No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

****

RANDOLPH JOHNSON SPAIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

RUDOLPH A. ASHTON, III
Panel Attorney
Eastern District of North Carolina
North Carolina State Bar No. 0125
P.O. Drawer 1389
New Bern, North Carolina 28563-1389
Telephone: (252) 633-3800
Facsimile: (252) 633-6669
Email: RAshton@dunnpittman.com

QUESTION PRESENTED

I. WHETHER THE APPLICATION OF THE CROSS-REFERENCE TO COUNT 2 OF THE INDICTMENT PURSUANT TO GUIDELINES § 2G1.1 AND § 2A3.1, AND THE SUBSEQUENT APPLICATION OF THE MULTIPLE COUNT ADJUSTMENT IN GUIDELINES § 5G1.2, RESULTED IN A SENTENCE WHICH EXCEEDED THE STATUTORY MAXIMUM AND VIOLATED THE PRINICPLES IN APPRENDI V. NEW JERSEY.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF CASES AND STATUTES

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner Randolph Johnson Spain respectfully prays this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, issued on June 6, 2018, affirming the petitioner's judgment and sentence.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Randolph Johnson Spain, No. 17-4641 (4th Cir., June 6, 2018). The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C. The order denying petitioner's request for rehearing and rehearing en banc was denied on July 23, 2018 and is reproduced as Appendix D.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's judgment and sentence was issued on June 6, 2018. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Randolph Spain was convicted of two counts of interstate transportation for prostitution in violation of 18 U.S.C. § 2421. (App. G).

Petitioners applicable guideline was § 2G1.1, promoting a commercial sex act. (App. K). Under subsection (c)(1), a cross-reference was applied to Guideline § 2A3.1 which raised the base offense level from 14 to 30. (App. J).

The cross-reference was applied because the district court found the offense involved conduct described in 18 U.S.C. § 2241 (App. H) or 18 U.S.C. § 2242 (App. I).

The district court then applied the multiple count adjustment under Guideline § 5G1.2 (App. L), resulting in the total sentence of 144 months.

Sixth Amendment, United States Constitution (App. M).

STATEMENT OF THE CASE

Procedural History

On March 19, 2014 Randolph Spain was indicted for two counts of interstate transportation for prostitution pursuant to 18 U.S.C. § 2421. (App. G). The case came on for trial before the Honorable James C. Fox, Senior United States District Court Judge, at the January 5, 2015 term of the Federal Court for the Eastern District of North Carolina sitting in Wilmington, North Carolina. On January 12, 2015 the jury found Mr. Spain guilty of both counts.

The sentencing hearing was held on November 4, 2015. Over objection, Mr. Spain's sentence was enhanced based upon a cross-reference. He was found to be an offense level 32, criminal history category IV, with a custody range of 168 to 210 months. Judge Fox upwardly departed and sentenced Mr. Spain to 120 months on Count 1, and a consecutive term of 120 months on Count 2, for a total term of 240 months. He also sentenced him to a supervised release term of 10 years. The petitioner duly appealed to the Fourth Circuit Court of Appeals.

In an unpublished opinion filed on December 20, 2016 the Fourth Circuit affirmed the convictions but vacated the sentence and remanded the case for re-sentencing. The Fourth Circuit affirmed the sufficiency of the evidence for the conviction in Count 2. It also concluded that the District Court did not err in applying the cross-reference in calculating the advisory guideline range. Finally, it agreed with the petitioner that the criminal history category had been improperly calculated. (App. E).

A text order was entered on January 25, 2017 reassigning the case to the Honorable Terrence W. Boyle, District Court Judge. The petitioner had filed a Petition for a Writ of Certiorari in the United States Supreme Court. Said petition was denied by the United States Supreme Court on May 22, 2017, and certified back to this Court on May 30, 2017. (App. F).

