

No. 21-7819

In The Supreme Court of the United States

____ Petitioner

vs.

United States of America ____ Respondent

On Petition for writ of Certiorari
To The United States Court of Appeals For
The Eighth Circuit

Petition For Rehearing

FILED

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SUPREME COURT OF THE UNITED STATES
ORIGINAL

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EW

Petition For Rehearing
(Sup. Ct. R. 44.2)

Petitioner presents its petition for a rehearing of this cause, and, in support thereof, respectfully shows:

Grounds For Rehearing

A rehearing of the decision in the matter is in the interests of justice because this Court is the "court of last resort," Cardinal Chemical v. Morton Int'l, 508 U.S. 83, 97 (1993), and "the case remains alive... when it comes to" this Court "of last resort," ibid., seeking justice for a wrong done to the petitioner by the Government.

In relevant part, applicable to this matter, as "Mr. Justice Bradley, speaking from the bench, said: "It ought to be understood, or at least believed, whether it is true or not, that this Court, being a Court of last resort, gives great consideration to cases of importance and involving consequences like this," Cahill v. New York, N. H. and H. R. Co., 351 U.S. 183, 186 (1956), especially "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties," Powell v. Nevada, 511 U.S. 79, 86-87 (1994) (Thomas, J., with whom Rehnquist, C.J., joins, dissenting) (citation omitted), such as this case does, and Roe v. Wade, 410 U.S. 113 (1973), has obliged this Court to follow its own findings, that "the police power is controlled by 50 different States instead of one notional sovereign," Natl Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012), what Mr. Justice White wrote, in dissent, warned

this Court, admonishingly: "In refusing to review a case which so clearly frames an issue," such as this case presents, "the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours." Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978) (White, J., with whom Rehnquist, J., joins, dissenting).

The constitutional and jurisdictional claims were properly presented in the 28 U.S.C. § 2255 motion in the district court below, and can be said those issues, "now fairly tendered by the petition for habeas corpus below, have never been adjudicated on its merits by the lower courts," United States v. Adams, 320 U.S. 220, 221 (1943).

Just as in a civil suit, under 42 U.S.C. § 1981, in this case, the jurisdictional and constitutional issues presented in the 28 U.S.C. § 2255 motion presented "questions not passed on below," in either of the two lower courts, and were "raised in the petition for certiorari," Comcast Corp. v. Nat'l Ass'n of African American-owned Media, 140 S.Ct. 1009, 1010 (2020), petitioner has "shown that he was deprived of the protected right and... established causation," *ibid.*, his "Due Process Clause... right to be deprived of... liberty, ... only by the exercise of lawful power," McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780, 2786 (2011) (citation omitted), where being charged, prosecuted, and convicted for conduct the Framers did not enumerate, in the legislative article, as a "precise subject-matter" for nationwide federal "police power" application, much less enforcement, by Congress, see, generally, Keller v. United States, 213 U.S. 138, 146 (1909)

(citations omitted), in challenging the statutes charged in this case, and being prosecuted in a district court incapable of being conferred with criminal case jurisdiction, as constitutional Article III courts are precluded being conferred with jurisdiction beyond the "cases" and "controversies" enumerated in Article III, § 2, see, generally, Ex parte Bakelute, 279 U.S. 438, 449 (1929), and especially when a constitutional court sits within a State, in which Congress lacks a "dual authority" it possesses only in regard to such courts within the District of Columbia, to be able to "clothe" the courts of the District not only with the jurisdiction and powers of federal courts in the several States, "civil case or controversy jurisdiction, "but with such authority as a State may confer on her courts," meaning criminal case jurisdiction, O'Donoghue v. United States, 289 U.S. 516, 545 (1933), and makes it clear, that because "Congress derives from the District clause," Art. I, § 8, cl. 17, "distinct powers in respect of the constitutional courts of the District{,}... Congress does not possess" such power "in respect of such courts outside the District." Id., at 551. See, generally, Steel Co. v. Citizens for Better Envt., 523 U.S. 83 (1998), the Court pointing out that criminal cases "are not, however, the sort of cases... that Article III, § 2, refers to," id., at 102, and is in accord with Williams v. United States, 289 U.S. 553 (1933), that the "judicial Power" of the United States was drafted "in terms to apply to controversies (but not to "all") to which the United States shall be a party," id., at 572; see also, e.g., Manaco v. Mississippi, 292 U.S. 313, 321 (1934) ("Clause one of § 2 of Article 3 extends the judicial power "to controversies to which

the United States shall be a party." Literally, this includes such controversies, whether the United States be party plaintiff or defendant. (Citation omitted)

ted).

