

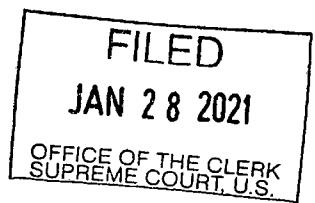
20-7715

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

IN RE: RICHARD DECARO - PETITIONER

PETITION FOR AN ORIGINAL EXTRAORDINARY WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. §1651(a) OF THE ALL WRITS ACT



Richard DeCaro, 24317-044
Federal Correctional Institution
Post Office Box 6000
Florence, Colorado 81226

QUESTIONS PRESENTED

1. Whether the Ex Post Facto Clause is violated where petitioner was sentenced to the amended statute, first degree murder, mandatory life, rather than the statute in effect at the time of the alleged offense, second degree murder, any term of years or for life; where this Court said the Guideline range is 168-210 months, leaving petitioner's legal sentence terminated?
2. Whether petitioner's sentence of first degree murder violates the Double Jeopardy Clause where the federal statute requires a "violation of the laws of any state" as an element of the offense; causing the federal jury to re-adjudicate the identical state law petitioner was found not guilty of violating by the state jury?
3. Whether counsel provided ineffective assistance of counsel, guaranteed by the Sixth Amendment, for not ensuring petitioner was constitutionally sentenced?

LIST OF PARTIES

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

RELATED CASES

State of Missouri v. Richard DeCaro, No. 92-650; Not guilty verdict on all counts entered September 14, 1994.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR AN EXTRAORDINARY WRIT

Petitioner respectfully prays that this extraordinary writ be issued.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is reported at United States v. Basile, 109 F.3d 1304 (8th Cir. 1997).

JURISDICTION

The jurisdiction of the Court is invoked under Article III of the Constitution of the United States, 28 U.S.C. §1251 and U.S. Const., Amdt. 11.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment: "No person shall be...subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law..."

Sixth Amendment: "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation...and to have Assistance of Counsel for his defense."

Seventh Amendment: "...no fact tried by a jury, shall be otherwise re-examined in any Court of the United States..."

Eighth Amendment: "...nor cruel and unusual punishments inflicted."

Article 1, §9: "No...ex post facto law shall be passed."

18 U.S.C. §1958(a) (1988) "Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise of

agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than \$50,000, or both."

§1958(a) (Amended 1994 Pub. L. 103-322, §60003(a)(11)): Substituted "and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000. or both" for "and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than \$50,000, or both."

U.S.S.G. §1B1.11 If the manual in effect at the time of sentencing causes a violation of the Ex Post Facto Clause, the edition of the Guidelines in effect on the date the alleged offense occurred should be used.

U.S.S.G. §2A1.1 First Degree Murder - Base Offense Level 43.

U.S.S.G. §2A1.2 Second Degree Murder - Base Offense Level 33.

U.S.S.G. §2E1.4 Use of Interstate Commerce Facilities During the Commission of Murder-For-Hire (a) Base Offense Level (Apply the greater): (1) 32; or (2) the offense level applicable to the underlying unlawful conduct. Statutory Provision Application Note 1: "If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used."

U.S.S.G. Amendment 449 (effective date, November 1, 1992): §2E1.4 is amended by deleting "... The maximum term of imprisonment authorized by statute ranges from five years to life imprisonment."

STATEMENT OF THE CASE

March 6, 1992, petitioner's wife, Elizabeth DeCaro, was murdered in our family's home by an intruder. The murderer, Daniel Basile, in his own words believed that no one would be home; he said, "I went to the house knowing no one would be home. Things went wrong and I did what I had to do, it was either her or me and I wasn't going back to prison."

My entire family was going out of town. We were planning a trip to the lake. March 4, 1992, Elizabeth decided, since the weather turned cold, not to go and to spend the weekend with her family. She decided that I should take the kids for a "daddy's weekend." Early morning on March 7th, the police notified me that Elizabeth had been murdered in our home. I did everything possible to help the police determine what happen.

March 7, 1992, the police, with the knowledge that the only one other than family that knew the entire family would be out of town, detained Craig Wells an employee at the automotive shop I managed; Wells was to be filling-in for me on March 6th. Wells was interviewed for 18 hours, after which he was threaten with the charge of first degree murder if he did not go along with the prosecutor's theory. Wells received total immunity to go along.

March 12, 1992, the murderer was caught with the vehicle he stole as a get-a-car the day he murdered Elizabeth; he was arrested by the state of Missouri. March 13, 1992, Mr. DeCaro was arrested.

April 1994, Basile was convicted of first degree murder and given the death penalty. September 14, 1994, Mr. DeCaro was found not guilty of first degree murder, second degree murder (both included murder for hire), aiding and encouraging, and aiding and encouraging a burglary by the state death penalty qualified jury; I was immediately released.