The case came on for a re-sentencing hearing before the Honorable Terrence W. Boyle, District Court Judge, on September 21, 2017. At the hearing it was agreed by counsel that the two-point enhancement for causing serious bodily injury was not applicable and that Mr. Spain's new criminal history category was 3, not 4. This equated to a total offense level of 30, and a guideline range of 121 to 151 months. Judge Boyle sentenced Mr. Spain to 151 months with a five year term of supervised release and credit for time served.

Prior to the filing of the judgment, it was determined that the judgment had been insufficiently stated. Therefore a second re-sentencing hearing was held on October 3, 2017. After hearing from counsel, Judge Boyle issued a final sentence of 120 months on Count 1, and 24 months on Count 2, consecutive, which equated to a total sentence of 144 months.

From that sentence the petitioner filed his Notice of Appeal on October 10, 2017. In an opinion filed on June 6, 2018, the Fourth Circuit Court of Appeals affirmed. (App. A). Petitioner's request for rehearing and rehearing en banc was denied on July 23, 2018. (App. D.)

STATEMENT OF FACTS

The facts of this case will not be dealt with in detail because the Fourth Circuit has already found that there was sufficient evidence to support the charges.

RMF met Randolph Spain in a bar in Wilmington, North Carolina on or about January, 2010, and shortly thereafter they began dating. In April, 2010 Mr. Spain invited RMF to accompany him on vacation to Myrtle Beach, South Carolina. The evidence showed that once in Myrtle Beach the petitioner disclosed he was a "pimp" and RMF began working for him as a prostitute. Count 1 involves RMF and an occurrence on or about April 23, 2010.

On or about June, 2010 Mr. Spain began communicating with TMN through a social networking site. He invited TMN to accompany him to Virginia Beach, Virginia, and she agreed. RMF was also in the vehicle, and the three traveled together to Virginia Beach. On or about August 18, 2010 defendant, RMF, and TMN traveled to Norfolk, Virginia because RMF had a court appearance. While there an argument developed and the local police were called to a hotel in reference to a prostitution complaint. Both RMF and TMN spoke with authorities and gave statements. The petitioner was arrested and detained. RMF and TMN returned to North Carolina.

In his original sentencing hearing, Randolph Spain argued through counsel that the cross-reference to Count 2 should not apply based upon the facts of the case. The cross-reference raised the base offense level from 14 to 30. Said objection was overruled. This issue was raised on the first appeal of this case to the Fourth

Circuit. Based on a review of the record, the Fourth Circuit concluded that the district court did not err in applying the cross-reference in calculating the advisory guidelines range. (App. E).

Upon remand, in his revised objections to the revised Presentence Report, the petitioner objected to the cross-reference for preservation purposes. He also argued that the multiple count adjustment was improperly applied and resulted in a sentence of greater than the ten year (120 months) statutory sentence. He also argued that the cross-reference enhancement resulted in a guideline range above the statutory maximum and that the stacking under the multiple count adjustment resulted in an impermissible sentence above ten years (120 months). The district court judge stated a sentence of 151 months.

At the second re-sentencing hearing to clarify the sentence, it was noted that although the cross-reference issue was previously decided by this court, the petitioner wanted it preserved because the cross-reference enhancement violated the Supreme Court decision in Apprendi v. New Jersey. Counsel further argued that applying the multiple count adjustment under the guidelines could have resulted in concurrent sentences, which would cap the sentence at 120 months. It was further argued that the multiple count adjustment erroneously applied the cross-reference enhancement resulting in a sentence higher than the statutory maximum. There was nothing in the indictment to indicate the petitioner was charged with a crime that could receive greater than 120 months; and the jury in this case did not consider the enhanced penalty which resulted in a guidelines range

above the statutory maximum for Count 2. Judge Boyle denied this argument and sentenced Mr. Spain to 120 months on Count 1, and 24 months on Count 2, consecutive, for a total of 144 months, which he indicated was within the middle range of the guidelines. Judge Boyle also stated it "leaves you with your Apprendi argument for another court." (App. N-2).