In other words, in order for the United States to be able to invoke federal jurisdiction, it must satisfy a showing the "irreducible constitutional minimum of standing" to sue, with the first and foremost requirement of alleging (and ultimately proving) the United States has suffered "an injury in fact" - a harm suffered, that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.*, 523 U.S. at 102, 103 (citations omitted). Thus, without this first requirement in existence in this case, since the "trio of injury in fact, causation, and redressability" constitutes the core of Article III's case-or-controversy requirement. *Id.*, at 103-104, the United States lacked standing to sue petitioner in the district court below, and even much less standing to criminally prosecute that case in on Article III court that lacks "judicial power" over criminal cases at all, under *Steel Co.*, 523 U.S. 102.

Citing case law by this Court, the Eighth Circuit has observed:

"A valid guilty plea... waives a defendant's 'independent claims relating to the deprivation of constitutional rights that occurred prior to 'pleading guilty,'... 'case-related constitutional defects' are made 'irrelevant to the constitutional validity of the conviction' by a guilty plea. 'Because the defendant has admitted the charges against him,'... 'However, a guilty plea does not waive all claims. A waiver does not occur, for example, when the defendant's plea was not made intelligently, voluntarily, and with the advice of counsel.'... Nor does a guilty plea waive a defendant's right to facially challenge the Government's ability to constitutionally charge him in the first place..."

"This statute is one of universal application within the territorial limits of the United States, and is not limited to those persons which are within the exclusive jurisdiction of the national government, such as the District of Columbia. Generally speaking, within any state of the Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, of least of action. The focus of Congress in respect to those matters do not extend into the territorial of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government."

Because, as was argued in the initial petition to this Court, the claim is that drugs, or controlled substances, is not a "precise subject-matter" for federal nationwide enforcement of its "police power" to regulate, the Commerce clause notwithstanding, as this Court correctly pointed out, in a guilty plea case, "the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the [government's] power to bring any indictment at all." United States v. Grace, 488 U.S. 563, 575 (1989) (citations omitted).

This Court's correct finding that "the police power" belongs to the States, and not the United States, is not anything new, since this Court in a case that can be said reinforces the dual-sovereign constitutional principle "that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect," United States v. Flores, 289 U.S. 137, 155 (1933) (citations omitted), before Oklahoma became a State, and was still a territory of the United States, pointed out:

United States v. Dewberry, 936 F.3d 803, 805-806 (8th Cir. 2019) (citations omitted).

Coke v. United States, 152 U.S. 211, 215 (1894).

As this Court makes clear: "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect," Arizona v. United States, 132 S.Ct. 2492, 2500 (2012) (citations omitted), and this Court has recently reaffirmed the principle, by overturning Roe v. Wade, supra, and makes it incumbent upon this Court to continue overturning "criminal" laws the Constitution precludes nationwide application, such as drug-related conduct, when, as James Madison, quoted by this Court numerous times, expressed: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite," The Federalist No. 45, pp. 292-293 (G. Rossiter ed. 1961)," United States v. Lopez, 514 U.S. 549, 552 (1995).

The principle announced by Mr. Madison, supra, 514 U.S. 552, clearly establishes that powers not conferred upon the United States, in the Constitution, "remain in the State governments," and "is deeply rooted in our history and tradition" and... is essential to our Nation's "scheme of ordered liberty," ... Dobbs v. Jackson Women's Health Org., 597 U.S. —, — (2022), slip opinion at p. 12 (citations omitted).

The analogy could not be clearer. "The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "the whole subject of the domestic relations of husband and wife," ... Obergefell v. Hodges, 576 U.S. 644, 690 (2015) (citations omitted) (Roberts,

C.J., with whom Scalia, Thomas, and Alito, JJ., join, dissenting); and "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision,..." *Dubbs, supra* slip op. of p. 5.

