No. 18-8619

IN THE

SUPREME COURT OF THE UNITED STATES

In re: DERRELL LAMONT GILCHRIST

PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO 28 U.S.C. § 2241

ORIGINAL

DERRELL LAMONT GILCHRIST-Pro Se
#37284-037
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TALLADEGA, AL 35160

QUESTION PRESENTED

CAN PETITIONER SEEK RELIEF PURSUANT TO 28 U.S.C § 2241 TO ADDRESS CLARIFICATION OF 18 U.S.C. § 924(c)(1)(C) IN THE FIRST STEP ACT OF 2018.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page.

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STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR EXTRAORDINARY WRIT

Petitioner respectfully prays that a writ issue in this matter.

OPINIONS BELOW

The opinion(s) of the United States Court of Appeals for the Fourth Circuit can be found at: United States v. Gilchrist, 119 Fed. Appx. 485 (4th Cir. 2005)(unpublished); United States v. Gilchrist, 137 Fed. Appx. 520 (4th Cir. 2005)(unpublished); and United States v. Gilchrist, 204 Fed. Appx. 258 (4th Cir. 2006) (unpublished).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C § 2241(a).

REASON FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH THE APPLICANT IS HELD.

The issues in this case are of significant national importance and are best considered by the Supreme Court at the earliest possible date in order to resolve an existing circuit split concerning the scope of the savings clause and § 2241.

In addition, the Court should consider the clarification of § 924(c)(1)(C)'s 25 year mandatory minimum provision contained in the First Step Act of 2018.

This Court interpreted § 924(c)(1)(C) in Deal v. United States, 508 U.S. 129 (1993)(Requirement under 18 U.S.C. § 924(c)(1) of enhanced sentence for subsequent conviction of carrying firearm during crime of violence held applicable to second through sixth of six counts on which accused was found guilty in single proceeding), defenitively establishing that the mandatory minimum provision in § 924(c)(1)(C) was applicable to petitioner.

In the First Step Act of 2018, Congress formally enacted an amendment to correct a misinterpretation of existing law.

Petitioner is currently housed in FCI Talladega, in the Northern District of Alabama. It would be futile to petition the district court given the circuit precedent of McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017), in the Eleventh Circuit. The weighty issues raised deserve to be heard.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 28 U.S.C. § 2255(e)

An application for a writ of habeas corpus on behalf of a prisoner who is authororized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

B. 28 U.S.C. § 2241(a)

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

C. FIRST STEP ACT OF 2018

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) In General-Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

SUMMARY OF ARGUMENT

It is Mr. Gilchrist position that the clarification of 18 U.S.C. § 924(c)(1)(C) established in the First Step Act of 2018 ("the ACT"), invalidates the 25 year mandatory minimum's imposed on him at sentencing. The amendment to correct a misinterpretation of law in the act overrules the Supreme Court's prior statutory interpretation in Deal v. United States, 508 U.S. 129 (1993), in which the Court held that the term conviction as used in § 924 (c)(1)(C) refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. This erroneous textual reading allowed multiple 25 year mandatory minimum sentences to be imposed in a single proceeding totaling 82 years. The misapplied mandatory minimum sentences present an error sufficiently grave to be deemed a miscarriage of justice and should be addressed vis 28 U.S.C. § 2241.

STATEMENT OF THE CASE

On January 17, 2003, in the United States District Court of Maryland, Petitioner Derrell Lamont Gilchrist was found guilty of: three counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d) (Counts One, Three, and Six); one count of conspiracy to commit bank robbery and carjacking, in violation of 18 U.S.C. § 371 (Count Five); one count of carjacking, in violation of 18 U.S.C. § 2119 (Count Ten); four counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Two, Four, Seven, and Eleven); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Count Tweleve).