Further facts will be developed during the argument portion of this petition.

REASONS FOR GRANTING THE PETITION

I. THE APPLICATION OF THE CROSS-REFERENCE TO COUNT 2 OF THE INDICTMENT PURSUANT TO GUIDELINES § 2G1.1 AND § 2A3.1, AND THE SUBSEQUENT APPLICATION OF THE MULTIPLE COUNT ADJUSTMENT IN GUIDELINES § 5G1.2, RESULTED IN A SENTENCE WHICH EXCEEDED THE STATUTORY MAXIMUM AND VIOLATED THE PRINICPLES IN APPRENDI V. NEW JERSEY, AND THE FOURTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED THE MANDATE RULE IN AFFIRMING THE PETITIONER'S SENTENCE.

The Petitioner, Randolph Johnson Spain, respectfully contends that the application of the cross-reference to Count 2 of the indictment pursuant to Guidelines § 2G1.1 (App. K) and § 2A3.1 (App. J), and the subsequent application of the multiple count adjustment in Guidelines § 5G1.2 (App. L), resulted in a sentence which exceeded the statutory maximum and violated the principles of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court in Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 490, 120 S.Ct. at 2362-2363.

Mr. Spain was charged in an indictment with two counts of interstate transportation for prostitution (Mann Act), pursuant to 18 U.S.C. § 2421. (App. G). The penalty for each count was not more than 10 years (App. G). The base offense level under Guideline § 2G1.1 is 14. (App. K). However, under subsection (c)(1), if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) (App. H), or 18 U.S.C. § 2242 (App. I), the cross-reference in Guideline § 2A3.1 (App. J) is applied. Guideline § 2A3.1(a)(2) dramatically raises the base offense level from 14 to 30.

(App. J). Neither the cross-reference nor the factual basis supporting conduct described in 18 U.S.C. 2241(a) or (b) or 18 U.S.C. § 2242 were charged in the indictment. Nor was the jury asked to decide whether the petitioner's conduct violated 18 U.S.C. § 2241(a) or (b), or whether it violated 18 U.S.C. § 2242.

Petitioner understands that the Fourth Circuit addressed the cross-reference issue in his prior appeal, and that he did not prevail. Nonetheless, he requested on remand that this issue be preserved. What the prior appeal failed to address was the interrelationship of the cross-reference with the multiple count adjustment in Guideline § 5G1.2. (App. L). Mr. Spain asserts that when the cross-reference is used to enhance the penalty and then consecutive sentences are imposed under the multiple count adjustment, this results in a violation of the principles enunciated in Apprendi under the Sixth Amendment of the United States Constitution. (App. M). There was nothing in the indictment to alert him as to the enhancement if convicted; nor was the jury asked to consider whether his conduct in the instant offenses involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242.

At the first re-sentencing hearing petitioner argued that the multiple count adjustment was improperly applied and that he should have had a maximum sentence of ten years, or 120 months. He further argued that pursuant to Guideline § 5G1.2, if one of the cases satisfies the sentence, then the other must be concurrent to it. The district court judge imposed a sentence of 151 months, without clarification.

The case was returned to court for a re-statement of the sentence on October 3, 2017. At that hearing counsel elaborated upon the cross-reference enhancement and its relationship to the multiple count adjustment, arguing that it violated the principles of Apprendi. He noted that the problem with the case was that Mr. Spain was not indicted with a crime that could receive a sentence greater than 120 months. There was nothing in the indictment or a trial that a jury could consider that enhanced the sentence. The interrelationship of the enhanced penalty through the cross-reference and the multiple count adjustment at sentencing resulted in a sentence which, upon stacking, violated Apprendi. The district court judge succinctly stated defendant's contention that "you can't stack without putting that in the indictment or putting that in the jury verdict." (J.A. 98; App. N-1). He then sentenced Mr. Spain to 120 months on Count 1 and 24 months on Count 2 consecutive, for a total sentence of 144 months, which was the middle range of the guidelines. The district court judge further noted that it "leaves you with your Apprendi argument for another court." (J.A. 99; App. N-2).

