19-6661

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JEAN BERNIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A.

IS THE PRINCIPLE OF SEPARATION-OF-POWERS, WHICH PROHIBITS JUDICIAL ENCROACHMENT ON THE EXCLUSIVE POWER OF CONGRESS TO MAKE LAWS, VIOLATED, WHEN A COURT OF APPEALS DENIES A MOTION TO RECALL THE MANDATE FOR A DECISION THAT INTERPRETED AN ENHANCING STATUTE THAT IS SUBSEQUENTLY EXPLICITLY ABROGATED BY A "CLARIFICATION" OF THAT ENHANCING STATUTE BY CONGRESS AND THAT CLARIFICATION IS THE EXACT SAME INTERPRETATION OF THE ENHANCING STATUTE PUT FORWARD BY PETITIONER ON DIRECT APPEAL AND REJECTED BY THE COURT OF APPEALS, RESULTING IN PETITIONER HAVING TO SERVE AN ADDITIONAL FIFTEEN ADDITIONAL YEARS IN PRISON NOT PRESCRIBED IN THE LAW PASSED BY CONGRESS?

B.

CAN IS THE PRINCIPLE OF SEPARATION-OF-POWERS, WHICH PROHIBITS CONGRESSIONAL ENCROACHMENT ON JUDICIAL POWERS, VIOLATED IF THE LAWS CODIFIED IN 28 U.S.C. §§ 2244(a), 2255(h), COVERING THE PROVISIONS FOR FILING A SECOND AND SUCCESSIVE HABEAS CORPUS PETITION; OR THE GENERAL SAVINGS CLAUSE, 1 U.S.C. § 109; IS USED TO ESTOP A COURT FROM EXERCISING ITS INHERENT POWER TO RECALL A MANDATE IN THE CIRCUMSTANCE DESCRIBED IN QUESTION A, ABOVE.

LIST OF PARTIES

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

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

OPINION BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

A) The date on which the United States Court of Appeals decided my case was June 26, 2019.

B) No petition for rehearing was filed in myy case.

C) An extension of time to file the petition for a writ of certiorari was granted to and including November 23, 2019 on September 17, 2019 in Application No. 19A300.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I, SECTION 1:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

ARTICLE III, SECTION 1:

The judicial powers of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

18 U.S.C. § 924(c)(1):

.....

(C) In the case of a violation of this subsection that occurs 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; and

.....

28 U.S.C. § 2244(a):

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or a court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255[28 U.S.C. § 2255].

28 U.S.C. § 2255(h):

A second or successive motion must be certified as provided in section 2244[28 U.S.C. § 2244] by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that , if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review.

1 U.S.C. § 109:

The repeal of any statute shal not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, ...

STATEMENT OF THE CASE

The genesis of this case is an arrest by the Federal Bureau of Investigation of Petitioner on two counts of bank robbery(18 U.S.C. § 2113(a) & (d); two counts of use of a weapon during a crime of violence(18 U.S.C. § 924(c); three counts of felon in possession of a firearm(18 U.S.C. § 922(g)) in August, 1990, in the Southern District of New York.

Petitioner was convicted at trial of all charges in December, 1990 and sentenced to the following in June, 1991:

(a) ten years each on the bank robbery charges to run concurrent to the felon in possession charges; and concurrent to each other;

(b) ten years each on the felon in possession charges to run concurrent to each other and concurrent to the bank robbery charges;

(c) five years on the first count of 924(c) and twenty years on the second count of 924(c) to run consecutive to the first 924(c) count and both 924(c) counts to run consecutive to the bank robbery counts and the felon in possession counts. See Appendix B.

Both prior to sentencing and at sentencing Petitioner challenged the enhancement provision of 924(c) being applied to him. 924(c) provided for a twenty year enhancement of a "second and subsequent conviction". Petitioner posited that the second and subsequent conviction language was implicated when a defendant incurred a second and subsequent conviction after he had been convicted for a first violation of 924(c) and served the term of imprisonment and then commits another violation of 924(c) upon release and is again convicted. See Appendix C, D.