On April 25, 2003, the district court imposed sentence. The sentence was comprised of 30 years under the pre-Booker guidelines for the robbery, carjacking, conspiracy, and possession of a firearm counts, followed by 7 years for the first violation of § 924(c), and 25 years for each additional § 924 (c) count to run consecutively to each other and the guideline sentence. This resulted in a 112 year term of imprisonment. See Appendix A, 2003 Judgment Order.

On Januray 11, 2005, the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion affirming Gilchrist's conviction. See United States v. Gilchrist, 119 Fed. Appx. 485 (4th Cir. 2005). It subsequently granted his petition for rehearing, however, "soley on the issue of whether he is entitled to be resentenced in light of United States v. Booker, 543 U.S. 220 (2005), which was decided the day after the Fourth Circuit issued its

initial opinion. United States v. Gilchrist, 137 Fed. Appx. 520 (4th Cir. 2005).

On November 14, 2005, the Honorable Deborah K. Chasanow resentenced Gilchrist to the same sentence previously imposed. See Appendix B, 2005 Judgment Order and Appendix C , November 14, 2005, Sentencing Hearing. On appeal, counsel submitted a brief under Anders v. California, 386 U.S. 738 (1967), asserting that there were no meritorious claims, but raising an issue as to whether "the district court erred by allowing [Gilchrist] to be tried and sentenced on an indictment that failed to allege specific violations of [§ 924(c)(1)(C)]". See United States v. Gilchrist, 204 Fed. Appx. 258, 259 (4th Cir. 2006). The Fourth Circuit affirmed, finding that it had "previously rejected this argument." Id (citing United States v. Robinson, 404 F.3d 850, 862 (4th Cir. 2005); Harris v. United States, 536 U.S. 545 (2002)). The Supreme Court denied certiorari on May 14, 2007. See Gilchrist v. United States, 550 U.S. 945 (2007).

Gilchrist's case then entered a labyrinth of federal collateral review, where it has wandered for the better part of a decade begining with the timely filing of his initial § 2255. See ECF No. 76.[1/] On September 27, 2012, the district court denied

1/ All references to ECF pertain to the Electronic Court Filing System for the United States District Court of Maryland (Greenbelt) under United States v. Gilchrist, Case No. 8:02-cr-00245-DKC-1.

his § 2255 petition. See ECF Nos. 116 & 117. Thereafter, on October 22, 2012, Gilchrist filed a motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. ECF No. 118, and subsequently on June 28, 2013, a motion to amend/ supplement the pending 59(e) motion was docketed [ECF No. 119], a motion for summary judgment was docketed on December 5, 2013 [ECF No. 125], and supplemental motion to supplement the record [ECF No. 126] was docketed on April 21, 2014.

No action has been taken by the district court with respect to these filings.

On March 14, 2016, Gilchrist filed a motion under § 2255(f)(4) citing Johnson v. United States, 544 U.S. 295, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005), raising that the Maryland conviction for conspiracy to distribute narcotics used to qualify him as a career offender pursuant to U.S.S.G. § 4B1.1 had been vacated by the Circuit Court of Prince Georges County Maryland. This matter was filed in the district court as Civ. No. DKC-16-904 [ECF No. 136]. The government in its response characterized the pleading as raising a issue based on Johnson v. United States, 135 S. Ct. 2551 (2015), and requested that the matter be held in abeyance pursuant to Standing Order 2016-03 issued by Chief Judge Catherine C. Blake. See ECF No. 138.

In tandem the Federal Defender's Office of Maryland was appointed to represent Gilchrist and authorization to file a second or successive § 2255 was sought in the Fourth Circuit Court of Appeals. On June 27, 2016, the Appellate Court granted authorization to file, and thereafter, the Federal Defender's Office filed a

supplemental brief in the district court that was assigned Civ. No. DKC-16-904. See ECF No. 141 & 142.

On May 29, 2018, Gilchrist petitioned for a writ of mandamus in the Circuit Court alleging undue delay by the district court in ruling on the postjudgment motions challenging the district court's denial of his initial 28 U.S.C. § 2255 (2012) motion. The petition was denied on November 7, 2018, [App. No. 18-1611], Gilchrist filed a timely petition for rehearing/ rehearing en banc that is currently pending.

