NO:

IN THE
SUPREME COURT OF THE UNITED STATES

FELIX OKAFOR,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER'S 3167 MONTH SENTENCE IMPOSED AS A RESULT OF THIS COURT'S MISINTERPRETATION OF THE STACKING PROVISIONS OF 18 U.S.C. 924(c)(1)(A)(i) IS CRUEL AND UNUSUAL PUNISHMENT PARTICULARLY IN LIGHT OF THE FIRST STEP ACT'S DESCRIPTION OF THE AMENDMENT AS A CLARIFICATION OF THE ORIGINAL MEANING OF 924(c)(1)(A)(i) DECLARING THE INTENT OF CONGRESS WAS TO MAKE THE STACKING PROVISIONS APPLICABLE TO FINAL CONVICTIONS ONLY?

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TABLE OF AUTHORITIES

CONSTITUTIONAL PRINCIPLES

The Fifth Amendment reads, in pertinent part, as follows:

> No person shall be…deprived of life, liberty, or property, without due process of law…

The Eighth Amendment reads, in pertinent part, as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and ununsual punishments inflicte

STATUTES

At the time of Petitioner's sentence, 18 U.S.C 924(c)(1)(C) read as follows:

> In the case of a second or subsequent conviction under this Subsection, the person shall-- (i) be sentenced to a term of imprisonment of not less than 25 years.

Section 403 of the First Step Act of 2018, Pub.L. 115-391, 924© 132 Stat. 5194, 5221-5222 (2018) clarified 18 U.S.C 924(c)(1)(C) to read as follows:

> In the case of a violation of this subsection that occur after a prior conviction under this subsection has become final, the person shall--(i) be sentenced to a term of imprisonment of not less than 25 years…

Petitioner was a first offender sentenced to 3167 months by stacking convictions for non-final violations of 924(c) as if Petitioner were a recidivist.

LIST OF PARTIES BELOW

The parties are identified in the case caption.

JURISDICTION

Jurisdiction of the United States District Court for the Eastern District of North Carolina was based on 18 U.S.C. 3231. Jurisdiction of the Court of Appeals for the Fourth Circuit was based on 28 U.S.C. 1291. Jurisdiction of the United States Supreme Court is based on 28 U.S.C. 1254(1).

OPINIONS AND ORDERS BELOW

Order of the Fourth Circuit Court of Appeals dated January 31, 2017 denying the petition to recall mandate is attached hereto. [Appendix "A"].

STATEMENT OF THE CASE

On January 22, 2013, a federal grand jury sitting in the Eastern District of North Carolina returned a superseding indictment charging Mr. Okafor with conspiracy to distribute and possess with intent to distribute one hundred kilograms or more of marijuana, and one hundred grams or more of heroin (Count One). He also was charged with distribution of an unspecified amount of marijuana near a school on November 8, 2011 (Count Four), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Four (Count Five). He was charged with distribution of an unspecified amount of marijuana on November 14, 2011 (Count Six), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Six (Count Seven). He was charged distribution of an unspecified amount of marijuana on November 22, 2011 (Count Eight), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Eight (Count Nine). He was charged distribution of an unspecified amount of marijuana on November 22, 2011 (Count Eight), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Eight (Count Nine). He was charged distribution of an unspecified amount of marijuana on December 2, 2011 (Count Ten), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Ten (Count Eleven). He was charged with distribution of an unspecified amount of heroin on December 7, 2011 (Count Twelve), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Twelve (Count Thirteen). He was charged with distribution of an unspecified amount of heroin on

December 9, 2011 (Count Fourteen), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Fourteen (Count Fifteen). He was charged with distribution of an unspecified amount of heroin on December 13, 2011 (Count Sixteen), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Sixteen (Count Seventeen). He was charged with distribution of an unspecified amount of heroin on December 13, 2011 (Count Sixteen), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Sixteen (Count Seventeen). He was charged distribution of an unspecified amount of heroin on December 16, 2011 (Count Eighteen), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Eighteen (Count Nineteen). He was charged with distribution of an unspecified amount of heroin on December 28, 2011 (Count Twenty), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Twenty (Count Twenty-One). He was charged with distribution of an unspecified amount of heroin on January 11, 2012 (Count Twenty-Two), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Twenty-Two (Count Twenty-Three). He was charged with possession with intent to distribute an unspecified amount of heroin on January 11, 2012 (Count Twenty-Four), and using and carrying a firearm during and in relation to the drug trafficking crime charged in Count Twenty-Four (Count Twenty-Five).

Petitioner elected to be tried by a jury. He was convicted on the twenty-five drug trafficking counts and eleven counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 USC 924(c). He was sentenced to 3167 months in prison.

Petitioner filed a timely notice of appeal. One of the issues presented on appeal was "Mr. Okafor's sentence of 3167 months, having never been convicted of a crime, amounts to cruel and

unusual punishment in violation of the Eighth Amendment to the Constitution of the United States." The appeal was denied without oral argument, and without explanation. ***United States v. Okafor***, 2015 U.S. App. Lexis 3155 (4th Cir. 2015), 602 Fed. Appx. 108 (4th Cir. 3/2/15).

