

IN THE
SUPREME COURT OF UNITED STATES

Case No. 18-5075

FELIX A. OKAFOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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Dated: November 22, 2018

Pro Se Petitioner

REASONS FOR A REHEARING

CAN A CONVICTION THAT IS ADMITTEDLY A VIOLATION OF THE CONCURRENT SENTENCE DOCTRINE BE ALLOWED TO STAND IN LIGHT OF RAY V UNITED STATES, 481 U.S.736 (1987)?

Petitioner presents this petition for a rehearing of the above-entitled cause, and in support of it, respectfully shows a rehearing of the decision in the matter is in the interests of Justice and the obligation to follow precedents in light of the doctrine of Stare Decisis, i.e., the proposition that Court follow its earlier judicial decision when same points arise again in litigation, because it fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Secondly, this case contains all factual similarities and a procedural distinction from this Courts earlier decision in Ray v. United States, 481 U.S. 736 (1987), that warrants its determination by a different Rule of Law.

As a result of these intervening circumstances and other substantial grounds that were not previously presented a rehearing is warranted.

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OPINION AND ORDERS BELOW

The Orders appealed from is located at the Docket of the United Court Of Appeals for the Fourth Circuit case No: 18-6012.

JURISDICTIONAL STATEMENT

This Petition for Writ Of Certiorari is from the Order and Judgment entered on June 5, 2018, in the above referenced Case by the Fourth Circuit Court Of Appeals. Accordingly, the Court has Jurisdiction over this petition for Writ Of Certiorari matter pursuant to 28 U.S.C. §1254 and 28 U.S.C. §2101. The District Court had original Jurisdiction over the subject matter of this case pursuant to 18 U.S.C. §3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291 and 28 U.S.C. §3742.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be deprived of Life, liberty or property without Due Process Of Law."

U.S. Const. amend. V.

"No person shall...be Subject for the same Offense to be Twice put in Jeopardy of Life or limb."

U.S. Const. amend. V.

The Due Process Clause protects the accused against conviction except upon proof beyond a Reasonable Doubt of the existence of every element of the offense with which he is charged.

U.S. Const. amend. V. and XIV.

STATEMENT OF THE CASE

On February 21, 2012, Petitioner (Okafor) was charged in a Twenty-two Counts indictment with violations of various Federal Narcotics and Firearms Offenses. Eleven Counts of possession to distribute in violation of 21 U.S.C. §841(a) and Eleven counts of possession of firearms in violation of 18 U.S.C. §924(c) (J.A.23-30).

On January 22, 2013, a Superceding indictment was issued which charged petitioner with Three additional Crimes; Conspiracy to distribute Marijuana and Heroin (Count-one); Maintaining a Dwelling to distribute controlled substances (Count-two); and Distribution of Controlled substances within 1000 feet of a School (Count-three). The other Twenty-two (22) charges remained the same.

Trial commenced on July 9, 2013 and concluded on July 11, 2013 (J.A.16). Petitioner (Okafor) was convicted on all Counts and petitioner was sentenced on April 22, 2014 (J.A.20). Petitioner entered a Timely notice of appeal on April 20, 2014.

On March 2, 2015, the Fourth Circuit Court Of Appeals affirmed the Conviction and a Rehearing and Rehearing en banc was denied on april 27, 2015. the United States supreme Court denied Certiorari on October 5, 2015. Petitioner filed a 28 U.S.C. §2255 Motion on June 2, 2016 and was denied on December 18, 2017. A Certificate Of Appealability was subsequently filed and was denied on April 3, 2018. A rehearing and Rehearing en banc was denied on June 5, 2018. Thus this Writ of Certiorari.

REASONS FOR GRANTING A REHEARING

THIS PETITION PRESENTS TO THIS COURT A MORE FUNDAMENTAL QUESTION FOR REVIEW: CAN A CONVICTION THAT IS ADMITTEDLY A VIOLATION OF THE CONCURRENT SENTENCE DOCTRINE BE ALLOWED TO STAND IN LIGHT OF RAY v. UNITED STATES, 481 U.S. 736 (1987)?

