

IN THE SUPREME COURT OF THE UNITED STATES

22-5239 **ORIGINAL**

EDWARD BISHOP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Supreme Court, U.S.
FILED

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIFICATE

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Edward Bishop
Edward Bishop
Reg. No. 17070-027

QUESTION PRESENTED FOR REVIEW

Whether § 924(c) criminalizes two separate offenses to determine if the Petitioner was convicted of an offense § 924(c) does not criminalize?

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PARTIES TO THE PROCEEDINGS

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Pro Se representation for Petitioner

Attorney for Respondent,
United States of America,

Solicitor General
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Washington, D.C. 20530

CITATIONS OF OPINIONS AND ORDERS IN CASE

- The original judgment of conviction of Petitioner in the United States District Court for the Northern District of Indiana was not reported and is attached hereto as Appendix "1".
- The opinion and order of the Seventh Circuit Court of Appeals denying Petitioner's Second or Successive § 2255. Bishop v. United States, No. 21-2057 (7th Cir. June 14, 2021). Published.
- The opinion and order of the United States District Court for the Eastern District of Michigan dismissing § 2241 Writ of Habeas Corpus on October 21, 2021 (Case No. 21-11367) is published.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be held to answer a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; deprived of life, liberty, or property without due process of law."

2. The Sixth Amendment of the United States Constitution provides:

"To be informed of the nature and cause of the accusation."

3. 18 U.S.C. § 924(c)(1)(A)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime.

4. § 2255(e)

An application for writ of habeas in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

On June 14, 2017, a federal grand jury for the Northern District of Indiana, South Bend Division returned a one-count indictment charging Edward Bishop with the use and discharge of a firearm during and in relation to a drug trafficking crime. See Title 18 United States Code Section 924(c). Also see Appendix "2".

Bishop, proceeded to trial, the district court instructed the jury as:

"The indictment charges Edward Bishop with using a firearm during and in relation to a drug trafficking crime. For you to find the defendant guilty of this charge, the government must prove it say both but it should be all of the following elements beyond a reasonable doubt: First, that Mr. Bishop committed the crime of possession of marijuana with intent to distribute in violation of Section 21, United States Code Section 841(a)(1)" (Trial Transcript Page 261). See Appendix "3".

Following the jury instructions, the trial court instructed the verdict form to the jury as: "use and discharge of a firearm in furtherance of a drug trafficking crime." (Trial Transcript page 281). See Appendix "4".

The jury found Edward Bishop guilty of use and discharge of a firearm in furtherance of a drug trafficking crime. (Trial Transcript page 294). See Appendix "5" and (Verdict Form). See Appendix "6".

The district court for the Northern District of Indiana sentenced Bishop to 120 months of imprisonment, followed by two years of supervised release. The United States Court of Appeals for the Seventh Circuit affirmed Bishop's conviction. United States v. Bishop, 910 F.3d 335 (7th Cir. 2018). The Supreme Court of the United States denied petition for writ of certiorari. Bishop filed a § 2255 motion in the district court to which the district court denied said motion. Bishop filed for COA in the Seventh Circuit Court of Appeals to which COA was denied. Bishop then filed a second or successive § 2255 motion. In said motion, he argued that the use and discharging of a firearm during and in relation to a drug trafficking crime and the use and discharge of a firearm in furtherance of a drug trafficking crime are not the

same offense and that although he was indicted for the former, he was convicted of the latter. The Seventh Circuit denied the motion. Bishop v. United States, No. 21-2057 (7th Cir. June 14, 2021).

COURSE OF PROCEEDINGS IN THE SECTION 2241 CASE BEFORE THIS COURT

On June 2, 2021, Petitioner filed a 28 U.S.C. § 2241 writ of habeas corpus challenging the constitutionality of the conviction, which asserted that: (1) Petitioner was convicted of a non-existent offense instead of the Section 924(c) charge on which he had been indicted by the grand jury; (2) The verdict form constructively amended Petitioner's indictment, and (3) The miscarriage of justice question should be decided based upon Sixth Circuit case law due to the split amongst the Sixth and Seventh Circuits.

On July 29, 2021, the district court issued a show cause order directing the United States to respond to Petitioner's § 2241 motion within thirty (30) days. See Appendix "7".

On August 27, 2021, the district court vacated the order directing the United States to respond to the petition.

On October 21, 2021, the district court dismissed Petitioner's § 2241 motion, which is attached hereto as Appendix "8".

A timely notice of appeal was filed.

On April 12, 2022, the United States Court of Appeals for the Sixth Circuit delivered its opinion affirming the district court's denial of Petitioner's § 2241.

