

No. 21-7835

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Supreme Court, U.S.
FILED
MAY 02 2022
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IN THE
SUPREME COURT OF THE UNITED STATES

Michael Perryman — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Perryman
(Your Name)

Federal Correctional Institution Ashland P.O. Box 66001
(Address)

Ashland, Kentucky 41105
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the mere-possession reasoning in Bailey and Bousley retain precedential value in regard to "use" of a firearm under the amended Section 924(c)(1).

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION.....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

REASONS FOR GRANTING THE WRIT

CONCLUSION.....

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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 A to the petition and is

reported at 20 F.4th 1127; 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 is unpublished.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 2020 U.S. Dist. LEXIS 8336; 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 is unpublished.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 is unpublished.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 is unpublished.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 January 28, 2022.

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: January 28, 2022, 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 _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

18 U.S.C. Section 924(c)(1)

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

Case #: 1:18-cr-00317-JPH-MJD-1

Motion for Writ of Mandamus; Amended extraordinary Motion for New Trial
by Michael Perryman

STATEMENT OF THE CASE

The Second Superseding Indictment charged Mr. Perryman with three counts: possession with intent to distribute fentanyl in violation of 21 U.S.C. Section 841(a)(1) and (b)(1)(B)(Count 1); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. Section 924(c)(1)(Count 2); and possession of a firearm by a convicted felon in violation of 18 U.S.C. Section 922(g)(1)(Count 3). Dkt. 89. The Court held a jury trial on September 23-24, 2019. Dkt. 141; dkt. 142. At the close of the government's case, Mr. Perryman moved for judgment of acquittal and the Court deferred ruling on the motion until after the jury rendered a verdict. Dkt. 142. The jury reached a unanimous guilty verdict on all three counts. Dkt. 143. The Court accepted the verdict and denied Mr. Perryman's motion for acquittal. Dkt. 142. On October 8, 2019, Mr. Perryman filed a renewed motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Dkt. 147. He contends that the evidence is insufficient to support his conviction because: (1) the government failed to prove that he possessed the drugs or the firearm; (2) the government failed to prove the quantity of the drugs; and (3) that the evidence did not support the jury's finding that such possession was "in furtherance" of a drug trafficking crime. See dkt. 148.

Mr. Perryman asserts that the evidence established only that the firearm was at the Residence. Dkt. 148 at 4. He asserts that there was "no 'credible evidence' that would require the jury to do anything other than speculate that the gun was used in furtherance of a drug crime.

Reasons for granting the Petition

In Bailey v. United States, (1995) 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472, 1995 U.S. LEXIS 8536, the Court said that a conviction for use of a firearm for purposes of 18 U.S.C. Section 924(c)(1) required evidence sufficient to show an active employment of the firearm by the accused, a use that made the firearm an operative factor in relation to the predicate offense. Such as, the Court said, required more than a showing of mere possession by a person who committed the predicate offense, since if Congress had intended possession alone to trigger liability under Section 924(c)(1), then Congress easily could have so provided in the statute. According to the Court, the application of an active-employment standard was (1) supported by the statutory language and legislative history; and (2) not inconsistent with Supreme Court precedent. In each of two consolidated cases, an accused was convicted of various predicate drug offenses and of violation of Section 924(c)(1). In one case, police found a firearm inside a bag in the locked trunk of an automobile, after stopping the driver for a traffic offense and arresting him after finding cocaine in the driver's compartment. In the other case, an unloaded, holstered firearm was found locked in a footlocker in a bedroom closet of the accused's apartment during a search conducted after the arrest of the accused for a number of drug-related offenses. In reversing convictions that had been affirmed on the basis of the "use" prong of Section 924(c), then remanded for consideration under the "carry" prong. The Court said that "use" did not extend to encompass the concealment by an offender of a gun nearby to be at the ready for an imminent confrontation, since if the gun was not disclosed or mentioned by the offender, then the gun was not actively employed and was not "used."

