

No. 19-5928

IN the
Supreme Court of the United States

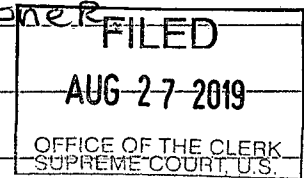
ORIGINAL

Marcos F. Santiago,

Petitioner

v.

United States of America,
Respondent



ON PETITION FOR WRIT OF CERTIORARI
To the Third Circuit United States
Court of Appeals

Petition For Writ of Certiorari

Marcos F. Santiago
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Thomson, IL 61285

Questions Presented

1. Whether Congress' decision to not make its recent "clarification of 924(c)" Fully Retroactive, creates a Significant Risk that thousands of Prisoners stand convicted and punished for "an act that the law does not make criminal," *Davis v. United States*, 417 U.S. 333, 346 (1974). (See Section 403(a) of the First Step Act of 2018)
2. IF the answer to question one is yes, whether Petitioner must be resentenced without application of 924(c)(1)(C)(i)'s 2.5-year enhancement since he did not violate 924(c)(1)(C)(i) by committing a second 924(c) offense after a conviction for a first 924(c) offense had been made final. (See Section 403(a) of the First Step Act of 2018).

List of Parties

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

Related Cases

There are no related cases

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STATUTES

Section 403(a) of The First Step

Act of 2018 (4)

18 U.S.C. § 924(c) (8)

1 U.S.C. § 109 (7)

Opinions Below

The opinion of The United States Court of Appeals is unpublished

The opinion of The United States District Court is unpublished

Jurisdiction

The date on which The United States Court of Appeals decided my case was August 1, 2019.

No Petition for rehearing was filed in my case.

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

Constitutional and Statutory provisions
Involved

Section 403(a) of The First Step
Act of 2018

Article 1 of the United States
Constitution

Fifth Amendment Due Process
Rights

Statement of the Case

In 2003 Petitioner was indicted for one count of conspiracy to affect interstate commerce by robbery (18 U.S.C. § 1951(a)); Three counts of affecting interstate commerce by robbery (18 U.S.C. § 1951(a)); Three counts of possessing a Firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)); one count of carjacking (18 U.S.C. § 2119); and two counts of being a Felon in possession of a Firearm (18 U.S.C. § 922(g)(1)).

A Jury Found Petitioner guilty of all the above counts except the carjacking count and one count of possessing a Firearm in furtherance of a crime of violence. Petitioner's District Judge dismissed the conspiracy count sua sponte, and on February 9, 2005 sentenced Petitioner to 33½ years of imprisonment —

30 years of which stemmed from the two 924(c) counts alone (5 years for the first, and 25 years for the second, 924(c)).

Petitioner's appeal was denied in 2007, and in 2008 Petitioner's 2255 motion was denied by the District Court.

On December 21, 2018, President Trump signed into law the First Step Act, which, among other things, clarified that the 25-year enhancement of 18 U.S.C. § 924(c)(1)(C)(i) is meant only for those who committed a second 924(c) offense after a conviction for a first 924(c) offense had been made final. Because Petitioner is actually innocent of 924(c)(1)(C)(i), he never should have received its 25-year enhancement, and humbly asks this Honorable Court to remand his case back to the District Court so that he may be resentenced without application of this enhancement.

Reasons For Granting The writ

In 1993 the Supreme Court interpreted a Subsection of 18 USC. § 924(c) in a way that resulted in inmates receiving extremely long and grossly disproportionate sentences. See Deal v. United States, 508 U.S. 129 (1993).

The Subsection in question, i.e., § 924(c)(1)(C)(i), provided a 25-year enhancement for the defendant who committed a second 924(c) offense, but did not make it clear if said enhancement was meant for the defendant who committed a second 924(c) offense after a conviction for a first 924(c) offense was made final; or meant for the defendant who was charged with multiple counts of 924(c) in the same indictment. The Supreme Court in Deal, *supra*, adopted the latter interpretation, although this interpretation later proved to be erroneous, as indicated by Congress'

Recent passage of Section 403(a) of The First Step Act of 2018, which clarified that the former interpretation was actually the correct one.

Congress stated, however, that its clarification of 924(c) is not retroactive to defendants sentenced before December 21, 2018 — which means that thousands of inmates who were caught in the crossfire between Congress' failure to draft a law clearly, and the Supreme Court's incorrect interpretation of that ambiguous law, will have to remain in prison although many of them — including Petitioner — have already completed the sentences they should have received and would have received were it not for the above-mentioned errors on the part of the legislative and judicial branches.

