct in Missoula, mt and elsewhere, leaving the jury to speculate as to the criminal conduct in these two other locations, prejudicing the jury against the petitioner by casting petitioner in a bad light as some serial offender. A jury trial lasted 1.5 days and found petitioner guilty. Defense attorney Modine failed to challenge the jurisdictional authority of the court and failed to call any of the petitioners alibi witnesses as petitioner had requested in letter. The Court during the proceedings was prejudice against petitioner when it found and used 'JUDGE FOUND FACTS' within petitioners PSR-report. A report ridiculed with false and inaccurate statements.

US probation officer Refused to remove the errors and to correct petitioners PSR report which petitioner is appealing in a 2241 in the District Court of tallahassee in Florida cause no: 5:17 cv150-MCR/CJK)(still pending)

Even though the court adopted the PSR calculations in the statement of Reasons & confirmed by the Chief Probation officer Eric Holter for the state of Montana. The Court however imposed a sentence greater than the recommended by the PSR.

Petitioner filed his notice of appeal 2255 and it was timely.. The district Court however denied petitioners 2255 as untimely or timebarred and then denied each of the merits within the 2255 as meritless on January 29, 2010. Petitioner filed motions for relief pursuant to FED.R.CIV.P rule 60(b)

3. Disposition

Disposition

~~The District~~ The District Court denied petitioners Rule 60(b) due to the Prejudice that exists against the petitioner by the Court for false allegations made within petitioners PSR.

5. Panel Decision

On July 28, 2017 petitioner filed for COA to the 9th Circuit. A panel of the 9th Cir. (Judges BYBEE & MURGUIA) denied the COA for the Identical reasons why (Judge HAWKINS & CALLAHAN) denied petitioners COA request NO:16-35404 on SEPT. 13, 2016.

The decision is unpublished. US v. Gary Schlake No: 17-35611, 17-35612(9th 12-18-17) and is replicated in App A.

AS to the issues raised in this petition-which warrants relief, The 9th circuit denied petitioner stating, "appellant has not shown "jurist of reason.... as App A explains. Petitioner would argue that he did in fact demonstrate that a Jurist of reason would find the district cort committed a proceedural error in petitioners rule 60(b) petition.

B. STATEMENT OF FACTS

Petitioner was arrested by FBI on 2-11-2004 for the SCH#1 'uninvestigated' local complaint for allegedly violating federal statute 18 USC 2422(b). Petitioner plad not guilty. During proceedings a court appointed attorney Manipulated petitioner into accepting a 5 year plea dispite his innocence or recieve a 30 year federal prison sentence. Petitioner under fear reluctantly plead guilty. Prior to sentencing petitioner wrote the court expressing his innocence. At sentencing, instead of taking back the petitioners plea and setting trial date,

was told he had to settle the SCH#2 case before going back to resolve the SCH#1 2255 issue. It wasnt until 2017 petitioner found out he could pursue both at the same time, and once he did so, the court denied him, despite his reasonings. The district Court denied COA and the Lower court too denied COA.

In the Petitioners 2nd Case known as SCH#2, an indictment was handed down on Sept. 21, 2006 while petitioner was serving a 5 year min/mand Forced plea in SCH#1. Charging petitioner with the same exact crime it seems. 18 USC § 2422(b). This time stating the conduct occurred in Missoula, mt, at whitefish, mt. and elsewhere. However the government decided only to address the allegations of the local allegation took place in Whitefish, mt on February 8th 2004, 3 days prior to the SCH#1 allegation, leaving jury to speculate as to the other 2 locations which violates the defendants due process rights.

