19-5911

ORIGINAL

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL R. BUTTS
Petitioner,

vs.

ERIC D. WILSON, FMC FORT WORTH
Respondent.

PETITION FOR CERTIORARI

FROM THE FIFTH CIRCUIT COURT OF APPEALS

Paul R. Butts, pro se
84674-008
Federal Medical Center
P.O. Box 15330
Fort Worth, TX 76119

QUESTIONS PRESENTED FOR REVIEW

I. Does the "saving clause" of 28 U.S.C. §2255 provide an avenue of judicial review for a federal prisoner to claim his actual innocence due to a "Congressional" interpretation of the statute of which he was convicted under prior to Congress' statements of intent? In other words, does the Court still "consider it uncontroversial...that the priviledge of habeas corpus entitles the prisoners to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of the relevant law [?]" Boumedience v. Bush, 553 U.S. 723, 779 (2008) (inter quote omitted).

II. May a federal prisoner rely on a Congressional decision of statutory interpretation which was previously unavailable or unknown at the time of or before his initial §2255, to file under the "saving clause"?

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CITATIONS OF OPINIONS AND ORDERS

The decision of the United States District Court for the Northern District of Texas, Fort Worth Division, of Petitioner's §2241 is attached as Exhibit A.

The opinion of the Court of Appeals from the Fifth Circuit is attached as Exhibit B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on June 6, 2019. Request for en banc was denied on July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF ADOPTION

Petitioner hereby adopts the arguments contained within his petitions filed in the Court of Appeals, which are attached herein.

STATEMENT OF THE CASE

In May 2017 Petitioner filed a successive §2255, claiming the erroneous application or interpretation of "in interstate" within §2252A, pre 2008 amendment, the statute of which he was indicted and convicted. That Congress had defined and interpreted the statute, after Petitioner's conviction, as expressed in United States v. Wright, 625 F.3d 583 (9th Cir. 2010). The Circuit Court declined to reach the merits of the claims and directed Petitioner to file them under section 2241. See Exhibit C.

Petitioner filed a §2241, raising the same claims. The district court dismissed the petition for "lack of jurisdiction", because it "did not rely on a retroactively applicable Supreme Court decision" and it failed to show that the claims were previously foreclosed. (citing Garland v. Roy, 615 F.3d 391 (5th Cir. 2010)

A timely appeal was filed. Petitioner argued that his claims relied upon an intervening Congressional interpretation of the law, which should be considered "equivalent to" a Supreme Court's. And that, Petitioner had no meaningful opportunity to raise the issues earlier, through no fault of his own. See Exhibits D & E . The Court denied the appeal. A request for En Bank review was filed. see Exhibit F. The Panel denied the request.

Petitioner now timely files for Writ for Certiorari.

ARGUMENT

I. Does the "saving clause" of 28 U.S.C. §2255 provide an avenue of judicial review for a federal prisoner to claim his actual innocence based on an intervening "Congressional" interpretation of an earlier statute?

A. What Has The Supreme Court or Congress Said

"To date, the Supreme Court has not provided much guidance as to the factors that must be satisfied for a [federal] prisoner to file under habeas corpus provisions such as §2241." Reye-Requena v. United States, 243 F.3d 893 (5th Cir. 2001)." [I]t is no wonder that federal courts have struggled to reach a uniform understanding. Recognizing that the meaning of §2255(e) is not easy of solution." McCarthan v. Dir. of Goodwill, 851 F.3d 1076 (11th Cir. 2017) (quotation omitted).

Petitioner filed his §2241 within the Fifth Circuit, which holds, that a petition must raise (1) a claim "that is based on a retroactively applicable Supreme Court decision"; (2) was "foreclosed by circuit law"; and (3) "the Supreme Court decision establishes the petitioner may have been convicted of a nonexistent offense." Garland, 615 F.3d at 394.