Petitioner Spain contends that since the cross-reference resulted in a guideline range above the maximum ten year penalty for the offense at hand, the alleged cross-referenced conduct should have been determined by a jury. Interstate transportation for prostitution pursuant to 18 U.S.C. § 2421 (Mann Act) is punishable by up to ten years imprisonment. (App. G). However Mr. Spain's sentence was enhanced by the cross-reference to 18 U.S.C. § 2241(a), (b) (App. H), or 18 U.S.C. § 2242 (App. I), both of which statutes have sentences of any term of years

or life. It is therefore contended that the conduct should have been determined by a jury in order to support an enhanced penalty. This would comply with the applicable principles enunciated in Apprendi.

In reaching its conclusion that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, the United States Supreme Court in Apprendi offered support for its decision as follows:

> "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Winship*, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")."

530 U.S. at 476-477, 120 S.Ct. at 2355-2356.

> "As we have, unanimously, explained, *Gaudin*, 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law."

530 U.S. at 477, 120 S.Ct. at 2356.

> "Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient

> times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed.1940)." *Winship*, 397 U.S., at 361, 90 S.Ct. 1068."

530 U.S. at 478, 120 S.Ct. at 2356.

In affirming the judgment of the district court, the Fourth Circuit Court of Appeals refused to consider the cross-reference issue pursuant to the mandate rule. The Fourth Circuit determined that it had previously decided the cross-reference issue in the first case and refused to reconsider it on appeal, even though it was argued in the district court for a different reason and a different basis. Furthermore the Fourth Circuit declined to consider the cross-reference argument because the additional reason had not been raised in the prior appeal. The Fourth Circuit therefore concluded that Mr. Spain was foreclosed from raising the cross-reference argument on resentencing and was foreclosed from litigating it on his appeal.

The Fourth Circuit further concluded that Mr. Spain's claim did not fall within any exception to the mandate rule. Petitioner disagrees.

The Fourth Circuit has held that there are three exceptions to the mandate rule under extraordinary circumstances, which are: (1) a showing that controlling legal authority has changed dramatically; (2) that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in serious injustice.

United States v. Bell, 5 F.3d 64, 67 (4th Cir. 1993). It is respectfully urged that this case falls under the third exception because Mr. Spain received an enhanced sentence based upon the cross-reference when the multiple count adjustment was applied. The Bell opinion further noted that the trial court may still possess some limited discretion to reopen an issue in "very special situations". 5 F.3d at 67. Mr. Spain urges that the cross-reference issue herein is such a very special situation. Therefore the mandate rule should not apply, and this issue should have been considered on its merits.

In United States v. Bell, 5 F.3d at 66, the Fourth Circuit stated that few legal precepts are as firmly established as the doctrine that the mandate of a higher court is "controlling as to matters within its compass," citing this Court's opinion in Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 780, 83 L.Ed. 1184 (1939). Petitioner Spain understands that this Court has long supported the doctrine of the mandate rule. However, it is not without exception. The complete sentence in this Court's opinion in Sprague v. Ticonic Nat'l Bank is:

> "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."

307 U.S. at 168, 59 S.Ct. at 781.

The petitioner respectfully urges that the cross-reference issue raised on remand was a legal issue under Apprendi as opposed to a factual determination and therefore could have been addressed.

