

No. 19-7207

IN THE
SUPREME COURT OF THE UNITED STATES.

ORIGINAL

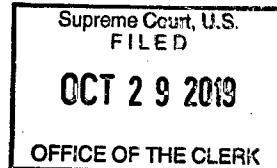
MOHAMED ELSHINAWY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.



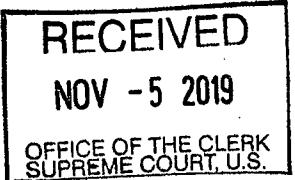
ON PETITION FOR WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Mohamed Elshinawy
Petitioner
in propria persona

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QUESTION PRESENTED FOR REVIEW

- I. Did the Courts violate the Separation of Powers and Due Process when the enhancement § 3A1.4 was applied without examining Congress' explicit directive in the VCLEA § 120004, precluding such.

LIST OF PARTIES

All parties in interest to the instant matter are listed
in the caption of the case on the cover page.

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The decision of the lower court is not published.

See United States v. Elshinawy, 2019 U.S. App. LEXIS 21002
(4th Cir. 2019).

JURISDICTION STATEMENT

The District Court had original jurisdiction over this matter pursuant to the United States Constitution, Article III, § 2, and 18 U.S.C. § 3231, because Petitioner, Mohamed Elshinawy was charged with violating the laws of the United States by, *inter alia*, conspiring to provide material support or resources to ISIS, a designated FTO, in violation of 18 U.S.C. § 2339B(a)(1) and 2339B(d)(1)(A), (D), (E), and (F) [Count One]; providing and attempting to provide material support to ISIS, in violation of 18 U.S.C. § 2339B(a)(1) and §§ 2339B(d)(1)(A), (D), (E), and (F) [Count Two]; unlawful financing of terrorism, in violation of 18 U.S.C. §§ 2339C(a)(1)(B), (a)(3) [Count Three]; and willfully making materially false statements and representations to agents of the Federal Bureau of Investigation ("FBI"), in violation of 18 U.S.C. § 1001(a)(2) [Count Four]. (ECF 19, Indictment)

Petitioner pleaded guilty to all counts and was sentenced to 240 months' imprisonment to be followed by a 15-year term of supervised release by judgment entered on 04/02/2018. ECF 61-2, Judgment. He filed a timely Notice of Appeal on 04/05/2018. (ECF 1, Notice of Appeal) The Fourth Circuit Court of Appeals affirmed his Judgment on 07/16/2019. (ECF 60) Petitioner timely filed a petition for rehearing en banc, which was denied on 08/13/2019.

This Petition is timely filed within 90 days of the denial of rehearing. This Court has jurisdiction under 18 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

Pub. L. 103-322, Title XII, § 120004, Sept. 13, 1994, 108 Stat 1796, 34 USCS § 10101 nt., 2022.

STATEMENT OF THE CASE

The Petitioner filed a pro per motion objecting to the 12 point enhancement under USSG § 3A1.4, United States v. Elshinawy, Case No. 1:16-cr-00009 (Doc. 240). The district court denied without explanation. Id. Mr. Elshinawy appealed to the Fourth Circuit Court of Appeals, United States v. Elshinawy, Case No. 18-4223 (4th Cir. 2018). Mr. Elshinawy then filed a motion for leave to supplement to raise this same argument, which the Court of Appeals granted. (Doc. 60, n. 5), but ultimately Affirmed his sentence, (Doc. 60), finding his argument to be meritless. Mr. Elshinawy timely filed a motion for panel/en banc rehearing, which the Court of Appeals denied on August 13, 2019. He then timely filed this petition with this Court.

REASONS FOR GRANTING THE WRIT

The questions presented are compelling and of national importance because the United States Court of Appeals for the Fourth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and is a question of "substance" not theretofore determined by this Court. The decision has been decided in a way most likely not in accord with applicable decisions of the Supreme Court. See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955).

