**Case No. 16-20151**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

**----------**

**No. 4:13-CR-303-2**

**IN THE UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF TEXAS**

**HOUSTON DIVISION**

**----------**

**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee**

**v.**

**CARRY LE,**

**Defendant-Appellant**

**----------**

# DEFENDANT-APPELLANT'S PETITION FOR PANEL REHEARING

**----------**

**Windi Akins Pastorini**
**Attorney at Law**
**Texas Bar No. 00962500**
**440 Louisiana, Suite 800**
**Houston, TX 77002**
**Tel. (713) 236-7300**
**Counsel for Defendant-Appellant**

## CERTIFICATE OF INTERESTED PERSONS

I certify that the persons interested in the outcome of this cause are the named parties:

1. Hon. Melinda Harmon, United States District Court Judge

2. Carry Le, Defendant-Appellant

3. United States of America, Plaintiff-Appellee

4. Counsel for Defendant-Appellant:

   Windi Akins Pastorini (on appeal)

   Christopher Goldsmith (in the district court)

5. Counsel for Plaintiff-Appellee

   Kenneth Magidson, United States Attorney
   Michael B. Kusin, Assistant United States Attorney (in the district court), Renata Gowie, Assistant United States Attorney (on appeal)

/s/ Windi Akins Pastorini
Windi Akins Pastorini
Counsel for Defendant-Appellant

## STATEMENT REGARDING ORAL ARGUMENT

Because the issue presented deals with an issue of nationwide importance, counsel requests oral argument if rehearing is granted.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**TO THE HONORABLE COURT OF APPEALS:**

COMES NOW the Defendant-Appellant, Carry Le (hereinafter "Le") through the undersigned counsel, Windi Akins Pastorini, and respectfully requests that this Court vacate the judgment of the United States District Court and remand this cause for re-sentencing. In support of this request, Le submits the following.

## JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of Texas (Rec. Exc. Tab 4: Judgment, ROA.16-20151.188). Le gave timely notice of appeal (Rec. Exc. Tab 2: Notice of Appeal). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

The Plaintiff-Appellee has argued that the sole issue raised by Le was waived as part of a general waiver executed as part of a plea bargain. Because a panel of this Court rendered a decision on January 3, 2017, this Court has continuing jurisdiction to receive a request for rehearing until January 17, 2017.

## STATEMENT OF ISSUES PRESENTED

Le's original brief for this appeal presented one issue:

The mandatory minimum sentence was illegal because it violates U.S. CONST. Amend. VIII in light of evolving standards of decency.

A panel of this Court held that the issue was waived. Therefore, the immediate question for consideration on rehearing is:

Did the panel err in holding that Le's written waiver, executed at the time of the plea, waived the right to appeal a claim under the "cruel and unusual punishment" clause of U.S. CONST. Amend. VIII?

## STATEMENT OF THE CASE

### A. Procedural History

Le was indicted for Conspiracy to Possess with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §846, 841(a)(1) and 841 (b)(1)(A)(vii)(Count 1 in the indictment), and Conspiracy to Maintain a Place of Manufacturing a Controlled Substance, in violation of 21 U.S.C. §846 and 856 (a)(1) (Count 2) (Rec. Exc. Tab 3: Indictment). The indictment alleged that the controlled substance was marijuana and/or marijuana plants.

Le entered a plea of guilty to Count 1 of the indictment. Le executed a written plea agreement which, among things, included a waiver of the right to appeal the sentencing determination (Rec. Exc. Tab 5: Plea Agreement; ROA.16-20151.131-132). After determining whether Le understood her rights, the district court judge found Le guilty on count 1 of the indictment (Rec. Exc. Tab 4: Judgment).

A Presentence Investigation Report ("PSR") was prepared in this matter. The PSR calculated the total offense level as 29, which yields a guideline range of imprisonment of 87-108 months. Nevertheless, the statutorily required minimum

sentence pursuant to U.S.S.G. §5G1.1(b) was a term of 120 months (ROA.16-20151.287).

On February 16, 2016, Le's counsel submitted written objections to the PSR. These objections presented arguments that challenged (1) the PSR writer's inclusion of a two-level enhancement for possession of firearms under U.S.S.G. §2D1.1(b)(1); (2) a two-level enhancement under U.S.S.G. §2D1.1(b)(12) for maintaining a premises for the purpose of manufacturing a controlled substance; and (3) a four-level enhancement under U.S.S.G. §3B1.1(a) for being an organizer or leader (R.O.A. 16-20151.292-297). There was no objection to the unconstitutionality of the mandatory minimum sentence.

At the sentencing hearing on March 4, 2016, the district court overruled Le's objections. As Le's trial counsel noted, the conclusion that Le was an organizer or leader precluded resort to the "safety valve" provision of 18 U.S.C. §3553(f) and the companion provisions in U.S.S.G. §5C1.2 (ROA.16-20151.251). The district court judge sentenced Le to 120 months in the Bureau of Prisons, with five years of supervised release (Rec. Exc. Tab 4: Judgment; ROA.16-20151.189).

