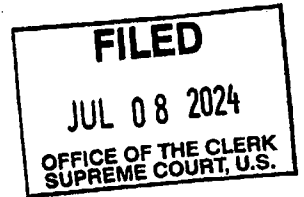


No. 24-5095

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



MOISES GAMBOA - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

MOISES GAMBOA
BOP # 18005-086
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QUESTION(S) PRESENTED

- DID THE LOWER COURTS IMPROPERLY INTERPRET UNITED STATES SENTENCING GUIDELINE § 4C1.1 THAT VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?
- DID THE LOWER COURTS DECISION CONTRADICT THE SUPREME COURT OF THE UNITED STATES ESTABLISHED PRINCIPLES OF ENGLISH GRAMMAR, STATUTORY CONSTRUCTION, AND STATUTORY INTERPRETATION?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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.

OPINION BELOW

- The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.
- The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the opinion of the Court of Appeals for the Fourth Circuit entered on April 29, 2024 in USCA No. 24-6123 as the Appellate opinion contradicts United States Supreme Court precedents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES
- SECTION 4C1.1 OF THE UNITED STATES SENTENCING GUIDELINES, 2023.

STATEMENT OF THE CASE

Mr. Gamboa was convicted in the United States District Court for the Southern District of West Virginia, Huntington Division for Aiding & Abetting Possession With Intent to Distribute 100kg or More of Marijuana. Mr. Gamboa does not have any criminal history points. He did receive a two-point enhancement under section 3B1.1 of the Sentencing Guidelines. There was no allegation or finding that Mr. Gamboa engaged in a continuing criminal enterprise as defined under 21 U.S.C. § 848. He was sentenced to 200 months on June 19, 2017.

The United States Sentencing Commission enacted Amendment 821 that provided a 2-point offense level reduction for those with zero (0) criminal history points, effective November 1, 2023. The courts were instructed they could not issue any Orders until February 1, 2024.

Mr. Gamboa, like many, filed a motion with the district court seeking a 2-point offense level reduction. On December 22, 2023 the district court entered an Order of denial stating Mr. Gamboa received an Aggravating Role enhancement pursuant to U.S.S.G. § 3B1.1. The district court determined that under U.S.S.G. § 4C1.1(10) this disqualified Mr. Gamboa from receiving the 2-point offense level reduction. Mr. Gamboa filed a motion for reconsideration with the district court that was denied on January 23, 2024.

Mr. Gamboa filed a direct appeal to the Fourth Circuit Court of Appeals that was denied on April 29, 2024. The court of appeals affirmed the district court's order after discerning no reversible errors.

REASONS FOR GRANTING THE PETITION

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *PERRIN v UNITED STATES*, 444 U.S. 37,42, 100 S.Ct. 311, 62 L.Ed.2d 196 (1979). It is normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *PEREIRA v SESSIONS*, 585 U.S. 198, 138 S.Ct. 2105,2115, 201 L.Ed.2d 433 (2018)(citing *TANIGUCHI v KAN PACIFIC SAIPON, LTD.*, 566 U.S. 560,571, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012)). Invoking the presumption of consistent usage - the rule of thumb that a term generally means the same thing each time it is used. *UNITED STATES v CASTLEMAN*, 572 U.S. 157,174, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014).

Statutory construction is a holistic endeavor, and at minimum, must account for a statute's full text, language as well as punctuation, structure and subject matter. *U.S. NAT. BANK OF ORE. v INS AGENTS*, 508 U.S. 439, 454-55, 113 S.Ct. 2172, 124 L.Ed.2d 402 (1993). A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. *Id.* at 454. Such Interpretation is based on the norms of statutory construction and the regular application of the principles of English grammar. See *FLORES-FIGUEROA v UNITED STATES*, 556 U.S. 646,652, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009)(courts ordinarily interpret criminal statutes consistently with ordinary English usage.).

The courts have long recognized that the Sentencing Guidelines have the same effect as law and should be reviewed under the same standards used for statutes. Much like Congress, we must assume that the U.S. Sentencing Commission is aware of existing law and statutory construction when it passes Amendments and Guidelines. See *MILES v APEX MARINE CORP.*, 498 U.S. 19,32, 111 S.Ct. 317, 122

L.Ed.2d 275 (1990).

The issue before this Court concerns the interpretation of U.S. Sentencing Guideline 4C1.1, that the U.S. Sentencing Commission enacted in November 1, 2023 in Amendment 821. Section 4C1.1, Adjustment For Certain Zero-Point Offenders, reads in full:

"(a) ADJUSTMENT – If the defendant meets all of the following criteria:

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A;
- (2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);
- (3) the defendant did not use violence or credible threats of violence in connection with the offense;
- (4) the offense did not result in death or serious bodily injury;
- (5) the instant offense of conviction is not a sex offense;
- (6) the defendant did not personally cause substantial financial hardship;
- (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);
- (9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Offense); and
- (10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by 2 levels."