Because our Government is "one of enumerated powers," such "enumeration of powers is also a limitation of powers, because "the enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others." *Notl Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2577 (2012) (citations omitted).

As this Court, many years ago, made very clear:

"Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and may pass laws to define and punish pirates and felons committed on the high seas, and offenses against the law of nations, Treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by an Act of Congress."

United States v. Hall, 98 U.S. 343, 345-46 (1879).

And, eight years prior to *Hall*, this Court, after reciting the subjects listed above as offenses enumerated for adjudication, this Court, in placing a limit just to those conducts, emphasized: "This is the extent of power to punish crime expressly conferred" *Knox v. Lee and Forker v. Davis*, 79 U.S. 457, 535-536 (1871).

This follows from what Chief Justice Marshall admonished years earlier, when inferring that the whole penal code of the United States is limited only to those subjects enumerated in the Constitution, and

stating: "The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given" in the Constitution McCulloch v. Maryland, 4 Wheat, 316, 417 (1819).

If neither "marriage", Obergefell, supra, or "abortion", Dobbs, supra, is nowhere mentioned in the Constitution for federal involvement, in any manner, it follows that drugs, or controlled substance, is nowhere mentioned in the Constitution for regulation, not even the Commerce Clause can save it from being struck down as applied in this case, because, as James Madison made clear, the power, given to Congress, under the Commerce Clause, was to enact legislation to provide "relief [to] the States which import and export through other States from the improper contributions," in the form of "duties," levied on them by the latter." The Federalist No. 42 (J. Madison).

Citing Madison, *inter alia*, this Court wrote of the purpose of the Commerce Clause power of

"preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention; the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation,""

OK! home Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-180

(1995) (citations omitted).

In other words, the clause's purpose is to keep the channels of commerce "among the several States" free of obstructions, *cf. e.g., In re Debs*, 158 U.S. 564, 579-586 (1895) (discussing the Commerce Clause's purpose of countervailing upon the "national government" "with the duty of keeping those highways of interstate commerce free from obstruction", and, as in *Debs*, where the Commerce Clause and the Postoffice Clause were combined to reach the results in that case, the Court has found that the "existence" of the power "may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowed

able to group together any number of them and infer from them all that the power claimed has been conferred." *Knox, supra*, 79 U.S. at 534.

Because drugs, much less firearms and possession by felons, frauds against

private persons or corporations (think "Varsity Blues"), or even robbers of banks owned by private corporations, are not a "precise subject-matter" for federal "police power" enforcement nationwide, the Commerce Clause, standing

alone, does not license its use, as an excuse, for fairly deducing the

existence of regulating the commerce over any other subject-matter

not a substantive power not within the legislative articles, since, on

its own, the Commerce Clause may only be used to prevent the imped-

iment of the flow of commerce, either by the State or Federal Govern-

ment.

A prime illustration of this principle can be said to have been made

clear, when this Court, in *Granholm v. Heald*, 544 U.S. 460 (2005), sta-

ted;

"First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. ...
"Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."

Id., 544 U.S. at 476, 477 (citations omitted).

And the dissenters drove home the constitutional principle of what is required before Congress may rely on the Commerce Clause to regulate something not initially in the Constitution, such as in Granholm, like the regulation of alcoholic beverages, pointing out:

"The moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution. ... The Eighteenth Amendment entirely prohibited commerce in 'intoxicating liquors' for beverage purposes throughout the United States and the territories subject to its jurisdiction."

Id., 544 U.S. at 494-495 (Stevens, J., with whom O'Connor, J., joins, dissenting).

In essence, as this Court clearly observed, "In the absence of a properly passed amendment," in this case, providing that drugs are to be regulated under the Commerce Clause, "would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'" U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

And such an amendment reaching the regulation of drugs is

not the only obstacle the Government faces. An amendment to the Judicial Article would be required, in order for "criminal" cases to be considered within the "judicial power" of the United States, as this Court's precedents makes clear the "judicial power" extends only to "the nine separately enumerated classes of cases," Romer v. Int'l Term. Operat. Co., 358 U.S. 354, 364 (1959), of which "criminal" cases is not one of such classes of cases the "judicial power" extends to. Thus, the "judicial power", or "jurisdiction" refers to "a court's adjudicatory authority," ... Accordingly, the term "jurisdiction" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority's Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-161 (2010), with criminal cases still remaining NOT a subject-matter the "judicial power" extends to.