BACKGROUND — A female called petitioner on 1-27-2004(just after the SCH1 incident). She identified herself as an 18 year old soon to be 19, a recent high school grad. She explained she came across the petitioners online adult dating page on MATCH.COM that contained 3 photos (which she described at trial) and a Cell #(which she called). petitioner was initially suspicious given the events in the SCH#1 situation and its unfoldings taking place at the exact same times. Petitioner and this individual engaged in a normal non-criminal lengthy phone calls at all hours of the day and nights. petitioner learned she lived in Whitefish, Mt. only after petitioner informed her he was going to BIG MT. Ski resort in Whitefish, Mt for a church retreat. She insisted on a meeting quiet aggressively. Petitioner did not commit and no meeting could take place. Petitioner and alibi witness and best friend DAVID WU of seattle, washington 406-531-2152 drove up to BIG Mt. Ski resort on Feb. 6th 2004. Both participated in all church related activities and both drove back home to Missoula, Mt at noon on 2-8-2004.

11 months after the whitefish trip-the father of this alleged 18 year old girl caught his 14 year old daughter having sex with a man named luke jungitsch. Upon filing a police report charging Mr. Jungitsch with violating Montana code 45-5-5-3D(statutory rape) the petitioner was also named in the complaint. Flathead detective Jeanne Landis began to investigate the case. Detective landis didnt identify the petitioner Mr. Schlake until April 2005 through phone records 4 months later. Immediately and without any investigation

and the court both constructively amended the petitioners indictment during the jury instructions(which requires reversal) to satisfy the jurisdictional nexus, that eliminated the need of proof of the requirement in petitioners indictment that petitioner had violated the interstate commerce clause.

petitioner filed for a COA and the lower Court in 2016-2017 denied COA.

Federal involvement into local police matters. Because of this continual practice by local police, its obvious this is the leading contributing factor to the federal governments 98% conviction rate overall in the federal system. Federal authorities take control over local complaints, attaching a federal criminal statute to them, and turning out 'PLEA BARGAINS' in federal Courts at an alarming rate all over the Country.

The Supreme Court & many Lower Courts clearly articulate a legal process that must be followed in order to justify Federal authorities inserting themselves into purely local police matters.³ But what of those defendants whos defense counsel fail to raise or fight the jurisdictional element in Court or in Direct appeals? Like the petitioner they continue to do federal time when they should not, had but for counsels failure to raise a constitutional claim in jurisdiction. The petitioner Schlake raised the jurisdictional issue in his 2255 appeal, yet the district court denied petitioners timely filed appeal due to two issues, 1. appeal was time barred, and 2. the district Court took it upon itself after a jury trial to insert an arguement the prosecution never made or brought up before the jury by denying the 2255 appeal for lack of merit and denying a COA. The petitioner cant get his jurisdictional issues raised because the district court keeps denying his due process rights to fundamental fairness. Furthermore the district Court in Missoula, Mt. refused to comply with Supreme Court and Lower Court Laws. The 9th in Hernandez v. Campbell 208 f3d 861, 865(9th 2000) stated, "Federal Courst are always under an independant obligation to examine their own jurisdiction and a federal Court may not entertain an action...it has no jurisdiction." The District Court in Missoula, MT. lacks federal jurisdiction over the defendant.

The Supreme Court stated, "Under the Authority of its inherit police powers, ...a Federal statute must be presumed to affect only federal jurisidiction, and not superceed a states exercise of police power."SCHWARTZ V. US 97 L.ed 231, 344 US at 199. And again stated, "its particularly important...where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected." US V LOPEZ 514 at 549. and again stated along with the 9th Circuit in MCCOY, "To warrant Federal intervention(into local police matters) we believe the statute requires a more significant use of a faiclity of interstate commerce...."

