

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

FREDDIE CAMACHO - Petitioner,

V.

NICOLE ENGLISH, WARDEN - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[1] Whether the holding of BURRAGE v. UNITED STATES, 134 S.Ct. 881 (2014), was ONLY LIMITED to the "DEATH RESULTS" provisions of the Drug Statutes under 21 U.S.C. § 841, and [n]ot a "RULE OF GENERAL APPLICATION" as held by this Honorable Supreme Court and the Modern Federal Jury Instructions?

[2] Whether a person in Federal Custody is entitled to file an application for habeas corpus under 28 U.S.C. § 2241 because a Section 2255 motion is "INADEQUATE OR INEFFECTIVE" to permit him to raise a claim that his sentence is invalid under an intervening and retroactively applicable statutory-interpretation decision of this Honorable Court?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Freddie Camacho, through PRO SE (hereinafter "Mr. Camacho"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in Case No. 16-3509, entered on August 22, 2017. Mr. Camacho's petition for rehearing EN BANC and petition for rehearing by the panel were denied on October 17, 2017.

OPINION BELOW

On August 22, 2017, a panel of the Court of Appeals entered its ruling affirming the denial of Mr. Camacho's 28 U.S.C. § 2241. Mr. Camacho filed a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 in the district of his confinement,

the Western District of Wisconsin, on June 24, 2015. The district court denied Mr. Camacho's § 2241 and published its opinion under: CAMACHO v. WARD, No. 15-cv-388-jdp; 2016 U.S. Dist. LEXIS 122920 (W.D. Wis., Sept. 12, 2016).

JURISDICTION

The Court of Appeals entered its judgment on August 22, 2017, and denied Mr. Camacho's petition for rehearing EN BANC and petition for rehearing by the panel on October 17, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"DEATH RESULTS" provision of 18 U.S.C. § 1201(a)

"DEATH RESULTS" provision of U.S.S.G. § 2A1.1

"DEATH RESULTS" provision of U.S.S.G. § 2A4.1(c)(1)

28 U.S.C. § 2241

28 U.S.C. § 2255(e)

Other Authority provision:

Modern Federal Jury Instructions

STATEMENT OF THE CASE

On or around February 04, 1998, a superseding indictment was issued charging Mr. Camacho with One Single Count of SIMPLE KIDNAPPING (i.e., without Resultant Death). The case proceeded to a jury on February 20, 1998. On February 24, 1998, the jury found Mr. Camacho guilty of SIMPLE KIDNAPPING.

At the sentencing hearing the district court found through its own assumptions and judicial findings that "DEATH RESULTED" from the Commission of the Kidnapping, and applied the "DEATH RESULTS" Cross-Reference provision of § 2A1.1 under the [M]andatory Guidelines of the PRE-BOOKER era. Using the 1997 version of the Mandatory Guidelines, the district court applied § 2A4.1(c), which [d]irected courts to apply § 2A1.1 (the First-Degree Murder - Death Results provision Guideline), based on the fact that under Application Note 1, the Mandatory Guidelines stated that the murder guideline Also applies when DEATH RESULTS from the Commission of certain felonies." See Application Note 1 of § 2A1.1.

Mr. Camacho appealed to the Fifth Circuit, arguing that the district court had erred in sentencing him based on the "DEATH RESULTS" Cross-Reference provision. UNITED STATES v. CAMACHO, 172 F.3d 866, 1999 WL 129651 *1 (5th Cir. 1999). In rejecting this challenge, the Fifth Circuit held:

"When a defendant is charged with and convicted of an offense, 'the sentencing court may nevertheless consider the relevant **but uncharged** conduct as long as the punishment selected is within the statutory range for the offense of conviction.' The Kidnapping statute under which Camacho was convicted, 18 U.S.C. § 1201, prescribes punishment by Death or Life Imprisonment "If the DEATH of any person RESULTS" from the Kidnapping. Accordingly, Camacho cannot show error, plain or otherwise." Id. (emphasis added).