Petitioner filed a pro-se 2255 motion, which was denied without a hearing. ***Okafor v. United States***, 2017 U.S. Dist. Lexis 207229 (EDNC, WD, Howard, J.). Thereafter, the Fourth Circuit denied his application for Certificate of Appealability ("COA"). CTA4 No. 18-6012. 717 Fed. Appx. 352.

Finally, in the wake of the First Step Act of 2018, Pub. Law No. 115-391, Section 403, 924(c), 132 Stat. 5194, 5221-22 (2018). The Act describes itself as a clarification of existing law. However, it also states that changes to 924(c) "apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Sec. 403(b), 132 Stat. 5222. The statute is internally inconsistent since clarifications are applied retroactively but the statute also has words that suggest the clarifications apply prospectively. In addition, the clarification makes it plain that Congress explicitly overruled ***Deal v. United States***, 508 U.S. 129, 113 S.Ct. 44 (1993) where the Court interpreted the statute to permit stacking of penalties even if the prior convictions were not final. This is not a situation where Congress repealed the statute. To the contrary, Congress never meant to impose this type of penalty in the first place.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This is a case of exceptional public importance because it involves the first interpretation of contradictory language in the First Step Act of 2018. and the Court's decision will apply to hundreds and possibly thousands of criminal cases nationwide. Second, the 3,167 month

sentence imposed on a first offender is disproportionate to the nature of the crimes and the characteristics of the offender.

SECTION 403(a) OF THE FIRST STEP ACT IS RETROACTIVE AS A RESULT OF THE DESCRIPTION OF THE AMENDMENT AS A CLARIFICATION

Deal v. United States, 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) interpreted 18 U.S.C. 924(c)(the "statute") to require enhanced consecutive sentences for offenders charged in the same indictment with multiple violations of the statute. For example, Deal was convicted of six counts of bank robbery and six counts of using a firearm during and in connection with a crime of violence. The district court sentenced him to five years for the first violation of 924(c) and a consecutive 20 years on each of the five other counts. The Fifth Circuit affirmed. The Supreme Court held that Deal's second through sixth convictions in a single proceeding arose "in the case of his second or subsequent conviction" within the meaning of 924(c)(1).

The First Step Act of 2018, Pub. Law No. 115-391, 132 Stat. 5194, 5222 (2018)("First Step Act" or the "Act") was specifically designated as a clarification of the meaning of 924(c) legislatively overruling the Supreme Court's decision in the ***Deal*** case.

The clarification is automatically retroactive because it is a specific rejection of the interpretation of a statute authorizing a huge jump in punishment that was never intended by Congress. The clarification of Congressional intent should result in a correction of the astronomical and irrational sentences arising from the ***Deal*** decision, as it does it other contexts.

For example, in ***Brown v. Thompson***, 374 F3d 253 (4th Cir. 2004), and ***BBT v. Construction Supervising Co.***, 753 F3d 124 (4th Cir. 2014), the Court held that clarifying amendments are retroactive. In ***United States v. Marmolejos***, 140 F3d 488 (3d. Cir. 1998), the Court held that guideline clarifications are retroactive.

Constitutional challenges to penal statutes as cruel and unusual punishment are either categorical or case specific. Here, the challenge is both categorical and case specific. Categorical because the word "clarification" usually means the prior interpretation was wrong and needs corrections. Case specific challenges are based on the lack of proportionality of the sentence. Here, the punishment is disproportionate to the crimes and the offender. In this case, the Petitioner is a first offender. The offenses are non-violent. The sentences are disproportionate to sentences imposed on low level drug offenders committing similar state crimes. ***Solem v. Helm***,463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

POWER TO RECALL MANDATE

The Fourth Circuit had and has the inherent power to recall the mandate especially when done to avoid a miscarriage of justice. ***Calderon v. Thompson***, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). The instant case involves a miscarriage of justice.

In the case at hand, the Fair Step Act's clarifying amendment in Section 403(a) supports a claim of actual innocence of the sentence. ***Spence v. Superintendent***, 219 F3d 162, 171 (2d Cir. 2000), ***United States v. Maybeck***, 23 F3d 888, 892-893 ((4th Cir. 1994).

Clarifications to penal statutes and guidelines are retroactive provided they legislatively overrule a prior erroneous interpretation of the statute. ***United States v. Goines***, 357 F3d 469, 474 (4th Cir. 2004). Ordinarily, clarifying amendments apply retroactively to the date of enactment of the statute. Accordingly, Petitioner is entitled to have the sentence vacated, and corrected to reflect the original intent of the Congress.

Finally, the imposition of a sentence of 3,167 months in prison is a fundamental defect resulting in a miscarriage of justice because it disproportionate to the nature of the characteristics of the offender.

WHEREFORE, Petitioner respectfully requests this Honorable Court to grant the writ, and then vacate and remand the Fourth Circuit's order denying the motion to recall the mandate.

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FILED: May 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4324
(5:12-cr-00059-H-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FELIX A. OKAFOR

Defendant - Appellant

ORDER

This case was decided by unpublished per curiam opinion on March 2, 2015, and the mandate issued on May 5, 2015.

