NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

ASHLEY NICHOLE RICHARDS	§	**PETITIONER**
	§	
VS.	§	
	§	
THE STATE OF TEXAS	§	**RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

CAUSE NOS. WR-82,217-04, WR-82,217-05, WR-82,217-06

CAUSE NOS. 1385762-B, 138573-B, AND 138575-B
IN THE 176TH JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

SCHNEIDER & McKINNEY, P.C.

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ISSUES PRESENTED

Petitioner pled guilty to three indictments alleging cruelty to non-livestock animals. Normally, the punishment range is for a state jail felony, six months to two years incarceration. The State alleged she used a deadly weapon in each case. Use of a deadly weapon during a commission of a state jail felony increases the punishment range to a third degree felony, 2-10 years incarceration. The trial court sentenced Petitioner to 10 years incarceration on each case.

Subsequently, the Texas Court of Criminal Appeals held the deadly weapon enhancement does not apply to non-humans. Petitioner then filed a *pro se* subsequent application for writ of habeas corpus asserting her sentence was illegal due to application of the deadly weapon enhancement. The State and the trial court recommended relief.

The Texas Court of Criminal Appeals denied relief in all three applications because Petitioner did not show the case holding the inapplicability of the deadly weapon enhancement was retroactive. The issue presented to this Court is:

When a statutory punishment enhancement is found inapplicable to a class of offenses, thereby decreasing the punishment range from 2-10 years to 180 days to two years incarceration, does the Cruel and Unusual Punishment Clause of the Eighth Amendment require the holding be retroactive.

LIST OF PARTIES

The State of Texas . . . . . Respondent

Attorney for Respondent

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Ashley Nichole Richards . . . . . Petitioner

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW ASHLEY NICHOLE RICHARDS, Petitioner herein, by and through her attorney, **TOM MORAN,** and pursuant to SUP. CT. R.10 files this petition for writ of certiorari and would show the Court as follows:

I. CITATION TO OPINIONS BELOW

A. Opinion Below

Ex parte Richards, Nos. WR-82,217-04, WR-82,217-05 and WR-82,217-06 (Tex. Crim. App. November 7, 2018) (not designated for publication). A copy is attached as Appendix A.

The findings of fact, conclusions of law and recommendation by the trial court in each case are attached as Appendix B.[1]

II. BASIS OF THIS COURT'S JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07. It entered its order denying habeas relief on November 7, 2018. No motions for rehearing are allowed for orders denying habeas

[1]The state habeas court entered three sets of findings of fact and conclusions of law. Each set contains identical attachments with the indictments, docket sheets and judgments in all three cases. In the interests of not wasting paper, all three findings of fact, conclusions of law and recommendations are attached. However, the attachments to the findings which are identical to all three cases are included only with the findings of fact with the lowest cause number.

relief. TEX. R. APP. P. 79.2(d).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

B. Applicable Texas Sentencing Statutes

THIRD DEGREE FELONY PUNISHMENT. (a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

TEX. PENAL CODE ANN. § 12.34

STATE JAIL FELONY PUNISHMENT. (a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.

(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.

(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited;

TEX. PENAL CODE ANN. § 12.35.

IV. STATEMENT OF THE CASE

After Petitioner's conviction and sentence was final, the Texas Court of Criminal Appeals invalidated the deadly weapon enhancement applicable to her case. The sentence range was reduced from 2-10 years incarceration as a third degree felony to 180 days to two years incarceration as a state jail felony. The Texas Court of Criminal Appeals denied habeas relief based on her failure to show the holding invalidating the deadly weapon enhancement was retroactive.

Ironically, on appeal her co-defendant's sentence as a third degree felony punishment was vacated based on the invalidity of the deadly weapon enhancement and he was ordered re-sentenced for a state jail felony. *Justice v. State,* 532 S.W.3d

862 (Tex. App. – Houston [14th Dist.] 2017, no pet.).

A. Factual Background

Appellant was charged in three indictments, each alleging cruelty to non-livestock animals and each containing an allegation that a deadly weapon was used. She pled guilty and on May 22, 2014, was sentenced to 10 years incarceration on each case. She filed an untimely *pro se* notice of appeal and the direct appeal was dismissed for lack of jurisdiction. *Richards v. State,* No. 14-14-007420-CR (Tex. App. – Houston [14th Dist.] October 7, 2014, no pet.) (not designated for publication). The mandate of the court of appeals issued on January 7, 2015.

On June 24, 2014, she filed a *pro se* applications for writ of habeas corpus alleging in each case, among other issues, that § 12.35(c)(1) was unconstitutional as applied to her without citing any constitutional provisions. The trial court entered findings of fact and conclusions of law prepared by the State essentially stating only that habeas is not a substitute for direct appeal and recommending denial of relief. The Court of Criminal Appeals denied relief without written order in each case. *Ex parte Ashley Nichole Richard,* Nos. WR-82,217-01, WR-82,217-02, WR-82,217-03 (Tex. Crim. App. October 15, 2014).