In Bousely v. United States (1998) 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828, 1998 U.S. LEXIS 3334, the Court recognized its holding in Bailey v. United States, supra, that "use" of a firearm under 18 U.S.C. Section 924(c)(1) required active employment of the firearm. Reversing a judgment upholding a Section 924(c)(1) conviction that followed an allegedly involuntary guilty plea, the Court pointed out that active employment included uses such as brandishing, displaying, bartering, striking with, firing, or attempting to fire the weapon, but did not include mere possession of a firearm by , for example, (1) mere storage of a weapon near drugs or drug proceeds; or (2) placement of a firearm to provide a sense of security or to embolden.

Importantly, in Bailey v. United States, supra, and Bousley v. United States, supra, retains precedential value in regard to "use" of a firearm under Section 924(c)(1) notwithstanding a 1998 federal statute (among other items) amended Section 924(c)(1) to include separate express "possesses" phrase.

The evidence in Mr. Perryman's case sub judice only establishes that the firearm was at the residence. Moreover, there was "no credible evidence" that reasonable supported the allegations that the firearm was used in furtherance of a drug-related crime.

Mr. Perryman asserts that his conviction under Section 924(c) is unconstitutional based on the Supreme Court's holding in Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which invalidated the residual clause of the Armed Career Criminal Act ("ACCA") as void for vagueness. Section 924(c) contains a residual clause that is similar to the ACCA's residual clause. In United States v. Davis, a more recent case in which the Court ruled redemptively on the constitutionality of Section 924(c)'s residual clause. 139 S. Ct. 2319, 204 L. Ed. 2d 757. In Davis, the Supreme Court announced a newly recognized right by finding Section 924(c)'s residual clause to be unconstitutionally vague. Id. at 2336. The Fourth

Circuit recently joined the Fifth, Tenth, and Eleventh Circuits in holding that Davis established a new substantive rule that must be applied retroactively.¹

Mr. Perryman seeks not only application of Johnson II, but an extension of that holding in order to invalidate Section 924(c)'s elements clause and to have that extension made retroactive so as to trigger and obtain relief. See United States v. Garcia-Cruz, No. 16CV1508-MMA, 2017 U.S. Dist. LEXIS 120922, 2017 WL 3269231, at *4 (S.D. Cal. Aug. 1, 2017) ("In sum, Defendant's claim arises out of an extension, not an application, of the rule announced in" Johnson II); Hirano v. United States, No. CR 99-00465 ACK, 2017 U.S. Dist. LEXIS 94989, 2017 WL 2661629, at *7 (D. Haw. June 20, 2017) this court should both extend the holding in Johnson II and make that extension retroactively applicable.

¹ The conflict among the circuits is the compelling reason the Court should grant certiorari in Mr. Perryman's Case.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Bailey v. United States</u> (1995) 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472, 1995 LEXIS 8536	
<u>Bousley v. United States</u> (1998) 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828, 1998 U.S. LEXIS 3334	
<u>United States v. Davis</u> (2019) 139 S. Ct. 2319, 204 L. Ed. 2d 757, 2019 U.S. LEXIS 2336	
<u>United States v. Garcia-Cruz</u> No. 16CV1508-MMA, 2017 U.S. Dist. LEXIS 120922, 2017 WL 3269231, at *4 (S.D. Cal. Aug. 1, 2017)	
<u>Hirano v. United States</u> No. CR 99-00465 ACK, 2017 U.S. Dist. LEXIS 94989, 2017 WL 2661629, at *7 (D. Haw. June 20, 2017)	
<u>Johnson v. United States</u> (2015) 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)	

STATUTES AND RULES

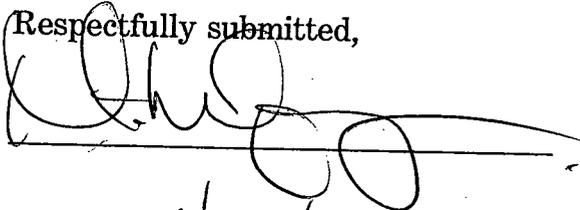
18 U.S.C. Section 924(c)

OTHER

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "R. H. O.", written over a horizontal line.

Date: 4/26/22