No.

In the

Supreme Court of the United States

DANIEL BURGOS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 20, 2001

QUESTIONS PRESENTED

Daniel Burgos was convicted of attempting to possess with intent to distribute cocaine, and money laundering. In this reverse sting prosecution, however, the government appeared at the scene of the transaction with no drugs, and no quantity of drugs were proved to the jury. The question for this court is:

> In a reverse sting prosecution, must the government appear at the scene of the transaction with a quantity of the substance purportedly involved in the transaction?

PARTIES TO THE PROCEEDING

Daniel Burgos is a citizen of the Commonwealth of Massachusetts.

As this is a criminal proceeding, the United States of America was the prosecuting party.

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Daniel Burgos respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

REPORT OF OPINION

The opinion of the First Circuit is reported at 254 F.3d 8 (2001), and is reprinted in the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To regulate commerce . . . among the several States."

The United States Constitution, Amendment V, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The United States Constitution, Amendment X, provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Daniel Burgos was convicted of a drug crime in a reverse sting operation, even though no quantity of drugs were involved in the transaction.

In February 1999 three Massachusetts police officers served an arrest warrant on one William O'Neil, who agreed to help his situation by informing on Daniel Burgos, the defendant/ petitioner here.

The officers brought Mr. O'Neil to the local headquarters of the DEA. There the officers set up and recorded a series of phone calls, in which Mr. O'Neil arranged a transaction between himself and Mr. Burgos. During the calls, a federal agent stood by, pretending to be an out-of-state supplier of the non-existent narcotics. Mr. Burgos then showed up at the agreed time and place with a substantial cache of cash, and was there arrested.

Mr. Burgos was indicted with attempt to possess with intent to distribute cocaine, 21 U.S.C. § 846 and 841(a)(1), and money laundering, 18 U.S.C. § 1956 (a)(1)(A)(i). After a jury trial, Mr. Burgos was found guilty of both charges, and sentenced to 108 months imprisonment.

Without either the defendant or the government having drugs at the scene of the transaction, the government's case against Mr. Burgos fails from beginning to end. There is no federal jurisdiction, no proof of the interstate commerce element for either the drug or money laundering allegations, no "detectable amount" necessary for sentencing pursuant to the sentencing statute or the sentencing guidelines, and no finding of a quantity of drugs by the jury necessary for a constitutional sentence.

REASONS FOR GRANTING THIS PETITION

A reverse sting is an operation in which police officials sell illegal drugs to those charged with the crime, and is an important drug interdiction tool. *United States v. Russell*, 411 U.S. 423, 432 (1972). Generally, the government comes to the scene of the sting with some quantity of drugs available for sale to the target buyer. *See e.g., United States v. Williams*, 109 F.3d 502, 506 (8th Cir. 1997) ("FBI Special Agent Pisterzi obtained five single kilogram packages of cocaine from the DEA lab in Chicago, which he brought to the hotel for use in the reverse sting.").

A. No Drugs Means No Interstate Commerce For Drug Crime Allegation

Over the past several decades, Congress has federalized the prosecution of many common street crimes. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court noted the trend, and required that for federal jurisdiction, a crime must "substantially effect" interstate commerce, *id.*, 559, and that the affect must be proved on a case-by-case basis, *id.*, at 561.

Because there were no drugs involved in Mr. Burgos's transaction, there was no possible proof of an effect on interstate commerce.

The First Circuit said that merely being in the illicit drug trade is a sufficient affect on interstate commerce. This ignores the *Lopez* requirement that the affect must be proved in every case. Moreover, it opens *every* wholly intra-state commercial transaction to federal regulation, as it is hard to imagine a commercial endeavor which does not have, somewhere behind it, yet another commercial transaction that might occur in a different state. Merely being in an industry, therefore, cannot implicate interstate commerce.