It seems every lower court has interpreted Clause 10 to mean either of these elements disqualifies a defendant from the 2-point level reduction. Mr. Gamboa contends based on U.S. Supreme Court cases relating to statutory construction, interpretation, and grammatical terms, the lower courts and many U.S. Attorneys who have pushed this interpretation are wrong. Even this Court's recent decision in **PULSIFER v UNITED STATES**, 2024 U.S. LEXIS 1215 (S.Ct. Mar. 15, 2024) supports Mr. Gamboa's argument.

There are three areas of § 4C1.1 that need to be analyzed to properly interpret this Guideline. First is the directive statement, "If the defendant meets **all** of the following criteria." (emphasis added). "All" means each criteria, all encompassing, if a defendant does not meet any one of the 10 criteria, he or she does not qualify. All parties can agree with this interpretation.

The Sentencing Commission then set out to list 10 criteria, each criteria separated by a "semi-colon". The use of a semi-colon before a phrase "indicates that the clause is independent from that which precedes it. " **GREATER E. TRANSPORT, LLC. v WASTE MGMT. OF CONN., INC.**, 211 F.Supp.2d 499,504 (SD NY 2002). AS this court determined in **PULSIFER**, it is clear that clauses creates an "eligibility checklist" that indicates that all clauses are necessary condition and must be met. **PULSIFER**, 2024 U.S. LEXIS 1215 * 23.

So the real dispute arises in Clause 10 and the usage and meaning of the word "and". The word "and" is used twice in Section 4C1.1, once at the end of Clause 9, which groups all the criteria clauses together with the last one, Clause 10. The only other time "and" is used is within Clause 10. In both incidences the word "and" has the same meaning – "along with" or "together with". See **WEBSTERS THIRD WORLD INTERNATIONAL DICTIONARY** 80 (1993).

"And", in grammatical terms, is of course a conjunction - word whose function is to connect specified items. Mr. Gamboa asserts "and" in Clause 10 conjoins both elements, meaning a defendant 1) must have received an adjustment under § 3B1.1 and 2) was not engaged in a continuing criminal enterprise.

Unless some feature of the law suggests that one or another of its terms bears a specialized meaning, our duty is to interpret Congress's [or in this case the U.S. Sentencing Commission] work as an ordinary reader would. See *NIZ-CHAVEZ v GARLAND*, 593 U.S. 155, 163, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021). At the heart of this issue lies no specialized term but perhaps the most ordinary of words. The Court in *PULSIFER* agreed "and" is "a conjunction - a word whose function is to connect specified items. *PULSIFER*, 2024 U.S. LEXIS 1215 * 15; see J. Opdycke, *HARPER'S ENGLISH GRAMMER*, 200 (rev. ed. 1966).

The Government will disagree contending the "and" in Clause 10 actually means "or". However, the Sentencing Commission when drafting section 4C1.1 used the word "or" three times for such a reading to mean either element. See Clause 3, 4, and 7 of § 4C1.1. It can reasonably be determined that "and" does not mean "or", but actually means "together with", "along with", "in addition to", or "as well as". *AMERICAN HERITAGE DICTIONARY* 66 (5th ed. 2018); *PULSIFER*, 2024 U.S. LEXIS 1215 * 15. [Guidelines] are supposed to be defined by the legislature [Commission], not by clever prosecutors riffing on equivocal language. See *DUBIN v UNITED STATES*, 599 U.S. 110, 129-130, 143 S.Ct. 1557, 216 L.Ed.2d 136 (2023).

The failure of the lower courts to interpret § 4C1.1 as it reads, prevents Mr. Gamboa from a sentence that would be lower today if he were to be sentenced today. To make Mr. Gamboa serve more time incarcerated than he would today is cruel and unusual punishment. The Government will argue it is up to the discretion of the district court whether to grant a reduction, however the

district court is to avoid unwarranted disparities, which would be created if not given the 2 level reduction.

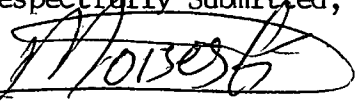
To even strengthen Mr. Gamboa's argument is that the U.S. Sentencing Commission submitted a technical amendment to change § 4C1.1 to take effect in November 1, 2024. This technical change separates Clause 10 into two Clauses, 10 and 11. For the defendants, such as Mr. Gamboa, who filed for reduction and was denied because there was an aggravating role, but no finding of continued criminal enterprise, they would be the only defendants effected by a Supreme Court decision confirming Mr. Gamboa's interpretation of § 4C1.1. As such a decision, confirming that the word "and" means both elements of Clause 10 have to be met will have limited but a wide reaching effect. Further a confirming decision based on Mr. Gamboa's interpretation pursuant to U.S. Supreme Court precedent, should be made retroactive to only those who filed a reduction motion and were denied in the one year that § 4C1.1 as presented in this petition was effective, November 1, 2023 to October 31, 2024.

CONCLUSION

Wherefore, for the reasons presented, the petition for a writ of certiorari should be granted.

DATE: June 19, 2024

Respectfully Submitted,

x 

Moises Gamboa

I, Moises Gamboa, declare under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge.

SIGNED on this the 19th day of June, 2024.

x 

Moises Gamboa