

22-7389
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

MAR 28 2023

OFFICE OF THE CLERK

GERALD Lee Banks — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gerald Lee Banks # 55321-056

(Your Name)

FCI-Williamsburg, P.O. Box 340

(Address)

Salters, S.C. 29590

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Did the Appellant err when it violated its own precedent in denying Banks sentencing error?

Did the Lower Court err when it violated Fourth Circuit precedent when it denied Banks sentencing error?

Did the Fourth Circuit Appellant Court err when it issue an opinion that conflicted with other appellat court opinion and its own?

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

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
United States v. Wheeler No: 16-6073 (4th. Cir. 2018)	5-8
Antonelli v. Warden 542 F3d. 1348, 1351 n1 (11th. Cir. 2008)	8

STATUTES AND RULES

- 18 USC Section 924 (c)(1)(A)
- 18 USC Section 924 (c)(3)(A)
- 18 USC Section 924 (c) (3)(B)

OTHER

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JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 09-13-2022.

[] 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: 02-7-2023, and a copy of the order denying rehearing appears at Appendix B.

[] 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

Fifth Amendment Constitutional Rights to be Free from Incarceration

STATEMENT OF THE CASE

Banks was arrested on July 25th., 2010, on charges of aiding and abetting in the use of a firearm during a crime of violence in violation of 924 (c)(1)(A) the government never stipulated to whether it was a crime of violence under 924(c)(3)(A) the elements clause or 924(c)(3)(B) the residual clause, in fact neither of these two subsections appear on any charging instrument thereby rendering the whole sentencing phase to mere speculation and creating a sentencing error which equates to a miscarriage of justice.

In denying Banks 2241, the Lower Court created a conflict with the Fourth Circuit's precedent in Wheeler and with the Eleventh Circuit's precedent.

Also during the appeal process did issue its order denying Banks appeal which did create a conflict with its own precedent set in Wheeler and the Eleventh Circuit's precedent in Antonelli, v. Warden 542 F3d. 1348 1351 n1 (2008). The Fourth Circuit also created a conflict with Antonin Scalia and Bryan A. Garner's legal interpretation of text Section's 2, 24, and 39 (2011), where they stated: Under Circuit's precedent a sentencing error claim is not cognizable in a 2255 proceeding therefore a 2255 motion is inadequate and ineffective to remedy an erroneous detention resulting from a sentencing error.

PROCEDURAL HISTORY

Banks was indicted by a federal Grand Jury in the Eastern District of North Carolina on 12 April 2011 with two counts: count-1 aiding and abetting a violation of the Hobbs Act, 18 USC § 1951 & 2; and Count-2, aiding and abetting in the use of a firearm during a crime of violence, 18 USC § 924(c)(1)(A) & 2. Pursuant to a guilty plea, Banks entered a plea of guilty to counts one and two on 1 August 2011 following a sentencing hearing on 7 December 2011, Senior United States District Court Judge James C. Fox, sentenced Banks to a term of 156 months for count-(1), followed by a consecutive term of 84 months for count-(2). Followed by a term of five years of supervised release. Banks timely appealed his conviction # 11-5198 which was subsequently denied. He also filed a § 2255 which was also denied, he then filed for authorization to file a second of successive § 2255 which was also denied, # 16-931 denied on June 27, 2016.

STATEMENT OF FACTS

According to the presentencing report ("PSR"), Jeffrey Chapman and Gerald Banks entered the Fuel Warehouse in New Bern North Carolina to commit an armed robbery on 19 July 2010. Both wore pantyhose stocking over their faces. Chapman aimed a handgun at the lone employee who was stocking the drink cooler, and ordered the employee to lie down on the floor. Chapman removed the money from the register - \$334.00 in cash - and stole \$90.00 worth of cigarettes. The employee was unharmed.

Police arrived at the scene and reviewed the video surveillance officers recognized Chapman and Banks. Chapman thereafter went on a crime spree, shooting at least two other individuals, before being arrested at a bus station a few weeks later while trying to flee.

Banks was arrested without incident on 25 July 2010. Though they both confessed to participating in the robbery, they both identified the other as the individual who was primarily responsible however, Chapman kept all the proceeds.

Chapman had committed other crimes of violence in the weeks leading up to the robbery of the Fuel Warehouse.

On the crime scene "video surveillance camera" Chapman is seen leading the robbery holding the pistol and giving commands to the clerk. In "contrast, Banks entered the store after Chapman, moved slowly and made "no" threats to the clerk."

A common sense analysis of the dynamic's of Banks behavior during the course of events here demonstrate taht he was not functioning under his own will, but that of Chapman which is contrary to the government's contention that he was a willing participate in the aiding and abetting the use of a firearm during a crime of violence.

Issue # 1 Continued:

As to Petitioner's argument/assertion to count two, he contends that he is erroneously detained based on a sentencing error due to the government's failure to prove the essential elements to sustain the charges thereby creating a sentencing error. He contends he is innocent because his conduct and factual circumstances of the case does not satisfy the "essential and statutory elements needed to sustain or impose a valid and constitutional conviction and sentence under the elements clause of 924(c)(3)(A) elements clause or 924 (c) (3)(B) the residual clause.

