

17-6562

Application No. 17A1028

ORIGINAL

Supreme Court, U.S.
FILED

MAR 07 2013

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL PALMER, PRO SE, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent(s).

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The
District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether The Government's Invalid
Conviction [By The Absence Of An
Amalagam Of Elements And Substan-
tive Sentencing Factors] Theory
And [The] Insufficiency Of Evidence
Deprive Petitioner Of A Quantum Of
His Liberty Without Due Process Of
Law?

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.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at United States v. Harris, 959 F.2d 246; or, (D.C. Cir. 1992)
DECEMBER 8, 2017 and FEBRUARY 27, 2018.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 8, 2017 and February 27, 2018,

☐ 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: Dec. 8, 2017 and Feb. 27, 2018, and a copy of the order denying rehearing appears at Appendix A & C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including Undecided (date) on Feb. 5, 2017 (date) in Application No. A. (Not given)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). and 28 U.S.C. § 1651(a)

☐ 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

United States Constitution:

Fifth Amendment:

No person shall be ... deprived of life, liberty, or property, without due process of law;

United States Code:

21 U.S.C. §§ 848(b)—Conditions for life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise, shall be imprisoned for life and fined in accordance with subsection (a) of this section if—

- (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders' and
- (2)(A) the violation referred to in subsection (a)(1) of this section involved at least 300 times the quantity of a substance described in Subsection 841(b)(1)(B) of this title, or

(c) Continuing criminal enterprise defined

For purposes of Section (a) of this section, a person is engaged in a continuing criminal enterprise if—

- (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony,

Prior to the Amendment from 1989-1995 21 U.S.C. § 848(b)(2)(A) read:

- (2)(A) the violation referred to in Subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in Subsection 841(b)(1)(B) of this title []

- (d)(1) [does not exist defining a violation]

STATEMENT OF THE CASE

Notwithstanding other proceedings of this case, e.g., see Case Nos. 15-3006 and Case No. 15-3007, USA v. Palmer, the Court issued an Order to the parties to address the "Motion To Govern Future Proceedings, see Appendix A, December 8, 2017 Order. As the Order of December 8, 2017, reflects another Circuit, i.e., the Ninth Circuit remanded a case involving 21 U.S.C. § 848(b)(2)(A)-interpreting one of the statutory terms--"violation," i.e., to require as a threshold matter of drug quantity to be 150 kilograms of cocaine powder or 1.5 kilograms of crack cocaine. The Ninth Circuit remanded the case in the first instance to be determine by the district court. Thereafter, the defendant was allowed to plead guilty to 21 U.S.C. § 848(a)--lesser-included offense, and sentenced to time served--27 years, and is now home.

Furthermore, since the cases are related insofar as they concern the constitutional/[() application] of the same exact statute-- § 848(b)(2)(A), they are "legal twins", which require the same result. However, in this case, the lower appellate court relied on "procedural particularism" rather than address the matter under 28 U.S.C. § 2106, as the Ninth Circuit did on the issue. See Whitmore at 628; 2017 App. Lexis 4803--No. 14-50310 (Ninth Cir. Mar. 17, 2017, see Appendix E, remanding to the lower district court in the first instance.

Because the Federal Rules of Appellate Procedure ("Fed. R. App. P.") 28(j), is specifically designed to address supplemental autho-

rities. The lower appeals court below abused its discretion under 28(j), to consider subsequent authorities pursuant to its correctional authority under 28 U.S.C. § 2106. The Supreme Court has recognized that certain circumstances would support inspection of a authority. See *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) ("Title 28 U.S.C. § 2106] appears on its face to confer upon this Court a broad power to GVR."). Likewise, the Court of appeals enjoys this same power under § 2106.

