

No. 21-6560

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IN THE  
SUPREME COURT OF THE UNITED STATES

CARLO DONATO

— PETITIONER

(Your Name)

VS.

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CARLO DONATO # 45257053

(Your Name)

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## QUESTION(S) PRESENTED

Whether, under the First Step Act, Act 403(a) Title 18 U.S.C. Section 924(c) modify penalty on the "stacking", fall under the "covered offense" Act, due to the fact that the statutory penalty was modified under the provision of the First Step Act. And, if a covered offense violation, is retroactive.

Whether, a compassionate release motion filed under Section 3582(c) of the First Step Act, should be granted based on EQUAL JUSTICE and NOT base on RACIAL INJUSTICE and DISPARITY OF SENTENCE is violating Section 3553(a)(6).

Whether, Section 3142(g) and Section 3553(a) "danger to the community" factor, is an abuse of discretion, without considering the Bureau of Prisons [Risk Pattern Score] under the First Step Act , Act 101(a) Subchapter D, Sections 3632 and 3633; Defendant immediate deportation, when considering "danger factor", violating the finding in light of Pepper.

## LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

U.S. v. MARKS, 2020 Dist. Lexis 68828, (WDNY. April 20, 2020)  
MOORE v. U.S., U.S. 2011 Dist. Lexis 41748 (ND of Libs. March 5, 2021)  
Terrey v. U.S., No 20-5904 (JUNE 14, 2021)

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 4 to the petition and is

reported at U.S. v. Dowd, 21-984; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at U.S. v. Dowd, 95-CR-223 (DRH); or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Oct 1 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Nov, 23, 2021, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.  
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A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
2

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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## **STATEMENT OF THE CASE**

On May 29, 1996 a jury found Donato guilty of one count of conspiracy in violation of Title 18 U.S.C. Section 371, Six counts of carjacking in violation of Title 18 U.S.C. 2119 (1992 version), one count of possession of a firearm in violation of Title 18 U.S.C 924(c), and five counts of use of a firearm in violation of Title 18 U.S.C. Section 924(c). On August 2, 1996 Donato was sentenced to 119 years' incarceration. The United States Court of Appeals for the Second Circuit affirmed on April 23, 1997. See, United States v. Donato, 112 F.3d 506 (2d Cir. 1997).

Therefore following consideration by the Court of Appeals Second Circuit of collateral attack Donato launched, the sentence was reduced on remand, owing a double-counting error, to 115 years in prison.

Donato requested a permission to file a second 2255 in light of Johnson and Davis. The Court of Appeals for the Second Circuit denied both request.

## REASONS FOR GRANTING THE PETITION

### 1. COVERED OFEENSE

The First Step Act, Act 403(a) Section 924(c) penalty of the "stacking", was modified for first time offenders. The law is very clear, and because of this modification this Section fall under a "covered offense", and applicable to the defendant's motion for compassionate release, retroactive.

In Terry v. United States, No. 20-5904 (June 14,2021), this Court stated:"the First Step Act makes an offender eligible for a sentence reduction only if the offense previously received a sentence for a "COVERED OFEENSE",132 Stat 5222. The Act defines "COVERED OFFENSE" as in violation of a Federal Criminal Statutory Penalties from which were modified by certain provisions in the First Step Act".

Under the First Step Act Title 18 Section 924(c) "penalty of the stacking" suffered the same modified penalty of other statutes in the First Step Act. Today defendant Donato would received 360 months on the guns, a 60 months for each count from a statute that he was found guilty in 1996 for the counts 3,7,9,11,13 and 15, plus 120 months for the underlying offenses for counts 1,2,6,9,10,12, and 14, for a total of 480 months and not 115 years of incarceration.

See, United States v. Ellerby, 2020 U.S. Dist Lexis 216637 (E.D.N.Y. March 17, 2021). A modification of the "stacking" penalty under the provision in the First Step Act, Act 403(a) Section 924(c)"stacking", in light of Terry, this statute should qualify as a "covered offense". See, United Stated v. Jordan, at al Case # 19-3620-cr (2nd Cir. August 11,2021)(covered offense). This Court should address this specific issue, because the lower Courts interpretation is conflicting between the finding in Landgraf v. USI Film Prods, 511 U.S. 2411, 273 114 S.Ct.1483,128 L.Ed.2d 229(1994)(retroactivity of the statute)

First Step Act, Act 403(a) Section 924(c) (stacking retroactivity) of the statute, and the finding in light of Terry. Due to the facts that a statutory penalty of the stacking was modified, the statute penalty on the staking is in violation and fall with in the scope of the COVERED OFFENSE ACT, which would make the Act retroactive.

Some lower Courts have honored the retroactivity doctrine in the modification of sentence in the 924(c) stacking penalty, under the First Step Act, other Courts have abused its discretion using erroneous legal standards, not governed under the First Step Act, including the case before this Court.

