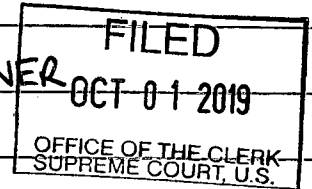


NO: 9-6195 ORIGINAL
IN THE
SUPREME COURT OF THE UNITED STATES

ALEJANDRO MARTINEZ - PETITIONER

V.S.

UNITED STATES OF AMERICA - RESPONDENT



PRO SE

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

PRO SE

PETITION FOR WRIT OF CERTIORARI

ALEJANDRO MARTINEZ

REG. # 30472-112

INCARCERATED PROSE PETITIONER

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P.O. BOX 2068

INEZ, KY 41224

QUESTIONS PRESENTED FOR REVIEW

The decision below was sustained because the NINTH CIRCUIT COURT OF APPEALS failed to recognize that 18 U.S.C § 924(c)(3)(B) was at the time, at the least, debatable among Jurist of Reason as being unconstitutionally vague. This was done with the denial of the CERTIFICATE OF APPEALABILITY. However, then, the NINTH CIRCUIT subsequently on a petition for REHEARING failed to even recognize that the SUPREME COURT in UNITED STATES v. DAVIS, CERT# 18-431, JUNE 24th, 2019, explicitly held that 18 U.S.C § 924(c)(3)(B) is indeed unconstitutional. As a result the petitioner herein is now in a form of judicial LIMBO, i.e. (Still on appellate review of initial 28 U.S.C § 2255 and postured where the filing of a simultaneous 28 U.S.C § 2255 is not appropriate), HENCE:

(1) DOES THIS COURTS DECISION IN UNITED STATES v. DAVIS, 588 U.S., 139 S.Ct. 2319 (2019) HOLDING THAT 18 U.S.C § 924(c)(3)(B) IS ALSO UNCONSTITUTIONALLY VAGUE, ALTER THE RANGE OF CONDUCT OR CLASS OF PERSONS THAT THE LAW PUNISHES, SUCH THAT UNDER TEAGUE v. LANE, 489 U.S. 288, 109 S.Ct 1060, 103 L.Ed. 2d 334 (1989), DAVIS supra, is a NEW SUBSTANTIVE RULE? CF SCHRIRO v. SUMMERLIN, 542 U.S. 348, 124 S.Ct 2519, 159 L.Ed. 2d 442 (2004)

(2) IF UNITED STATES v. DAVIS, 588 U.S., 139 S.Ct 2319 (2019) IS A NEW SUBSTANTIVE RULE, DOES ITS HOLDING IN COMBINATION WITH WELCH v. UNITED STATES, 578 U.S., 136 S.Ct. at 1264-65, 1268 COMPEL THE CONCLUSION THAT THE ENUNCIATIONS OF DAVIS supra SHOULD BE APPLIED RETROACTIVELY TO 18 U.S.C. § 924(c) ISSUES THAT WERE ALREADY ON APPEAL AT THE TIME OF ITS JUNE 24th, 2019 RELEASE?

(3) WHERE, IF DETERMINED THAT UNITED STATES V. DAVIS, 588 U.S. ___, 139 S.Ct. 2319 (2019) IS A NEW SUBSTANTIVE RULE WHICH MUST BE GIVEN RETROACTIVE EFFECT TO CASES ON COLLATERAL REVIEW, DID THE NINTH CIRCUIT COMMIT CLEAR ERROR AND THUS OFFEND THE PETITIONERS EQUALITY OF LAW BY REFUSING TO APPLY THE NEW RULE TO THIS INSTANT CASE, BEING A FIRST FILED 28 U.S.C. § 2255, IN CONTRADICTION TO THE IDEAL ADMINISTRATION OF JUSTICE? SEE, HANKERSON V. NORTH CAROLINA, 432 U.S. 233, 247, 97 S.Ct. 2339 (1977) ("IT HARDLY COMPORTS WITH THE IDEAL ADMINISTRATION OF JUSTICE WITH AN EVEN HAND, WHEN A ONE CHANCE BENEFICIARY - THE LUCKY INDIVIDUAL WHOSE CASE WAS CHOSEN AS THE OCCASION FOR ANNOUNCING THE NEW PRINCIPLE -- ENJOYS RETROACTIVE APPLICATION, WHILE OTHERS SIMILARLY SITUATED HAVE THEIR CLAIMS ADJUDICATED UNDER THE OLD DOCTRINE")

INTERESTED PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON
THE COVER PAGE.