This Supreme Court's precedents

and the United States Constitution demand that such sentences be corrected without further delay, as Petitioner will demonstrate more fully in the following argument.

Argument

A. Section 403(a) of the First Step Act of 2018 is a Clarification of law, not a mere change or repeal of law, and thus does not trigger 1 U.S.C. § 109's bar to retroactive application.

Because section 403(a) of the First Step Act of 2018 (FSA) is a clarification rather than merely a repeal of law, the Federal Saving Statute (1 U.S.C. § 109) is ~~not~~ triggered by it and thus does not preclude it from being made fully

Retroactive. In Dorsey v. United States, 567 U.S. 260, 272 (2012), For example, this Honorable Court wrote in relevant part that: "Case law makes clear that the word 'Repeal' [in 1 USC § 109] applies when a new statute simply diminishes the penalty that the older statute set forth." at 272.

Section 403(a) of the FSA did not "Repeal", "diminish[]", or "Reduce" the 25-year enhancement of 18 U.S.C. § 924(c)(1)(C)(i). It only clarified to whom it must be applied.

And because clarifications of laws create a significant risk that a defendant stands convicted and punished for an act that the law does not make criminal, such clarifications are always made fully retroactive by the Judicial Branch. What the Seventh Circuit said in Brown v. Caraway, 719 F3d 583, 594 (7th Cir. 2013) applies with equal force to defendants such as Petitioner, who received but never should have

Received 924 C(1)(Ck)'s 25-year enhancement - that is:

"We may dispense with the purported narrow dispute between the parties by Finding that Begay [v. United States, 553 U.S. 137 (2008)] provided a "post conviction clarification in the law" that has "rendered the Sentencing Court's decision unlawful"... It is sufficient, for present purposes, that "it is now clear that [Brown]... never should have been classified as a career offender and never should have been subjected to the enhancement... reserved for such repetitive and violent offenders."

B. Supreme Court precedent requires Section 403(a) of The First Step Act of 2018 to be made Fully retroactive

In INS v. St. Cyr, 533 U.S. 289,

302, 121 S.Ct. 2271, 150 LEd 2d 347 (2001), this Honorable Court stated in relevant part:

"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." (emphasis added)

In 1993 this Honorable Court erroneously applied and interpreted a subsection of 924(c) that gave defendants a 25-year enhancement for a second or subsequent 924(c) offense. See Deal v. United States, 508 U.S. 129 (1993). Specifically, in Deal this Court held that 924(c)'s 25-year enhancement is not meant solely for the recidivist who failed to learn his or her lesson, but can be applied to those who are charged with multiple counts of 924(c) in the same

indictment. Though the dissenting judges in Deal argued that the enhancement was meant only for the recidivist, their numbers weren't enough to prevail. But it is now clear, as indicated by Congress' recent "Clarification of 924(c)", see Section 403(a) of the FSA, that the dissenting Justices in Deal were right all along — the 25-year enhancement of 924(c)(1)(C)(i) is meant only for those who failed to learn their lesson, that is, those who committed a second 924(c) offense after a conviction for a first 924(c) offense had been made final.

And because a clarification of the law is an explanation of what the law meant, not only as far back as the date of a defendant's sentencing hearing, but even as far back as the date of the law's enactment, it is clear that the 25-year enhancement that Petitioner's Judge

imposed on him is unlawful.

In Bailey v. United, 516 U.S. 137 (1995), the Supreme Court clarified the meaning of the term "use" in 924(c), holding that it requires the government to show "active employment of the firearm," at 144. And because this decision "necessarily carr[ie]d] a significant risk that a defendant st[ood] convicted of 'an act that the law does not make criminal,'" Davis v. United States, 417 U.S. 333, 346 (1974), this Honorable Court made it retroactive in Bousely v. United States, 523 U.S. 614, 620 (1998). In Bousely, supra, the late Honorable Justice Stevens wrote in relevant part:

"This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. Teague v. Lane, 489 U.S. 288, (1989), because our decision in Bailey... did not change the law. It merely explained [or

clarified] what § 924(c) had meant ever since the statute was enacted "at 625.

And further on Justice Stevens stated:

"Petitioner's conviction and punishment on the 924(c) charge 'are for an act the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of Justice' and presents exceptional circumstances' that justify collateral relief. "at 626

(In Petitioner's case it's his conviction and punishment, not on the 924(c) charge, but on the 924(c)(1)(C)(i) charge, that "are for an act the law does not make criminal," since he never committed a second 924(c) offense after a conviction for a first 924(c) offense had been made final.)

