United States Court of Appeals
For the First Circuit

No. 04-2147

IN RE: ALFRED TRENKLER,

Petitioner.

Before

Boudin, Chief Judge,
Torruella and Lynch, Circuit Judges.

JUDGMENT

Entered: February 16, 2005

Petitioner seeks, through a petition for writ of mandamus, to vacate his two life sentences. We deny the petition for writ of mandamus because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive § 2255 petitions. 28 U.S.C. §§ 2255 ¶ 8, 2244(b)(2).

Denied.

By the Court:

Richard Cushing Donovan, Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.

[cc: Dana Alan Curhan, Esq., Kevin P. McGrath, AUSA, Dina Michael Chaitowitz, AUSA]

United States Court Of Appeals
For The First Circuit

In Re Alfred Trenkler,
Petitioner-Defendant

Case No.

(District Court Case No. Crim. A. 92-10369-Z)

Petition For Writ Of Mandamus

Now comes the Petitioner, Alfred Trenkler, by and through the undersigned counsel, and moves this court to assume jurisdiction in this matter and issue a Writ of Mandamus to the respondent trial judge (Zobel, J.) directing the respondent to enter the appropriate orders specifically requested herein.

Issue Presented

Whether the petitioner is entitled to the issuance of a Writ of Mandamus where the trial court lacked authority to impose two concurrent life sentences, rather than terms of years, without first submitting the issue to the jury as the statute required.

Factual and Procedural History

For purposes of this petition, the petitioner will adopt the factual and procedural history set forth in an unpublished decision of the United States Court of Appeals for the Third Circuit, which addressed the denial of his petition for a writ of habeas corpus under

28 U.S.C., § 2241. *See Trenkler v. Pugh*, ---F.3d---, 2003 WL 22967268 (3rd Cir. 2003). The court accurately summarized the history of the case as follows:

> In October 1991, an explosion at the Roslindale, Massachusetts home of Thomas Shay, Sr. killed one Boston Police Bomb Squad Officer and severely maimed another. The police officers had been investigating a suspicious object in Shay Sr.'s driveway, which he reported finding after hearing noises coming from the floorboards of his 1986 Buick Century. Police later arrested two suspects, Trenkler and Thomas Shay, Jr., for their respective roles in the explosion. The two men were indicted by a grand jury and tried separately. At Trenkler's trial, the Government's case was that Trenkler had built the bomb for Shay Jr. to use against his father. *See United States v. Trenkler*, 61 F.3d 45, 48 (1st Cir. 1995). In 1994,[1] Trenkler was convicted of conspiracy in violation of 18 U.S.C., § 371; receipt of explosive materials in interstate commerce with the intent to kill, injure, and intimidate Shay Sr. and cause damage to his property, in violation 18 U.S.C., § 844(d); and attempting to damage and destroy maliciously, by means of an explosive, Shay Sr.'s car, which was used in interstate commerce, in violation of 18 U.S.C., § 844(i). Trenkler was sentenced to two concurrent terms of life imprisonment for the 844 convictions and one concurrent sixty month term for the conspiracy conviction.[2] (Shay Jr., in contrast, received a 12 year sentence following a plea agreement.)
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> Since the Court of Appeals for the First Circuit affirmed Trenkler's sentence on direct appeal in

[1] In fact, the petitioner was convicted November 29, 1993. *See Trenkler v. United States*, 268 F.3d 16, 18 (1st Cir. 2001).
[2] Sentencing took place on March 8, 1994.

> 1995, Trenkler has made several unsuccessful post-conviction motions (including a motion for collateral relief under 28 U.S.C., § 2255, which was denied as untimely). *See Trenkler v. United States*, 268 F.3d 16 (1st Cir. 2001). In October 2002, Trenkler filed a petition for a writ of habeas corpus under 28 U.S.C., § 2241, on the ground that the Supreme Court's decision in *Jones v. United States*[529 U.S. 848 (2000)], decriminalized the conduct for which he was convicted and sentenced. In an order dated March 7, 2003, the District Court denied this petition for lack of jurisdiction.

The Third Circuit affirmed the denial of the habeas petition on December 18, 2003, and the United States Supreme Court denied his petition for a writ of certiorari on June 21, 2004. *Trenkler v. Pugh*, ---U.S.---, 124 S.Ct. 2886 (2004).