Petitioner presents this petition for a rehearing of the above entitled case, and in support of it, respectfully posits that a rehearing of the decision in the matter is in the interest of justice for reasons stated below.

First, petitioner begins by highlighting the doctrine of "stare decisis" the doctrine of precedents under which it is necessary for a court to follow earlier judicial decisions when same points arise again in litigation. This principle is undermined if previous panel decisions were open to reconsideration merely because they are debatable. This Court have adopted this approach in case after case. See Chevron USA v. NRDC, 467 US 837 (1984) (A Court prior judicial construction of a statute overrides all future decisions arising from the same problem, Chevron 467 US at 842); Payne v. Tennessee, 501 US 808 at 828-29 (1991) (stare decisis is always preferred course because it promotes the even handed predictable and consistent legal principles); Vasquez v. Hillery, 474 US 254 at 266-67 (1986) (same).

furthermore, in Hilton v. South Carolina Railroad Commission, 502 US 197 (1991) it stated that the Supreme Court will not depart from the doctrine of Stare Decisis without some compelling justification because...1). The Doctrine is of Fundamental importance to the rule of law; 2). Adherence to the precedent promotes stability, predictability, and respect for judicial authority, 502 US at 201-03.

Secondly, the decision in Ray v. United States, 481 US 736 (1987), this Court refused to apply the doctrine where a defendant received, in addition to Concurrent terms of incarceration, Cumulative monetary assessments pursuant to 18 U.S.C. § 3013. The defendant having been found guilty of one count of Conspiracy and two counts of possession with intent to distribute. The District Court imposed \$50 assessment on each of the three counts in addition to the

Concurrent sentences totaling \$150. The Supreme Court unanimously vacated the judgment Of the Court of appeals and remanded the case to the Court of appeals so that it might consider the accused challenge to the second Conviction because it improperly applied the Concurrent Sentence doctrine. In a per Curiam Opinion expressing the Unanimous view of the court, it held that Sentences were not concurrent because District Court imposition of \$50 assessment on each of the three Counts totaling \$150 made the accused's liability to pay the total assessment dependent on the validity of each Conviction.

In the Instant case, petitioner received in addition to Concurrent terms of Incarceration cumulative Monetary assessments pursuant to 18 U.S.C. §3013. petitioner was convicted of Twenty-five Counts. One Count of conspiracy, a 21 U.S.C. §846, Ten Counts of Possession to distribute a §841(a) violation, Eleven counts of §924(c) predicated on those violations, One Count of §856 violation and one count of §860 violation. The District Court imposed a \$100 assessment on each of the Twenty-Five convictions in addition to the Concurrent sentences totaling \$2500. (25 x \$100). the Court of Appeals improperly applied the Concurrent sentence doctrine in declining to review petitioner's second and Successive convictions on the other remaining Twenty-four Counts.

In fact, this case contained all factual Similarities and a Procedural distinction from the case of Ray v. United States, 481 U.S. 736 (1987)., i.e the Similarities included: (i). Multiple-Convictions merged with Count-One to run concurrent sentence. (ii). district Court imposed an assessment On each of the counts of conviction in addition to the Concurrent sentence pursuant to 18 U.S.C. §3013; (iii). The Court of appeals improperly applied the concurrent sentence doctrine in declining to review petitioner's second and successive convictions

With respect to the [a] procedural distinction, the District Court imposed a \$100 assessment in addition to the concurrent sentence but left the 18 U.S.C. §924(c) to run consecutively. This lone distinction from the case of Ray, supra, warrants its determination by a different or at least altered rule.

In view of this a procedural distinction, Petitioner contends that the legislative history of the statute interpreting §924(c) would be necessary and insofar as this history may be very relevant, it would significantly help to address the procedural distinction in the instant case in light of this petition for a rehearing. The complete text of 18 U.S.C. §924(c)(1) provides: (c) whoever, during and in relation to any crime of violence or drug trafficking crime for which may be prosecuted in a Court of the United States, uses or carries a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years and if a machine gun to imprisonment of thirty years. In case of his second or subsequent conviction under this subsection, such person shall be enhanced to imprisonment of 25 years and if the firearm is a machinegun to life imprisonment without release. Notwithstanding any other provision of the law, the Court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection, run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking in which firearm was used or carried.

