

18-9109 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE CHRISTIAN NUNEZ-BELMONTES

Petitioner

Supreme Court, U.S.

FILED

APR 09 2019

OFFICE OF THE CLERK

VS

UNITED STATES OF AMERICA.

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Fifth Circuit in Case No. 18-60064

PETITION FOR WRIT OF CERTIORARI
JOSE CHRISTIAN NUNEZ-BELEMONTES

Jose Christian Nunez-Belemontes
#19960-043
FCI Yazoo City Low
2225 Haley Barbour Parkway
Yazoo City, Mississippi 39194

QUESTIONS PRESENTED

- I. Is An Administrative Order Conclusive And In Violation Of Constitutional Due Process Without The Administrator Of The Drug Enforcement Administration Who Reports Any Violation Of Title 21 U.S.C. § 841(a) To Any United States Attorney For Institution Of A Criminal Proceeding, Without Giving The Person Appropriate Notice And Opportunity To Present His Views, Either Orally Or In, With Regard To Such Contemplated Proceedings Violative Of The Defendant's Due Process.

LIST OF PARTIES

JOSE CHRISTIAN NUNEZ-BELEMONTES

Defendant/Appellant

United States Of America

Plaintiff/Appellee

Gregory Layne Kennedy

Assistant U.S. Attorney

501 East Court Street

Suite 4.430

Jackson, Mississippi 39201

Attorney for Plaintiff/Appellee

The Honorable William H. Barbour, Jr.

United States District Court Judge

United States Court Of Appeals

for the Fifth Circuit

600 S. Maestri Place

New Orleans, Louisiana 70130

TABLE OF CONTENTS

Question Presented.....	i
List of Parties.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	1
Statement of Jurisdiction.....	1
Constitutional and Statutory Provision.....	2
Statement of the Case.....	4
I. Facts and Proceedings Below.....	4
A. The Offense.....	4
B. The Pre-Sentence Report.....	5
C. The Sentencing Hearing and Judgment.....	5
D. The Direct Appeal.....	5
Reasons For Granting The Writ.....	6
I. Is An Administrative Order Conclusive And In Violation Of Constitutional Due Process Without The Administrator Of The Drug Enforcement Administration Who Reports Any Violation Of Title 21 U.S.C. § 841(a) To Any United States Attorney For Institution Of A Criminal Proceeding, Without Giving The Person Appropriate Notice And Opportunity To Present His Views, Either Orally Or In, With Regard To Such Contemplated Proceedings Violative Of The Defendant's Due Process.....	6
Conclusion.....	9
Certificate Of Service.....	9
Appendix.....	10

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Pages</u>
Class v. United States, 200 L. Ed. 2d 37 (Feb. 21, 2018).....	6
Gonzales v. Raich, 162 L. Ed. 2d 1 (2005).....	7
Harline v. DEA, 148 F.3d 1199, 1202 (10th Cir. 1998).....	8
Maynard v. DEA, 117 F. App'x 941, 943 (5th Cir. 2004).....	8
Monson v. DEA, 589 F.3d 952, 960 (8th Cir. 2009).....	8
 <u>Statutes</u>	
21 U.S.C. § 801.....	2,8
21 U.S.C. § 824(a).....	8
21 U.S.C. § 824(c).....	8
21 U.S.C. § 841.....	2
21 U.S.C. § 841(a)(1).....	4,6
21 U.S.C. § 841(b)(1)(B).....	4
21 U.S.C. § 846.....	3,4
21 U.S.C. § 877.....	3,8
21 U.S.C. § 885.....	3
21 U.S.C. § 971.....	8
40 U.S.C. § 5104(e).....	6
 <u>Rules</u>	
U.S.S.G. § 2D1.1(b).....	5
U.S.S.G. § 3B1.1(a).....	5

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
FOR JOSE CHRISTIAN NUNEZ-BELEMONTES

Jose Christian Nunez-Belemontes respectfully submits that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published, *United States v. Nunez-Belemontes*, 747 Fed. Appx. 265 (5th Cir. Jan. 9, 2019), appears at Appendix A.