Allowing federal prosecutors to assume interstate commerce

without proving it goes a long way to the complete federalization of criminal law – an area of traditional state authority. *See* Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499 (1996); Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

B. No Drugs Means No Interstate Commerce For Money Laundering Allegation

Mr. Burgos was charged with money laundering in connection with the drug crime because he was unable to otherwise account for his financial plentitude. But the transaction for which he was charged was carried out entirely within the Commonwealth of Massachusetts, using only cash. The Government did not allege the use of, for instance, interstate highways, federally insured banks, the postal system, or any other basis for *interstate* commerce. Present with the informant during the recorded phone calls was a DEA agent posing as a drug supplier from New York. The supposed supplier was entirely a figment of the government's imagination, however, and cannot fill the interstate void.

A cash-only single-state transaction does not implicate interstate commerce. *United States v. Grey*, 56 F.3d 1219, 1223-26 (10th Cir. 1995). If it could, there would be no limit to commerce clause power – it would extend to every child's summertime lemonade stand.

C. No Drugs Means Defendant Cannot Be Statutorily Sentenced

The conduct of which Mr. Burgos is accused – attempting to possess with intent to distribute cocaine – is criminalized in the first several words of 21 U.S.C. § 841(a). Most of the remainder of the lengthy statute is devoted to sentencing. It

specifies substances and amounts, and contains graduated sentences generally commensurate with the seriousness of the drug and the quantity involved in the crime. 21 U.S.C. § 841(b).

Regardless of the type or amount of substance, however, all the penalty sections of 21 U.S.C. § 841 base sentencing upon a "detectable amount" of the drug. The portion of the statute under which Mr. Burgos was sentenced provides:

> "In the case of a violation of subsection (a) of this section involving . . . 500 grams or more of a mixture or substance containing a *detectable amount* of . . . cocaine, its salts, optical and geometric isomers, and salts of isomers . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years, [and] a fine . . . ."

21 U.S.C. § 841(b)(1)(B)(ii) (emphasis added). The Sentencing Guidelines contain the same language:

> "Unless otherwise specified, the weight of a controlled substance set forth in the [drug quantity] table refers to the entire weight of any mixture or substance containing a *detectable amount* of the controlled substance."

U.S. S.G. § 2D1.1(c), note*(A) (emphasis added).

Chapman v. United States, 500 U.S. 458 (1991) construed 21 U.S.C. § 841 and held that sentencing for LSD should be based on the weight of the carrier. It wrote: "So long as it contains a *detectable amount*, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459.

That there must be a "detectable amount" cannot, by the language of the statute and guidelines, be seriously disputed. Without it, a defendant cannot be sentenced to incarceration.

Mr. Burgos, however, was sentenced without proof of any "detectable amount" of an illicit drug.

D. No Drugs Means Defendant Cannot Be Constitutionally Sentenced

This Court recently determined that a defendant cannot be constitutionally sentenced beyond the maximum provided in a criminal statute, without the facts necessary for the enhanced sentence having been proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Mr. Burgos was sentenced to a term within the maximum provided for two kilograms of cocaine, assuming that amount was proven to the jury. Because *no amount* was proven, however, the statutory maximum penalty for a sale of cocaine is irrelevant. The maximum term of imprisonment for no cocaine is zero, but Mr. Burgos was sentenced to considerably more. Accordingly, Mr. Burgos's sentence is unconstitutional.

E. No Drugs Means No Federal Jurisdiction

Because the government neglected to bring any drugs to the scene of the transaction, its case fails from beginning to end. An affect on interstate commerce is necessary to confer federal jurisdiction. *See e.g., United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991), *cert. denied*, 502 U.S. 926 (1992).

If the mere intra-state use of cash, being in a particular industry, or having a person present who pretends to be from another state, were enough to create federal jurisdiction, the tenth amendment and the founders system of dual sovereignty would be destroyed. This Court has held that the interstate commerce power:

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon intestate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937). In Mr. Burgos's case, the government failed to allege or prove an affect on interstate commerce. Accordingly, the court was without jurisdiction to convict and sentence Mr. Burgos.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 16, 2001

APPENDIX

United States Court of Appeals
For the First Circuit

No. 00-1163

UNITED STATES OF AMERICA,
Appellee,

v.

DANIEL BURGOS,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman, Senior U.S. District Judge]

Before
Selya, Lynch, and Lipez, Circuit Judges.

Joshua L. Gordon for appellant.
Jennifer Hay Zacks, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief, for appellee.

June 22, 2001