The implication from the holding above was, that the Life sentence Mr. Camacho received under the PRE-BOOKER Mandatory Guidelines, was authorized because of the "DEATH OF ANY PERSON [R]ESULTS" language of § 1201(a). If the sentence had been

purely predicated on the provision of § 1201(a) that allows a sentence of "any term of years or for life," the Fifth Circuit would have said same and **not** discussed the **"DEATH OF ANY PERSON RESULTS"** part of § 1201(a). This conclusion was bolstered by the Fifth Circuit's opinion on direct appeal in Mr. Camacho's Co-Defendant's case.

On direct appeal, Mr. Castaneda-Aragus, like Mr. Camacho, argued that the sentencing court had erred in applying the "DEATH RESULTS" Cross-Reference provision. See, UNITED STATES v. CASTANEDA-ARAGUS, 189 F.3d 468, 1999 WL 511921 *2 (5th Cir. 1998). In rejecting that challenge, the Fifth Circuit held:

"Castaneda **COULD NOT HAVE RECEIVED LESS THAN A LIFE SENTENCE**. See 18 U.S.C. § 1201(a) (providing for a **mandatory minimum** of life in prison when the 'DEATH OF ANY PERSON RESULTS' from the Kidnapping)." Id. (emphasis added).

Thus, while the original sentencing court applied the "DEATH RESULTS" Cross-Reference provision, it appears that the Fifth Circuit treated the application of 18 U.S.C. § 1201(a)'s **Mandatory Life** provision as being synonymous with the U.S.S.G. § 2A4.1(c) "DEATH RESULTS" Cross-Reference provision under the PRE-BOOKER era, which directed the court to apply Application Note 1 of U.S.S.G. § 2A1.1.

HENCE, Mr. Camacho argued in his § 2241 Habeas Corpus Petition and in his Appeal to the Seventh Circuit that the BURRAGE v. UNITED STATES, requirement of **"BUT-FOR" CAUSATION** applied to [b]oth "DEATH RESULTS" provisions under which he

was sentenced --i.e., 18 U.S.C. § 1201(a) and the PRE-BOOKER Mandatory Guideline Regime Application of §§ 2A1.1 and 2A4.1(c).

Nevertheless, the Seventh Circuit affirmed the denial of Mr. Camacho's Habeas Corpus by concluding that the BURRAGE holding [**WAS LIMITED ONLY**] to the Drug Statute (21 U.S.C. § 841) and that Mr. Camacho could not rely on a drug case to fuel his habeas petition. Thus, [c]ontradicting BURRAGE and the recent changes and revisions made to the **Modern Federal Jury Instructions** in reference to the Kidnapping Statute's "DEATH RESULTS" provision clause of 18 U.S.C. § 1201(a) (Instruction 42-7 Fifth Element --Death of Victim of the Kidnapping).

This petition follows.

REASONS FOR GRANTING THE WRIT

The question whether BURRAGE was [LIMITED ONLY] to the "DEATH RESULTS" provisions of Drug Cases as concluded by the Seventh Circuit, turns on whether the Seventh Circuit's decision CONTRADICTED this Honorable Court's holding: that BURRAGE was a "RULE OF GENERAL APPLICATION."

In Mr. Camacho's second claim (i.e., **But-For Causation requirement**), the Seventh Circuit held, to wit:

"... we are not persuaded that BURRAGE's 'but-for' causation requirement applies to 18 U.S.C. § 1201... The BURRAGE court **limited its holding** finding that 'at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death... a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is but-for cause of death...." Id. at 892. In contrast, § 1201(a)'s **enhancement provision requires simply that 'the DEATH of any person RESULT[;]'** the specific cause of death is immaterial. Therefore, but-for causation is incompatible with the statutory goal of § 1201(a)."

Id. CAMACHO v. ENGLISH, 872 F.3d 811 (7th Cir. Aug. 22, 2017).

Thus, the decision by the Seventh Circuit in Mr. Camacho's case **TOTALLY CONTRADICTS** not only this Honorable Court's holding in BURRAGE, but also the authors of the "**Modern Federal Jury Instructions**," who have [R]EVISED the jury instructions to the Kidnapping Statute (18 U.S.C. § 1201(a)), under the authority of BURRAGE.