US V MCCOY 323 f3d 1114(9th 2002) C.F. LOPEZ 514 US at 561 n3. However the District Court

and the lower court 'should have known' if they reviewed the record that "petitioner did not 'knowingly' and 'intentionally' waive a known right." JOHNSON V ZERBST 304 US 458, 464, 468 (1938). The district court should have 'displayed a reasonable presumption against a waiver; since a "proper waiver" is an intentional relinquishment or abandonment of a known right.' Especially in light of the fact that the government did not prove beyond a reasonable doubt to evidentiary certainty to a jury that the alleged 'altered' so-called emails that the government fully admitted to the Court She 'created on Microsoft word program' never traveled across state lines violating the interstate commerce clause. Thus the reason why the government had to manufacture the stipulated agreement to be 'CONSISTANT' with the 3rd circuits ruling in US V MACEWAN 445 f3d at 245. the court stated, "the use of the internet is interstate commerce." the identical language used in petitioners 'contested stipulated agreement'. The government "contrived" this agreement to be sure for the precise purpose of creating Federal jurisdiction. US V. COATES 949 F2d 104, 106(4th 1991), US V ARCHER 486 at 680 id at 681.

The lower Courts in US V WRIGHT(9th cir), US V SCHAEFER(10th cir), US V. DAYTON 672 f3d 891(10th cir en banc 2012) and others are in "DIRECT CONFLICT" WITH the lower courts decision in US V MACEWAN and in direct conflict with the District Courts ruling in the petitioner Schlakes denied 2255 appeal. The WRIGHT & SCHAEFER courts "REJECT" the MACEWAN decision. Thus for the district court to apply the macewan decision into petitioners denied 2255 appeal to justify the governments position violated the petitioners constitutional rights to due process. Especially when the language in the district courts ruling contradicts the lower court and supreme court rulings..

Then 10th circuit Judge and now Supreme Court Justice Neil Gorsuch then raised in SCHAEFER, " we do not read 18 USC § 2252(a) as contemplating that a mere connection to the internet would provide the internet movement required by the statute...after establishing an internet connection...the government must still prove the internet connection also moved.. across state lines. we decline to [assume] that the internet use alone automatically equates with a movement across state lines...the government must also introduce sufficient substantial evidence to satisfy its burden..."

The 9th circuit affirmed this in the Schaefer court in wright, "...the government made no attempt to prove the image transmitted via internet had traveled in Interstate

commerce...the government say so wasnt enough to prove the internet opperates in interstate commerce no matter how obvious."²

The lower courts interstate commerce clause decisions contradict the district courts position in the petitioners 2004 & 2007 cases.

The petitioners federal convictions seem irrelevant and illegal becaues the local police failed to investigate any of the allegations in the complaint against petitioner and failed to demonstrate the petitioner violated any interstate commerce clause element that absolutely is essential to trigger and warrant the initial federal intervention.

The petitioner prays this High Court will see the "NATIONAL" importance and the "NATIONAL IMPLICATIONS" of this states right issue verse federal intervention into local police matters that continues today.(³ pg13) US V Wander 601 f2d 1251(3rd cir 1979)

Local police are not being held accountable or are not being trained to investigate cases properly - instead some skirt around the law in order to give local uninvestigated cases or cas~~e~~s they deem unprosecutable at the state and local level over to FBI to investigate.³p.13)

Petitioners case is only one of many examples nationwide. The petitioners 22 1/2 year sentence is illegal and shouldnt have to suffer because his defense attorney failed to raise a legitimate jurisdictional arguement he would have won or because the district Court displays heavy prejudice against petitioner by denying any motion for relief regardless of proof because of a false PSR report. This violates the petitioners Constitutional rights to due process and fundamental fairness.

The petitioner should be granted relief by this court, or at the very least should be granted a COA to appeal to the 9th Circuit Courts for review. The petitioner has exhausted every possible avenue for relief and prays this Court will Grant CERT because petitioners case warrants reveral and acquittal. Please give petitioner a chance to hear his side.

²-The government had a duty under 18 U.S.C. § 2701 et seq to file a trial subpoena to trace petitioners I.P.computer address to prove whether illegal materials was shipped via petitioner's computer across state lines.

3 "to ensure that the legislature speaks with special clarity when marking the boundaries of criminal conduct, the courts must decline to impose punishment for actions that are not ""plainly and unmistakably""proscribed in interstate commerce.(emphasis added) US V. Gradwell, 243 US 476, 485(,37 S.ct 407, 61 L.ed 857(1917)...." Dunn v. US, supra, --US at --99 S.,ct at 2197 .IV....."....."

