No. 19-5141

ORIGINAL

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM WADE — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Tenth Cirucit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. William Wade
(Your Name)

FCI Butner II, PO Box 1500
(Address)

Butner, NC 27509
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

1. The 10th Circuit has already declared that the 924(c) "residual" clause is unconstitutional in light of this Courts Johnson v US and Sessions v Dimaya rulings. However, at the time of Sentencing of Wade, the Court failed to "specify which prong it relied on" to apply the 924(c). Therefore, does the Court get a "2nd Bite at the Apple", especially when the petitioner was sentenced "after Johnson had already came out"?

2. The Courts are "split" on "when and how" to apply the "physically restrained enhancement". Therefore, this Court should resolve this "split" that is depriving some individuals who are similiar in conduct but get sentenced in different circuits.(See U.S.S.G 2B3.1(b)(4)(b))

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[x] reported at 2019 US App Lexis 11068 (10th Cir); or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[x] reported at 18-cv-01739-RM (Dist. of Colo); or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:** NA

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 16, 2019.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:** NA

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment, Due Process Clause and Double Jeopardy Clause aka 2nd Bite at the Apple Clause

Amendment V (1791)

...No person shall be held to answer for a capital or, otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; [**nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb**]; nor shall be compelled in any criminal cases to be a witness against himself, **nor be deprived of life, liberty, or property**, without due process of law; nor shall private property be taken for public use, without just compensation.

18 USC 924(c)(3) Definition of a Crime of Violence

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of comitting the offense

U.S.S.G 2B3.1(b)(4)(b)

..Physically restrained means, the forcible restraint of the victim such as being "tied, bound, or locked up"..USSG 1b1.1 cmt app n.1(k)

STATEMENT OF THE CASE

The petitioner (William Wade, Wade hereafter) and his brother robbed a bank, but did not touch or assault any individual. The petitioner and his brother pled guilty to to 18 USC 2113(a) and (d) and 18 USC 924(c). At the time of the guilty plea, the government and court did not "specify" which prong it was relying on to apply the 924(c), force clause or residual clause. This was all after this courts Johnson v US, 135 S.Ct 2551 (2015) had already been deciced and the parties still had failed to specify which prong of the 924(c) they were relying upon.

However, the parties applied a 2 level "physically restrained" enhancement, although all of the police records, videos and witness statements showed that there was not physical actions done to any party. Based upon these findings, the District Court of Colorado imposed 90 months after a preliminary hearing was performed about the motion to dismiss the 924(c) count.(Ecf No. 138).

The petitioner filed a timely appeal, in which addressed these 2 enhancements under the 924(c) and 2b3.1(b)(4)(b). (US v Wade 16-1364/16-1391 ,10th Cir. 2017). The 10th circuit original held that the petitioner's crimes "may fit under the force clause". The 10th Circuit continued to the "physically restrained" and held that ..the 10th Circuit Fisher decision controls the outcome of the issue and thus the court upheld the sentences of Wade.(See US v Fisher 132 F.3d 1327 (10th Cir. 1997)

Since the ruling of Wade's Direct Appeal, the 10th Circuit has declared that the 924(c) definition is in fact unconstitutional in wake of the Sessions v Dimaya and Johnson rulings.

REASONS FOR GRANTING THE PETITION

This Court has held in 2 Sp. Ct rulings that ..the "executive is to speak with [1] voice if the nation is to be respected ..,and when 2 US Attorney Offices have conceded to [1] point , that all US Attorney' Offices are bound by that concession." (Munaf v Geren 553 US 674,702 (Sp. Ct 2008) and Depierre v US 131 S.Ct 2225 (Sp. Ct 2011)

The reason this premise is important is becasue the US Solictor Office along with the Dept. of Justice have both conceded twice during the [3] oral arguments of both Johnson v US 135 S.Ct 2551 (2015) and then later in Sessions v Dimaya 138 S.Ct 1204 (2018) and now US v Davis I and II (16-8777 and 18-431) that if the ACCA and 16(b) were declared unconstitutional that it would also mean. that the 924(c) , which has been conceded to use the same formulation, would also be unconstitutional.

Based upon these numerous concessions, the petitioner moved the District Court and 10th Circuit to Vacate the unconstitutional 924 (c) conviction, but instead of Vacating the conviction, the 10th Circuit has took a 2nd bite at the apple by "forcing the crime to fit in the force clause", when for years , at least 30, it used the categorical apporach and not the force clause, but instead the residual clause.

In this case, the circuits are split, even the inter-circuits are split on not only the question of "is the 924(c) residual clause unconstitutional" but also, How many bites at the apple can the court get to make a crime fit?. In this case, this court has also answered this question in Descamps v US 570 US 254 (2013) but many

courts including the 10th Circuit have failed to adhere to the sound ruling of Descamps, which held that.."any court with ample amounts of time on any given day may come up with numerous hypothetical situations in order to try to make the crime fit..[but] that is all they are,are hypotheticals".

The Courts have also been split on the question of"does the government or the defendant have to show that the residual clause was been applied versus the other clause, when dealing with issues on the residual clause".

Therefore, because of this, the petitioner's case is ripe to be used as the "vehicle" to resolve these questions that are plaguing the courts below and denying the defendants a fair chance to return to the family lives outside of prisons.

It is clear that the 924(c) uses the categorical approach and also does require the courts to "imagine" the actions of a crime. However, in this case, there was not a piece of evidence that the defendants used force, but instead it was the opposite. The court does not dispute that there wasn't force used.., but that is contrary to its ruling, which is another reason why the court should resolve the issues herein.

The petitioner's case is not premature, because the 10th Circuit and others have begun to realize that the 924(c) residual clause is unconstitutional, but it does little for those like the petitioner who the courts have already had a 2nd bite at and forced the crime to fit under the force clause, when all these years it had used the residual clause. Therefore, this court should Grant the Cert or GVR.

Issue II

THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT SURROUNDING THE APPLICATION OF 2b3.1(b)(4)(b) AND ITS PROPER USAGE

The 2nd and 5th have determined that "the directions to move" are not enough to apply the "physical force restraint enhancement." (See US v Paul 17-2702 (2nd Cir. 2018) and US v Garcia 16-10863 (5th Cir. 2017).

However, the 10th Circuit and others have decided that a "mere direction to move without any physical contact is enough to invoke the 2b3.1(b)(4)(b) enhancement." (US v Fisher 132 F.3d 1327 (10th Cir. 1997)

This is a important and reoccuring question that is in fact denying individuals their life & liberty interest and is also causing a confussion and disconformity among the lower courts that is worthy of this courts direction. Therefore, because of this, the petitioner has been subject to the enhanced sentence based upon his location of sentencing and had he been in the 2nd or 5th circuit, then the same actions would not have warranted the additional enhancement. Therefore, this court should Grant the Cert and resolve this issue that is.. properly preserved thru-out the courts and filings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Billy Wade

Mr. William Wade, 43404-013

Date: June 30th, 2019