### 2. RACIAL DISPARITY

The First Step Act was passed by Congress, to be transparent and base on equal justice in a Federal System for first time offenders. The lower Courts do not apply this new standards and applicable law uniformly, in a post-conviction motion for compassionate release, instead, abuse of discretion, racial disparity and unjust sentencing scheme are the norms of practice on the majority of the cases, for qualified offenders, violating the Fifth and Eighth Amendment of the Constitution including Section 3553(a)(6) of the United States Sentencing Guideline.

Defendant Donato, presented to the lower Courts, unique remarkable post-conviction factors/arguments, that qualify Donato for a sentence reduction. However, the lower Courts decided to denied Donato's motion, no base on equal justice, but base on abuse of discretion, failing to apply a correct applicable law govern under the First Step Act, racially motivating and unjust sentence disparity, those are the legal standards applied to this case before this Court. Defendant Donato has meet all the criteria set forth in Section 3553(a) and Section 3142(g) mitigating circumstances in favor of the motion for compassionate release. The lower Courts has failed to adapt the First Step Act standards, and failed to consider ALL factors (no partials), presented by defendant Donato, and precedent law in light of Pepper, post-conviction applicable law, under these circumstances.

Here Donato is illustrating case law of abuse of discretion, racial disparity, sentencing disparity within the Federal Court System, and government misconduct:

In Moore v. United States, 2021 U.S. Dist. Lexis 41748 (N.D.of Alabama March 5, 2021). Mr. Moore's charges/conviction and sentence include Title 18 U.S.C. Section 371, Section 2119 and Section 924(c)[stacking], in a 1993 indictment. Mr. Moore is African-American.

In Donato v. United States, 21-984 before this Court, Mr. Donato's changes/conviction and sentence include Title 18 U.S.C. Section 371, Section 2119 and Section 924(c)[stacking], in a 1995 indictment. Mr. Donato is NOT African-American.

In Moore the lower Court granted a motion for compassionate release in light of the stacking made retroactive, disparity of the sentence and rehabilitation. The lower court did not consider Mr. Moore to be a danger to the community, even thought Mr. Moore had violent infraction during his incarceration.

In Donato, the lower Court denied the motion for compassionate release, in light of the stacking which were no-retroactive, and that Donato was a danger to the community. Many other factors that were never considered by the lower courts. This is unprecedent on what happen in our legal system across the nation and to the case before this Court.

Here, both defendant are charged, convicted and sentenced in violation of the same statutes, filing the same motion for compassionate release in Federal Court, but the outcome of both cases are totally the opposite, even thought defendant Donato presented unique and remarkable post-sentencing factors, which include no violent conduct or violent infraction, during his 26 years of incarceration. (See APPX D ), and violating Section 3553(a)(6).

At first impression this case is base on racial disparity and unjust judicial system, and no base on the merit of the arguments and post-conviction evidences that shows extraordinary and compelling reasons that warrant a reduction of sentence, like defendant Moore.

In United States v. Holloway, 66 F.3d U.S. Dist. Lexis 102278(E.D.N.Y. 2014), also African-American, once again, the lower court agree with the government to reduce his sentence on the stacking of the gun. The lower court did not address the argument on racial disparity. In Holloway, for the government A.U.S.A. Ms.Corkery did not opposed for a reduction of sentence. In the case before this Court in Donato, the government A.U.S.A.Ms.Corkery part of the legal team, opposed for a sentence reduction, because Donato is a danger of the community. Here the governed position is very confusing and contradictory racially motivated in violation of Donato's due process rights. I brief an very documented in the lower court, defendant presented the following factors: unconditional rehabilitation that stated in 1996(see attached certificate); no act of violence or violent infraction (See attached progress report and classification report. See APPX D ); held one job for 15 years as a Chef in the Officer Diner which is very rare in this environment (see attached letter of recommendation); more than 50 courses of education and vocational training together with the change of the law of the stacking of the gun under the First Step Act, a Cristian believer in the Prison Fellowship Program and a Deportation factors. If those factors are not considered extraordinary and compelling reasons in order to grant a reduction of a sentence, than is one conclusion a total miscarriage of justice.

In a case of Moore and Holloway, shows very clear the conduct of the government as well the conduct of the lower courts. Both defendants are entitled to equal justice in a Federal System. However the same equal equal justice under the Constitution should applied to defendant Donato, instead the District Court abuse its discretion, and the Court of Appeals did as well. See, United States v. Clark, Case No. 20-10094 (Fifth Cir. July 15, 2021)(reversed and remanded for abuse of discretion). Defendant Donato presented to the lower courts in addition to all the factors, documented evidences, letter of recommendation, more than 70 district court cases, 8 different Court of Appeals cases and 1 Supreme Court case in support of Donato's arguments, and meet al the criteria's that is governed by the First Step Act, the lower courts totally disregarded.