The courts wrongly concluded that Petitioner was relying on United States v. Wright, 625 F.3d 585 (9th Cir. 2010) to make his

claim. However, Petioner only pointed to the Wright case to establish the trial court's erroneous application or interpretation of the statute of which he was convicted. Petitioner argued that, he is relying on an intervening "Congressional interpretation" of the statute, which should be held "equivalent" to a Supreme Court's. see Exhibits: D,E, & F.

There is "an entrench split among the court of appeals regarding the extent to which a change of statutory interpretation permits a federal prisoner to resort to §2241 for additional round of collateral review." Bruce V. Warden, Lewisburg, 863 F.3d 170 (3rd Cir. 2016). "And so they will remain, at least until Congress or the Supreme Court speaks on the matter." Id.

The Third, Fifth, and Eleventh Circuits require a federal prisoner to rely on a "Supreme Court decision" interpreting a statute to file under §2241. see In re Dorsaivil, 119 F.3d 245 (3rd Cir. 1997); Garland, 615 F3d at 394; and Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999). However, other circuits do not tie the §2241 to a "Supreme Court decision". see Dhimsa v. Krueger, 917 F3d 70(2nd Cir. 2019) ("on intervening change in the governing interpretation of the statute of conviction.")(emphasis added); In re Jones, 226 F3d 328 (4th Cir. 2000) ("substantive law change such that the conduct of which the prisoner was convicted is deemed not to be criminal"); Hill v. Master, 836 F.3d 591 (6th Cir. 2016) ("a case of statutory interpretation"); and David v. Cross, 863 F.3d 962 (7th Cir. 2017) (same).

This Court has stated, "We do consider it uncontroversial, however, 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." Boumediene, 553 U.S. 779 (inter quote omitted). But the Court did not state on whose determination the prisoner must rely on to show the error.

B. What About Congressional Legislation

In this case, Petitioner has argued that his claims are applicable under §2241, due to his actual innocence as established by the intervening Congressional interpreatation of the statute of which he had been indicted and convicted. see Exhibits: D. at p. 4-5; E. at p.5-6; and F. at p.4. Congress had clearly and directly stated the statute's intent of "in interstate" of §2252A, within the Statements of Purpose for the 2008 amendment.

This Court has held, that "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81 (1969). "It is for Congress, not this Court to amend the statute if it believes that [the statutory language leads to undesirable consequences]." Dodd v. United States, 545 U.S. 353, 359-60 (2005)." "[I]t is up to Congress rather than Courts to fix it." Exxon Mobil Corp. v. Allapattah Serv., Inc., 545 U.S. 546, 565 (2005).

The strongest evidence of Congress' intent lies in the Report on the bill, which "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Garcia v. United States, 469 U.S. 70, 76 (1984). Here, the Report interprets the statute's earlier use of "in interstate" as it was at the time of Petitioner's alleged conduct, and the changes:

Under "III. SECTION-BY-SECTION SUMMARY OF THE BILL", the Senate Report's §7 states:

(i) "This section modifies the jurisdiction predicates for Federal Law":

(ii) "Currently those proscriptions apply only if the activity occurs 'in interstate...commerce'," and this section "expands this predicate to include activities occurring 'in or affecting interstate or foreign commerce'," as well as "using a means or facility of interstate commerce"; and

(iii) In United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007), the defendant "would have been within the statute if [this language] had been added to the statute." S. Rep. (110-332, 2008, WL 188570 (4/28/2008) (emphasis added).

The House Statements made:

(i.) Rep. Boyda, "author of the bill": The Schaefer Court "asked congress to clarify its intent" of the statute's use of "interstate commerce, and we will do that with the passage of [this bill]." (153 Cong. Rec. H13591-92, 2007, WL3355186 (11/13/2007) (emphasis added);

(ii.) Rep. Conyers: "Had the statute instead used the phrase 'in or affecting interstate commerce', "the Schaefer Court would have upheld the conviction, so this bill "makes clear... Congress 'intends' [present tense] to use its full commerce clause authority.", which means "conduct that may appear to be wholly localized." Id. (emphasis added):

(iii.) Rep. Goodlatte: This "legislative fix will allow the government to satisfy the interstate requirement by proving ...the material moved in or affecting interstate...commerce, would expand the jurisdiction..." Id. (emphasis added);

(iv.) Rep. Biggert, "lead Republican cosponsor": As Sheafer "pointed out" the "use of 'in commerce' instead of 'affecting commerce'" "signaled Congress' intent to limit Federal jurisdiction," so this bill "will close an unacceptable loophole in the Federal Criminal Code", "in current law" and "clarifies the intent of Congress". Id. (emphasis added).