The Authors of the Modern Federal Jury Instructions held the following in their commentary of **Instruction 42-7**, to wit:

"Section 1201 provides that the baseline sentence for the offense is any term of years or life imprisonment. It then allows for an enhancement '**if the death of any person RESULTS**' requiring either the death penalty or life imprisonment. Under the Supreme Court's decision in Apprendi v. New Jersey, holding that it is unconstitutional to remove from the jury the assessment of facts, other than a prior conviction, that might take a sentence beyond the unenhanced statutory maximum, it [w]as clear that this issue must be submitted to the jury when the death penalty is sought, but it **was not clear** that this was true in other cases. However, in Alleyne v. United States, the court held that any fact that increases the mandatory minimum sentence must be submitted to the jury as well, so it is **now clear** that this enhancement 'must be submitted to the jury and found beyond a reasonable doubt.'

"In BURRAGE, which involved a **similar enhancement** in 21 U.S.C. § 841 when a drug user died as a result of drugs distributed by the defendant, the Court held that the **phrase 'if death or seriously bodily injury results'** requires 'BUT-FOR' CAUSATION. The Court explained that absent some indication in the statute that the term '**RESULTS**' is intended to have some lesser meaning, it should be defined as imposing 'a requirement of actual causality.' Quoting from a decision concerning retaliation under Title 7 of the Civil Rights Act, the Court defined 'actual causality' as requiring proof 'that the harm would not have occurred in the absence of --that is, BUT FOR-- the defendant's conduct. **The Court also made clear that this is a RULE OF GENERAL APPLICATION**, stating that 'it is one of the traditional background principles 'against which Congress legislates,... that a phrase such as 'results from' imposes a requirement of **but-for causation.**' Accordingly, the recommended charge has been REVISED to make it ABSOLUTELY CLEAR that 'BUT-FOR' causation is REQUIRED."

Id. Verbatim Commentary Language from Hon. Judge Leonard B. Sand et al., MODERD FEDERAL JURY INSTRUCTIONS (2016) (Footnotes omitted).

HENCE, **CONTRARY** to the Seventh Circuit's conclusion, it appears that the Authors of the Modern Federal Jury Instructions properly understood this Honorable Court's holding in BURRAGE, that its holding was indeed a **"RULE OF GENERAL APPLICATION,"** and thus REVISED the Kidnapping jury instructions by making **is ABSOLUTELY CLEAR** that "BUT-FOR" causation was required in order to apply the "DEATH RESULTS" provision.

Thereby, BURRAGE was [not] limited to Drug Cases as held by the Seventh Circuit, and is therefore applicable to the "DEATH RESULTS" provision of the KIDNAPPING STATUTE and **also** to

the PRE-BOOKER Mandatory "DEATH RESULTS" provisions of the U.S.S.G. §§ 2A1.1 and 2A4.1(c).

As mentioned above, Mr. Camacho was sentenced using the 1997 version of the PRE-BOOKER Mandatory Guidelines. Section 2A4.1(c) provided, as it does now, that: (1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States,... the Court was required to apply § 2A1.1 (First Degree Murder Guideline); because (2) Application Note 1 explains that the murder guideline "ALSO APPLIES WHEN [D]EATH [R]ESULTS FROM THE COMMISSION OF CERTAIN FELONIES." Id. (emphasis added). In the case at bar, the commission of the Kidnapping.

This same Application Note 1 has been AMENDED by the U.S. Sentencing Commission in AMENDMENT 663. See Application Note 1 of § 2A1.1 which provides:

"[t]his guideline also applies when DEATH RESULTS from the commission of certain felonies. For **EXAMPLE, this guideline may be applied as a result of a CROSS-REFERENCE (e.g., a Kidnapping in which DEATH OCCURS)...**" Id. U.S.S.G. App. C., Amend. 663 (emphasis added).

Thus, because the "DEATH RESULTS" language of § 2A1.1, Application Note 1, impacts "WHAT MUST BE PROVED" under BURRAGE, this Honorable Court should GRANT Certiorari to resolve this question of exceptional importance herein, and VACATE the Seventh Circuit's decision and REMAND for further proceedings.

SECOND QUESTION PRESENTED

The question whether a person in Federal Custody is entitled to file an application for habeas corpus under 28 U.S.C. § 2241, because a Section 2255 motion is "INADEQUATE OR INEFFECTIVE" to permit him to raise a claim that his sentence is invalid under an intervening and retroactively applicable statutory-interpretation decision of this Honorable Court, should be once and for all resolved by this Court. See **Concurring Opinion in CAMACHO v. ENGLISH**, No. 16-3509, Document Entry 38, at *8 (7th Cir. - Aug. 22, 2017).

