No. 22-5979

IN THE

Supreme Court of the United States

DEMETRICE R. DEVINE and BRANDON JOWAN MANGUM,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government's argument in response to the defendants' petition was rejected by this Court in Whalen v. United States, 445 U.S. 684, 694, 100 S. Ct. 1432, 1439, 63 L. Ed. 2d 715 (1980). RICO, VICAR and 18 U.S.C. 924(j) rely on different statutory elements under Blockburger, but factually, the sole reason the punishment under each of these statutes is enhanced to life is because of the murder of a single person by firearm.

In Whalen, the Government argued for multiple punishment because the statute criminalized murder, which could be committed in some form of felony other than rape, such as robbery, kidnaping or arson, etc. Id. The Court agreed that multiple punishments were applicable when the killing and underlying offenses were different; however, since the felony murder in Whalen was rape, then multiple punishments for a killing and rape could not be imposed. The Whalen Court explained to the extent Congress' drafting of the statute supported the Government's argument, contrary to the interpretation by the Court, any "doubt must be resolved in favor of lenity." Id.

Here, the Government urges the same reasoning that was rejected by Whalen. The Government contends that any use of violence could enhance the punishments under RICO or VICAR to life, so that the elements are different. But as in Whalen where the alleged VICAR violence was murder with a firearm, the elements are the same. Similarly, under section 924(j), the life enhancement is triggered by the same murder with a firearm, showing that the elements are the

same. Finally, under RICO, murder with the firearm enhances the punishment to life, making the elements the same as § 245(j). The killing with a firearm is essentially the lesser included offense in every offense statute.

Under RICO, the overt act committed by Demetrice Devine was the murder of Adarius Fowler, while the overt act committed by Brandon Mangum was the murder of Rodriguez Burrell. The violence committed under VICAR was the murder of Fowler or Burrell by firearm. The element triggering a life sentence under section 924(j) was the murder of Fowler or Burrell by firearm. Factually there had to be a murder of Fowler or Burrell by firearm to trigger a life sentence under RICO, VICAR, and section 924(j).

Since the Blockburger rule of statutory construction was announced in 1932, Congress has fashioned multiple ways to enhance punishments by statutes analogous to the common law felony murder rule. Murder with a firearm under section 924, which was passed in 1968, carries a life sentence. Murder as an overt act under RICO, which was passed in 1970, carries a life sentence. Murder with a firearm under VICAR, which was passed in 1984, carries a life sentence. Whalen's factual gloss announced in 1980 on the Blockburger different elements test, ought to be controlling on the Circuits with respect to these statutes.

This Court has long held that the question under the double jeopardy clause whether punishments are "multiple" is essentially one of legislative intent. Ohio v. Johnson, 467 U.S. 493, 498-499, 104 S. Ct. 2536, 2540-2541, 81 L. Ed. 2d 425 (1984). The Congressional intent for each of the above statutes (§ 924(j), RICO, and

VICAR), was to enhance punishments where violence, racketeering, murder, or firearms resulting in death occur. The statutes were enacted at different times to address increased violent conduct, drug activity, gang activity, and illegal firearm use. Each of the statutes has its own set of elements, some overlapping, and some not. While each of the statutes on its own may lend itself to the Blockburger test, it is impossible to determine whether the Congressional intent of all three statutes was to provide separate consecutive punishments for the same criminal act. As previously noted in this Court's opinion in Whalen, any doubt regarding Congressional intent must be resolved in favor of lenity. 445 U.S. at 694, 100 S. Ct. at 1439.

Petitioners do not contend that Congress could not proscribe multiple punishments when the offenses are committed using separate means. Petitioners argue that Congress did not intend to create consecutive punishments when the underlying offense is not factually distinct. The interpretation urged by the Government is not consistent with the purpose of Blockburger, which is to avoid multiple punishments for the same offense committed on the same occasion. Whether it is termed to be an act, event, incident, occasion, or episode, there was only one death of Adarius Fowler on November 21, 2008, and one death of Rodriguez Burrell on May 25, 2009. Therefore, multiple consecutive life sentences should not have been imposed. The Government's reasoning was then and is now contrary to this Court's holding in Whalen.

The Government contends that the petitioners' double jeopardy claim is subject to plain error review, citing Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021). Petitioners do not agree that a constitutional challenge to multiple consecutive life sentences lends itself to plain error review. They further contend that the imposition of multiple life sentences does affect a substantial right and, when imposed unfairly, does affect the integrity and reputation of the criminal justice system. Petitioners further reject the implication of the Government's argument that their petition ought not be reached.

Finally, the Government contends that even if the petitioners prevail on their argument, it would have no practical effect on their terms of imprisonment because each are subject to at least one life sentence. Petitioners strongly disagree. A similar argument was made by the Government in Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), where this Court determined that conspiracy to distribute controlled substances is a lesser included offense of Continuing Criminal Enterprise (CCE), requiring that one of the convictions must be vacated. In Rutledge the district court entered judgment of conviction on both counts and imposed a sentence of life imprisonment without possible release on each, the sentences to be served **concurrently**. In addressing the Government's argument that the second conviction may not amount to a punishment at all, this Court in Rutledge stated as follows:

> "If we ignore the assessment as the Government requests, the force of its argument would nonetheless be limited by our decision in *Ball v. United States*, 470 U.S. 856, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). There, we concluded that

Congress did not intend to allow punishment for both illegally 'receiving' and illegally 'possessing' a firearm. *Id.,* at 861-864, 105 S. Ct., at 1671-1673. In light of that conclusion, we held that 'the only remedy consistent with the congressional intent is for the District Court . . . to exercise its discretion to vacate one of the underlying convictions' as well as the concurrent sentence based upon it. *Id.,* at 864, 105 S. Ct., at 1673. We explained further:

> 'The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See *Benton v. Maryland*, 395 U.S.784, 790-791 [89 S. Ct. 2056, 2060-2061, 23 L. Ed. 2d 707] (1969); *Sibron v. New York*, 392 U.S. 40, 54-56 [88 S. Ct. 1889,1898-1899, 20 L. Ed. 2d 917] (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.' *Id.,* at 864-865, 105 S. Ct. at 1673.

Under *Ball*, the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence."

517 U. S. at 301, 302, 116 S. Ct. at 1248.

Petitioners respectfully contend that if an improper concurrent sentence can have potential adverse collateral consequences to a defendant, improper consecutive sentences can have even greater potential adverse consequences.

In conclusion, please be reminded that the Fourth Circuit in its opinion below noted, "our sister circuits have been repeatedly faced with a dizzying variety of double jeopardy challenges to various combinations of RICO-related offenses." (Pp. 19-20 Opinion). This is because the enhancement statutes herein were enacted at various times to address a variety of significant concerns. The issue becomes whether there was Congressional intent to authorize multiple consecutive sentences to address the same offensive conduct. Petitioners pray that certiorari be allowed so that this Court can resolve some of the "dizzying variety of double jeopardy challenges" to the many combinations of RICO-related offenses.

Respectfully submitted.

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