As such, Petitioner informed the Court of Appeals that there was a Rule 60(b)(4)/ and/or (6) motion under the Federal Rules of Civil Procedure ("Fed.R.Civ. P.") pending in the District Court, i.e., requesting to vacate the 21 U.S.C. § 848(b) conviction instead of the 21 U.S.C. § 846 conviction. Subsequently, Petitioner submitted the Whitmore case to the district court to demonstrate the § 848(b)'s infirmness. The "Executive Branch"—Assistance United States Attorney ("AUSA"), had conceded as a party to the interpretation of "violation" under 21 U.S.C. § 848(b)(2)(A), see *U.S.A. v. Whitmore*, Case No. 2:90-Cr-0652-SVW, 6-5-2017 (Doc. 1236-file 5-29-17) "Sentencing Memorandum"—U.S.D.C. Cen. District of CA-W.D.

No doubt, "uniformity" of decisions under federal law is the ultimate goal of the courts. Inconsistency of decisions under the same statute is intolerable, cases under § 848(b)(2)(A) are "legal twins" requiring the same result.

Therefore, in not adhering to the purpose of a rule of the courts—Rule 28(j), Fed.R.App.P., renders unjust results.

Statutory, 21 U.S.C. § 2106 on its face confers power of an appellate court to render just[ice] in a particular case or "twin" cases.

REASONS FOR GRANTING THE PETITION

"Where Intervening Developments, or Recent Developments That The Court Have Reason To Believe The Court Below Did Not Fully Consider Reveal A Reasonable Probability That The Decision Below Rests Upon A Premise That The Lower Court Would Reject If Given The Opportunity For Further Consideration, And Where It Appears That Such A Redetermination May Determine The Ultimate Outcome of The Litigation."

The United States Court of Appeals for The Ninth Circuit has remanded a case—United States v. Whitmore, 682 Fed. Appx. 626; 2017 U.S. App. LEXIS 4803—No. 14-50310, filed March 17, 2017, which vacated Whitmore's sentence and remand for the district court to resentence Whitmore in accordance with now-applicable law.

Whitmore present[ed] two additional arguments of appeal. First, he argues that the jury's verdict on the drug-quantity threshold was invalid because (1) the court erroneously aggregated the drug quantities involved in multiple offenses; (2) there was insufficient evidence to support a finding that any single violation involved the requisite drug quantity; and (3) the jury did not itself find the drug quantities as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000)[Including *Alleyne v. United States*, 133 S.Ct. 2151 (2013)].

Accordingly, this is "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c).

A "violation" of law as defined by Congress, which plays a critical role in the form of the administration of criminal justice as directed by Congress to the Court and the Government. See e.g., *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992) ("A statutory directive binds both the executive officials who administer the statute and the judges who apply it in particular cases;") *id.*, 439.

Congress defined a single "violation" in § 848(b)(2)(A) because after it amended the statute's § 848(b)(2)(A) to mean—

"the violation referred to in subsection (c) (1) of [§ 848] involved at least 300 times the quantity of a substance described on subsection 841(b)(1)(B) of this title."

The use of the singular "violation" indicates that the government is required to show that the defendant committed a single offence that involved the threshold quantity of drugs. See *Richardson v. United States*, 526 U.S. 813, 818 (1999) (holding the word "violation" in § 848 connotes a criminal offense). Because this "statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary" it must "be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981). Accordingly, the government may not aggregate drugs involved in multiple violations/offenses to reach § 848(b)'s quantity threshold.

Petitioner invites the Court to review a portion of Whitmore's Opening Brief to the Ninth Circuit relating to the above, See Appendix D, pp. 24-35, under Case No. 14-50310

B. The Court Should Issue A Grant Vacate
 A Remand ("GVR") Order

In *Stutson v. United States*, 516 U.S. 193, 196 (1996) recognized—Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience," Cf. *Adam v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942) ("But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.")

In this case, ... a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations, and is also satisfactory to the Government. In this case, as in *Lawrence*, a GVR Order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.

Therefore, in *Whitmore*, supra, the lower courts have defined a term in a statute—21 U.S.C. § 848(b)(2)(A), which applies to Petitioner as well as a "class" of people sentenced under § 848(b), by an invalid legal theory of the Government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael Palmer—Pro se

Date: April 9, 2018