May 30, 1995, petitioner was rearrested by the federal government and made a 250,000 dollar bond the next day. I was offered a 5 year plea deal but refused because I did not commit a crime.

The federal government offered to take Basile off of death row if he would testify to their theory; he refused and was made a co-defendant. The federal jury was allowed to know Basile was on death row but not allowed to know I was found innocent in the state trial. March 7, 1996, I was convicted in federal court on all counts.

June 21, 1996, petitioner was sentenced to a mandatory life sentence under the amended statute in violation of the ex post facto clause; which is the subject of this petition. I have served 365-370 months with good time and clear institution conduct, well over that of the legal sentence.

REASONS FOR GRANTING THE WRIT

1. The Ex Post Facto Clause was violated because petitioner was sentenced to the amended statute, first degree murder, mandatory life, rather than the statute in effect at the time of the alleged offense, second degree murder, any term of years or for life.

Petitioner's ex post facto violation is so cut and dry, the facts are clear, but sadly no other court has been willing to rule on the merits; leaving only this Court to correct the error. In light of the facts presented below, petitioner's continual incarceration violates the Eighth Amendment.

The violation is rooted in this Court's third point of constitutional law outlined in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); where the Court stated, "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

The district court violated the Ex Post Facto Clause by sentencing petitioner to the 1994 amended 18 U.S.C. §1958(a) statute, first degree murder, mandatory life, rather than the pre-amended statute in effect at the

time of the alleged offense, second degree murder, any term of years or for life. This Court made clear that "any term of years or for life" is second degree murder and a person with zero criminal history points, such as petitioner, would be subjected to a Guideline range of 168-210 months. Id. Lewis v. United States, 523 U.S. 155 (1998).

The ex post facto violation is evident on the cover of petitioner's Presentence Report (PSR). The PSR listed the 1994 amended statutes, punishments, and fines for all three statutes petitioner was sentenced to; Counts 1, 3-7 have a statutory maximum of five years, I have served over 30 years so at issue is Count 2. The statutory punishment for Count 2 is listed as Life Imprisonment/\$250,000.00 fine; which has always been first degree murder with no statute of limitations (see PSR page 1; Appendix B).

The statute in effect at the time of the alleged offense, the pre-amended §1958 statute, authorizes a range of punishment of any term of years or for life/\$50,000.00 fine; which is second degree murder. The statute's 5 year statute of limitations is further evidence that Congress intended to limit the punishment to second degree murder.

In Lindsey v. Washington, 301 U.S. 397 (1937) this Court said when there is a range of punishment up to a maximum of 15 years annexed to a criminal law at the time of the alleged offense and the law is later amended to a mandatory 15 years the Ex Post Facto Clause is violated.

Petitioner's ex post facto violation is similar as that in Lindsey. March 6, 1992, the day of petitioner's alleged offense, the punishment was second degree murder, any term of years or for life (5 years to life; see U.S.S.G. Amendment 449). Petitioner was instead sentenced to the 1994 amended statute that required first degree murder, a mandatory life sentence, violating the Ex Post Facto Clause.

Further evidence the Ex Post Facto Clause was violated is the fact that the 1995 Guideline manual was used (see PSR page 6, ¶22; Appendix B). The Guidelines made clear that if the manual in effect at the time of sentencing causes an ex post facto violation, the edition of the Guidelines manual in effect on the date the alleged offense occurred is used (U.S.S.G. §1B1.11).

This Court stated, "The Ex Post Facto Clause prohibits federal courts from adopting new guidelines for sentencing where the new guidelines create 'significant risk' of a higher sentence." Id. Peugh v. United States, 569 U.S. 530 (2013).

Because I went through the state trial and was sentenced in federal court over 4 years later, it is my belief the Probation Officer in preparing the PSR simply made an error. Rather than following the correct Guideline, U.S.S.G. §2E1.4, he jumped straight to U.S.S.G. §2A1.1 which has always been for first degree murder (see PSR page 6, ¶24; Appendix B). If he would have started with §2E1.4, he would have found U.S.S.G. Amendment 449 which states the correct range of punishment was 5 years to life. Further evidence proves the ex post facto violation. The maximum fines are listed as \$250,000.00 instead of \$50,000.00 (see PSR page 12, ¶83).

Lastly, the sentencing judge did not make a statement when pronouncing petitioner's sentence other than adopting the recommendations in the PSR (see general, Sentencing Transcript; Appendix C).

2. Petitioner's sentence of first degree murder violates the Double Jeopardy Clause because the federal statute requires a "violation of the laws of any state" as an element of the offense. This caused the federal jury to re-adjudicate the identical state law petitioner was found not guilty of violating by the state jury.