Clearly, Congress expressed a more narrow interpretation of the earlier statute's use of "in interstate commerce". "Congressional legislation that thus express the intent of an earlier statute must be accorded great weight." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102,118 n.13 (1980). Courts have excepted this fact and have held they are "governed by the pre-amended statute" as interpreted by Congress. United States v. Swenson, 335 F. Appx. 751 (10th Cir. 2009). see also Wright, 625 F.3d at 600-01; United States v. Lewis, 554 F.3d 208 (1st Cir. 2009). Lewis, Swenson,Wright and others had their cases vacated on direct appeal based on the Congressional interpretation of the earlier statute.

Petitioner was indicted in October 2005, held pre-trial, took his case to trial and was convicted in February 2008, before the enactment of the amendment in October2008. "This case is governed by the statute as written at the time of [his] conduct." Lewis, 554 F.3d at 218. There is no question as to Petitioner's actual innocence of the statute, as it stood at the time of his alleged conduct, according to Congress.

Respondent in this case, has not provided any evidence, not one line from any transcripts or otherwise which establishes Petitioner caused any movement "in interstate commerce", as interpreted by Congress. Respondent only tries to put such proof on Petitioner. see Appellee Br. p.3 n.1 ("Without citing any record evidence...") Petitioner has claimed that, the government did not prove, claim, or even suggest that he caused any "in inter-

state" movement. Obviously, Petitioner cannot point to something that is not there. It was the Respondent who was ordered to "Show Cause" by "present[ing] any admissable evidence of petitioner's guilt." Bously v. United States, 523 U.S. 614, 623 (1998).

C. Is Congress Authoritative For Purpose of §2241

"Congress [and some courts] seem[] to have lost sight of the fact that federal convicts more often can raise federal statutory claims in their collateral attacks - notably in case in which the federal criminal statute under which a prisoner was convicted has since been authoritatively interpreted more narrow." Richard H. Fallon, Jr., John F. Manning, Danial J. Meltzer, & David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 1362 (7th ed. 2015) (emphasis added).

Congressional legislation is authoritative. After all; one of the fundamental principles of our democracy is that "within our constitutional framework the legislative power, including the power to define criminal offenses...resides wholly with Congress." Whalen v. United States, 445 U.S. 684, 689 (1980) (citing United States v. Wiltberger, 18 U.S. 76, 95 (1920); United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812)).

It was the Tenth Circuit which "asked Congress to clarify its intent", that is to define its meaning, of "in interstate" within the statute at issue. Rep. Boyda, at H13591. It "signaled Congress' intent to limit Federal jurisdiction", which narrowed the scope of

which courts had. Rep. Biggert, at H13592. see Exhibit E at p.3. Congressional amendments can "constitute 'intervening' authority" if it "clarifie[s] the meaning of the statute at issue[.]" Landreth v. Comm'r, 859 F.2d 643 (9th Cir. 1988). If the intent of Congress is clear, that is the end of the matter; courts "must give effect to the unambiguously express intent of Congress." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 462 U.S. 837, 104 (1984). "For under our federal system it is only Congress, and not the courts, which can make conduct criminal." Bousley, 523 U.S. at 620-21.

As shown, Congress' interpretation of the earlier statute did narrow the scope of terms, and therefore is substantive and applies retroactively. Bousley, 523 U.S. at 624. see Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004) ("New substative rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms..."); Welch v. United States, 136 S. Ct. 1257 (2016) ("Treating decisions as substantive if they involve statutory interpretation").