As chronicled Gilchrist has sought relief at every level with justice delayed.[2/]

2/ At the 2005 sentencing the district court explained it was constrained to impose the mandatory minimum sentence for counts 4, 7, and 11. Judge Chasanow stated: "In any event, I conclude that, unless the supreme Court or the Fourth Circuit tell me that the law is different, that Harris remains good law, and that the statutory mandatory minimums which were adopted as the guideline sentences are not affected adversely by the recent Supreme Court decisions. So I will not be declaring that unconstitutional in any way, shape, or form, and instead, what I believe we need to do is go forward on those counts that are encompassed strictly within the guidelines -- 1, 3, 5, 6, 10, and 12." See Appendix B at 8-9.

REASONS FOR GRANTING THE WRIT

A. SECTION 2241 IS THE PROPER VEHICLE TO GAIN REDRESS

The savings clause set forth in § 2255(e), allows a court to entertain a traditional § 2241 petition for habeas corpus if "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [the petitioner's] detention." Ten Circuit court's interpret the savings clause to provide an opportunity for prisoners to demonstrate they are being held under an erroneous application or interpretation of statutory law. Two circuits, however, read the clause so narrowly that the savings clause may only be satisfied under the limited circumstance when the sentencing court is unavailable, "practical considerations prevent the prisoner from filing a motion to vacate, or a prisoner's claim concerns the execution of his sentence." McCarthan v. Director of Goodwill Indus., 851 F.3d 1076, 1076, 1092-93 (11th Cir. 2017)(en banc); see also Prost v. Anderson, 636 F.3d 578, 587-88 (10th Cir. 2011); compare with United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018); Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013).

In this case Gilchrist wishes to invoke the court's authority under § 2241(a). Congess has bestowed the courts broad remedial powers to secure the historic office of the writ of habeas corpus. It is uncontroversial that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law. Habeas corpus is above all, an adaptable remedy, and

its precise application and scope change depending upon the circumstance.

The current petition falls aquarely within the ambit of § 2241 based on the clarification of statutory law that was unavailable during the original direct appeal and intial § 2255. See Deal v. United States, 508 U.S. 129 (1993)(the language of 924(c)(1) gave no indication that punishment of those who failed to learn the lesson of prior conviction or of prior punishment was the sole purpose of § 924(c)(1), to the exclusion of other penal goals). The Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence. See Nelson v. Campbell, 541 U.S. 637, 643 (2004)("[T]he 'core' of habeas corpus" has included challenges to "the duration of [the prisoner's] sentence."); and INS v. St. Cyr, 533 U.S. 299 (2001)(Federal courts held to have habeas corpus jurisdiction under 28 U.S.C. § 2241 to decide whether alien was eligible for waiver of removal under repealed § 212(e) of Immigration and Nationality Act (8 U.S.C. § 1182(c)). Indeed, one purpose of traditional habeas relief was to remedy statutory, as well as constitutional, claims presenting " a fundamental defect which inherently results in a complete miscarriage of justice" and "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is present." Davis, 417 U.S. at 346 (quoting Hill v. United States, 368 U.S. 424, 428(1962)).

A denial of the right to seek collateral relief from a fundamentally defective sentence would leave the purpose of the writ of habeas corpus unfulfilled.

The clearest example for applying the Acts clarification of 924(c)(1)(C) via § 2241 would be this Courts rationale from Bousley. In Bousley, the Court was asked to determine what retractive effect should be given to its decision in Bailey v United States, 516 U.S. 137 (1995). Bailey considered the "use" prong of 18 U.S.C. § 924(c)(1), which imposes increased penalties on the use of a firearm in realtion to certain crimes. The Court held as a matter of statutory interpretation that the "use" prong punishes only "active employment of the firearm" and not mere possession. 516 U.S., at 144. The Court in Bousley had no difficulty concluding that Bailey was substantive, as it was a decision "holding that a substantive federal criminal statute does not reach certain conduct." Bousley, supa, at 620. The Court reached that conclusion even though Congress could (and later did) reverse Bailey by amending the statute to cover possession as well as use. In contrast, Congress has now clarified a different subsection of 924(c) that was previously interpreted by the Court. In this instance, it is not a matter of giving the Act retroactive effect, but of applying the statute the way Congress intended.