Specifically, Banks was charged with aiding and abetting in the use of a firearm during a crime of violence, 18 USC § 924(c)(1)(A)

& 2, which does not incorporate the "essential and statutory elements" of 924(c)(3)(A) the elements clause nor 924(c)(3)(B) the residual clause. Charging aiding and abetting the use of a firearm during a crime of violence under 924(c)(1)(A) without more must be viewed under the "plain Error' Doctrine" as the indictment does not contain the essential elements under the "use-of-force" of the guidelines or 924(c)(3)(A) or 924(c)(3)(B). When a indictment fails to charge all the essential statutory elements, it fails to charge that offense based thereon 924(c)(1)(A) fails to establish a crime of violence and must be dismissed as a illegal sentence enhancement.(miscarriage of justice)

In further support of Banks contention the Fourth Circuit Court of Appeals decision in United States v Loayza, 107 F3d. 257 (4th. Cir. 1997) was precise and divinitive where it held that "If an indictment does not contain every "essential statutory element" of the offense it is invalid and a Bill of Particulars cannot cure the defect. We also find in the Fifth Circuit Court of Appeals in line with the holdings of the Fourth Circuit when it held in United States v. Berrious-Centeno, 250 F3d. 294 (5th. Cir. 2001) to be sufficient an indictment "must" allege each material element of the offense, if it does not, it fails to charge that offense.

In the instant case Banks was charged and convicted on charges that were void of all essential statutory elements to make up the charge. Wherein an indictment is jurisdictional and a defect in an indictment is not waived by a guilty plea.

The facts of this case are clear cut, the government failed to prove the essential statutory elements of the charge of 924(c)(3)(A) or 924(c)(3)(B) creating an erroneous detention resulting from a sentencing error.

The record is clear and the above documents facts establish that Banks is not guilty of a violating any crimes of violence under the elements clause of 924(c)(3)(A) or 924(c)(3)(B) and based on the government's failure to prove the essential statutory elements has subjected Banks to a sentencing error.

A sentencing challenge is never cognizable in a § 2255 proceeding therefore, § 2255 is inadequate and ineffective for obtaining a remedy to an illegal detention caused by a sentencing error. Correspondingly despite a textual circuit precedent a district court may adjudicate a sentencing error challenge in a § 2241 habeas corpus.

The decivise question in this proceeding is whether the district court has subject matter jurisdiction over the petition for writ of habeas corpus. The governing text an application for writ of habeas corpus...shall not intertained...unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention in contained in 28 USC § 2255(e).

The text's plain meaning and its contextual meaning, provide a simple definition and one foreshadowed in the Eleventh Circuit's holding in Antonelli v. Warden, 542 F3d. 1348, 1351 n1 (11th. Cir. 2008). A prisoner may proceed under § 2241 when the prisoner's §2241 claim is incognizable under 28 USC § 2255(e) and (h). In other words when a claim could never have been brought under § 2255 then the claim may be adjudicated under § 2241.

The simple definition fits squarely within the traditional cannons of construction. Antonin Scalia and Bryan A Garner Reading law. Interpretation of legal text §§ 2, 24, 39 (2012). Under the Circuit's precedent a sentencing error claim is not cognizable in a

§ 2255 proceeding. Therefore, a § 2255 motion is inadequate and ineffective to remedy an erroneous detention resulting from a the sentencing erro.

Habeas equitable traditions and American fairness concepts favor considering any miscarriage of justice claim as fulfilling the requirements of § 2255(e) otherwise the ANtiterrorism Effective Death Penalty Act's restrictions on filing a successive § 2255 motion amount to an unconstitutional suspension of the Habeas Corpus. Banks sentnce is fundamentally defective since it exceeds the lawful maximum. Banks convictions is a mis-carriage-of-justice since the government did not prove the elements of the crime.

Banks shows that the constitution requires the district court either accept jurisdiction under the miscarriage of justice doctrine or requires the district court to declare the Antiterrorism Effective Death Penalty Act an unconstitutional suspension of the hadeas corpus succinctly Banks continued imprisonment is a miscarriage of justice and neither American tradition nor the constitution can tolerate a statutory scheme that renders such a detention irremediable.

Wherefore, based on the government's failure to prove the essential and statutory elements of the case thereby resulting a sentencing error. Petitionet asks that his sentence be vacated and/or dismissed. As unconstitutional.

Respectfully

s/ 
Gerald Lee Banks

REASONS FOR GRANTING THE PETITION

The reason the the petition should be granted is that the lower court and the appellant court are violating their own case precedents solely to keep from providing individuals the relief theye so rightfully deserve.

They refuse to acknowledge the errors that are being committed by the lower courts, this is not fair or just law. In the instant case Banks has received a sentencing error where he has served more than the maximum on this unconstitutional sentence. He deserves a second look. If this court continues to ignore these abuses, no one will every receive justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerald Lee Banks

Date: 03/28/2023