The Fifth Circuit erred in not allowing a "governing" and "authoritative" intervening Congressional decision interpreting the earlier statute, which narrow the scope of the terms, to be applicable for Petitioner to seek review under §2241. The Fifth Circuit has <u>restricted</u> §2241 <u>only</u> for review, if it is based on a "Supreme Court decision". see Garland, 615 F.3d at 394. The habeas corpus is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." Jones v. Cunning-

ham, 371 U.S. 236, 242 (1963); Boumediene, 553 U.S. at 774 ("most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoner's claim.")

Petitioner argues that, Congress did interpret the earlier statute more narrowly, such that the conduct of which he was convicted is deemed not to be criminal. Thus, he must be allowed to utilize the "saving clause" of §2255 for relief. To allow a federal prisoner to rely on an intervening Congressional decision to interpret an earlier statute as bases to file under the provisions of §2241, would do no harm to the structure of the "saving clause".

"[A] thorny constitutional issue" will result if "no other avenue of judicial review [is] available" to Petitioner "who claims that [he] is factually...innocent as a result of a previously unavailable statutory interpretation[.]" Dorsainvil, 119 F.3d at 251. see Triestman v. United States, 124 F.3d 361 (2nd Cir. 1997) (addressing violations of the Suspension Clause, Fifth and Eighth Amendments if Petitioner is denied the right of habeas corpus under §2241).

II. May a federal prisoner rely on a Congressional decision of statutory interpretation which was previously unavailable or unknown at the time of or before initial §2255, to file under the "saving clause"?

Although the Court of Appeals only denied Petitioner's §2241

because he did not rely on a Supreme Court decision, Exhibit B at p. 2, the district court did note that he failed to show the claim was foreclosed by circuit case law. Therefore, Petitioner will address the issue here.

A. Unavailable At Trial and Appeal

The circuit case law was well established at and prior to Petitioner's direct appeal. That is, the "in interstate commerce" did not require actual crossing of state lines. see e.g. United States v. Nader, 542 F.3d 713 (9th Cir. 2008) ("Congress did not intend to require actual interstate activitiy by using the phrase 'in interstate commerce'."); United States v. McCalla, 545 F.3d 750 (9th Cir. 2008) ("Regulation of intrastate...is a valid exercise of Congress's authority under the commerce clause"); United States v. Sutcliffe, 505 F.3d 944 (9th Cir. 2007); and United States v. Mohrbacher, 182 F.3d 1041 (9th Cir. 1999).

Petitioner's attorney, Philip Hantel, did not raise the "in interstate" issue, not even in direct appeal. It must be presumed he believed it to be futile under the then established circuit case law. A heavy measure of deference is given to counsel's judgments. see Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (The Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."); Murray v. Carrier, 477 U.S. 478, 488 (1986) ("a showing that the...legal basis for a claim was not reasonable available to counsel...would constitute cause under this standard.").

B. Unknown and Unavailable Until After Initial §2255

Petitioner has clearly established his unavailability to the relevant case law and lack of knowledge of the facts and issues raised in his §2241, at the time he filed his pro se §2255. see Exhibit F at p. 3-4. The Court of Appeals did not raise this as a ground for denial. However, Petitioner will briefly show:

1. Congressional statements (reports) of bills are not made available to inmates within the Bureau of Prisons (BOP). Thereby, Petitioner, acting pro se, could not have had knowledge of Congress's clear intent for the earlier statute's use of "in interstate", until it would be cited in court decisions, such as in United States v. Wright, 625 F.3d 583 (9th Cir. 2010). "[H]abeas courts in this country routinely allow[] prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to prisoners." Boumediene, 553 U.S. at 781.

2. In early 2009 the BOP stopped updating the printed law books for inmates, due to a new computer based system to be installed. This new system was not installed at FCC Beaumont TX low, where Petitioner was housed at the time, until November 2012. Making all court decisions from 2009-2012 unavailable. i.e. Lewis, Swenson, Wright and others.

3. Petitioner's initial pro se §2255 was filed in November 2010. That's two years before the new computer law system was installed, making all court decisions from early 2009-2012 unavailable.