Without review of this Court, the majority of lower courts will keep the default process of applying the § 3A1.4¹ enhancement on any defendant convicted of terrorism, especially Muslim defendants: (1) without examining Congress' explicit directive about the element of the crime to ensure that the defendants will not be punished twice for the same offense, thus also violating separation of powers and/or regardless if the enhancement is already incorporated in the base offense; (2) regardless of the extent to which the statute was violated; (3) regardless of the circumstances of the case whether it actually involved an actual terrorism act or First Amendment protections which were not likely to incite or imminently produce violent or lawless action.

The Fourth Circuit declined to issue any explanation as

¹USSG § 3A1.4 is a severe enhancement that is not logical with unfettered discretion. This enhancement increases the criminal history category to Level 6 regardless of an individual's past criminal history or offense characteristics, leaving open possibilities of Eighth Amendment violations as well as creating disparate sentences contrary to § 3553(a).

to why the Petitioner's argument was meritless when holding that it was, in fact, meritless. United States v. Elshinawy, Case No. 18-4223 (4th cir. 2019). However, reasonable jurors could debate because other judges have agreed with Petitioner. See, e.g., United States v. Jumaev, Case No. 12-CR-00033-JLK (D. Co. July 18, 2018), 2018 U.S. Dist. LEXIS 119916 (holding, "under both the 'involves' or the 'intended to promote prong' then, the terrorism enhancement only applies if I find that Mr. Jumaev had some intent that was not required by the jury to find him guilty."). Cf. United States Sentencing Guidelines Manual, Appendix B (quoting section 120004; unless such involvement or intent is itself an element of the crime).

ARGUMENT

This Court should hear the merits of this case due to the fact that it raises questions of fundamental importance. It is well-established that Congress, not the courts, creates and defines crimes. It is not for courts to rewrite statutes.

See, Blount v. Rizzi, 400 U.S. 410 (1971). In the federal system, "defining crimes and fixing penalties are legislative, not judicial functions." United States v. Evens, 333 U.S. 483, 486 (1948).

If lower courts are applying incorrect legal standards or clearly erroneous factual findings, those courts abuse their discretion. See, Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

This question is extremely vital for this Court to consider as it raises questions on courts' jurisdiction, separation of powers, equal protection, and First Amendment applications.

Petitioner argues that the standards for the prohibitions of U.S.S.G § 3A1.1-4 should not be treated differently in application or interpretation. For example, in United States v. Mikalajunas, 936 F.2d 153 (4th Cir. 1991), the Court of Appeals reversed based on § 3A1.3, because physical restraint was an element of the offense. The enhancement could only apply if the "crime of terrorism" adds to the basic crime (i.e., § 2339B) and is not an element already. See, for example, United States v. Wilson, 193 F.3d 467 (4th Cir. 1999).

A. AEDPA did not restrict the VCCLEA

Through the history of U.S.S.G. § 3A1.4 and the amendments made by Congress, certain areas of the prior laws (*i.e.*, Violent Crime Control Law Enforcement Act ("VCCLEA")), including some that are unsettled or arcane were untouched. In other areas, Congress changed aspects of the old rules without addressing how these changes should affect connected aspects that are not explicitly changed. See, e.g., Rhines v. Weber, 544 U.S. 269, 274-77 (2005) (addressing AEDPA).

Specifically, Section 120004 in the VCCLEA restricted the enhancement of 5K2.15 (predecessor to 3A1.4) to crimes of which involvement or intent itself was not an element. See, United States v. Graham, 275 F.3d 490, 527 (6th Cir. 2001) (citing S.738, 102 Cong. § 738 (1991) (unless such involvement or intent is itself an element of the crime); Sec. 120004 (same)).

B. Canons of Statutory Construction Apply

It is clear that all of these bills are statutes and thus the basic canons of statutory interpretation apply. "[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." Corley v. United States, 556 U.S. 303 (2009) (quoting Hibbs v. Winn, 542 U.S. 88 (2004)).

Yet, the court of Appeals consistently refuses to even hear any argument. Thus, this Court should grant, vacate, and remand so Petitioner has an opportunity to be heard.