A § 2255 is inadequate and ineffective to test the legality of a sentence when:(1) at the time of sentencing, settled law of the circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled law changed by virtue of a Congressional statutory "clarification" overturning prior established law; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h) for second or subsequent motions; (4) due to this statutory clarification, the sentence

now presents an error sufficiently grave to be deemed a fundamental defect.

B. DEAL WAS WRONGLY DECIDED

In 1993, on certiorari review the Supreme Court interpreted the version of the 18 U.S.C. § 924(c)(1) statute in effect at that time. Relevant to the current discussion is the former version of § 924(c) and current version both contain language imposing an enhanced mandatory minimum. Section 924(c)(1) prescribed a 5-year prison term for the first such conviction (in addition to the punishment provided for the crime of violence) and required a 20-year sentence "[i]n the case of [a] second or subsequent conviction under this subsection". See 18 U.S.C. § 924(c)("1993 version"). The Court in a 6-3 opinion (Scalia, J. delivered the opinion of the Court, in which Rehnquist, C.J., and White, Kennedy, Souter, and Thomas, JJ., joined. Stevens, J., filed a dissenting opinion, in which Blackmun and O'Connor, JJ., joined) held Deal's second through sixth convictions in a single proceeding arose "[i]n the case of his second or subsequent conviction" within the meaning of § 924(c)(1). There is no merit to his contention that the language of § 924(c)(1) is facially ambiguous and should therefore be construed in his favor under the rule of lenity. In context, "conviction" unambiguously refers to the finding of guilt that necessarily precedes the entry of a final judgment of conviction. If it refered, as Deal contends, to "judgment of conviction," which by definition includes both the adjudication of guilt and the sentence, the provision would be incoherent, prescribing that a sentence which has already been imposed shall be 5 or 20 years longer than it was. Most importantly, the Court reasoned "The present statute does not use the term 'offense',

and so does not require a criminal act after the first conviction; it merely requires a conviction after the first conviction."

It is now evident that the view held in the dissenting opinion authored by Justice Stevens that the phrase "second or subsequent conviction" in § 924(c) was intended to refer to a conviction for an offense committed after an earlier conviction had become final was the proper interpretation of the statute in line with Congress's intent.

The Supreme Court over the years has reaffirmed its holding in Deal, even after amendment to the statute raising proscribed mandatory minimum sentences. See Greenlaw v. United States, 544 U.S. 237 (2008)(The error was plain because this Court had held in Deal v. United States, 508 U.S. 129, that when a defendant is charged in the same indictment with more than one offense qualifying for punishment under § 924(c), all convictions after the first rank as "second or subsequent", see id., at 132-137.).

The unfortunate result of Deal is over 19 years of a incorrect interpretation being applied to thousands of defendants in the federal system.

C. ENACTMENT OF THE FIRST STEP ACT OF 2018

On December 21, 2018, the First Step Act of 2018 ("the Act"). was signed into law. The Act contains numerous prison and sentencing reforms.

Title IV of the Act contains Sentencing Reform provisions, including Section 403, which is titled "Clarification of section 924(c) of title 18, United States Code". SEC. 403 provides in relevant part:

> (a) IN GENERAL.-Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceeding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

D. FAILURE TO APPLY CLARIFICATION OF SECTION 924(c) TO PETITIONER'S CASE WOULD BE A MISCARRIAGE OF JUSTICE

It must be noted at the outset that when an amendment alters, even "significantly alters", the original statutory language, this does "not necessarily" indicate that the amendment institutes a change in law. Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999); accord Wesson v. United States, 48 F.3d 894, 901 (5th Cir. 1993)(noting that "an amendment to a statute does not necessarily indicate that the previous version was the opposite of the amended version"). Certainly, Congress may amend a statute to establish new law, but it also may enact an amendment "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." United States v. Sepulveda,

115 F.3d 882, 885 n. 5 (11th Cir. 1997). As Courts have explained, a "change in statutory language need not ipso facto constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear." United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985).