A clarification of the law is a

clarification of the law, regardless of whether it is the Supreme Court that clarifies an element of a law that the appellate courts misinterpreted (as in Bailey, supra); or the Congress that clarifies an element of a law that the Supreme Court itself misinterpreted (as it did in Deal, supra). Both Congress and Supreme Court clarifications of law "carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal," Davis, supra, at 346, so both should be made fully retroactive.

In Petitioner's case, for example, he is being punished with a 25-year enhancement for something he did not even do - i.e., commit a second 924(c) offense after conviction for a first 924(c) offense had been made final.

And it makes no difference that the state of the law at the time of Petitioner's sentencing hearing allowed

his Judge to impose a 25-year enhancement on him, because (1) that law was grossly misunderstood and misinterpreted, see United States v. Tucker, 404 U.S. 443, 92 Sct. 589, 30 L ed 2d 592 (1972) ("[w]e deal here, not with a sentence imposed in the informed discretion of a trial Judge, but with a sentence founded . . . upon misinformation of constitutional magnitude," at 447); and (2), as the late Honorable Justice Stevens pointed out in Bousely, Supra, a clarification of the law is an explanation of what that law "had meant ever since [it] was enacted . . .," at 625. Clearly, then, Petitioner never should have received a 25-year enhancement and thus is entitled to full retroactive application of Section 403(a) of the FSA of 2018.

In United States v. Wheeler, 886 F3d 415, 430 (4th Cir. 2018), the court stated that when a defendant "never should have been subject to an

increase in the first place, the error is grave. " (emphasis added). The Wheeler court further maintained that "[a]n increase in the congressionally mandated sentencing floor implicates separation of powers principles and due process rights fundamental to our justice system. In the federal system, 'defining crimes and fixing penalties are legislative, not judicial functions.'" United States v. Evans, 333 U.S. 483, 486, 68 Sct. 634, 92 LEd. 823 (1948). Congress alone can set maximum and minimum terms of imprisonment, see id. 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 "trench[] particularly harshly on individual liberty." Whalen v. United States, 445 U.S. 684, 689-690... (1980).

Because Congress did not authorize Petitioner's Sentencing Judge to impose a 25-year enhancement on him, his due process rights were violated in a way that "trenched particularly harshly on [his] individual liberty." Instead of a 33½ year sentence, Petitioner should have received a sentence of around 13 years, which, with good time, would have been about 11 years. Petitioner has now been incarcerated almost 17½ years — six and a half years longer than he should have been imprisoned. And all for something that he did not even do — i.e., commit a second 924(c) offense after a conviction for a first 924(c) offense had been made final.

C. Congress' decision to not make its clarification of 924(c) fully retroactive is unconstitutional.

Article 1 of The United States Constitution gives Congress broad powers to legislate. But it does not give Congress the power to punish someone with imprisonment who has not violated any of The laws passed by Congress. But that is essentially what Congress has done by not making its clarification of 924(c) fully retroactive. In Petitioner's case, to be sure, he did violate 924(c) by possessing a gun in furtherance of a crime of violence. But Petitioner did not violate the subsection of 924(c) that authorizes a Judge to give a defendant 25 extra years. Congress made this clear when it passed Section 403(a) of The FSA of 2018. Nevertheless, because Congress did not make this "Clarification of 924(c)" fully retroactive, Petitioner is essentially being told that he must still suffer 924(c)(1)(C)(i)'s enhanced 25-year punishment, even though he did not violate 924(c)(1)(C)(i) itself.

In the words of the late Honorable Justice Stevens:

"... There can be no room for doubt that such a circumstance 'Inherently Results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief."

Conclusion

Because Congress clearly exceeded the limits of its legislative powers under Article I of the United States Constitution, by not making its "Clarification of 924(c)" Fully retroactive and thus creating a substantial risk that many prisoners are being punished for an act that the law does not make criminal, and thereby placing itself at odds with Supreme Court precedent, Petitioner prays this Honorable Court to hold that

Congress' "Clarification of 924(c)"
in Section 403(a) of The First
Step Act of 2018, must be made
Fully Retroactive, and to Remand
Petitioner's case back to the
District Court so that he may
Receive a new Sentence without
application of 924(c)(1)(C)'s 25-
year enhancement.

Respectfully Submitted,

Marcos F. Santiago

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