The lower court's opinion was base on what happen at trial 26 years ago'. This defendant motion should have been granted, if there were equal justice, because even when the Court of Appeals stated that defendant do not have any arguable argument of fact or law, that is total a miscarriage of justice.

It is worth nothing to this Court that although defendant Donato has long been seeking relief, his rehabilitation effort began before the enactment of the First Steep Act, it would have taken remarkable prescience for Donato to anticipate many years ago', the change that lay ahead with respect of the federals sentencing laws, and devote himself to building up a resume that he cold use in support of an application for judicial relief, at some then-unknown time in the future. Most layers and legislator not have anticipated such remarkable changes of the law. Furthermore, the fact that some self-interest may have been involved is hardly remarkable and is not a reason to disregard Donato's accomplishment since that Donato has established unique extraordinary and compelling reasons for a deduction of sentence.

An abuse of discretion occurs when the lower courts relies on clearly erroneous finding of fact, use erroneous legal standards or improperly apply the law, and in this case before this Court, this clearly happen. This Court in Pepper clearly stated:"(e) evidence of post sentencing rehabilitation may be highly relevant to several sections of 3553(a) factors that Congress has expressly instructed district court to consider at sentencing"),at 229. Conclusively, those standards did not applied in this case, violating defendant's Constitutional Rights. See, Pepper v. United States, 476 492 131 S.Ct. 1229 L.Ed. 2d. 196 (2011).

### 3. U.S.S.G SECTION 3553(a) - RISK FACTOR-DANGER TO THE COMMUNITY

Under the First Step Act, Act 101(a) Subchapter D, Section 3632 and 3633, this is the only applicable section post-sentencing and govern under the First Step Act is a "Risk Pattern Score", to assess if a defendant is a danger to the community upon release when he file a motion for a reduction of sentence in the Court, including all the factors in support of, while incarcerated. Congress authorized the Justice Department than Attorney General Mr. William Barr, to delegate the Bureau of Prisons Director Mr. Carvajal to created a Risk Pattern Score for federal inmates, in order to determine if an inmate is a danger to the community, and the recidivism, upon release, under Sections 3622 and 3633. This is the most important post-sentencing and most updated document that is available to the lower courts when presented in a motion for compassionate release. (See APPX E), and in light of Pepper (2011).

In this case the lower courts relied completely on same of the fact of the case, and not base on facts/evidences presented by defendant Donato in the post-sentencing relief motion. Without taking in consideration that none of the victims got injured or harmed, the evidence at trial show that the carjacker was a gentleman, including give then their personal belong before leaving with they car, and no gun was never recovered. Donato still maintain his innocence of the crimes. Including but not considered by the lower court, testimony of the agents quoted in the Pre-Sentence Report at page 12 # 37, and I quote: "Agents inform that Donato held neither aggravating or mitigating role in the scheme". This totally violated the due process rights, and an abuse of discretion at its best.

The lower courts acknowledge that the defendant has a good conduct while incarcerated, but, remain a danger to the community. This is very confusing with unprecedent findings.

Base on the Bureau of Prisons Risk Pattern Score, Donato score at Low Risk (See APPX. E), and Low for Recidivism Risk, which makes him eligible for home confinement, and clearly confirm that Donato "is not a danger to the community". See, Pepper v. United States, 476, 492 131 S.Ct. 1229 L.Ed. 2d. 196(2011)(under Section 3553(a),"post-sentence conduct... sheds light on the limewood that [defendant] will engage in future criminal conduct").

Defendant Donato's factor of deportation, was not taken in consideration in order to determine the danger of the community factor, Under Section 3142(g) mitigating circumstances. If defendant will be released, he will be immediately deported by ICE authority. How can defendant Donato would be a danger to the community if deported?. This is for this Court to make its finding. See, Francis v. United States, 2021 U.S. Dist. Lexis 13272 (S.D.N.Y. Jan 22, 2021)(MOTION FOR COMPASSIONATE RELEASED GRANTED WITH IMMEDIATEDE DEPORTATION); United States v. Muhammed, 2021 U.S. Dist. Lexis 13655 (D. of Conn July 31, 2020)(same); United States v. Chavirra-Cordoba, 2021 U.S. Dist. Lexis 7446 (N.D. of Ill. Jan 14, 2021)(same), and more than 20 district court case not listed in this application. Once again, NO EQUAL JUSTICE.

Defendant Donato has presented to this Court, many violation of abuse of discretions, unequal justice within the lower courts, violation of due process rights, unjust legal standards. The lower courts improperly applied the law, and clearly did not make any finding in the defendant's arguments, in violation to all the finding in Pepper (2011).

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Orly Dantz, pro se

Date: December 1 2021