In its brief on appeal, the Government contended that the district court has the discretion to decide whether sentences should run consecutively or concurrently. The Government relied upon the United States Supreme Court decision in Oregon v. Ice, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed. 2d 517 (2009). In a 5-4 decision, the Supreme Court held that the Sixth Amendment does not inhibit States from assigning to judges, rather than juries, finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses. Ice is clearly distinguishable from the case at bar. Respondent Ice twice entered an 11-year-old girl's residence and sexually assaulted her. For each of the incidents he was convicted of first-degree burglary, first-degree sexual assault for touching the victim's vagina, and first-degree sexual assault for touching her breasts. Pursuant to the Oregon Revised Statutes, Ice received some consecutive and some concurrent sentences. The Supreme Court held that the consecutive sentences did not violate the Apprendi rule in that case. The difference herein is that Randolph Spain was convicted of two counts of interstate transportation for prostitution pursuant to 18 U.S.C. § 2421. (Mann Act). (App. G). However his sentence was enhanced by the cross-reference to 18 U.S.C. § 2241(a) or 18 U.S. C. § 2242. As previously noted, both of those statutes have sentences of any term of years or life. (App. H, I).

Under the Mann Act, the jury herein only had to find that the petitioner knowingly transported an individual in interstate commerce with the intent that such individual engage in prostitution or in a sexual activity for which any person can be charged with a criminal offense, or attempted to do so. The jury found Mr.

Spain guilty of those offenses. However the jury never determined whether he used force against that other person, or threatened or placed that person in fear as promulgated under 18 U.S.C. § 2241(a) and 18 U.S.C. § 2242(1). (App. H, I).

In Oregon v. Ice, both the majority Justices and dissenting Justices considered their prior opinion in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed. 2d 856 (2007). In Cunningham, the defendant was convicted of continuous sexual abuse of a child under the age of 14. The United States Supreme Court held that California's determinate sentencing law, which authorized a judge, not a jury, to find facts exposing a defendant to an elevated upper term sentence violated the defendant's right to trial by jury. In distinguishing Cunningham, the majority in Oregon v. Ice noted that under Apprendi any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The majority then noted that it had applied Apprendi's rule in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002), Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005). They concluded,

> "Most recently, in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), we applied *Apprendi's* rule to facts permitting imposition of an "upper term" sentence under California's determinate sentencing law. All of these decisions involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times."

555 U.S. at 167, 129 S.Ct. at 717.

It is respectfully urged that the cross-reference application herein is more similar to the factual scenario in Cunningham v. California than Oregon v. Ice.

The dissenting Justices in Oregon v. Ice found Apprendi and Cunningham to be controlling. The dissent quoted from the decision in Cunningham as follows:

> "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." 549 U.S. at 290, 127 S.Ct. at 869.

555 U.S. at 178, 129 S.Ct. at 723.

In reversing the California Court of Appeal, and in criticizing the California Supreme Court's decision in People v. Black, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005), the majority in Cunningham v. California concluded as follows:

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S. at 307-308, 124 S.Ct. 2531."

549 U.S. at 290-291, 127 S.Ct. at 869.

It is respectfully contended that the cross-reference in the instant case, when applied through the multiple count adjustment under the Guidelines, relies upon judge made additional facts used to impose a longer term. Therefore the Sixth Amendment requirement is not satisfied. Randolph Spain respectfully contends that

this creates a very special situation, that the mandate rule should not apply, that the cross-reference violates Apprendi and Cunningham when applied by the multiple count adjustment, and that he is entitled to a new sentencing hearing. Therefore this petition should be allowed.

CONCLUSION

For the foregoing reasons, Petitioner Randolph Johnson Spain respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his judgment and sentence.

This the 22nd day of October, 2018.

DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC
Counsel for Petitioner Randolph Johnson Spain

By: Rudolph A. Ashton, III
RUDOLPH A. ASHTON, III
Panel Attorney
Eastern District of North Carolina
North Carolina State Bar No. 0125
3230 Country Club Road
Post Office Drawer 1389
New Bern, NC 28563
Telephone: (252) 633-3800
Facsimile: (252) 633-6669
Email: RAshton@dunnpittman.com