The determination that a federal interest exists is extremely sensitive, however, because federal prosecutorial intervention has a significant effect on federal-state relations. When federal authorities intervene, more than a bruised solvereign egos may surface. Federal prosecutions in a particular case may signal to local authorities that federal intervention is federal preemption of the intire field of similar cases, (like that in the above petitioners schlake case at hand) in the future.

We must evaluate the likelihood that the local authorities will yeild to the Federal authorities and abdicate ALL their responsibilities to police and prosecute traditionally local offenses. It would not be unreasonable then to conclude that local athorities to say, "if the feds want this case, they can have them all."

The capacity of the federal prosecutors office to manage investigations and prosecutions of purely local police matters with only a tangential interstate overtone is thus properly measured not by its ability to handle just one isolated case, but to want to handle all subsequent similar cases and by the likeilhood that it will do so. Justice FRiendly stated, "I believe the federal courts also have a profound responsibility to prevent the adverse social consequences that would flow from the failure of both state and federal authorities to take action in the wake of casual or sporadic federal intervention in local matters."

Just because legislative history may define or give interpretation of a federal criminal statute,,,we must consider the ultimate jurisdictional and social effects of our action." That not all federal prosecutions into local matters warrants such actions, ... "a matter of happenstance, would transform relatively minor state offenses into federal felonies." Rewis, supra, 401 US at 812, 91 S.ct at 1059

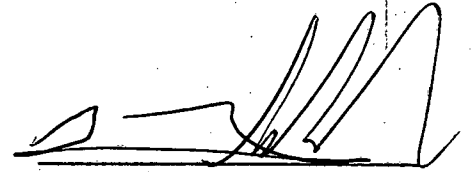
If it lies within the province of the District Court in Missoula, Mt. and Courts throughout the United States to accept and prosecute any and all uninvestigated cases, or cases local police can not prove. Then what distinction is their between state rights provided to its citizens and the solvereignty of citizens within those states? If these practices are allowed to continue day by day, year by year, the boundary lines between states increasingly disappear to the point where no distinction between states is left. And the rule of law & the constitution of the US lessens in value.

The petitioners case is of Greater importance on the National stage than the petitioner himself. If cases similar to petitioners case keeps slipping through legal cracks and goes unchecked the National Impact is greater and the cost rises and prison population increases to create a constitutional crisis where one question is asked, "when will it stop?"

CONCLUSION

The petition for Writ of Certiorari should be granted.

Dated this 23 day of Feb 2018.

A handwritten signature in black ink, appearing to read 'Gary Schlake', written over a horizontal line.

Gary Schlake
Po box 7007
Marianna, FL. 32447

* Pro-Se litigant

APPENDIX B

Constitution
Of The
United States
Amendments V. VI. X. XIV

Fifth Amendment

....nor shall any person....be deprived of life
liberty, or property, without due process of law...

Sixth Amendment (Trial by jury-Proff beyond reas. doubt)
In all criminal prosecutions. the accused shall enjoy
the right to a speedy trial and public trial by an
impartial jury.....

Tenth Amendment

The right for the states to prosecute criminal behavior
rather than the federal government, where states have
jurisdiction.

Fourteenth Amendment

...No state shall make or enforce any law which shall
abridge the privileges or immunities of citizens of the US
nor shall any state deprive any person of life, liberty
or property, without due process of law; nor deny to any
person within its jurisdiction the equal protection of
the law."

APPENDIX C

ORDER OF THE
United States
District Court
Missoula, Montana.

Unpublished order-US v. Gary Schlake No: CR-04-13-D-DWM
& CR-06-51-M-DWM 7-18-2017

Which Shows Court Never addressed the claims of a
proceedural error by constructively amending
petitioners indictment and stipulated agreement.