Subsequently, the Texas Court of Criminal Appeals held that the deadly weapon sentence enhancement in § 12.35(c)(1) did not apply in cases involving non-

humans. *Prichard v. State,* 533 S.W.3d 315 (Tex. Crim. App. 2017).[2] The result was that the maximum penalty applicable to Petitioner was two years incarceration, not the 10 years assessed by the trial court.

On June 27, 2018, she filed a second *pro se* application for writ of habeas corpus relying upon *Prichard*. She phrased her claims in terms of insufficiency of the evidence, the same analysis used by the Court of Criminal Appeals in *Prichard.* Subsequently, undersigned counsel was appointed.

The State filed proposed findings of fact and conclusions of law in each case recommending habeas relief. They were adopted unchanged by the state habeas court on August 28, 2018. Copies of all three sets of findings of fact and conclusions of law are attached as Appendix B.

In November 7, 2018, the Court of Criminal Appeals denied relief in an unpublished order. The applicable language in the court's order is:

> Applicant raises three grounds based on this Court's recent decision determining that deadly weapon findings do not apply to non-human victims. *Prichard v. State,* 533 S.W.3d 315 (Tex. Crim. App. 2017). The habeas court has recommended granting relief. However, Applicant has challenged these convictions before and does not demonstrate that *Prichard* is retroactive, making it applicable to these cases. *Ex parte Oranday-Garcia,* 410 S.W.3d 865, 867 (Tex. Crim. App. 2013). Therefore, consideration of these writ applications is barred by Section 4 of Article 11.07 of the Code of Criminal Procedure. The writ

[2]Like the instant case, *Prichard* was a conviction for cruelty to non-livestock animals.

applications are dismissed as subsequent.

The issue presented to this Court is whether a decision holding a sentencing enhancement inapplicable, thereby reducing the punishment maximum from 10 years incarceration to two years, is always retroactive by operation of the Cruel and Unusual Punishment Clause of the Eighth Amendment..

B. Reasons for Review

Petitioner asks this Court to hold all decisions finding sentencing enhancements inapplicable or invalid are retroactive. If this Court does not do so, she will serve five times the maximum sentence for her crimes of conviction.

Review is proper pursuant to SUP. CT. R. 10(b) in that the decision of the Court of Criminal Appeals conflicts with *United States v. Jones,* 877 F.3d 884 (9th Cir. 2017); and *United States v. Taylor,* 873 F.3d 476 (5th Cir. 2017). While not a reason for review in Rule 10, the decision of the Court of Criminal Appeals also conflicts with this Court's decision in *Welch v. United States,* __ U.S. __, 136 S. Ct. 1257 (2016).

1. Retroactivity of Decisions Holding Sentence Enhancements Void

In *Johnson v. United States,* __ U.S. __, 135 S. Ct. 2551 (2016), this Court held the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) was void for vagueness. Essentially, this Court did what the Court of Criminal

Appeals did in *Prichard:* it held that a sentencing enhancement could not be applied in a specific set of cases. Subsequently, in *Welch,* this Court held *Johnson* was retroactive to cases on collateral review.

The Court's analysis in *Welch* separated retroactivity into two categories under *Teague v. Lane,* 489 U.S. 288 (1989): substantive and procedural. Substantive rules alter the range of conduct of the class of persons that the law punishes. Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." 136 S. Ct. at 1264-65, citing *Schiro v. Summerlin,* 542 U.S. 348, 351-52 (2004). Those rules apply retroactively. Conversely, procedural rules, that is rules that regulate only the manner of determining a person's culpability, do not apply retroactively. 136 S. Ct. at 1265. The *Welch* Court held *Johnson* was retroactive because it changed the substantive reach of the Armed Career Criminal Act. The Court wrote:

> Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence. *Johnson* establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. It

follows that *Johnson* is a substantive decision.

Id. (internal citations omitted).

In *Jones,* the Ninth Circuit reversed a district court's denial of relief under 28 U.S.C. § 2255 based on the use of armed robbery convictions under Arizona law which did not qualify as a predicate offense under the Armed Career Criminal Act and vacated a 15-year mandatory minimum sentence imposed based on the residual clause of the Act.

At sentencing in 2006, Taylor conceded that injury to a child under Texas law was a predicate offense for enhancement under the Armed Career Criminal Act.[3] The district court applied the Act to Taylor's guilty plea to possession of a firearm by a felon and assessed his punishment at 260 months incarceration. 873 F.3d at 477. In denying his third § 2255 motion based on the injury to a child enhancement, the district court held Taylor should have challenged the enhancement at punishment and that the residual clause did not play any part in sentencing. *Id.,* at 478. The Fifth Circuit not only reversed the district court but vacated the sentence of 260 months, reformed it to the 10-year applicable maximum, then ordered his immediate release because he had served 129 months. *Id.* at 482.