Reasons For Issuing The Writ

A. The Defendant Should Not Have Received A Life Sentence Where, At The Time He Was Convicted, The Statute Under Which He Was Charged Did Not Permit The Court To Impose Such A Sentence Without First Submitting The Issue To The Jury

The defendant contends that the trial court lacked authority to impose a life sentence, as opposed to a term of years, without first submitting the issue to the jury. While his prior attorneys certainly share the blame in the imposition of this sentence, he is in the final analysis serving an illegal life sentence. A petition for a writ of mandamus provides a vehicle for

correcting that sentence—in fact, the only vehicle for doing so. The defendant petitioner asks that the case be remanded to the trial court and that the District Judge be ordered to resentence him.

1. The Merits

As noted above, on November 29, 1993, the petitioner was convicted of two offenses under 18 U.S.C., § 844, and the trial court imposed concurrent life sentences pursuant to 18 U.S.C. § 34. That section currently provides that, "[w]hoever is convicted of any crime prohibited by this chapter [18 U.S.C.S. §§ 31 et seq.], which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life." In its current form, the sentencing judge is free to impose a life sentence without constraint. However, prior to its amendment in September of 1994, the language of 18 U.S.C. § 34 permitted the sentencing judge to impose a life sentence or the death penalty after a jury trial *only* "if the jury shall in its discretion so direct[.]" Prior to its amendment in 1994, 18 U.S.C. §§ 844(d) and (i) specifically referenced Section 34 with regard to the imposition of a life sentence.

In the absence of a recommendation from the jury, the District Judge clearly erred under the language of the pre-1994 statutes in imposing two life

sentence without first submitting the sentencing issue to the jury. Indeed, "circuit courts considering the application of the pre-1994 versions of 884(i) and 34 have consistently concluded that only a jury had authority to impose a life sentence and that the judge could only impose a sentence for a term of years less than life." *United States v. Grimes*, 142 F.3d 1342, 1352 n.12 (11th Cir. 1998). *See United States v. Tocco*, 135 F.3d 116, 131 (2d Cir. 1998), cert. denied, 523 U.S. 1096 (1998) ("The plain language of this section authorizes the imposition of a life sentence only by jury recommendation in the absence of a plea."); *United States v. Gullett*, 75 F.3d 941, 950-951 (4th Cir.), cert. denied, 519 U.S. 847 (1996) (the statutory language did not permit the defendant to be subject to a life sentence unless the jury so decided.); *United States v. Prevatte*, 16 F.3d 767, 783 and n.16 (7th Cir. 1994) ("we conclude that it was plain error to impose a life sentence without a jury direction"); *United States v. Williams*, 775 F.2d 1295, 1299 (5th Cir. 1985), cert den 475 U.S. 1089 (1986), appeal after remand 819 F.2d 605 (5th Cir. 1987), reh den, en banc 826 F2d 12 (5th Cir. 1987) and cert den 484 U.S. 1017 (1988) (defendant convicted of planting pipe bomb which results in killing may not be sentenced under 18 U.S.C. §§ 34, 844, to life imprisonment in absence of jury recommendation or jury waiver); *United States v. Hansen*, 755 F.2d 629,

631 (8th Cir.), cert. denied, 474 U.S. 834 (1985) (holding discretion of district court for sentencing is explicitly limited "in this case by the statute which provides that life imprisonment may be imposed only if death results from the defendant's actions and if the jury directs the imposition of the sentence").

The error was by no means harmless in this case. While the District Judge certainly could have imposed a substantial sentence, that sentence could not have been a de facto life sentence and would necessarily have been shorter than the sentence currently in effect. *See United States v. Martin*, 63 F.3d 1422, 1432 (7th Cir. 1995) ("where a legislatively enacted sentencing scheme has expressly deprived a court of the possibility of imposing a life sentence, a sentence for a term of years exceeding the defendant's approximate life expectancy would ordinarily constitute an abuse of discretion."). The petitioner would have been entitled as a matter of law to the imposition of a sentence that was less than his life expectancy. *Id.*

The sentence was illegal as a matter of law at the time of its imposition, and cannot be permitted to stand.