The statutes structure does not clarify any ambiguity inherent in its literal language. The title of the entirety of §924(c) is "penalties"; the 1998 Congress reenacted §924(c)(1) separately different parts of the first sentence into different subsections Pub.l-105-386, 1(a)(1), 112 Stat. 3469.

However, the sections title did not help for Congress did not attempt to clarify any ambiguities, but instead, had determined that at least some portion of the 924(c) creates not penalty enhancements, but entirely new crimes. The original house report, S. Rep. No. 98-225pp. 312-14 (1984), Section §924(c) sets out as an offense distinct from the underlying felony and is simply not a penalty provision. Because of the conflict between the earlier statutory provision and the post enactment statutory restructuring, it is hard to determine what congressional intent was when it enacted its earlier statutory provision. See Almendarez-Torres v. United States, 523 US 224 (1998); Amendments that among other things, neither, "declare the meaning of earlier law" nor "seek to clarify an earlier enacted general term, "fail to provide interpretive guidance." Alendarez-Torres, 523 US at 237.

For instance, the §924(c)(1) statute clearly refers directly to sentencing: the first to recidivism, the second to concurrent-sentences and third to probation. More importantly, the legislative history of the statute is very clear that 924(c) cannot run concurrently with any other term of imprisonment imposed under this subsection, that is, it cannot run together with its predicate offense. However, it is obviously silent in those situations where those terms of imprisonment imposed under the subsection i.e., predicate offenses that are subsequently dismissed, reversed or vacated.

Because of this lack of interpretive guidance and the ambiguity inherent in the statute and the uncertainty as to congress intent in this regard, the rule of lenity should apply after all traditional interpretative factors fail. United States v. Bass, 404 U.S. 336 (1971); Bell v. United States, 349 U.S. 81, 84, (1955).

Furthermore, Petitioner contends that where concurrent sentences that

are predicate offenses of 924(c)(1) are dismissed, reversed, or vacated, the 924(c) conviction and sentences should also be vacated. The predicate offense: crime of violence and drug trafficking are elements of statute 924(c) that must be proven beyond a reasonable doubt to convict. Thus:

"Whoever during and in relation to any crime of violence or drug trafficking crime for which may be prosecuted in a court of the United States, uses or carries a firearm."

You cannot have a 924(c) conviction without a violation of crime of violence or drug trafficking crime.

Accordingly, a rehearing tightly and squarely focused on this lone distinction between this instant offense and the decision in Ray, *supra*, can be resolved. For example the Fourth Circuit has addressed a similar situation in dicta, United States v. Wilson, 135 F.3d 291n 7 (4th Cir. 1998) where the panel stated: "We will not go into details about the evidence on the 18 U.S.C. 924(c) charge, because that charge falls if its predicate offense falls." As here in the instant offense, the predicate offense falls in light of the improper application of the concurrent sentence doctrine, so should the 924(c) consecutive sentences predicated on those offenses.

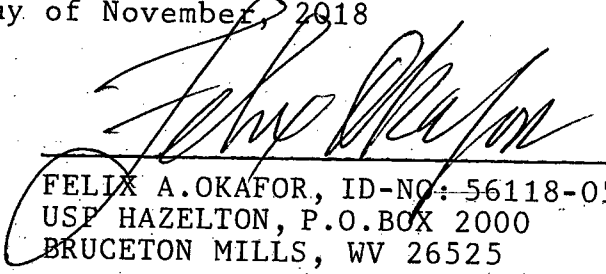
And whether these distinctions merit a different rule of law, is a matter of fundamental fairness to Petitioner and would not unduly burden the court.

For the reasons stated above, Petitioner urges that a petition for a rehearing be granted, and that, on further consideration, that the petition for writ of certiorari be granted, and the court of appeal improper application of the concurrent sentence doctrine be reversed, or appropriate.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner request this Court grant this petition for a Rehearing and that, on further consideration, that the petition for Writ Of certiorari be Granted, and the decision of the Fourth Circuit court of appeals be reversed.

Respectfully submitted this 22nd day of November, 2018



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