REASON FOR GRANTING THE WRIT

B. CIRCUITS ARE CURRENTLY SPLIT AS TO WHETHER § 924(c) CREATES TWO SEPERATE OFFENSES AND THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

(1) Petitioner was convicted in the Seventh Circuit by a jury for: "use and discharge of a firearm in furtherance of a drug trafficking crime." The

Seventh Circuit states that the crime the Petitioner was convicted of is a valid crime, and the Sixth Circuit states that it is not a valid crime.

The Seventh and Ninth Circuits have held that the statute merely describes two alternative means for committing the same offense. See United States v. Haynes, 582 F.3d 686, 703-04 (7th Cir. 2009); United States v. Arreola, 467 F.3d 1153 (9th Cir. 2006).

The Sixth, Fourth, Eighth, and Tenth Circuits have held that § 924(c) creates two separate offenses. See United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004); United States v. Woods, 271 Fed. Appx. 338, 343 (4th Cir. 2008); United States v. Gamboa, 439 F.3d 796, 810 (8th Cir. 2006); and United States v. Brooks, 438 F.3d 1231, 1237 (10th Cir. 2006). ((1). Use or carry offense which has "during and in relation to" as its standard of participation, and (2) possession offense, which has "in furtherance of" as its standard of participation). The Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), prohibited only "using or carrying a firearm during and in relation to" drug trafficking. Congress responded to the Bailey decision in 1998, by amending § 924(c) to cover "possession of a firearm in furtherance of" a crime known as the "Bailey Fix Act."

Petitioner was indicted on a one-count indictment for violating § 924(c), which § 924(c) cannot stand alone without the underlying crime in a § 924(c) prosecution.

The Sixth Circuit opinion erred affirming the district court's denial of Petitioner's claim of being convicted of a non-existent offense because its decision is in direct conflict with this Court's decision in Stirone v. United States, 361 U.S. 212, 217 (1960). The record reveals that the Petitioner was not convicted of the crime charged in the indictment, and the Sixth Circuit agrees that the Petitioner's verdict form does not match the indictment. See Appendix "9". The Sixth Circuit Court of Appeals stated:

"As noted on the verdict form, the jury found him guilty of 'use and discharge of a firearm in furtherance of a drug trafficking crime.'"

By the Petitioner being convicted of a crime other than the crime charged in the indictment is a clear miscarriage of justice.

This Court should exercise its supervisory powers over the lower courts and issue the writ.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

1. § 924(c) criminalizes two separate offenses in plain text of the statute.

Section 924(c)(1) provides, in relevant part:

"Any person who, during and in relation to any crime of violence or drug trafficking crime for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime."

Although the statute then defines the "drug trafficking crime" in a manner that makes clear it must be a federal, U.S. Code offense, see 18 U.S.C. § 924(c)(2).

The phrase "drug trafficking crime for which the person may be prosecuted in a court of the United States" is susceptible to only be meaning a federal, U.S. Code offense. This is true for two reasons: First, a federal district court is "a court of the United States," and there is no dispute that in the context of criminal jurisdiction, the phrase "may be prosecuted in a court of the United States" limits the application of § 924(c) to drug trafficking crimes which can be charged in a federal district court.

Stautory and Legislative History

Congress clearly intended to punish only using, carrying, or possessing a firearm in relation to the commission of a federal crime.

Original Enactment

Congress enacted § 924(c) in October 1968 as part of the Gun Control Act

of 1968, Pub. L. No. 90-618, 82 Stat. 1213. In its initial form, Section 924(c) read, in relevant part:

Whoever (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. Pub. L. No. 90-618, § 924(c), 82 Stat. 1213.

This provision was originally offered as an amendment on the House Floor by Representative Richard Poff of Virginia, see 114 Cong. Rec 22231 (July 19, 1968), and passed the same day, see 22248.

In introducing the amendment, Congressman Poff made it unmistakably clear that the provision applied only to federal predicate felonies.

First, Congressman Poff stated that his amendment "makes it a separate federal crime to use a firearm in the commission of another federal crime, 114 Cong. Rec. 22231. In explaining one of those reasons for limiting the application of his amendment to federal felonies avoiding the burden of the prosecutor of proving a given firearm moved in interstate commerce in order to establish federal jurisdiction, Congressman Poff noted that "every federal felony defined in the code already has its own jurisdictional base," at 22231, which further indicates he contemplated only U.S. Code offenses as predicates.