The **Circuits are SPLIT** on whether the SAVINGS CLAUSE is applicable to allegedly unlawful sentences, or only to allegedly unlawful convictions. Compare **HILL v. MASTERS**, 836 F.3d 591, 596 (6th Cir. 2016) (concluding that the savings clause permits § 2241 cases challenging fundamental sentencing error, including sentences above a statutory maximum OR MANDATORY GUIDELINE RANGE), and **BROWN v. CARAWAY**, 719 F.3d 583, 588 (7th Cir. 2013) (same) with **MCCARTHAN v. DIR. OF GOODWILL INDUS.-SUNCOAST, INC.**, 851 F.3d 1076, 1092 (11th Cir. 2017) (finding the savings clause applicable only to "claims that are not cognizable or that cannot be remedied under section 2255") and **IN RE BRADFORD**, 660 F.3d 226, 230 (5th Cir. 2011) (finding the savings clause applicable only to claims of actual innocence).

In Mr. Camacho's Appeal, the Seventh Circuit held that he had failed to meet the first two **DAVENPORT** factors, and that he had not established that any SENTENCING ERROR occurred, let

alone one that was a "MISCARRIAGE OF JUSTICE," and so he had failed to meet the third DAVENPORT factor also.

However, under Seventh Circuit precedent, the only thing that was required from a Federal Prisoner was the following:

"[F]irst, the prisoner must show that he relies on a Statutory-interpretation case, rather than a constitutional case. [S]econd, the prisoner must show that he relies on a retroactive decision that he could not have invoked in his first § 2255 motion. The [t]hird condition is that [the] **SENTENCE ENHANCEMENT**... have been grave enough error to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding." BROWN v. CARAWAY, 719 F.3d 583, 586 (7th Cir. 2013) (alteration in original) (citations and internal quotation marks omitted).

Thus, there is no doubt that the Seventh Circuit's panel in CAMACHO v. ENGLISH, misapplied the wrong "SAVINGS CLAUSE" procedures under its own precedent procedures. [F]irst, because Mr. Camacho met and satisfied the first prong of the DAVENPORT and BROWN "SAVINGS CLAUSE" test. BURRAGE was a statutory interpretation case. This Court held in BURRAGE that the [p]hrase "if Death or Seriously Bodily Injury RESULTS" requires "BUT-FOR" Causation; and further explained, that absent some indication in the statute that the term "**RESULTS**" is intended to have some lesser meaning, it should be defined as imposing "a requirement of actual causality." BURRAGE, 187 L.Ed.2d at 722-725. Thus, BURRAGE was a Statutory-Interpretation case and Mr. Camacho satisfied the firth prong of DAVENPORT.

[S]econdly, Mr. Camacho also met and satisfied the Second prong of the DAVENPORT/BROWN "Savings Clause" test, because BURRAGE was in fact RETROACTIVE and applied to the "DEATH RESULTS" provision of the Kidnapping Statute and Mandatory Sentencing Guideline. Mr. Camacho was barred from raising his BURRAGE type claim when he originally sought § 2255 relief under the Fifth Circuit's precedent. In UNITED STATES v. CARBAJAL, 290 F.3d 277 (5th Cir. 2002), the court held that "[l]ike § 841(b)(1)(C), the plain language of § 2D1.1(a)(2) [d]id not impose any sort of explicit CAUSATION REQUIREMENT. CARBAJAL was decided April 25, 2002, LONG BEFORE Mr. Camacho's § 2255 motion was denied in 2003. In light of CARBAJAL, it would have been totally futile for Mr. Camacho to have argued that "BUT-FOR" causation was required for the mandatory life sentence under § 1201(a). The same was true for the **Mandatory era Guideline** Cross-Reference provision. Indeed, the court in CARBAJAL construed the causation requirement of § 841(b)(1)(C) interchangeably with the Guideline **enhancement** under § 2D1.1(a)(2) that calls for a higher base offense level when DEATH "resulted from" a defendant's drug distribution. CARBAJAL, 290 F.3d at 284. Thus, the Second requirement for invoking § 2241 relief under the "SAVINGS CLAUSE" tests of DAVENPORT and BROWN were satisfied and met, because the law changed [after] Mr. Camacho's first § 2255 motion.