STATEMENT OF JURISDICTION

The Fifth Circuit filed its opinion on January 09, 2019. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 801. Congressional findings and declarations: controlled substances

The Congress makes the following findings and declarations:

- (1) Many of the drugs included within this title have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
- (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--
 - (A) after manufacture, many controlled substances are transported in interstate commerce,
 - (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
 - (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
- (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
- (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed intrastate.
- (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.
- (7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

21 U.S.C. § 841. Prohibited acts A

- (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 885. Burden of proof; liabilities

(a) Exemptions and exceptions; presumption in simple possession offenses.

(1) It shall not be necessary for the United States to negative any exemption or exception or exception set forth in this title, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

21 U.S.C. § 877. Judicial Review

All final determinations, findings, and conclusions of the Attorney General under this title shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

STATEMENT OF THE CASE

I. Facts and Proceedings Below

A. The Offense

On September 7, 2016, Jose Christian Nunez-Belemontes (hereinafter "Nunez-Belemontes") was charged in count one of a five-count indictment in the United States District Court for the Southern District of Mississippi, Northern Division, to wit: conspiracy to possess with intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Count One) (Doc. 4, Indictment).

With respect to Nunez-Belemontes, the amount involved in the conspiracy attributable to him as a result of his alleged conduct, and the conduct of other alleged conspirators reasonably foreseeable to him, is more than 500 grams of a detectable amount of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(b)(1)(B). (Doc. 4, Indictment).

Nunez-Belemontes unknowingly and unintelligently plead guilty on September 12, 2017 to conspiracy to possess with the intent to distribute cocaine hydrochloride in violation of 21 U.S.C. § 846. The Government somehow determined Nunez was trafficking cocaine based on wire interceptions and cocaine seizures. The Government stipulated that the amount of cocaine for which Nunez is accountable was between 15 kilograms and 50 kilograms.

B. The Pre-Sentence Report

The pre-sentence report (PSR) concluded that Nunez-Belemontes base offense level was 32. The pre-sentence report added several enhancements. The enhancements added 10 points to the presentence report, bringing the adjusted offense level to 42. Nunez-Belemontes received a three point reduction for acceptance of responsibility, reducing his total offense level to 39. Nunez-Belemontes objected to the enhancements. The Court overruled all of Nunez's objections.

C. The Sentencing Hearing and Judgment

The Court overruled all of Nunez-Belemontes objections and applied all of the enhancements. The Court imposed a sentence of 262 months.

D. The Direct Appeal

Nunez-Belemontes submitted several request to the Fifth Circuit for Attorney Dennis C. Sweet be terminated because of his lack of communication with him and Nunez-Belemonte desired to proceed in his on behalf. During the time frame that this motion was pending Attorney Sweet continued to proceed in a perfunctory manner, submitted a brief without Nunez-Belemonte consent and raised two (2) claims as follows:

- I. Whether The District Court Committed Reversible Factual Or Legal Error As It Applied U.S.S.G. § 2D1.1(b).
- II. Whether The District Court Committed Reversible Factual Or Legal Error As It Applied U.S.S.G. § 3B1.1(a).

On January 9, 2019, the Fifth Circuit Granted the Government's motion to dismiss based on the appeal waiver and DENIED the alternative motion for summary affirmance. Nunez-Belemontes's motion to relieve counsel and to proceed pro se was DENIED as untimely.

Shortly thereafter, Nunez-Belemontes filed a motion to extend time to file a petition for rehearing and/or rehearing en banc. On January 18, 2019, the Fifth Circuit stated in a letter that, "Only your attorney can file motions or other documents on your behalf." "Your motion is being forwarded to your attorney for whatever action he deems necessary." "In this Court's January 9, 2019, opinion, your motion to relieve attorney and proceed pro-se was denied."

