

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 12 1995

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 94-1136
)	
DAVID A. DASHNEY,)	
)	
Defendant-Appellant.)	

Appeal from the United States District Court
For the District of Colorado
D.C. No. 94-Z-465

John M. Hutchins, Assistant United States Attorney, Denver, Colorado (Henry L. Solano, United States Attorney, Denver, Colorado, with him on the brief), for Plaintiff-Appellee.

Richard L. Gabriel, Holme, Roberts & Owen LLC, Denver, Colorado, for Defendant-Appellant.

Before **MOORE**, **ANDERSON**, and **TACHA**, Circuit Judges.

MOORE, Circuit Judge.

In 1990, a jury convicted David A. Dashney on two counts of violating 31 U.S.C. §§ 5322(a), 5324(3), and 18 U.S.C. § 2, by structuring cash transactions in order to evade currency reporting requirements. We later affirmed the conviction on Count 1 and reversed and vacated the conviction on Count 2 on the ground the structuring charged constituted one violation under *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), cert. denied, 502 U.S. 1031 (1992). *United States v. Dashney*, 937 F.2d 532 (10th Cir.), cert. denied, 502 U.S. 951 (1991). In affirming Count 1, we expressly rejected Mr. Dashney's contention a conviction under §§ 5322(a) and 5324(3) requires the government prove defendant knew of the reporting requirement and specifically intended to violate it. *Id.* at 540.

After he served his sentence, the Supreme Court decided *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655, 663 (1994), which held for a conviction under §§ 5322(a) and 5324(3) "the jury had to find [defendant] knew the structuring in which he engaged was unlawful." Mr. Dashney then filed a petition in the district court to vacate his sentence under 28 U.S.C. § 2255. The district court denied relief, concluding under *Teague v. Lane*, 489 U.S. 288 (1989), *Ratzlaf* announced a new rule which neither applied retroactively nor fell within either of *Teague's* exceptions. In this appeal, Mr. Dashney challenges that holding, urging *Teague* is inapplicable to bar relief. We agree, reverse the district court, and remand for proceedings prompted by our conclusion.

Although conceding a denial of relief "would appear to violate principles of equity," the government reinforces the district court's determination with a two-pronged argument: first, the principle of judicial finality must be preserved; and, second, *Ratzlaf* announced a new rule of law, contravening "a majority of circuit precedent." However, Mr. Dashney contends *Teague* is inapplicable because *Ratzlaf* did not announce a new rule of constitutional criminal procedure but only "declared what the law meant from the date of its enactment." Mr. Dashney relies on *Davis v. United States*, 417 U.S. 333 (1974), and *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988), which he asserts represent the substantive standard to determine retroactivity.

Indeed, *Ratzlaf* is "a substantive non-constitutional decision concerning the reach of a federal statute." *Shelton*, 848 F.2d at 1489. Our retroactivity analysis, thus, differs "from the situation that gives rise to the analysis set forth in *Teague* -- . . . retroactive application of new rules of criminal procedure." *United States v. McClelland*, 941 F.2d 999, 1001 (9th Cir. 1991).

What *Ratzlaf* did was articulate the substantive elements which the government must prove to convict a person charged under §§ 5322(a) and 5324(3). That is, it explained what conduct is criminalized. This is a substantive change in the law mandating retroactivity because "a statute cannot 'mean one thing prior to the Supreme Court's interpretation and something entirely

different afterwards.'" *Shelton*, 848 F.2d at 1489 (quoting *Strauss v. United States*, 516 F.2d 980, 983 (7th Cir. 1975)).¹

In this context, principles of judicial finality, which the government urges and the district court observed, are irrelevant. Surely, if a defendant's "conviction and punishment are for an act that the law does not make criminal[,] [t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Davis*, 417 U.S. at 346 (quoting *Hill v. United States*, 368 U.S. 424 (1962)).²

Nevertheless, in holding the district court incorrectly applied *Teague*, we make no comment on the sufficiency of the evidence presented or the jury instructions, areas touched during oral argument. With this caution, we **REVERSE** the district court's order dismissing the petition with prejudice and **REMAND** for the district court to consider Mr. Dashney's § 2255 motion on the merits.

¹ Although the government distinguishes *Shelton* because it dealt with another statute and it did not contest retroactivity, it agrees if *Shelton's* "rationale applies here, then the defendant should be given his relief." That result is inescapable.

² We note the government does not contest Mr. Dashney's raising this challenge to his conviction under § 2255.