2. The Imposition Of A Life Sentence Not Authorized By The Jury May Also Run Afoul Of Principles Set Forth In *United States v. Blakely*, 542 U.S. ___, 124 S.Ct. 2531 (2004)

In addition to the grounds set forth above, there are additional grounds that entitled the defendant to relief from the unlawful life sentence. In the recently decided case of *United States v. Blakely*, 542 U.S. ___, 124 S.Ct. 2531 (2004), the Supreme Court addressed a state sentencing system that permitted the judge, in imposing sentence, to find and consider facts in addition to those that found by the jury or admitted by the defendant as part of a plea. *United States v. Blakely*, 542 U.S. at ___, 124 S.Ct. at 2537. Applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court in *Blakely* found a violation of the Sixth Amendment where sentence was imposed under a determinate sentencing scheme that permitted the judge to find facts not reflected in the jury's verdict or admitted by the defendant. *Id.*

The majority in *Blakely* specifically stated that it was not addressing sentences imposed in the Federal courts. *Id.* at 2538, n. 9 ("The Federal Guidelines are not before us, and we express no opinion on them"). Nevertheless, the principles set forth therein clearly implicate the Federal Guidelines and related statutes. *Id.* at 2549 (O'Connor, J., dissenting) (noting the likely

impact of the majority decision on the Federal Sentencing guidelines based on their similarities to the state sentencing scheme under challenge). Indeed, the Supreme Court has recently agreed to hear two cases addressing the application of *Blakely* principles to the Federal system. *United States v. Fanfan*, --- S.Ct. ---- (Mem), 2004 WL 1713655 (Aug 02, 2004).

In this case, prior to imposing a life sentence, the jury was required to make a finding that a life sentence was appropriate in the particular circumstances— a factual determination specifically reserved for the jury under the pre 1994 statutory scheme. By making that finding and imposing a life sentence in the absence of the necessary finding by the jury, the trial court exceeded its authority in violation of the defendant's rights under the Sixth Amendment.

3. Mandamus Is The Only Remedy Available To The Petitioner

Although the various attorneys who have appeared on his case have for the most represented him competently as to most of the issues presented, unfortunately, none of the attorneys picked up on this issue.

Ideally, the issue of the illegal sentence should have been addressed at the time of sentencing or shortly thereafter, or at the very least, in his direct appeal. *See* 18 U.S.C. § 3742. In addition, Rule 35(a) of

the Federal Rules of Criminal Procedure at one time would have permitted the trial court to correct an illegal sentence at any time. However, prior to the petitioner's sentencing, the rule was amended to require that corrections be made or requested within seven days of the imposition of sentence. A motion pursuant to 28 U.S.C. § 2255 raising this issue directly or claiming ineffective assistance of counsel would also be foreclosed, since Section 2255 carries a one-year statute of limitation. This circuit has not looked favorably on requests for equitable tolling and has specifically denied such a request by the petitioner in this case as to an earlier 2255 motion. *See Trenkler v. United States*, 268 F.3d 16, 24-27 (1st Cir. 2001).

In fact, a request for a writ of mandamus is currently the only remedy available to the petitioner. Under 28 U.S.C. § 1651 a writ of mandamus may be issued when district court has committed clear abuse of discretion or engaged in conduct amounting to usurpation of judicial power.[3] *See Allied Signal*

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[3] The procedure for petitioning for a writ of mandamus is set out in Rule 21 of the Rules of Appellate Procedure, which provides as follows:

"Writs of Mandamus and Prohibition, and Other Extraordinary Writs (a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. (2) (A) The petition must be titled "In re [name of petitioner]." (B) The petition must

Recovery Trust v Allied Signal, Inc., 298 F.3d 263, (3rd Cir. 2002). Mandamus is an extraordinary remedy requiring "(1) a showing of some special risk of irreparable harm, and (2) a demonstration of clear entitlement to the relief requested, i.e., that the district court's order is palpably erroneous." *In re Cambridge Literary Props. Ltd.*, 271 F.3d 348, 348 (1st Cir. 2001), *citing Bennett v. City of Boston*, 54 F.3d 18, 21 (1st Cir. 1995). "And, even these showings do not necessarily require a court's use of the writ of mandamus, which, as an exceptional remedy, is to be granted only in the exercise of sound discretion." *In re Cargill, Inc.*, 66 F.3d 1256,1260 (1st Cir. 1995).