In determining whether an amendment clarifies or changes an existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment. See, e.g., Piamba Cortes, 177 F.3d at 1284 ("Courts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment."); liquilux, 979 F.2d at 890 (using the legislature's expression of what it understood itself to be doing" to determine whether an amendment is a clarification).

Most significant to the determination here, Congress formally declared in the title of the relevant section of the Act that the amendments of § 924(c)(1)(C) were a clarification. See First Step act of 2018, Title IV Sec. 403.

As a clarification rather than a substantive change , Sec. 403 of the Act amounts to a declaration on the part of Congress that § 924(c)(1)(C) never, even as it existed prior to the Act, required a enhanced sentence for multiple violations of § 924(c) in a single indictment. The Supreme Court has long instructed that such declarations-i.e., "subsequent legislation declaring the intent of an earlier statute"-be accorded "great weight in statutory construction." Loving v. United States, 517 U.S. 748, 770 (1996); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381-82 (1969)(and numerous cases cited therein).

For this reason, it is claer that the decision in Deal was wrongly decided and the Act was meant to correct this misinterpretation.

In the federal system, defining crimes and fixing penalties are legislative, not judicial, functions. Congress alone can set maximum and minimum terms of imprisonment, and those limits define legal boundaries for the punishment for a particular crime. A sentencing judge determines the type and extent of punishment within fixed statutory or constitutional limits. If in fact the legislature has circumscribed the judge's discretion by specifying a mandatory minimum sentence, fundamental fairness requires that the defendant be so informed. Therefore, consistent with the constitutional principle of separation of powers, a defendant has a constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, and a violation of that principle can tread particularly harshly on individual liberty.

It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Mandatory minimums can lead to a minimum sentence of imprisonment more than twice as severe as the maximum the trial judge would otherwise have imposed.

Put simply, because the Act clarified § 924(c)(1)(C) to reflect what the statute always was intended to mean, the prior imposition to petitioner was a errouneous application that created the mistaken impression that the district court had no discretion See Deal supra.

It would be a miscarriage of justice to allow Gilchrist's three § 924(c) sentences that were enhanced pursuant to the § 924(c)(1)(C) provision to stand given the Act's clear intent, which

abrogated this Court's decision in Deal. If this argument is well taken than Gilchrist is entitled to be resentenced because the district court was mistaken as to its authority to impose the mandatory minimum in this case. Nevertheless, now Congress has spoken clearly the original intent of § 924(c)(1)(C). An erroneously imposed mandatory minimum is a fundamental defect resulting in a miscarriage of justice.

CONCLUSION

In its simplest form, the argument raised by Gilchrist is that § 924(c)(1)(C) from its inception was intended to be a true recidivist statute. In the years following its enactment § 924(c)(1)(C) has been misinterpreted allowing its use as a bludgeon. Congress in its own words has enacted a "clarification" consistent with its original intent.

The principles of Justice demand that Gilchrist be afforded a resentencing without the specter of the 25 year mandatory minimum. In accordance with this concept, Gilchrist has sought relief in the highest court in the land, the Supreme Court, also within this notion is the priciple that a pro se defendant be afforded a less stringent reading of his pleadings than a attorney. The oft cited but seldom realized case of Haines v. Kerner, embodies nothing if not the promise that a defendant himself may seek redress on a even field with a trained lawyer.

Based on the foregoing, Mr. Gilchrist prays that this Court grant him relief.

Dated: February 5, 2019

Respectfully submitted,

Donell L Gilchrist