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[3]Prior to *Johnson,* the Fifth Circuit held in three cases (including one before Taylor was sentenced) the Texas injury to a child statute was a predicate offense under the Armed Career Criminal Act. *Taylor,* n. 4 at 478.

It follows directly that this Court and at least two circuits have held invalidation of a sentencing enhancement is retroactive and cognizable on appeal. The same should apply to the instant case.

2. The Eighth Amendment

While it is well settled that a sentence within the statutory range is rarely if ever subject to review under the Eighth Amendment, *United States v. Contreras,* 816 F.3d 502, 514 (8th Cir. 2016); *United States v. Paton,* 535 F.3d 829 (8th Cir. 2008), the same cannot be said for a sentence greater than the applicable statutory maximum. The Fifth Circuit, by adjusting Taylor's sentence impliedly held that a sentence greater than the statutory maximum is illegal. And, since it is outside the punishment range set by Congress or a state legislature, it implicates the Eighth Amendment Cruel and Unusual Punishment Clause. A sentence outside the statutory range is objectively unreasonable because the legislature has great discretion in determining what is a reasonable punishment range an offense, a determination reflected in the statutory punishment range. Anything outside that range would be unreasonable in the legislature's determination.

In *Prichard,* the Court of Criminal Appeals held that applying the deadly weapon enhancement to non-human victims would cause absurd results not intended by the Legislature. The court wrote:

> Permitting a deadly weapon finding in this case would necessarily mean that killing all animals could result in a deadly weapon finding. If this Court interpreted the broad phrasing in the deadly weapon statute to permit a deadly weapon finding for killing an animal covered in the animal-cruelty statute, that finding would significantly enhance the punishment that could be imposed against a defendant for causing serious bodily injury to or the death of, for example, frogs, lizards, turtles, and rats. The finding would not be limited to, for example, cats, dogs, or horses, or other animals that many people may view as pets or loved ones.

533 S.W.3d at 329.

The Court of Criminal Appeals further explained:

> Of course, we do not hold that it would be irrational or absurd for the Legislature to write a statute that expressly permits deadly weapon findings to elevate the punishment for exhibiting or using a deadly weapon that may threaten or cause serious bodily injury or death to certain animals or plants or even to all animals or plants. Rather, we hold that, given the broadness of the particular statutory language in the deadly weapon statute, and given our consideration of the extra-textual factors, here the Legislature's apparent intent as to this statute was to permit a deadly weapon finding for those weapons that are used or exhibited against humans only.

Id. at 330.

It follows that the holding of the Court of Criminal Appeals as to the intent of the Legislature means Petitioner was sentenced to a sentence greater than that intended by the Legislature, thereby making the punishment a cruel and unusual punishment.

This Court should grant review to determine whether a holding by a state's

highest court the not intent of the legislature to impose a sentencing enhancement such as the Texas deadly weapon enhancement necessarily is retroactive because the sentences applying the enhanced sanction are outside the punishment range set by the legislature. Such a holding would be consistent with this Court's holding in *Welch* that invalidation of a sentencing enhancement applies retroactively.

It also would be consistent with the holding of the Ninth Circuit in *Jones* and the Fifth Circuit in *Taylor* in applying retroactively holdings that sentencing enhancements should not be applied.

3. Conclusion

Based on the judgment in each case, Petitioner has been confined continually since August 16, 2012, on three sentences for which, if she had been given the maximum punishment on each case, would have expired on August 15, 2014. She has been confined more than four years longer than the maximum sentence. Further, the website for the Institutional Division of the Texas Department of Criminal Justice says her projected release date is August 16, 2022,[4] 10 years after her arrest on these case. Thus, the Court of Criminal Appeals holding that she has not proved *Prichard* is retroactive condemns her to an additional three and a half years incarceration.

[4]https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=08535473 (visited January 31, 2019).

Stated simply, she will serve five times the maximum sentence set by law if this Court does not grant review and hold decisions finding statutory sentencing enhancement inapplicable always are retroactive.

This Court can dispose of this relatively straightforward issue without full briefing and oral argument. It could issue a *per curiam* opinion holding that the Eighth Amendment Cruel and Unusual Punishment Clause requires retroactivity of decisions holding void sentence enhancements which increase the maximum punishment for a crime.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant her petition for writ of certiorari and hold that the Eighth Amendment Cruel and Unusual Punishment Clause requires retroactivity to holdings invalidating or finding inapplicable sentence enhancements which increase the statutory maximum punishment for a crime.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document and its attachments was served on the State of Texas on this 1st day of February, 2019, by mailing a copy, postage paid to:

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/s/Tom Moran
Tom Moran