Upon consideration of appellant's motion to recall the mandate, the court denies the motion.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 5, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4324
(5:12-cr-00059-H-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FELIX A. OKAFOR

Defendant - Appellant

MANDATE

The judgment of this court, entered March 2, 2015, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4324

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FELIX A. OKAFOR,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:12-cr-00059-H-1)

Submitted: February 24, 2015 Decided: March 2, 2015

Before WILKINSON, NIEMEYER, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert H. Hale, Jr., ROBERT H. HALE, JR. & ASSOCIATES, Raleigh, North Carolina, for Appellant. Thomas G. Walker, United States Attorney, Jennifer P. May-Parker, Yvonne V. Watford-McKinney, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A twenty-five count superseding indictment charged Felix A. Okafor with various drug and firearm offenses. A jury convicted Okafor on all counts, including eleven counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (2012). The district court imposed a sixty-month mandatory minimum sentence on the first § 924(c) conviction and 300-month consecutive mandatory minimum sentences on each of the other ten § 924(c) convictions. On appeal, Okafor argues that his § 924(c) convictions should be reversed because the district court erred when it admitted expert testimony by a detective and when it permitted the detective to bolster the credibility of a confidential informant ("CI") before Okafor challenged the CI's credibility. Okafor further contends that the stacking of eleven mandatory minimum sentences constitutes cruel and unusual punishment under the Eighth Amendment.[1] Finding no reversible error, we affirm.

[1] Okafor has filed a motion for leave to file a pro se supplemental brief, along with that brief. Because Okafor is represented by counsel who has filed a merits brief, Okafor is not entitled to file a pro se supplemental brief, and we therefore deny his motion. See United States v. Penniegraft, 641 F.3d 566, 569 n.1 (4th Cir. 2011) (denying motion to file pro se supplemental brief because defendant was represented by counsel).

I.

Because Okafor did not object to the detective's expert testimony or to the testimony that allegedly bolstered the CI's credibility, we review these evidentiary claims for plain error. United States v. Perkins, 470 F.3d 150, 155 (4th Cir. 2006). Under the plain error standard, Okafor must demonstrate that (1) there was an error; (2) that was plain; and (3) that affected his substantial rights. United States v. Olano, 507 U.S. 725, 732 (1993). Furthermore, even if Okafor shows that the district court plainly erred, we will not exercise our discretion to correct the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at 732, 735-36 (internal quotation marks and brackets omitted); see also Fed. R. Crim. P. 52(b).

Where the Government presents "overwhelming evidence" of a defendant's guilt independent of the challenged evidence, an alleged error does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," and reversing the defendant's conviction(s) "would do far more to damage the public's perception of judicial proceedings than leaving the conviction in place." United States v. Williamson, 706 F.3d 405, 413 (4th Cir. 2013). This court has "frequently disposed of a plain error issue by analyzing either the third or

fourth prong of Olano after assuming, without deciding, that there was an error and that it was plain." United States v. Jackson, 327 F.3d 273, 304 (4th Cir. 2003). We follow that well-trodden path here.

A defendant's possession of a firearm during a drug transaction constitutes a violation of 18 U.S.C. § 924(c) where possession of a firearm serves to protect the defendant against the theft of drugs and profits from the drug transaction or to enhance the collection of his profits. United States v. Pineda, 770 F.3d 313, 317 (4th Cir. 2014). Here, the Government presented overwhelming video evidence demonstrating that Okafor possessed a firearm during the drug transactions. During each of the transactions, the videos show a white towel hanging out of Okafor's right pants pocket, usually with the butt end of the handgun sticking out of the towel or the outline of the firearm pushing against Okafor's pants pocket. Furthermore, Okafor told the CI that the object wrapped in the white towel was a firearm, and one of the videos shows Okafor removing the firearm and displaying it to the CI. Finally, a search of Okafor's person resulted in the recovery of a Glock Model 22, .40 caliber pistol from his right front pants pocket.

Accordingly, the video evidence overwhelmingly demonstrates that Okafor possessed a firearm during the drug transactions and

that his possession of the firearm was in furtherance of the transactions. Okafor has not established that any error in admitting the detective's testimony affected his substantial rights or seriously affected the fairness or reputation of judicial proceedings.

II.

We review challenges to sentences on Eighth Amendment grounds de novo. United States v. Malloy, 568 F.3d 166, 180 (4th Cir. 2009). Where a defendant commits multiple violations of 18 U.S.C. § 924(c), the mandatory minimum sentence for each violation stacks and the sentences must be served consecutively. United States v. Khan, 461 F.3d 477, 494-95 (4th Cir. 2006). "'Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history.'" Id. at 495 (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)). Accordingly, while the stacking of mandatory minimum sentences under § 924(c) produced a "lengthy" sentence, it "do[es] not constitute cruel and unusual punishment pursuant to the Eighth Amendment." Id.

III.

Accordingly, we affirm Okafor's convictions and sentence. We deny Okafor's motion for leave to file a pro se supplemental

brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED