No. 18-7346



ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARK RAYMOND FORD — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Raymond Ford 22380-018
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# QUESTION(S) PRESENTED

I.

Whether The Lower Court Denial Of Modification Of Sentence Under 18 U.S.C. §3582(c)(2) Based On A Mandatory Guidelines Range Departure's Sentence Violates Congress' Intent? If Yes, Is This Court's Decision To Excised Two Provisions Of The Sentencing Reform Act In **United States v. Booker**, 543 U.S. 220 (2005) A Substantive **Rule** That Is Retroactive To Pre-**Booker** Cases?

II.

Whether U.S.S.G. §1B1.10--Amendments 782 And 750 Denies **Due Process** Because It Gives District Courts Authority To Distinguish Between A Certain Class Of Defendants To Be Resentenced ? If Yes, Should U.S.S.G. **§1B1.10(b)(1)**; And U.S.S.G. **§5G1.1(b)** Governing Reductions Under **§3582(c)(2)** Be Excised to Achieve Uniformity ?

## LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES



OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 25 2017.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Fifth Amendment-Due Process of Law.

(2) 18 U.S.C. §3582- A district court may reduce a prisoner's term of imprisonment if his/her sentence is **based on** a sentence range that has subsequently been lowered by the Sentencing Commission.

(3) **U.S.S.G. §1B1.10(b)(1)..." and shall leave all other guideline application decisions unaffected"** §1B1.10(b)(1).

(4) **U.S.S.G. §5G1.1(b)** ("where a statutorily required minimum sentence is greater than the maximum of the applicable range, the statutorily required minimum sentence shall be guideline sentence")).

## STATEMENT OF THE CASE

The Petitioner was convicted by Jury for Conspiracy to distribute cocaine base, cocaine hydrocloride and marijuana, in violation of 21 U.S.C. §846. (**Ct.1**); Possession with intent to distribute cocaine base in violation of 21 U.S.C. §841 (a)(1) (**Ct. 6**); Possession with intent to distribute cocaine hydrochroride in violation of 21 U.S.C. §841 (a)(1) (**Ct. 7**), and Possession of a firearm by a convicted felon in violation of 18 U.S.C. §922 (g) (**Ct. 8.**) On September 29, 1999, the district court found by a preponderance of evidence drug quantity-cocaine base, and sentenced Petitioner to a single term of life imprisonment. Recently, the Petitioner filed in the district court a "Motion for Modification of the Term of Imprisonment." **Doc. 447.** The Petitioner also filed a "Supplemental Motion for Modification of Term of Imprisonment." **Doc. 447.** On November 30, 2016, the district court denied Petitioner's motions. The court also denied Petitioner motion to proceed on appeal in forma pauperis.

Petitioner, then filed a Motion for leave to proceed on appeal in forma pauperis to the Eleventh Circuit Court of Appeals. On September 25, 2017, the Eleventh Circuit Court of Appeals issued an Order denying Petitioner's motion for leave to proceed on appeal. This petition follows:

## REASON FOR GRANTING THE PETITION

I

The U.S. Sentencing Commission's Policy Statement In U.S.S.G. §1B1.10 Violates Congress Intent; And Booker, supra, That Is Generally Retroactively Applicable In Light Of This Court's Clarification of Teague's Framework In **Welch v. United States,** 136 S.Ct. 1257 (2016).

The Eleventh Circuit panel opinion affirming the district court's ruling that "Amendments 750 and 782 do not impact [Petitioner's] sentence because he was sentenced to a statutory minimum mandatory. [Petitioner] has not provided sufficient justification for the Court to revisit its prior determination", and denial of Petitioner's 18 U.S.C. §3582 motions holding that, Petitioner's "appeal is frivolous". **See Appendix "A".** Contrary to the Eleventh Circuit Court's holding, under 18 U.S.C. §3582(c)(2), a district court may reduce a prisoner's term of imprisonment if his/her sentence is **based on** a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. §3582(c)(2). This Court in **Dillon v. United States,** 177 L.Ed 271 (2010), held that in considering a §3582(c)(2) motion, a district court must engage in a "two step inquiry." **Id.** at 284. "At step one,3582(c)(2) requires the court to follow the Commission's instructions in 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized. Specifically , 1B1.10 (b) (1) requires the court to

begin by determin[ing] the amended guideline range that would have been applicable to the defendant had the relevant amendment been in effect at the time of the initial sentencing. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guidelines application decisions unaffected. **Id.** at 284.

"At step two of the inquiry, 3582(c)(2) instructs a court to consider any applicable 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case. Because reference to 3553(a) is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under 3582 into plenary resentencing proceedings." **Id.** at 285.

Unfortunately, based on this binding authority in §3582 proceeding, the district court reinstated the mandatory guidelines departure's sentence within the context of the sentence modification proceeding, when the court ruled that "[a]fter a review of these pleadings and after having been fully advised, this Court concludes the Defendant's motions are to be denied since Amendment 750 and 782 do not impact his sentence because Defendant was sentenced to a statutory minimum mandatory." **See Appendix "B".** But see Dillon, 177 L.Ed. 2d at 289 ("Prior to our decision in Booker, the Guidelines were

mandatory only by virtue of congressional mandate, and not by virtue of commission decree. Following Booker, the commission's policy statement in 1B1.10 took effect in March 2008. That statement is now the only source of binding authority in 35 82 proceedings, as it purports to have the effect of reinstating a mandatory Guidelines regime within the context of a sentence modification proceeding. It is now the Commission's policy statement, and not an explicit congressional mandate, that makes the Guidelines ranges binding under 3582(c)(2)." (Justice Steven dissenting). Clearly, the District Court relying on Commission's binding authority, undermine Congress' authority, where Congress did not authorize §1B1.10 Policy Statement to be applied to §3582 in pre-Booker cases.

In Petitioner's case, in 1999, the district court was bound by the mandatory sentencing regime, thus the court considered the Guideline range in the PSI, and then departed from the Guidelines range. See Sentencing Transcripts and Judgment of Commitment **Docs. # 227; 229.** The Judge had no discretion but to sentence Petitioner to a mandatory term of life imprisonment based on crack cocaine offenses and firearm offenses, that was one hundred (100) times to one (1) ratio than powder cocaine offenses. Importantly, in **Dillon v. United States**, 177 L.Ed. 2d 271, 280 (2010), the Supreme Court explained that" [a]s enacted the SRA made the Sentencing Guidelines binding-Except in limited circumstances, district court lacked discretion to depart from the Guidelines range. Under the regime, facts found by the judge, by a preponderance of the evidence, often increased the mandatory guidelines range and permitted the

judge to impose a sentence greater than that supported by the facts established by the jury verdict or guilty plea." See **Id.** at 280. The Dillon court, further reiterates its Booker holding "that treating the Guidelines as mandatory in these circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt. **Id.** The Court, further explained "[t]o remedy the constitutional problem, we render the Guidelines advisory by invalidating two provisions of the SRA: 18 U.S.C. §3553(b)(1), which generally required a sentencing court to impose a sentence within the applicable Guidelines range, and 3742(3), which prescribed the standard of review of appeal, including de novo review of Guidelines departures." **Id.**

It is important to note, based on the above circumstances that occurred in Booker, had Petitioner been sentenced after the decision in Booker, the judge would not have been able to use facts found by a preponderance of the evidence to increase the mandatory guidelines range, then depart from the guidelines, nor would the court be able to impose a sentence greater than that supported by the facts established by the jury verdict.

In balance, Petitioner argues the district court denial of Modification of Sentence under 18 U.S.C. 3582(c)(2), based on a mandatory guidelines range departure's sentence violated United States v. Booker, 543 U.S. 220 (2005), that is clearly retroactively applicable in his §3582(c)(2) proceedings in light of this Court's clarification of **Teague's** framework in

Welch v. United States, 136 S.Ct. 1257 (2016). Thus, the mandatory guidelines range departure's sentence cannot be used to determine eligibility for modification under §3582(c)(2).

Notably, the "statutory minimum mandatory sentence" was constructed by using the SRA's mandatory sentencing guidelines regime to establish a guideline range of 262 to 327 months, then based on 18 U.S.C. §3553(b)(1), the court departed and imposed a statutory minimum mandatory. However, recently, this Court clarified the Teague v. Lane, 489 U.S. (1989) framework in Welch v. United States, 136 S.Ct. 1257 (2016), and based on the Court's clarification of Teague's framework, it is safe for Petitioner to argue that **Booker** announced a new rule--one that is substantive. In Welch, the Court clarified "whether a new rule is substantive or procedural by considering the function of the rule, not its underlying constitutional source." See Welch, 136 S.Ct. at 1265. Further, the Court makes clear that "[t]he Teague balance thus does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural function or substantive function-that is, whether it alters only the procedures used to obtain conviction, or alters instead the range of conduct or class of persons that the law punishes." Welch, 136 S.Ct. at 1266 (quoting **Schriro v. Summerlin,** 542 U.S. 348, 353 (2004).

Clearly, as mentioned above, Booker invalidated "two provisions of the SRA" that treated the Guidelines as mandatory--facts found by a judge by a preponderance of the

evidence often increases the mandatory guidelines range and permitted the judge to impose a sentence greater than that supported by the facts established by the jury's verdict. Those two provisions of the SRA: **18 U.S.C. §3553(b)(1)**, which generally required a sentencing court to impose a sentence within the applicable Guidelines range, and 3742(e), which prescribed the standard of review on appeal, including de novo review of Guidelines departures. See Dillon, supra. Thus, with this in mind, it is safe to say Booker "changed the substantive reach of the [SRA], by altering 'the range of conduct or the class of persons that the [SRA] punishes.'" Welch, 136 S.Ct. 1266.

Therefore, Booker announced a substantive rule that has retroactive effect to mandatory guidelines cases moving under §3582(c)(2) proceeding, because those cases were final before **U.S.S.G. § 1B1.10 took effect in March 2008.** Admittedly, this Court has not applied Booker, supra., to §3582 proceeding. But recently, this Court has granted review in **Koons v. United States**, 17-5716(2017), when Koons presented the question- Does **Freeman v. United States**, 564 U.S. 522(2011)(plurality opinion), support the holding that there is a substantive limitation on the term "based on" in 18 U.S.C. §3582(c)(2).

