U.S. Department of Justice

Civil Rights Division

Appellate Section - PHB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

DJ 175-38-46

Leonard Green, Clerk
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Re: *Wiegand* v. *United States*, No. 02-1740

Dear Mr. Green:

This letter is submitted in lieu of the brief for the United States as appellee in this appeal. As explained below, the United States urges the Court to vacate the district court's judgment and remand to the district court for further proceedings.

This is an appeal by a *pro se* federal prisoner from the denial of his motion under 28 U.S.C. 2255. The district court ruled that the motion was untimely. The petitioner filed a notice of appeal, and the district court granted a limited certificate of appealability on the following question: whether Wiegand's challenge to his conviction on count 3 of the indictment is barred by the one-year statute of limitations. This Court also limited the issues on appeal to this question. For the reasons explained below, we believe that the district court erred in ruling that Wiegand's challenge to his conviction on count 3 was untimely.

Appellant was convicted in 1993 on multiple counts for the racially motivated arson of a residence. Count 3 of the indictment charged a violation of 18 U.S.C. 844(i) (arson of a building used in an activity affecting interstate commerce). His conviction was affirmed on all counts by the 6th Circuit, which specifically held that the evidence was sufficient to establish the interstate commerce element of Section 844(i). *United States* v. *Wiegand*, No. 93-1735 (Dec. 23, 1994). In May 2000, the Supreme Court issued its decision in *Jones* v. *United States*, 529 U.S. 848 (2000), which narrowed the applicability of the interstate commerce element of Section 844(i). In July 2000, Wiegand filed a motion under 28 U.S.C. 2255 to vacate or set aside his conviction and sentence, arguing that, under *Jones*, the evidence was insufficient to satisfy the interstate

commerce element of Section 844(i) (R. 123, Petitioner's Motion To Vacate, Set Aside Conviction And Sentence at 12-17).

There is a one-year statute of limitations for motions under Section 2255. Paragraph 6 of Section 2255 provides, in pertinent part,

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
>
> (1) the date on which the judgment of conviction becomes final; [or]
>
> * * * * *
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

Because Wiegand's motion was filed more than one year after his conviction became final, the motion was timely only if it fit within ¶ 6(3). In other words, because appellant's motion was filed within one year of the decision in *Jones*, it was timely if *Jones* (1) recognized a new right; that (2) is made retroactively applicable to cases on collateral review.

The district court denied the motion as time-barred in all respects (R. 133, Order Approving And Adopting Magistrate Judge's Report And Recommendation). As to the 844(i) count, it ruled that only the first requirement of ¶ 6(3) was met: that *Jones* had recognized a new right, but that that right had not yet been made retroactively applicable to cases on collateral review (R. 131, Report and Recommendation at 9-19). Wiegand filed a notice of appeal (R. 134), and the district court granted a limited certificate of appealability on the question whether the challenge to the 844(i) count was timely (R. 138, Order Granting Limited Certificate Of Appealability; R. 137, Memorandum Opinion). That is the question pending in the present appeal.

The district court held that *Jones* recognized a new right for purposes of ¶ 6(3) (R. 131, Report and Recommendation at 10-14). The United States does not dispute that ruling in this Court. See *Pryor* v. *United States*, 278 F.3d 612, 614-615 (6th Cir. 2002) (holding that *Bailey* v. *United States*, 516 U.S. 137 (1995) recognized a new right when it narrowly construed the term "used" in 18 U.S.C. 924(c)(1)).

The district court held that the second requirement of ¶ 6(3) - retroactivity - was not satisfied here because neither the Sixth Circuit nor the Supreme Court has yet held that *Jones* is retroactively applicable on collateral review (R. 131, Report And Recommendation at 14-19). We disagree. Although the United States has argued in the past, in other cases, that the Supreme Court must make the retroactivity determination, it is now the position of the United States that any court, including the district court in which the motion is filed, or the court of appeals reviewing a district court decision, can make a new rule retroactive. The last court to rule on a Section 2255 motion – whether it is the district court, a court of appeals, or the Supreme Court – will necessarily determine whether the new right relied on is retroactive and, therefore, whether the Section 2255 motion is timely under ¶ 6(3).

In *Bousley* v. *United States*, 523 U.S. 614 (1998), the Supreme Court held the rule in *Bailey* to be retroactively applicable on collateral review. And, in *Pryor*, 278 F.3d at 615, the Sixth Circuit applied that holding to the exception in ¶ 6(3). Like *Bailey*, the decision in *Jones* narrows the substantive scope of a criminal statute, and it should also be considered retroactive on collateral review. Thus, under this Circuit's precedent, the rule in *Jones* is also retroactively applicable to collateral review.

Because Wiegand's Section 2255 motion was filed within a year of the *Jones* decision, and because, under this Court's precedent, *Jones* meets both requirements of the ¶ 6(3) exception, the motion (as to his 844(i) conviction) was timely.

This Court should therefore vacate the district court's order denying Wiegand's motion, as to his conviction on 18 U.S.C. 844(i), and remand the case to the district court.

Respectfully submitted,

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Chief

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cc: Mr. Wiegand