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APPENDIX

#1 - COPY OF APRIL 26th, 2019 "COA" DENIAL

#2 - COPY OF JULY 22nd, 2019 "REHEARING" DENIAL

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NO:
IN THE
SUPREME COURT OF THE UNITED STATES

ALEJANDRO MARTINEZ - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

PRO SE

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

Comes now, ALEJANDRO MARTINEZ, respectfully petitioning the SUPREME COURT OF THE UNITED STATES for the retroactive application of US v. DAVIS, CERT # 18-431, JUNE 24th, 2019, IN review of the Judgment of the Federal Appeals court for the NINTH CIRCUIT rendered and entered in Appeal # 18-55735 on APRIL 26th 2019 and JULY 22, 2019, which refused to acknowledge that the petitioners conviction for 18 U.S.C. § 924(c)(3)(B) is unconstitutional. See UNITED STATES v. ALEJANDRO MARTINEZ 788 F.3d 956 at 962 (9th cir 2012) (stating specifically that the companion offense for the 924(c) conviction is the conspiracy charge as set out in 18 U.S.C § 241). But SEE ALEJANDRO MARTINEZ v. UNITED STATES, Appeal # 18-55735 (9th cir April 26th, 2019) (denying COA on Ground 1 (ONE) 924(c)(3)(B) issue as not debatable)

CONSTITUTIONAL PROVISIONS AND SUPREME COURT LAW

The Petitioner relies upon the following Constitutional provision and Supreme Court Controlling law:

U.S. CONST. AMEND V (FIVE) PROVIDES:

NO PERSON SHALL BE DEPRIVED OF LIFE
LIBERTY OR PROPERTY WITHOUT DUE PROCESS
OF LAW

1. UNITED STATES v. DAVIS, 588 U.S. 139 S.Ct 2319 (2019) (Holding: 18 U.S.C 924 (c)(3)(B) is void for vagueness and therefore Unconstitutional)

2. HANKERSON v. NORTH CAROLINA, 432 U.S. 233, 247, 97 S.Ct 2339 (1977) (Holding: it hardly comports with the ideal administration of justice with an even hand when a one chance beneficiary -- the lucky individual whose case was chosen as the occasion for announcing the new principle -- enjoys retroactive application while others similarly situated have their claims adjudicated under the old doctrine.)

REQUEST FOR PRO SE LIBERAL CONSTRUCTION

With Respect to this Honorable Court, the petitioner requests that the JUSTICES review his pleadings in accordance with PRICE v. JOHNSTON, 334 U.S. 266, 292, 68 S.Ct 1063, 92 L.Ed. 1356 (1948) and HAINES v. KERNER, 404 U.S. 519, 520-521, 92 S.Ct 594, 30 L.Ed. 2d 652 (1972).

OPINION BELOW

Copies of the decision of the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT which denied the Certificate of appealability (COA) and motion to reconsider the denial of the (COA) are contained in the appendix at #1 and #2.

STATEMENT OF JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254.
This petition is timely pursuant to Sup. Ct. R. 13.3.

STATEMENT OF THE CASE

The "law of the case" as established by the NINTH CIRCUIT COURT OF APPEALS in UNITED STATES v. ALEJANDRO MARTINEZ, 788 F.3d 956 (9th Cir 2012) is cut and pasted below:

{788 F.3d 962} PIERSON, Senior District Judge:

A jury found defendants Fernando Cazares, Gilbert Saldana, Alejandro Martinez, and Porfirio Avila guilty of violating 18 U.S.C. § 241 by conspiring {2015 U.S. App. LEXIS 5} to intimidate African-American citizens in the Highland Park neighborhood of Los Angeles and to deprive them of their constitutional right to "purchase, lease and hold real and personal property, and the right to occupy a dwelling, free from intimidation based on race." The jury found defendants Cazares, Saldana, and Martinez guilty of violating 18 U.S.C. §§ 245(b)(2)(B), and 2(a) by shooting Kenneth Kurry Wilson, an African-American man, because of his race and color and because he was enjoying facilities provided and administered by a subdivision of the State, namely the public streets of Los Angeles. The jury also found defendants Cazares, Saldana, and Martinez guilty of violating 18 U.S.C. §§ 924(c)(1)(A)(iii), (i)(1) and 2(a) by using firearms to kill Kenneth Kurry Wilson while carrying out the charged conspiracy.