On appeal Le argued that the mandatory minimum punishment violated U.S. CONST. Amend. VIII and that this constitutional issue fell outside the scope of the waiver executed at the time of Le's plea. A panel of this Court held that the issue was

waived.

**B. Facts Relevant to the Issue Presented**

The pertinent facts concerning the offense are set forth in Le's original brief, which in turn relied heavily on a rendition of the facts is included in the PSR. In the interest of brevity, the factual discussion in the original brief is incorporated herein by reference.

Because of the nature of Le's claim, which relies on the consideration of "evolving standards of decency" as a guide to application of the Eighth Amendment to a particular punishment, one important fact not mentioned in the original brief should be, and can be, considered. "Evolving standards," under *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) and its progeny, may take into account evidence of societal change, utilizing judicial notice. In modern times the "evolving standards" doctrine has drawn heavily upon empirical evidence, in cases such as *Graham v. Florida*, 560 U.S. 48 , 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

In that regard, it is important to note that on November 8, 2016, the voters in the most populous state, California, approved statutory changes which legalize possession of marijuana without requiring that it be for medicinal use. The statutory changes further required the State of California to commence issuing licenses to

marijuana retailers no later than January 1, 2018. The appetite for marijuana in California can only be met by commercial production, which is apt to take the form of enclosed growing operations. In this cause, ordinary houses were converted into makeshift "grow houses," but the horticultural methods were similar to what will occur on a larger scale in California. In effect, California is legally approving, but regulating, the kind of activity which Le and her associates committed. The marijuana-growing industry is set to receive large inflows of capital from legitimate investors. That is a far cry from subjecting the conduct to a mandatory minimum penalty of ten years.

## SUMMARY OF THE ARGUMENT

The issue in this motion for rehearing is whether the panel erred in finding that the issue raised by Le was waived. Although the panel relied on a prior panel opinion, that case did not deal with the "evolving standards" concept. The applicable standards may continually "evolve" through legal and social developments, and that is what has occurred with respect to growing marijuana.

The panel also did not address the fact that the plea was entered before the Supreme Court decided *Taylor v. United States*, 579 U.S. __, 136 S. Ct. 2074, 195 L. Ed. 2d 456 (2016). After *Taylor*, competent counsel would have wanted to capitalize on that decision and would not have agreed to waive an attack on the mandatory

minimum.

Third, the panel simply did not deal with the basic principle that an unconstitutional statute, or an unconstitutional portion of a statute is void. The parties in one particular case cannot validate a void statute, by agreement, by waiver, or any other way.

## REASONS FOR REHEARING

**Did the panel err in holding that Le's written waiver, executed at the time of the plea, waive the right to appeal a claim under the "cruel and unusual punishment" clause of U.S. CONST. Amend. VIII?**

There are three main reasons for rehearing in this cause, as discussed below.

1. **The "evolving standards" issue is distinguishable from the Eighth Amendment issue considered in *United States v. Keele*, 755 F.3d 752 (5th Cir. 2014).**

The panel opinion pointed out that the earlier panel decision in *United States v. Keele, supra*, had held that a waiver executed as part of a plea bargain extended to an Eighth Amendment issue raised on appeal in that case. In *Keele*, however, the argument was that the amount of restitution ordered was excessive. The underlying question in that instance would have been whether restitution, if the amount ordered

is supported by some evidence, even falls within the scope of the Eighth Amendment. That is not a situation in which social, political or legal changes would alter the analysis, short of a repudiation of the whole concept of restitution. Stated another way, nothing changed in the Eighth Amendment framework which would justify giving Keele back the right to dispute restitution which he waived.

In contrast, there have been a number of recent social, political and legal changes which fairly raise the question whether a ten-year mandatory minimum for simply helping to operate a few "grow houses" amounts to cruel an unusual punishment. Le's trial counsel would have been aware that a few states had legalized marijuana possession and sale in one form or another, but a handful of states does not prove a trend. To draw an analogy, barbarian victories in Gaul did not prove that Rome inevitably would fall, but the trend did continue. On November 8, 2016, Rome fell in the California election. Le's counsel was an attorney, not a soothsayer, and could not be expected to know the California election results in advance.

Another trend indicator has appeared in Presidential pardons. The current administration has issued large numbers of pardons to federal inmates serving long sentences for narcotics offenses. It might be argued that this was a budgetary decision, except that reducing the budget has not been the highest priority in recent years. Instead this policy is better understood as reflecting a humane decision that

punishments were simply too great. Again, Le's counsel could not anticipate future decisions made in the White House.

In the same vein, there also is the matter of *Taylor,* decided after both Le's plea and the sentencing. How could Le's counsel have anticipated *Taylor*?

In short, several things which are relevant to the Eighth Amendment question changed after Le's waiver. It cannot be said that Le "knowingly" waived such developments.