C. Rule of Lenity

Due to questions of the statute, the rules of Lenity will also apply. See, Hernandez v. Holder, 783 F.3d 189, 196 (4th Cir. 2015) ("[B]ecause the rule of lenity is a last resort, not a primary tool of construction, it applies only where there is a grievous ambiguity or uncertainty in the statute.")(citations and internal quotation omitted); see also, Reno v. Koray, 515 U.S. 50, 64-65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to [the drafters'] intent."))

D. Separation of Powers

The District Court denied Petitioner's pro se motion without an evidentiary hearing. The Petitioner argued before the Fourth Circuit Court of Appeals that when involvement or intent is itself an element of the crime [i.e., crime of terrorism] then the enhancement cannot apply based on Congress' directive. (Doc. 58-1 at 2)(quoting PL 103-322, Title XII, § 120004). The Court of Appeals held this argument was meritless. See, United States v. Mohamed Elshinawy, 2019 U.S. App. LEXIS 21002, n.5 (4th Cir. May 1, 2019). Any argument based on Congress' directives cannot be deemed meritless. An action or argument is frivolous if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). This frivolity determination exists to prevent "abusive or captious litigation." Id. at 324

The Petitioner argues that, when Congress ordered an enhancement "unless such involvement or intent is itself an element of the crime" that is unilaterally applicable and is not subject to the inherent discretion of the district courts. Further, when a judicial body does add the enhancement to offenses that have such as an element of the crime [i.e., federal crime of terrorism] that body has violated the separation of powers as further argued below.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." Loving v. United States, 517 U.S. 748, 756 (1996)(citing Montesquieu, The Spirit of the Laws, 151-152 (T. Nugent transl. 1946); 1 W. Blackstone, Commentaries *146-*147, *269-*270). Thus,

the Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

INS v. Chadha, 462 U.S. 919, 951 (1983).

The "concept of separation of powers," then, is exemplified by "the very structure of the Constitution." Miller v. French 530 U.S. 327, 341 (2000)(internal quotation marks omitted).

"The Framers regarded the checks and balances that they had built into the tripartite Federal government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). "While the boundaries between the three branches

are not 'hermetically' sealed, the Constitution prohibits one branch from encroaching on the central prerogatives of another." Miller, 530 U.S. at 341 (citation and internal quotation marks omitted).

Accordingly, the Supreme Court has "not hesitated to strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separated Branches or that undermine the authority and independence of one or another coordinate Branch." Mistretta v. United States, 488 U.S. 361, 382 (1989). With regard to the Executive Branch, separation-of-powers concerns are focused "on the extent to which [a statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977). In cases involving the Judicial Branch, The court has traditionally acted to ensure "that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by other branches," and "that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch." Mistretta, 488 U.S. at 383. (citation, internal quotation marks and alteration omitted). "Even when a branch does not arrogate power to itself,... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Loving, 517 U.S. at 757.

The case at hand raises these specific questions. If Congress specifically says "do this unless this" then the courts cannot act

contrary to Congress' directives. The court of Appeals held: "The terrorism enhancement provides that if a defendant's offense involved, or was intended to promote, a federal crime of terrorism," Elshinawy, Id. at LEXIS 1 (citing § 3A1.4), then the 12-point enhancement applies. This reading and application completely ignores Congress' directive that "an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism unless such involvement or intent is itself an element of the crime." P.L. 103-322, § 120004. The Court of Appeals and Petitioner both agree that Petitioner's offense, 18 U.S.C. § 2339B is a crime of terrorism and has as an element "crime of terrorism." See, Elshinawy, Id. at 11. Thus, Petitioner contends that his argument is not meritless and Due Process and fundamental fairness necessitate a hearing.

CONCLUSION

WHEREFORE, in light of the foregoing and with good cause showing, Petitioner hereby prays this Honorable Court accept and GRANT this, his petition for Writ of Certiorari, and ORDER that such writ should issue causing Petitioner's case to be remanded to the lower Court(s) for consideration and action in accordance with this Court's holdings and established law, and any other relief this Court deems just and equitable.