The issue was raised on appeal of the judgment and conviction to the Second Circuit Court of Appeals. The appeals court, in a case of first impression in the circuit, found that Congress intended clearly that enhanced sentencing for a second or subsequent 924(c) conviction can be applied with a simultaneous first conviction for a 924(c) violation. See Appendix E.

A petition for a writ of certiorari was filed by Petitioner again raising the issue. The petition was held in abeyance pending the Court's decision in Deal v. United States,which raised the same issue. The Court ruled against Deal on the same basis as the Second Circuit. See Deal v United States, 508 U.S. 129(1993). The Petitioner's petition for certiorari was subsequently denied. See Bernier v. United States, 508 U.S. 941(1993).

We jump forward in time twenty-seven years to December 18, 2019. On that day, President Trump signed into law what was termed the "First Step Act". Section 403 of the Act is called "Clarification of Section 924(c) of Title 18, United States Code", and provides:

(a) In General - Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

(b) Applicability To Pending Cases - This section, and the amendments made by this section, shall apply to any offense that

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."

As a consequence of the "clarification" of 924(c), Petitioner filed a motion to recall the mandate in the Second Circuit Court of Appeals. Petitioner requested that the appeals court recall the mandate and reconsider its decision in light of Congress explicitly stating the manner and method of adjudicating the enhanced sentence under the 924(c) statute. See Appendix F.

The appeals court denied the motion finding that the fact that Congress clarified the statute on the same exact point that the Petitioner had raised and the appeals court and the Supreme Court had rejected did not constitute an "exceptional circumstance". The appeals court further cited United States v. Redd, 735 F.3d 88(2d Cir. 2013). See Appendix A. Redd stands for the proposition that a motion to recall the mandate based on an intervening change in the law is to be considered under the rules providing for a second and successive 2255 motion.

Petitioner finds himself gravely disturbed by such a brusque rejection of his claim. In a nation of laws with courts guided by the rule of law, a decision rendered by the courts which is contrary to the intent of Congress should not be allowed to stand, costing a defendant fifteen years of his life. Such a decision, not explained, amounts to oppression by an authoritian state.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 illustrates the character of the reasons the Court considers in granting a writ of certiorari and at 10(c) states:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In his limited research, Petitioner has not identified a circumstance similar to this case, where Congress has clarified the manner and method of applying a sentencing enhancement. A manner and method which directly and explicitly abrogates rulings by the circuit courts and this Court.

What Congress did not explicitly do is to have this clarification apply to cases that were sentenced prior to this clarification of the law. That means that many prisoners will suffer an extra fifteen or twenty years in prison based on erroneous interpretation of the law by the courts unless this Court owns up to the error and crafts a means for prisoners sentenced to those excess years to get back in the courts.

In Petitioner's particular circumstances, what is in front of the Court is the denial of a motion to recall the mandate by the

Second Circuit Court of Appeals. The Petitioner advanced the interpretation of the "second and subsequent" language of 924(c) now codified by Congress which was rejected by the Second Circuit in United States v. Bernier, 954 F.2d 818(2d Cir. 1992) and by this Court in United States v. Deal, 508 U.S. 129(1993).

This Court has recognized that the courts of appeals have the inherent power to recall their mandates, subject to review for an abuse of discretion. See Calderon v. Thompson, 523 U.S. 538, 549(1998). The Second Circuit found that there were no exceptional circumstances justifying a recall and cited United States v. Redd, 735 F.3d 88(2d Cir. 2013). Redd maintains that any motion to recall the mandate after an intervening change in the law is to be treated as a motion pursuant to the dictates of 28 U.S.C. § 2255 for a second and successive motion.

The Second Circuit uses the term "exceptional circumstances". Calderon uses the term "extraordinary circumstances". Extraordinary is defined as "going beyond what is usual, regular or customary". Merriam-Webster's Collegiate Dictionary, Tenth Edition, 1999. By all definitions, the instant circumstance does not occur on a usual, regular or customary basis. Moreover, such an occurrence rarely exposes an error which works such a manifest injustice.

Furthermore, the citation to Redd is inapposite to the circumstance we find ourselves in. Redd reasons that "when a defendant moves to recall the mandate based on intervening precedent that calls

into question the merits of the decision affirming his conviction, we construe the motion as one to vacate the defendant's sentence pursuant to 2255." Redd, supra, at 735 F.3d 90.