Ultimately, a Conference Committee adopted Congressman Poff's version of § 924(c) with only minor changes and the Conference Report itself described the House bill as punishing "a person [who] uses a firearm to commit, or carries a firearm unlawfully during the commission of a federal felony." See H.R. Rep. No. 90-1956 at 31 (1968) (Conf. Rep.).

Subsequent Amendments

Congress amended § 924(c) as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 48 Stat. 1837 (1984), in part by replacing the "any felony" language with the phrase "any crime of violence," Pub. L. No. 98-

Just two years later, in 1986, Congress again amended § 924(c) through the Firearms Owners Protection Act of 1986. See Pub. L. No. 99-308, 100 Stat. 449 (1986). In that act, Congress clarified which predicate felonies qualified to trigger § 924(c) by bifurcating the statutory predicate, expanding the phrase of "crime of violence" to include a "crime of violence or drug trafficking crime." Pub. L. No. 99-308, § 104. The act also added definitions for both "crime of violence" and "drug trafficking crime" to § 924(c) itself.

In 1998, Congress amended § 924(c) again, this time in response to the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995). Congress considered several bills with differing language before eventually adding the words "possess a firearm in furtherance of the crime." The legislative history of the amendment bolsters the view that Congress intended "in furtherance of" to create a different standard of conduct than the "during and in relation to" language. The House Committee Report clarified that the members regarded "in furtherance of" as a slightly higher standard, encompassing the "during and in relation to" language. H.R. Rep. No. 105-344, at 11 (1997).

THE COURT OF APPEALS ERRED BY DETERMINING THAT PETITIONER'S CLAIM
OF BEING CONVICTED OF A NON-EXISTENT OFFENSE DID NOT MEET THE
STANDARDS SET FORTH BY THIS COURT IN STIRONE

Petitioner asserted in his § 2241 petition as grounds for relief that: Petitioner was convicted of a non-existent offense for which he was not indicted by a grand jury nor which § 924(c) criminalizes.

Petitioner was found guilty by a trial jury for: "use and discharge of a firearm in furtherance of a drug trafficking crime." The verdict form cross

matched a non-existent unindicted standard of participation (in furtherance of) with the conduct of (use). Petitioner was indicted by a grand jury for: "used and discharged a firearm during and in relation to a drug trafficking crime."

The same principles apply here as in Stirone terms. In Stirone v. United States, 361 U.S. 212, 219 (1960), the Supreme Court found a constructive amendment when the indictment charged the defendant with unlawful interference with the interstate movement of sand, while the trial court's instruction allowed the jury to convict for either unlawful sand or steel shipments. The court held that the indictment could not fairly be read as containing the same charge as the conviction. See Stirone, 361 U.S. at 217.

The Fifth Amendment's Due Process Clause guarantees that a defendant can be convicted only of crimes charged in an indictment.

("When a defendant is convicted of charges not included in the indictment, an amendment of the indictment has occurred") See United States v. Keller, 916 F.2d 628, 653 (11th Cir. 1990).

The grand jury clause is violated when the indictment is effectively altered to change the elements of the offense charged, such that a defendant is actually convicted of a crime other than that charged in the indictment. United States v. Burfoot, 889 F.3d 326, 338 (4th Cir. 2018).

A federal defendant has a due process right to be tried and convicted only for a crime that actually exists. "Conviction and punishment for an act that the law does not make criminal inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974). A conviction for a "non-existent offense" thus reflects a "fundamental defect" in a criminal judgment must be set aside. ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.") Cole v. Arkansas, 333 U.S. 196, 201 (1948).

Petitioner's § 2241 petition alleged facts that, if proved, entitle the Petitioner to relief. Petitioner asserted that the district court gave the jury a verdict form with language that differed from the indictment, thus Petitioner conviction on count one should be reversed, Petitioner is innocent of the charge that has landed him in prison.

CONCLUSION

Petitioner, Edward Bishop, has been deprived of basic fundamental rights guaranteed by the Fifth Amendment and Sixth Amendment of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein, Petitioner's conviction was sustained in violation of his due process and is a complete miscarriage of justice. Petitioner prays that this Court will issue of writ of certiorari and reverse the judgment of the Sixth Circuit Court of Appeals.¹

Respectfully Submitted,

Date: 7-7-21

Edward Bishop
Edward Bishop
PRO SE REPRESENTATION

VERIFICATION

I, Edward Bishop, verify that the foregoing statements made within this document are true, correct, and complete to the best of my knowledge and belief pursuant to the penalty of perjury.

Edward Bishop
Edward Bishop

1: If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter be remanded to the Sixth Circuit Court of Appeals for reconsideration in light of this Court's opinion in Bailey and Stirone.