**2. *Taylor* makes marijuana growing a protected part of commerce.**

The panel also did not independently evaluate the significance of *Taylor, supra* for this cause. In *Taylor* the Supreme Court extended the protection of the Hobbs Act to a marijuana producer and dealer. After *Taylor*, if someone had entered one of the grow houses to rob Le, federal officers would consider Le a victim, not a perpetrator, in bringing a Hobbs Act case. Yet, if that robber only used his fists to rob Le in that scenario, his punishment under the Hobbs Act might be less than Le's own mandatory punishment simply for her role in helping to run the grow house.

It is true that marijuana had been recognized as a component of commerce in *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005), a case which was cited in *Taylor.* In *Gonzales*, however, the finding that the marijuana business was subject to "commerce" regulation by federal authorities was intended to further

the prosecution and punishment of the activity. *Taylor* lends support for going in the opposite direction. By effectively treating marijuana as a legitimate part of national commerce, Taylor calls for a long, hard look at the mandatory minimum.

**3. Waiver of the unconstitutionality of a statute is not possible.**

The panel also did not consider the legal effect of finding the mandatory punishment unconstitutional. As this Court stated in *Alexander v. Cockrell*, 294 F.3d 626, 630 (2002), an unconstitutional statute "is void *ab initio*, having no effect, as though it had never been passed." A waiver as part of a plea bargain amounts to an agreement by the parties in a given case, but the parties cannot create a statutory requirement, or validate a statutory requirement unconstitutionally legislated, by mere agreement on an *ad hoc* basis.

The Eighth Amendment only affects punishment. What this Court should hold is that the mandatory minimum punishment is unconstitutional. Such a ruling does not void Le's conviction, but does permit the district court to apply the Guidelines in a fair and systematic manner. As pointed out in Le's original brief, the Guidelines provide adequate leeway for consideration of the Department of Justice policies, as set forth in an official memorandum in 2013, which is discussed in Le's brief.

## CONCLUSION

Wherefore the Defendant-Appellant, Carry Le, prays that this Court grant rehearing in this cause and, upon reconsideration, vacate the judgment and remand this cause for a new sentencing hearing.

Respectfully submitted,

/s/ Windi Akins Pastorini
Windi Akins Pastorini
Attorney at Law
Texas Bar No. 00962500
440 Louisiana, Suite 800
Houston, TX 77002
Tel. (713) 236-7300

Counsel for Defendant-Appellant,
Appointed on appeal.

## CERTIFICATE OF COMPLIANCE

This motion for rehearing complies with the type-volume limitation of Fed.R.App.P. 40(b)(1) because it contains 2,064 words. This motion complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect in Times New Roman 14-point font for text and 12-point font for footnotes.

/s/ Windi Akins Pastorini
Windi Akins Pastorini
Counsel for Defendant-Appellant

## CERTIFICATE OF SERVICE

I certify that a copy of this Defendant-Appellant's Petition for Panel Rehearing is being electronically served on counsel for the Plaintiff-Appellee on this the 17th day of January, 2017 at the following address:

Office of the United States Attorney
for the Southern District of Texas
Appellate Division
Attention: Renata Gowie
1000 Louisiana, Suite 2300
Houston, TX 77002

/s/ Windi Akins Pastorini
Windi Akins Pastorini
Counsel for Defendant-Appellant

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
January 3, 2017
Lyle W. Cayce
Clerk

No. 16-20151
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CARRY LE,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CR-303-2

Before BARKSDALE, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Carry Le pleaded guilty to conspiracy to possess, with intent to distribute, 1,000 or more marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vii), and 846, pursuant to a plea agreement containing an appeal waiver. The district court sentenced her, *inter alia*, to the mandatory minimum sentence of 10 years' imprisonment. In seeking to circumvent the appeal waiver, Le asserts, *inter alia*, the mandatory minimum

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

sentence violates the Eighth Amendment in the light of evolving standards of decency, and, therefore, the waiver does not bar her appeal. In response, the Government contends this court should, nevertheless, dismiss the appeal.

A defendant may waive the statutory right to appeal in a valid plea agreement. *See United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (holding appellate waivers are enforceable if invoked by the Government). "This court reviews *de novo* whether an appeal waiver bars an appeal." *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). In so doing, this court "conduct[s] a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement". *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

First, Le knowingly and voluntarily waived her appellate rights. In the plea agreement, she agreed to waive her right to appeal or "collaterally attack" her conviction and sentence for any reason other than ineffective assistance of counsel. At her rearraignment hearing, Le stated she read and understood the terms of the plea agreement. An appeal waiver is enforceable when the plea agreement includes an explicit waiver of appeal and the defendant indicates she read and understood the plea agreement. *Id.*

Second, affording the language of the appeal waiver its plain meaning, it undoubtedly "applies to the circumstances at issue" in this case. *United States v. Harrison*, 777 F.3d 227, 233 (5th Cir. 2015). Le's appeal is not based on ineffective assistance of counsel, the only specific exception in her appeal waiver. Notwithstanding the belated constitutional challenge presented now, the appellate waiver is valid and enforceable against Le. *See Keele*, 755 F.3d at 756–57.

DISMISSED.