A petitioner "is allowed to present reasonable available evidence, but his ability to...is limited by the circumstances of his confinement and his lack of counsel at this stage." Id. at 776.

Clearly, Petitioner did not have access to the Congressional statements or relevant case law, which were argued within his §2241, at the time of his initial §2255. Petitioner has shown this unavailability. see DE 1, Exhibits: E at p.4 and F at p. 3-4. He simply "could not have effectively raised his claim of innocence at an earlier time." Cephos v. Nash, 328 F.3d 98 (2nd Cir. 2003) (quoting Triestman, 124 F.3d at 363)). The Respondent has not denied or argued these facts.

Certainly, if Petitioner would have known of Congress' interpretation of "in interstate", he would have raised the issue within his initial §2255. He would not have wanted to spend an additional 9 years incarcerated.

Petitioner can not raise the statutory claim in a second or successive §2255, as "Congress had determined that second or successive §2255 motions may not contain statutory claims." Lorensten v. Hood, 223 F.3d 950 (9th Cir. 2003); Sustache-Rivera v. United States, 221 F.3d 8 (1st Cir. 2001) ("The saving clause has to be restored to for statutory claims because Congress restricted second or successive petitions to constitutional claims.") (inter citations omitted). The reason why the Ninth Circuit declined to reach the merits of

Petitioner's §2255 and directed him to file the claims under §2241. see Exhibit C. Whether §2255 is inadequate or ineffective depends on "whether it allows the petitioner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015) (en banc).

There is no question that the Congressional decision to interpret the statute was unavailable or unknown to Petitioner at the time of his initial §2255, which allows him to utilize the "saving clause" of §2255.

Again, the Fifth Circuit did not deny Petitioner's appeal on these grounds. Therefore the Court accepted his arguments that the circuit case law was foreclosed and the issue was unavailable or unknown to him at the time he filed his initial §2255. The Court only found Petitioner did not rely on "Supreme Court decision", as argued above.

CONCLUSION

It is clear that, Congress did interpret its prior meaning of "in interstate" of §2252A, within the statements of purpose for the amendments to the statute. Petitioner argues that such an intervening Congressional decision to interpret the earlier statute more narrowly is "authoritative", "governing" and is "equivalent" to a Supreme Court decision, such that it must permit a federal prisoner to resort to a §2241 for relief.

"New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms[.]" Schriro, 542 U.S. at 352. Courts have allowed the Congressional decision to apply retroactively to cases on direct appeal. see i.e. Lewis (1st Cir.), Swenson (10th Cir.), and Wright (9th Cir. 2010). It does not follow that courts would permit review in some cases, but deny collateral review to an actually innocent person who could not have effectively raised his innocence earlier, would pass constitutional muster on both due process and equal protection grounds. Triestman, 124 F.3d at 380 n.22.

It "may violate the Eighth Amendment to imprison someone who is actually innocent[.]" Herrera v. Collins, 506 U.S. 390, 432 (1993) (Blackmon, J., dissenting).

WHEREFORE, Petitioner respectfully requests for this Honorable Supreme Court to confirm that an intervening "Congressional" decision to interpret an earlier statute, which narrowed the scope of its terms, is governing and authoritative for the purpose of allowing a federal prisoner to resort to a §2241 for relief. Further, to order Petitioner's immediate release based upon his actual innocence as established.

Respectfully Submitted,

Paul R. Butts, pro se
84674-008
Federal Medical Center
P.O. Box 15330
Fort Worth, TX 76119

I, Paul R. Butts, declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is true and correct. Executed on this 4 day of September, 2019.

Paul R. Butts

CERTIFICATE OF SERVICE

I, Paul R. Butts, certify that one true copy of the foregoing was mailed to the attorney of record for Respondent on this 4 day of September 2019, addressed as follows:

Brian W. Stoltz
Assistant U.S. Attorney
1100 Commerce Street
Third Floor
Dallas, TX 75212-1699

Paul R. Butts