As stated earlier, petitioner was found not guilty in State of Missouri v. Richard DeCaro, No. 92-650 (1994) of first degree murder, second degree

murder (both included murder for hire), aiding and encouraging, and aiding and encouraging a burglary (see State Verdict and Instructions; Appendix D).

If U.S.S.G. §2E1.4 would have been used to determine petitioner's sentence, the double jeopardy violation could have been avoided. U.S.S.G. §2E1.4 Statutory Provision Application Note 1 states, "If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used." At the very least, since petitioner was found not guilty of the state laws by the state jury, it should have raised several red flags not only to counsel but to the court as well.

Because the federal statute, 18 U.S.C. §1958, requires a "violation of the laws of any state" as an essential element, the district court instructed the federal jury to re-adjudicate the same Missouri first degree murder statute petitioner was found not guilty of violating by the state jury, causing violations of the Fifth Amendment and the spirit of the Seventh Amendment. Although civil in nature, the Seventh Amendment very clearly reflects the Fifth Amendment and is no less important; "[n]o fact tried by a jury shall be otherwise re-examined in any Court of the United States..." (see Jury Instruction 31; Appendix E).

Petitioner's counsel objected to instruction 31, but during direct review, the Eighth Circuit Court of Appeals mistakenly believed (and based its entire legal framework) that we did not object to the instruction. The court stated, "The government included in its addendum a copy of jury instruction 31, which was given without objection to the legal elements... Neither defendant having raised a challenge to the legal elements, we consider whether, in keeping with the instruction... the interstate transactions at issue were a part of and in furtherance of the murder-for-hire scheme." Id. Basile 109 F.3d 1311 (see page 8; Appendix A).

caused a variance in my indictment because it did not charge murder; if it had, I could have plead my prior acquittal.

3. Counsel Provided Ineffective Assistance of Counsel.

Counsel fell well below that which the Sixth Amendment demands. Counsel should have brought the above facts to the court's attention prior to sentencing or at least appealed the facts on direct review.

Seven days prior to being sentenced, this Court ruled in favor of a 3 point sentencing reduction for successive prosecutions and being found not guilty in the state trial. Id. Koon v. United States, 518 U.S. 81 (1996). My attorneys should have brought this to the sentencing court's attention and I should have received the same 3 point reduction; my sentence would be terminated and I would not have had to carry the weight of dying in prison.

Prior to trial, during a two minute phone call, my attorney told me the government offered me five years to plead guilty. I refused because I did not commit a crime and I believe it would have been perjury to plead guilty. All he said was, "good why should you, you were just found innocent and I want to go up against this prosecutor; I think I can win." He should have explained the process, then I could have made an educated decision.

Post Conviction Counsel didn't argue any of the above facts or even ineffective assistance of counsel.

RELIEF SOUGHT

Petitioner respectfully request the vacation of his unconstitutional sentence and remanded to district court for resentencing; ultimately being resentenced to time served.

SUPREME COURT RULE 20.1

1. The Court's Appellate Jurisdiction.

Petitioner has presented the Court with an original action in the form of an Extraordinary Writ of Habeas Corpus.

2. The Exceptional Circumstances of this Case Warrant the Exercise of this Court's Jurisdictional Discretionary Powers.

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." Ex parte Fahey, 332 U.S. 258, 260 (1947). The Court has the authority to entertain original habeas petitions. See Felker v. Turpin, 518 U.S. 651, 660 (1996).

Petitioner's last hope for review of his unconstitutional sentence lies with this Honorable Court. His case presents exceptional circumstances that warrant the exercise of this Court's discretionary powers because no other court has been willing to entertain the facts outlined in this petition.

Petitioner has served 371 months with good time on an illegally imposed sentence where this Court made clear the legal sentence is 168-210 months. Petitioner's constitutional claims have never been adjudicated and not only clear and convincing, they are beyond a reasonable doubt; rooted in this Court's jurisprudence.

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Ex parte Yerger, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). "[F]undamental fairness is the central concern of the writ of habeas corpus." Strickland v. Washington, 466 U.S. 668, 697 (1984). In Harris v. Nelson, 394 U.S. 286, 292 (1969), the Court stated the following regarding the Great Writ:

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary (citation omitted).

Petitioner's case presents the exceptional circumstances for which the Great Writ was intended to apply.

3. Adequate Relief Cannot Be Obtained in Any Other Form or From Any Other Court.

Petitioner has tried to get the lower courts to make a ruling on the merits of his Constitutional claims, but all attempts have fallen on deaf ears; with no adjudication of his claims. It is inconceivable that these courts would allow me to die in prison unconstitutionally without even making an attempt to address my claims.

CONCLUSION

For the forgoing extraordinary circumstances and to avoid a total miscarriage of justice, petitioner prays this Honorable Court issues the writ and remands to the district court for resentencing to time served.

Respectfully submitted on this day of March 17, 2021.


Richard DeCaro