Therefore, since drugs — controlled substances —, like marriage or abortion, is not mentioned anywhere in the Constitution, where this Court has pointed out "that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending" the Constitution, Carter v. Carter Coal Co., 298 U.S. 238, 293-94 (1936), thus neither in an amendment, just as in this Court's Dobbs decision made clear that abortion regulation belongs to the States, the same holds true for controlled substances and the regulation of such illegal conduct therefore is a "police power" that "is controlled by so different States instead of one national sovereign," Ngitt Fedn, supra

132 S. Ct. at 2578 (citing The Federalist No. 45 (J. Madison)), what this Court found in Obergefell, regarding marriage, and in Roberts, regarding abortions. "Petitioner, like many other criminal defendants, has done [this] part by specifically presenting this Court with [the] opportunities to" consider the limits of the Constitution says nothing about "drug" regulation in the States. "It is time for this Court to do its part."

"The Court's duty to resolve this matter is particularly compelling, because [this Court is] the only court authorized to do so." Rangel-Reyes v. United States, 126 S. Ct. 2873, 2874 (2006) (citation omitted) (Thomas, J., dissenting from the denial of certiorari) (emphasis added).

As Justice Brennan observed:

"Even if punishment of the 'guilty' were society's highest value and procedural safeguards denigrate to this end—in a constitution that a majority of the members of this Court would prefer, that is not the ordering of priorities under the Constitution framed by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame its own. ... what possible justification then can there be for denying vindication of such rights on federal habeas when [federal] courts do deny those rights at trial? To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depends ... and as Mr. Justice Holmes so succinctly reminded us, it is 'a less evil' that some criminals should escape than that the Government should play an ignoble part." ... "It is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, ..."

Stone v. Powell, 428 U.S. 465, 523-525 (1976) (in relevant parts, citations omitted) (Brennan, J., with whom Marshall, J., concurs, dissenting). Quoting a 1946 case, this Court should continue to stand by its own admonition, when it reiterated:

"Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." The Court explained this longstanding rule as jurisdictional and upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the constitution or laws of the United States."

Franklin v. Gwinnett Co. Pub. Schools, 503 U.S. 60, 66 (1992) (citation omitted).

ted).

As was reiterated by this Court in circumstances where the lower federal courts avoided, thus evaded, the constitutional and jurisdictional issues raised below, in paraphrasing:

"The Eighth Circuit 'did not address these arguments', say and, for that reason, neither shall we." See Cutter v. Wilkinson, 544 U.S. 709, 718, n.7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (these are a court of review, not of first view). ... we believe that the Court of Appeals should have an opportunity to decide whether to enter final judgment below and remand the case, leaving it to the [Eighth] Circuit whether to determine their merits, taking such action as it deems appropriate."

Reh. Plans Comm. of IBM v. Jander, 589 U.S. —, 140 S.Ct. —, 205 L.Ed.2d 432, 433-434 (2020) (in relevant part, emphasis added, citations omitted).

Because the district court did not even address, and much less reach, the merits that establish "standing" to proceed under 28 U.S.C. § 2255, and after "reviewing" the initial petition, as well as this petition for rehearing that establishes that deprivation of liberty is an "injury-in-fact" when that liberty is deprived by the exercise of constitutionally unlawful power, as the totality of the circumstances of this case demonstrate, see generally

McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780, 2786 (2011) (citation omitted), this Court should be able to "conclude that the case should be

remanded for the courts below to address the" claims raised below, and "should take place in the District Court[?]" Frank v. Gao, 586 U.S. ___, 139 S. Ct. ___, 203 L. Ed. 2d 404, 409 (2019) (citation omitted).

As this case involves "substantive rules" set out in the Constitution, as this Court admonishes:

"A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void, ... It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, ..."

Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) (citation omitted).

Conclusion

For the reasons just stated, Kevin Ray Smith urges that this petition for a rehearing be granted, and that, on further consideration, the Petition for Certiorari be granted or the judgment of the lower court be reversed, vacated, and remanded or as appropriate.

Dated: June 30, 2022.

Respectfully submitted



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