Importantly, Freeman is a guidelines case, but so too is Booker. Concurrently, looking at both cases with Petitioner's case, the term "based on" was the lynchpin to the district court's denial of sentence modification under §3582(c)(2). Notwithstanding, at Petitioner's initial sentencing-1999 the

court used the U.S.S.G manual to calculate Petitioner's guideline range, then departed to the statutory sentence. Thus, even if this court do not agree with Petitioner's Booker argument, this Court may still grant certiorari in light of Koon's, supra.

## II.

**U.S.S.G. § 1B1.10** Denies Equal Protection When It Provides For Full Resentencing As Of Right For A Certain Class Of Defendants--One that Meets Requirement Of **§1.B1.10(c)** Without Regard To Mandatory Minimum; Whereas Subsection **(d)** Has No Such Discretion To Conduct Resentencing Of Another Class Of Defendants That Are Similar Situated.

Petitioner asserts, the Court of Appeals for the Eleventh Circuit held that Petitioner's appeal is frivolous, where the district court ruled that "Amendments 750 and 782 do not impact his sentence because Defendant was sentenced to a statutory minimum mandatory." **Doc. # 447 at 1.** Petitioner argues the District Court's reliance on **U.S.S.G. §1B1.10**--Amendments 750, 782, to make dissimilar treatment amongst similar defendants--including Petitioner, violates the equal protection clause. This Court has explained, equal protection of the law requires not only that laws be equal on their face, but also that they be executed so as not to deny equality. **Yick Wo v. Hopkins**, 118 U.S. 356 (1886); **Ziegler v. Jackson**, 638 F.2d 776,779 (5th Cir Unit B, March 1981)("The unequal application of a state law, fair on its face, may act as a denial of protection")). See Also **United States v. Booker**, 543

U.S. 220, 225 (2005) (Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing, i.e, to increase the likelihood that offenders who engage ijn similar real conduct would receive similar sentences."))

To the contrary of the above ,**U.S.S.G. § 1B1.10-Reduction in Term of Imprisonment as a Result of Amended Guidelines Range (Policy Statement),** violates these well established principles of law where **§1B1.10(a)(3),** provides **Limitation--** Consistent with subsection(b), proceedings under **18 U.S.C. § 3582 (c)(2)** and this policy statement do not constitute a full resentencing of the defendant. **1B1.10.**In addition, **§ 1B1.10(c)** also provides **Cases Involving Mandatory Minimum Sentences and Substantial Assistance--** If the case involves a statutory required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statements the amended guidelines range shall be determined without regard to the operation of **§5G1.1** (Sentencing on a Single Count of Conviction) and **§ 5G1.2** (Sentencing on Multiple Counts of Conviction). **See 1B1.10.(c).** However, in **Commentary Application Notes Eight(8)- Use Of Policy Statement in Effect on Date of Reduction...Background, states: The listing of an amendment in subsection(d)** reflects policy determinations by the commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound

discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, **does not authorize a reduction** in other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right. See Id.

Ultimately, Petitioner asserts **U.S.S.G §1B1.10,** provides for full resentencing as of right for a certain class of defendants--ones that meet the requirements of **1B1.10(c),** to be resentenced without regard to mandatory minimum based on "other components"--substantial assistance that took place in their original sentence. Whereas the Amendments in **subsection(d)** "does not authorize a reduction in any "other component" of the sentence." See **Commentary Application Notes 8.** On the other hand, the district court has no discretion to conduct resentencing, without regard to mandatory minimum based on "other components" of another class of defendants' sentences, like for example, in Petitioner's case the sentence that was imposed, "based on" the guidelines departure. Thus, the district court should've had discretion to determine the amended guideline range without regard to the operation of **§5G1.1** Sentencing on a Single Count of Conviction) and **§5G1.1** (Sentencing on Multiple Counts of Conviction).

To the contrary, U.S.S.G. **§1B1.10,** rather on one hand, treat defendants differently by giving full resentencing to

one class because of his/her history of substantial assistance, not because of new information given to the Government, but only because they have given substantial assistance in the original sentencing proceedings. See Koons, supra., (review granted). Then on the other hand, **§1B1.10** deny another class full resentencing, notwithstanding the mandatory guidelines regime was excised in **Booker**, supra.; and the **Fair Sentencing Act** was passed by Congress, both have not been applied retroactively to mandatory guidelines departures sentences--mandatory minimums. Surely, that's not what Congress intends--for one class of defendants to be **twice rewarded** for a single substantial assistance act; but another class of defendants completely denied any reward of mercy-while all defendants are similarly situated--already convicted sentenced and starts over with a clean slate.

This Court has granted review in Koons, supra., to hear related issues, and this Court's decision in Koons, will have an impact on Petitioner's case. Accordingly, Petitioner invokes Koons, supra., where this Court may grant certiorari in Petitioner's case in light of Koons.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Mark Ford

Date: 12-18-17