[L]astly, Mr Camacho easily met and satisfied the third test of the Seventh Circuit's "SAVINGS CLAUSE" procedures, because "MISAPPLICATION of the Sentencing Guidelines, at least

where (as here) the defendant was sentenced in the PRE-BOOKER era, represents a **FUNDAMENTAL DEFECT** that constitutes a Miscarriage of Justice **corrigible** in a § 2241 proceeding." BROWN, 719 F.3d at 588.

In BROWN v. CARAWAY, 719 F.3d 583 (7th Cir. 2013), the Seventh Circuit held that a petitioner may utilize the SAVINGS CLAUSE of § 2241 to challenge the misapplication of the career offender Sentencing Guideline where the petitioner was sentenced in the PRE-BOOKER era when the Sentencing Guidelines were **Mandatory**. 719 F.3d at 588. The Court reached that conclusion even though the petitioner's sentence **[did not]** exceed the statutory maximum for the offense of conviction. The Court pointed out that the text of the savings clause focuses on the legality of the of the prisoner's detention, **and does not limit its scope to testing the legality of the underlying conviction.** Id. The Court reasoned that "sentences imposed pursuant to erroneous interpretations of the **[M]andatory Guidelines** bear upon the legality of the petitioner's detention for purposes of the SAVINGS CLAUSE." Id. Thus, the Seventh Circuit concluded in BROWN, that the Misapplication of **Mandatory** Sentencing Guidelines "represent a fundamental defect that constitutes a miscarriage of justice **corrigible** in a § 2241 proceeding." Id.

Subsequently, the Sixth Circuit has relied on the same reasoning of the decision in BROWN, in also holding that the savings clause of § 2241 may be utilized to challenge the

MISAPPLICATION of the career offender Sentencing Guideline at the time when those guidelines **WERE MANDATORY**. See, **HILL v. MASTERS**, 836 F.3d 591, 597 (6th Cir. 2016).

In **HILL**, the Sixth Circuit noted that in **KIRK v. UNITED STATES**, 481 F. Appx. 249 (6th Cir. 2012) (per curium), it granted a \$ 2255 petition where the defendant's erroneous classification as an armed career criminal resulted in a sentence that well exceeded the statutory maximum authorized for the offense of conviction. Id. 836 F.3d at 597. The Court reasoned that "[s]erving a sentence imposed under the **MANDATORY GUIDELINES (subsequently lowered by retroactive Supreme Court precedent)** shares similarities with serving a sentence imposed above the statutory maximum. Both sentences are beyond what is called for by law, and both raise a fundamental fairness issue." Id. at 599 (internal citation omitted).

Thus, consistent with **BROWN v. CARAWAY**, Mr. Camacho was entitled to proceed via 28 U.S.C. § 2241 with his **BURRAGE** claim under the "DEATH RESULTS" provisions of 18 U.S.C. § 1201(a) and **MANDATORY GUIDELINES**. It is of no consequence that the **Mandatory Guideline Enhancement** at issue does not involve the career offender provisions. This is because the "DEATH RESULTS" Cross-Reference, similar to the career offender guideline, arguably "increase[d], dramatically, the point of departure of [Mr. Camacho's] sentence and accordingly is

certainly as serious as the most grievous misinformation that has been the basis for granting habeas relief." Id. (alteration added, internal quotations omitted).

Thus, based on the fact that BURRAGE was [NOT LIMITED] to Drug Cases Only, as determined by the Seventh Circuit in CAMACHO, and because this Honorable Court made clear that it's ruling in BURRAGE was a "RULE OF GENERAL APPLICATION," as further interpreted by the Hon. Leonard B. Sand et. al. (Modern Federal Jury Instructions), this Honorable Court should VACATE the judgment of the Court of Appeals and remand the case for further proceeding on Mr. Camacho's BURRAGE claims pursuant to his Habeas Corpus proceedings under the SAVINGS CLAUSE of § 2241.

CONCLUSION

For the foregoing reasons, Mr. Camacho respectfully prays that this Petition for Writ of Certiorari be Granted.

Respectfully submitted,



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