The petitioner, being aware that at least two circuits have decided that a violation of the charged CONSPIRACY, i.e. 18 U.S.C § 241, was a crime of violence as defined in 18 U.S.C § 924(c)(3)(B), submitted a timely filed MOTION TO VACATE pursuant to 28 U.S.C § 2255, alleging inter alia:

IN LIGHT OF JOHNSON v. U.S., 135 S.Ct 2551 (2015) and SUBSEQUENTLY SESSIONS v. DIMAYA, 138 S.Ct 1204 (2018) THE PETITIONERS CONVICTION FOR 924(C)(3)(B) WAS UNCONSTITUTIONAL

See D.C. NO. 2:17-cv-04723-PA (C.D. CAL), (DOC.#1) (DOC.#2) (DOC.#33)

UNITED STATES v. GREER, 939 F.2d 1076 (5th Cir 1991); UNITED STATES v. CROCIERE, 129 F.3d 233 (1st Cir 1997); UNITED STATES v. ACOSTA, 470 F.3d 132 (2nd Cir 2006)

The UNITED STATES Responded to the claim in a number of ways, none of which had any merit. For instance, the Govt. asserted that the 924(c) conviction could also rest on the conviction for 18 U.S.C § 245(b)(2)(B), which is a legal premise that is SQUARELY FORECLOSED by the "law of the case doctrine" in US v. ALEJANDRO MARTINEZ, 788 F.3d at 962 (Companion offense for 924(c) conviction is 18 U.S.C § 241). CF MUSACCHIO v. UNITED STATES, 136 S.Ct 709 (2016):

"THE LAW OF THE CASE DOCTRINE GENERALLY PROVIDES THAT WHEN A COURT DECIDES UPON A RULE OF LAW, THAT DECISION SHOULD CONTINUE TO GOVERN THE SAME ISSUES IN SUBSEQUENT STAGES OF THE SAME CASE"

The UNITED STATES IN THIS case further went on to Concede that a conviction for a violation of 18 U.S.C § 241 was specifically a crime of violence pursuant to 924(c)(3)(B). See Govt. Response at (DOCKET # 16 pg 18) in Civil # 2:17-cv-04723-PA (C.D.CAL)

However the District Court, on MAY 8th, 2018, went on to deny this issue, and specifically adopted the Governments response for its legal premise for why it was doing so. See 2:17-cv-04723-PA (C.D.CAL) (DOC. # 39)

Being that this issue is and has been one for which has been debatable among Jurist of Reason, the petitioner filed for a CERTIFICATE OF APPEALABILITY to the Court below. Appeal No. 18-55735 (DOCKET ENTRY NOS. 243)

Unfortunately for the petitioner, on APRIL 26th, 2019 the NINTH CIRCUIT Court of Appeals denied the request for a certificate of appealability stating that the appellant has not shown that Jurist of reason would find it debatable whether the Section 2255 motion states a valid claim...

During the time frame for which the appellate court afforded the petitioner to submit a motion for rehearing, this Court issued its opinion in UNITED STATES v. DAVIS, U.S. SUP. CT. CERT # 18-431 (JUNE 24th, 2019),²

On July 2, 2019, a diligent 8 days later, the petitioner delivered his "MOTION FOR REHEARING IN LIGHT OF U.S. v. DAVIS..." specifically stating:

"COMES NOW THE PETITIONER, ALEJANDRO MARTINEZ

RESPECTFULLY MOVING THIS COURT TO REHEAR GROUND

#1, IN LIGHT OF THE FACT THAT 18 U.S.C. § 924(C)(3)(B)

WAS STRUCK DOWN BY THE SUPREME COURT OF THE UNITED

STATES ON JUNE 24th, 2019 in U.S. v. DAVIS (CERT # 18-

431..."

However, again, unfortunately the petitioner was denied from rehearing by the Court on July 22, 2019. The later denial serves only to increase expense and grief on the petitioner and place undue burden upon the resources of this Court and Judicial Economy.

As previously demonstrated it was the appeal Court in U.S. v. ALEJANDRO MARTINEZ, 785 F.3d at 962 that explicitly acknowledged that the "JURY FOUND 18 U.S.C. § 924(C) VIOLATION BY USING FIREARMS WHILE CARRYING OUT THE CHARGED CONSPIRACY", i.e. 18 U.S.C. § 241; 18 U.S.C. § 924(C)(3)(B), and it is clear that this Court has instructed the Federal Judiciary that they are not allowed to put forth judicial guesses to substitute for what a Jury must find unanimously. See ALLEYNE v. UNITED STATES, 570 U.S. 99, 103, 133 S.Ct. 2131, 2155 (2013).