A number of circuit courts, including the First Circuit, have held that a writ of mandamus is an appropriate vehicle to direct a federal district judge to

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state: (i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issue presented by the petition; and (iv) the reasons why the writ should issue. (C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court. (b) Denial; Order Directing Answer; Briefs; Precedence. (1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time. (2) The clerk must serve the order to respond on all persons directed to respond. (3) Two or more respondents may answer jointly. (4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals. (5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae. (6) The proceeding must be given preference over ordinary civil cases. (7) The circuit clerk must send a copy of the final disposition to the trial-court judge."

correct an erroneous sentence. *See United States v. Patterson*, 882 F.2d 595, 600 (1st Cir. 1989) (dispute as to "the district judge's power to impose the sentence that he did . . . has long been recognized as falling squarely within the narrow range of cases for which mandamus is appropriate"), *citing United States v. Jackson*, 550 F.2d 830, 831 (2nd Cir. 1977). *See also United States v. Martinez-Zayas*, 857 F.2d 122, 127 (3rd Cir. 1988) (failure of district court to impose mandatory prison term on convicted was reviewable on mandamus where statute imposed mandatory sentence); *United States v. Ferri*, 686 F.2d 147, 152 (3rd Cir. 1982) (writ of mandamus will only be granted in extraordinary circumstances and cannot be used to correct mere error in exercise of conceded judicial power; however, court of appeals has jurisdiction to review, by way of mandamus, district court's order reducing sentence because district court was without jurisdiction to reduce sentence), *cert. den.* 459 U.S. 1211 (1983); *United States v. Denson*, 588 F.2d 1112, 1128 n.24 (5th Cir. 1979) (court of appeals is authorized by 28 U.S.C. § 1651 to issue writ of mandamus "to correct the illegal sentences imposed by District Court."); *Garrison v. Reeves*, 116 F.2d 978, 978-979 (8th Cir. 1941) (writ of mandamus is proper to direct federal district judge to correct erroneous sentence).

There are few recent cases on this subject, and therefore little guidance as to how to challenge an illegal sentence through the mandamus process. It may be appropriate to treat the challenge like a direct appeal. *See* 18 U.S.C. § 3742. Under 18 U.S.C. § 3742, a sentence imposed as a result of an incorrect application of the sentencing guidelines or that is incorrect as a matter of law must be reversed even if reasonable. *See United States v. Mejia-Orosco*, 867 F.2d 216 (5th Cir. 1989), *adhered to, reh den* (5th Cir. 1989) 868 F2d 807 *and cert den* 492 U.S. 924 (1989). To vault that hurdle, an appellant, under18 U.S.C. § 3742, must make a fourfold showing: (1) that an error occurred, (2) which was clear or obvious and which not only, (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Rodriguez-Castillo*, 350 F.3d 1, 5 (1st Cir. 2003). An error not objected to at the plea hearing is reversible only where the error is plain, affects the defendant's substantial rights, and seriously affects the fairness of the proceeding. *See United States v. Mills*, 329 F.3d 24, 29 (1st Cir. 2003)."If the court of appeals determines that the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such

instructions as the court considers appropriate." 18 U.S.C. § 3742 (f) (1).

In this case, the petitioner fulfills each of the elements set forth above. *See United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir. 1989). Specifically, a clear error occurred at sentencing which affected the petitioner's substantial rights. Further, the trial court's failure to follow the pertinent statute, resulting in an illegal life sentence, should qualify as an event that seriously affects the fairness of the proceeding. *See United States v. Mills*, 329 F.3d 24, 29 (1st Cir. 2003). Since the error in this case was plain, affects the defendant's substantial rights, and seriously affects the fairness of the proceeding, the fact that this error was not objected to at the plea hearing or otherwise addressed in any subsequent proceeding is not fatal. *See Id.*

Although mandamus is an extraordinary and unusual proceeding, its application is appropriate in the present case where, through no fault of his own, the petitioner is now serving an illegal life sentence.

B. Conclusion

Based on the reasons and authorities set forth above, the petitioner respectfully requests that this court issue a Writ of Mandamus to the respondent trial judge directing the respondent to resentence him in a manner consistent with the requirements of the statute under which he was convicted.

Alfred Trenkler,
By his attorney,

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United States Court Of Appeals
For The First Circuit

In Re Alfred Trenkler,
Petitioner-Defendant

Case No.

Certificate Of Service

I certify that on August 24, 2004, I served the attached Petition For Writ Of Mandamus by sending it first class mail, postage prepaid, to:

Kevin McGrath
United States Attorney's Office
John Joseph Moakley Federal Courthouse
One Courthouse Way
Suite 9200
Boston, MA 02210

Hon. Rya W. Zobel
C/O Tony Anastas, Clerk
United States District Court
For the District of Massachusetts
John Joseph Moakley Federal Courthouse
One Courthouse Way
Boston, MA 02210

Signed under the pains and penalties of perjury this twenty-fourth (24th) day of August, 2004.

Alfred Trenkler,
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