

No. 18-6716

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY WALKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit
USCA7 Case No. 17-3287

Reply Brief

PETITIONER'S BRIEF IN RESPONSE TO THE GOVERNMENT'S
BRIEF IN RESPONSE OPPOSING CERTIORARI

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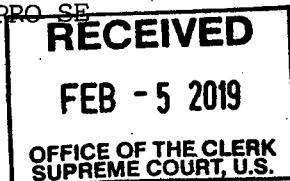


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Law And Argument

I. The Government's Opposition Brief Cites Numerous Cases Where The Questions Presented In This Case Have Been Presented To This Court And Denied Certiorari Thereby Implicating The Frequent And Recurring Nature Of The Circuit Conflict And, Therefore, Warranting Resolution Of It By This Court

The Government's Opposition Brief states that this Court has repeatedly declined to review the "finality question" presented by this case. Opp. Brief, id. Page 13 (collecting cases).

The Petitioner points out that the very fact that this Court has had to "repeatedly" deny certiorari on this "finality question" strongly indicates that the finality question presented here has caused a frequent and recurring problem amongst the lower courts.

As such, this Court should grant certiorari in this case to stem the flow of cases that will eventually, just as they have in the past, seek review in this Court on this open question having a substantive effect on the rights of criminal defendants seeking to benefit from a new rule of criminal procedure handed down before their convictions have become final.

II. This Case Represents An Ideal Vehicle For Resolving The Circuit Split Identified In This Case

The Government cites three bases for denying certiorari in this case on the grounds that this case does not represent an ideal vehicle for resolving the Circuit split identified in this case.

For the reasons stated herein below, this Court should reject those claims and grant certiorari in this case to resolve the questions presented.

(a) The Mandate Left The District Court With More Than A "Ministerial Act" To Perform And, Therefore, The Position Of The United States Taken In Its Opposition Brief Misrepresents The Nature Of The Seventh Circuit's Mandate Suspending Finality

The Government argues that there was no suspension of finality in this case, and that this case therefore represents a poor vehicle for resolving the finality question presented by this case, because the Seventh Circuit's Mandate directed the District Court to perform nothing more than a mere "ministerial act." Opp. Brief, id. 11-13.

The Government's characterization of the Seventh Circuit's Mandate, however, misrepresents the true nature of the Seventh Circuit's Mandate issued in this case because the Mandate did NOT leave the District Court with a "strictly ministerial" act to perform.

In particular, even as the District Court noted, the District Court COULD have (following remand pursuant to the Seventh Circuit's Mandate) reimposed the vacated \$5,000.00 fine imposed solely as to Count One vacated pursuant to the Seventh Circuit's Mandate. See Appendix H of the Certiorari Petition, Page 2 of 3, id. n.1 (noting that, though it could reimpose the vacated fine on a remaining Count, it was "more appropriate" not to do so at the late stage of the proceedings).

Aside from the "unbundling" of the overall sentencing package that the vacatur of the \$5,000.00 fine represented (and with it the suspension of finality as to all remaining counts), the very fact that the District Court acknowledged that it could move the fine from the vacated Count One to another unvacated Count illustrates in the strongest possible terms that the Mandate did NOT relegate the District Court to the performance of a "ministerial act."

Indeed, the fact that the Court could have altered judgment with respect to the unvacated counts (by transferring to one of the remaining counts the vacated fine) means that the Judgment was NOT "final" under this Court's longstanding precedents.

As this Court has repeatedly held, a "final judgment" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute its judgment." Ray Haluch Gravel Co. v. Central Pension Fund Of Operating Engineers And Participating Employers, 571 U.S. 177, 183 (2014).

Clearly, then, the Judgment below was NOT "final" when the District Court was tasked with deciding whether or not to carry out the original sentencing intent of the sentencing judge on remand by reimposing the fine as to another undisturbed Count -a NON-ministerial task it in fact performed when rendering Judgment in this case. See Appendix H to Writ of Certiorari, id. Page 2 of 3, n.1.

Accordingly, the Government's arguments premised on the claim that the Seventh Circuit's Mandate left the District Court to perform only ministerial tasks fail as the District Court was left with something more to do than merely execute its Judgment according to the Seventh Circuit's Mandate.

(b) **The Finality Question Addressed By The Parties And The Seventh Circuit Below Squarely Implicate A Bona Fide Circuit Split On The Question Of When A Criminal Judgment Becomes "Final" Following A Remand For The Imposition Of A New Judgment**

The Government hangs its hat on the claim that the Mandate here on the claim that the Judgment was final following remand from the Seventh Circuit because the Mandate compelled only a ministerial act. However, though attempting to distinguish the Ninth Circuit's holding in United States v. Colvin, 204 F.3d 1221 (9th Cir. 2000), Opp. Brief at 14, the Government

concedes that the Ninth Circuit, in Colvin, "took a different view" than the other Circuits to have addressed the questions presented in this petition. The Circuit split exists, and the Government concedes as much.

Moreover, while Colvin in fact addressed when a § 2255 petition was timely following the finality of the conviction and sentence, timeliness in Colvin was tied to, and dictated by, the question of when the underlying JUDGMENT AND CONVICTION became "final" following a successful direct appeal and remand for the imposition for a Judgment and Conviction Order conforming to the Ninth Circuit's Mandate -a question identical that addressed here that is likewise tied to, and dictated by, when the Petitioner's Judgment and Conviction Order became final following his successful appeal to the Seventh Circuit that unbundled his overall sentencing package.

Thus, Colvin is in fact indistinguishable from the case at bar and represents one side of a frequent and recurrent problem facing the lower Courts on a question of substantial importance.

This case, therefore, represents an ideal vehicle for resolving the questions presented.

(c) Contrary To The Government's Assertion, A Resentencing Pursuant To Booker Would Fundamentally Alter The Nature Of The Petitioner's Sentence

The Government argues that this case is not ideal to resolve the questions presented because the outcome of his sentence because the Petitioner received to concurrent life sentences. Opp. Biref at 15.

The Government's arguments must fail for two reasons.

First, the Government's Guideline sentencing arguments are based on the 2018 version of the Guidelines and calculations made thereunder. The

Petitioner, on the other hand, is entitled to be sentenced under the version of the Guidelines in effect at the time of his crime and sentencing.

Second, Booker invalidated the MANDATORY sentencing Guidelines under which the Petitioner received the life sentences the Government claims will thwart his receipt of any relief in this case. United States v. Booker, 543 U.S. 220 (2005). Thus, if sentenced to today, even if the Petitioner is or remains subject to a sentence of lifetime imprisonment, he is NOT subject to a "mandatory" life sentence following Booker. Following Booker, the Petitioner only remains ELIGIBLE for an ADVISORY term of imprisonment "up to" lifetime imprisonment under the Guidelines. That qualification, alone, has been held to warrant this Court's intervention and relief. See Hicks v. Oklahoma, 447 U.S. 347 (1980) (granting certiorari relief to a criminal defendant who was denied Court's discretion to impose a lower sentence than the maximum).

Accordingly, the Petitioner can show that he is entitled to substantive relief and that his sentence is likely to be affected by a grant of certiorari in this case.

This case, therefore, remains an ideal vehicle for resolving the questions presented to the Court.

Conclusion

Wherefore, the Petitioner respectfully requests his writ be granted on this 29 day of January, 2019.


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