No. __-____

IN THE
Supreme Court of the United States

BARKLEY GARDNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may punish a violation of 18 U.S.C. § 1959(a) by a fine instead of death or life imprisonment.

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Petitioner Barkley Gardner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished Opinion affirming the district court order granting in part and denying in part Mr. Gardner's motion for a sentence reduction under Section 404 of the First Step Act is attached at Pet. App. 1a and is reported at 2022 WL 861818 and 2022 U.S. App. LEXIS 7703.

LIST OF PRIOR PROCEEDINGS

1. *United States v. Barkley Gardner,* No. 4:95-cr-41-D-8, United States District Court for the Eastern District of North Carolina.

   Final Judgment and Sentence issued on March 11, 1997

2. *United States v. Barkley Gardner,* United States Court of Appeals for the Fourth Circuit:

Case No.	Opinion/Final Order Issued
97-4220	August 9, 2002
03-7400	May 26, 2005
07-6502	July 2, 2007
08-8356	March 17, 2009
13-6830	July 30, 2013
13-7770	January 28, 2014
16-6772	October 18, 2016
17-288	July 19, 2017
17-7620	April 3, 2018
18-233	May 30, 2018
18-316	August 27, 2018
20-7844	February 19, 2021
20-6059	July 2, 2021
21-6863	March 23, 2022

JURISDICTION

The Fourth Circuit issued its opinion on March 23, 2022. Pet. App. 1a. This Court's jurisdiction over this timely petition rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1959(a)(1):

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of

> any State or the United States, or attempts or conspires so to do, shall be punished—
>
> > (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

STATEMENT OF THE CASE

Mr. Barkley Gardner was convicted in the mid-90s of multiple counts related to a drug conspiracy in the Eastern District of North Carolina. Under the mandatory Sentencing Guidelines at the time, multiple counts of the conviction carried mandatory life sentences, which the district court imposed to run concurrently.

But Mr. Gardner did not consider his life over. He diligently worked to put his life on the right track over the past 25 years of incarceration, despite no hope of ever being released. He earned his GED. He has worked steadily in the Bureau of Prisons, maintaining steady employment in the UNICOR program for over 13 years.[1] And during a quarter century of incarceration, he has only 4 infractions, and none is his last 20 years. Through his actions, he showed that he had matured and was no longer the dangerous individual who committed those serious crimes in the mid-1990s.

And that was how Mr. Gardner expected to live the rest of his days. A remorseful man. An improved man. A better man. But still an imprisoned man.

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[1] "UNICOR is the trade name for Federal Prison Industries, Inc., a government corporation that provides work and training opportunities for federal inmates. *Johnson v. Rowley*, 569 F.3d 40, 43 n.1 (2d Cir. 2009) (internal quotation omitted).

Then, as a result of retroactive changes to the crack cocaine sentencing laws, Mr. Gardner had a chance for the district court to consider his rehabilitation and exercise its discretion to reduce his sentence. *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) at § 404. Mr. Gardner, in 2019, filed a motion under Section 404 of the First Step Act asking for the district court to reduce his sentence.

Recognizing that Mr. Gardner was no longer the man who deserved the life sentence he received, the district court granted his motion and reduced the punishment for almost all of his counts of conviction to either 360, 240, or 120 months of imprisonment, all to run concurrently with each other.

But the court felt constrained as a matter of law to keep the punishment for Count Five of his conviction—murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1)—at life. The court held that the statutory minimum offense for this offense was life, so it was foreclosed from imposing a sentence below that. It entered an order reducing the sentence for Counts 1, 2, 3, 4, 6, and 7 to 360 months or less. It kept the sentence for Count 5 at life, noting that its holding was "based on statutory minimum being life." The net result of this order was no actual change to Mr. Gardner's life sentence.

Mr. Gardner timely appealed, arguing that the district court had the discretion to sentence him to a fine in lieu of imprisonment for a violation of Section 1959(a)(1), so it legally erred when it held that it lacked the power to reduce his sentence on Court Five. The Fourth Circuit, bound by its prior opinion in *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), held that a fine was a not a

stand-alone penalty for a violation of Section 1959(a)(1) and affirmed the district court's order.

This petition follows.

REASON FOR GRANTING THE PETITION

This Court should grant review because the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R 10(c). Specifically, when the plain language of a statute sets a penalty for a crime, must the courts apply that penalty, or can they hold that that penalty is "deeply problematic" and "cannot be what Congress intended" and not apply it?

This case presents a conflict between Congress' plain language and the courts' view of what Congress intended notwithstanding the language that it used. "As with any question of statutory interpretation, [this Court's] analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Section 1959's plain language says that a district court may sentence an individual guilty of murder in aid of racketeering "by death or life imprisonment, or a fine under this title, or both." 18 U.S.C. § 1959(a)(1). The statute thus authorizes a punishment of death *or* life imprisonment *or* a fine. The plain meaning of "or" compels this result. Further, the fact that the statute includes "or both" buttresses this reading of the statute. It would be impossible to sentence someone to death and life imprisonment. So the "or both" language must indicate that Congress intended

for a fine to be one of the permissible sentencing options for a violation of Section 1959(a)(1).

"It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez*, 555 U.S. at 118. But the Fourth Circuit did not do that. Instead, it held that "or" meant "and" and that a fine simply could not be a stand-alone punishment for Section 1959(a)(1).

This Court rejected such an approach in *United States v. Evans*, 333 U.S. 483 (1948). There, the government argued in the context of a criminal immigration statute that "Congress intended to authorize punishment, but failed to do so, probably as a result of oversight." *Id.* at 487. Thus, it asked this Court to "plug the hole in the statute" and impose a penalty that Congress had not authorized. *Id.* This Court rejected that request as outside the scope of interpreting statutes and encroaching on activity that is "essentially legislative." *Id.*

And the world didn't end. Instead, in response to this Court's refusal to rewrite the plain language of a statute, Congress amended the statute to clarify its meaning. *See United States v. Vargas-Cordon*, 733 F.3d 366, 379 (2nd Cir. 2013) (discussing history of statute). That is how the process is supposed to work. Courts apply the plain language of statutes. And if that application leads to results that Congress does not like, then Congress amends the statutes. When courts instead attempt to act as legislatures, they short-circuit the deliberative democratic process.

Here, the Fourth Circuit ignored the plain language of the statute. In so doing, it kept Mr. Gardner in prison for life despite the district court's willingness to

exercise its discretion to reduce his sentence to a term of years. This Court's review is necessary to correct this error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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