REASONS FOR GRANTING THE WRIT

I. Is An Administrative Order Conclusive And In Violation Of Constitutional Due Process Without The Administrator Of The Drug Enforcement Administration Who Reports Any Violation Of Title 21 U.S.C. § 841(a) To Any United States Attorney For Institution Of A Criminal Proceeding, Without Giving The Person Appropriate Notice And Opportunity To Present His Views, Either Orally Or In, With Regard To Such Contemplated Proceedings Volative Of The Defendant's Due Process.

In *Class v. United States*, the defendant plead guilty and was convicted under 40 U.S.C. § 5104(e), which prohibits the carrying of a firearm "on the Grounds or in any of the Capitol Buildings." *Class v. United States*, ____ U.S. ____, 138 S. Ct. 798, No. 16-424, 200 L. Ed. 2d 37, 2018 U.S. LEXIS 1378, 2018 WL 987347, at *2 (Feb. 21, 2018). On appeal, the defendant argued that this statute violated the Second Amendment and the Due Process Clause. 2018 U.S. LEXIS 1378, [WL] at *3. The Supreme Court concluded that the defendant's voluntary and unconditional guilty plea by itself did not waive

his right to challenge on direct appeal the constitutionality of that statute of conviction, 2018 U.S. LEXIS 1378, [WL] at *4.

As is customary, the Supreme Court's analysis begins with the statute at hand. The CSA is a "comprehensive regime," designed "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12-13, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). Its individual Parts are the armatures that give it form: Part A lays out the Act's purpose; Part B defines controlled substances; Part C provides regulatory requirements for those substances (e.g., registering, labeling and packaging, recordkeeping); and then, when individuals spurn those requirements, Parts D and E provide criminal - and administrative-enforcement mechanisms, respectively. See 21 U.S.C. § 801 et seq. In broad brushstrokes, the Act thus makes it "unlawful to manufacture, distribute, dispense, or possess any controlled substances" unless an individual plays within the rules of the CSA's "closed regulatory system." *Raich*, 545 U.S. at 13.

This case hinges on the language of the separate yet similar statutory provisions in Part D that undergird Count One. Count One charges Nunez-Belemontes with conspiring to commit a ubiquitous federal drug offense under the Act, which reads:

(a) **Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The Controlled Substances Act, see 21 U.S.C. §§ 801-971, established a comprehensive regulatory framework to control the manufacture, distribution, and dispensation of controlled substances. *Maynard v. DEA*, 117 F. App'x 941, 943 (5th Cir. 2004). The Act requires practitioners who dispense controlled substances to register with the Attorney General. see 21 U.S.C. § 822. Concomitantly, the Act authorizes the Attorney General to suspend or revoke a registration after issuing an order to show cause and holding a hearing in accordance with the Administrative Procedure Act. See 21 U.S.C. §§ 824(a), (c). The Attorney General has delegated this authority to the Drug Enforcement Administration (DEA). See *Harline v. DEA*, 148 F.3d 1199, 1202 (10th Cir. 1998).

Under the CSA, "any person aggrieved by a final decision" of the DEA under the Act "may obtain review of the decision" in the appropriate court of appeals. 21 U.S.C. § 877. Explicit in this grant of jurisdiction to the courts of appeals is the requirement that the DEA issue a "final decision" under the Act. See *Monson v. DEA*, 589 F.3d 952, 960 (8th Cir. 2009).

As a result of Attorney Dennis C. Sweet IV, never relieving himself as counsel as Nunez-Belemontes instructed and the Fifth Circuit denying Nunez-Belemontes timely request, he received no consideration on his claim, despite this Court's holding in *Class*.

CONCLUSION

The petition for writ of certiorari must be granted.

Respectfully submitted,

JOSE CB NUNEZ

Jose Christian Nunez-Belemontes
#19960-043
FCI Yazoo City Low
2225 Haley Barbour Parkway
Yazoo City, Mississippi 39194

I declare that the foregoing is true and correct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been sent with First-Class U.S. Postage, on the 9th day of APRIL 2019, to the following:

Mr. Noel J. Francisco
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Gregory Layne Kennedy
Assistant U.S. Attorney
501 East Court Street
Suite 4.430
Jackson, Mississippi 39201

JOSE CB NUNEZ

Jose Christian Nunez-Belemontes