The clarification of the statute by Congress is not an intervening precedent by the Court or any other court. Redd and 2255 address decisions made by the courts in the habeas corpus jurisprudence. The clarification is the definitive interpretation of the manner and method of enhancing a sentence for a second and subsequent conviction for a 924(c) violation by the branch of government which is vested by the Constitution with the authority to make the laws and prescribe punishment.

Recently in Welch v. United States, 194 L.Ed.2d 387, 403(2016), the Court remarked that a court is prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law. If a federal court exceeds its own authority by imposing a punishment not authorized by Congress, it violates the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty. Federal courts impose only such punishments as Congress has seen fit to authorize. See Whalen v. United States, 445 U.S. 684, 689(1980).

The true meaning of the principle of separation of powers is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would

subvert the principles of a free constitution. See Dreyer v. Illinois, 187 U.S. 71, 84(1902).

The courts have subverted the Constitution by misconstruing the intent of Congress in enacting the enhancement for a second and subsequent conviction for 924(c). The injustice comes in the refusal to correct that error. The courts have basically legislated the meaning of the enhancement provision and when confronted with the true meaning of the enhancement have refused to correct the situation. The courts have exercised the power of Congress and instituted a punishment not meant by Congress. That is a violation of the separation of powers principle.

Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the other. Yet the dynamic between the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well. Petitioner seeks that protection. See Bond v. United States, 180 LED2d 269, 280(2011).

The power to recall a mandate and revisit its prior decision is an inherent power which a court can exercise in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice. See Christianson v. Colt Industries, 486 U.S. 800, 817(1988). Petitioner posits that fifteen additional years based on erroneous statutory interpretation by the courts works a manifest injustice on Petitioner.

Finally, Petitioner posits that the Savings Clause, 1 U.S.C. § 109, does not cabin a court's inherent power to recall a mandate and revisit a prior decision. It is of no moment that the subject matter of the controversy is a sentencing issue, a penalty, if you will. The court is not applying the clarification of the manner and method of the enhancement provision, in and of itself, in an independent proceeding post the clarification. 1/

What the court would be doing is reconsidering a position that was presented to it in the initial adjudication of the controversy, that the court had previously rejected. The clarification of the application of the sentencing enhancement simply serves to enlighten the previous controversy, it is not the driving force which informs the controversy. Petitioner was that driving force thirty years ago.

As previously stated, a court has the inherent power to recall a mandate and revisit its prior decision in any circumstance. See Christianson v. Colt Industries, 486 U.S. 800, 817(1988). Just as the courts can not encroach upon the legislative prerogative of precribing punishment for the violation of a criminal law, Congress, no doubt may not usurp a court's power to interpret and apply the law to the circumstances before it. See Bank Markazi v. Peterson, 194 LEd.2d 463, 479(2016).

1/. It is arguable that the Savings Clause does not even apply to this circumstance as the "clarification" is remedy or procedure and not an amelioration to the penalty. Cf. Warden v. Marrero, 417 U.S. 653, 661-62(1974).

CONCLUSION

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. See Marbury v. Madison, 2 L.Ed. 60, 73-74(1803).

In this circumstance, should the language of the AEDPA apply as the Second Circuit holds or should the language of the Savings Clause be put forward to estop the Court from recalling its own mandate and reconsider a decision in the court's exercise of its Article III powers, an opposition between the laws and the Constitution is created.

If both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of those conflicting rules governs the case. This is of the very essence of judicial duty. See Marbury, id.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such an ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be considered, in court as a paramount

law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. See Marbury, id.

The interpretation of 18 U.S.C. § 924(c) second and subsequent language by the courts has proven to be clearly erroneous and has been specifically abrogated by the "clarification" contained in section 403 of the First Step Act. In the frenzy engendered by a rise in violent crime rate in the late 1980's and early 1990's, the courts, including this Court, were complicit in adopting a harsh and severe approach to sentencing. Draco would be proud.

Petitioner respectfully requests that the Court address the issues raised by Petitioner. The Court is eminently more qualified to frame and expound on these matters.

Dated: 11/07/19

Respectfully Submitted,

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