Due to a series of institutional lockdowns at the Facility that the petitioner is housed, he submitted a timely pro se motion for extension of time for which to perfect his petition for rehearing, prior to filing the petition

REASONS FOR GRANTING THIS WRIT

Where the NINTH CIRCUIT COURT OF APPEALS in US v. ALEJANDRO MARTINEZ, 788 F.3d 956, 962 has specifically found that the Jury determined the companion offense for the petitioners 924(c) conviction was the "Conspiracy" charge of 18 U.S.C § 241, it was erroneous for the Court below not to find the constitutionality of the 924(c)(3)(A) conviction as debatable, when at the time it was debatable in all circuits. In addition, when it is taken into consideration, that even after this Court issued UNITED STATES v. DAVIS, explicitly holding that 924(c)(3)(A) is unconstitutional, the NINTH CIRCUIT declined to grant a rehearing, the appearance given is one that runs the "RISK OF UNDERMINING THE PUBLICS CONFIDENCE IN THE JUDICIAL PROCESS." CF. MARTIN v. FRANKLIN CAPITAL CORP, 546 U.S. 132, 139, 126 S.Ct 704, 163 L.Ed. 2d 547 (2005)

"DISCRETION IS NOT WHIM, AND LIMITING DISCRETION ACCORDING TO LEGAL STANDARDS HELPS PROMOTE THE BASIC PRINCIPLES OF JUSTICE THAT LIKE CASES SHOULD BE DECIDED ALIKE"

THERE IS NO OTHER ADEQUATE MEANS TO OBTAIN RELIEF

Because the petitioner is currently postured on appellate review of his initial 28 U.S.C. § 2255 and the filing of a second and successive 28 U.S.C. § 2255 is not appropriate at this time, he is placed in a sort of Judicial limbo. For instance, if this Honorable Court does not Grant him at the least a ("GVR")

it is altogether possible that he might never receive the Equality of US v. DAVIS Supra, if this Court does not render a ruling prior to the 1-year anniversary of DAVIS. CF 2255(F)(3), (H)(2).

PETITIONERS RIGHT TO THE WRIT IS CLEAR AND FAIR

The law of the case doctrine provides that this petitioner has a current conviction for 924(C)(3)(B), ALEJANDRO MARTINEZ, 788 F.3d 956 at 962, thus "IT HARDLY COMPORTS WITH THE IDEAL ADMINISTRATION OF JUSTICE WITH AN EVEN HAND [WHEN THE ENTIRE FEDERAL JUDICIARY BUT FOR THOSE IN THE NINTH CIRCUIT] ENJOYS RETROACTIVE APPLICATION, WHILE OTHERS SIMILARLY SITUATED [SUCH AS ALEJANDRO MARTINEZ] HAVE THEIR CLAIMS ADJUDICATED UNDER THE OLD DOCTRINE." CF HANKERSON V. NORTH CAROLINA, 432 U.S. 233, 247, 97 S.Ct 2339 (1977).

THE WRIT IS APPROPRIATE UNDER THE CIRCUMSTANCES

At the time this Court issued UNITED STATES V. DAVIS, 588 U.S. 139 S.Ct 2319 (JUNE 24TH, 2019), the petitioner had a timely filed Certificate of Appealability ("COA") pending before the NINTH CIRCUIT COURT OF APPEALS pertaining to 924(C)(3)(B).

Because it is the petitioners belief that DAVIS supra is a NEW SUBSTANTIVE RULE for which should be given Retroactive application on collateral review, he prays this Court finds that in accord with the FUNDAMENTAL FAIRNESS principles of habeas Corpus, allowing the RETROACTIVITY OF DAVIS here, will be appropriate.

CONCLUSION

Wherefore with Respect, the petitioner implores this Court to issue a "GVR", or, any other form of relief it deems appropriate to help ensure the Stability Within the Circuit Courts and the FAIR AND IMPARTIAL ADMINISTRATION OF JUSTICE FOR ALL AMERICANS.

Diligently Seeking Fairness

DECLARATION

I, ALEJANDRO MARTINEZ, hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing facts are true and correct.

Date: 9/25/2019

By: Alejandro Martinez
ALEJANDRO MARTINEZ

REG# 30478-112

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