18-8730 No. ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

In re JIMMIE LEE DIXON, Petitioner

PETITION FOR EXTRAORDINARY WRIT of Habeas Corpus
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR EXTRAORDINARY WRIT
UNDER THE AUTHORITY OF THE ALL WRITS ACT
OF 28 U.S.C. § 1651(a)

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Pro Se

QUESTION PRESENTED FOR REVIEW

1. Whether the Supreme Court can make a New Rule Retroactive Through Multiple Holdings that Logically Dictate the Retroactivity of the New Rule, as the Seventh and Eleventh Circuits has Held.

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Petitioner Dixon asks that a Extraordinary Writ under the All Writs Act of 28 U.S.C. § 1651(a) issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 14, 2018.

PARTIES TO THE PROCEEDING

Petitioner is Jimmie Lee Dixon.

Respondent is the Acting Solicitor General for the United States of America.

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OPINION BELOW

The unpublished opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying Petitioner Dixon's application for leave to file a second or successive habeas petition under 28 U.S.C. § 2255(h)(2) was entered on August 14, 2018. App. A1-A3. The unpublished opinion and judgment denying his petition for rehearing en banc was entered on

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within 90 days after the court of appeals entered judgment on August 14, 2018. See Sup. Ct. R. 13.1 The Court has jurisdiction to grant the writ under 28 U.S.C. § 1651(a).

STATUTORY PROVISION INVOLVED

This case involves the application of 28 U.S.C. § 2255(h)(2), which states in relevant part:

> (h) A second or successive motion must be certified as provided by in section 2244 [28 U.S.C. § 2244] by a penal of the appropriate court of appeals to contain...
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

On April 23, 2018, Petitioner Dixon filed an application for leave to file a seond or successive habeas petition under 28 U.S.C. § 2255(h)(2). In his application he argued that Sessions v. Dimaya, 138 S. Ct. 1204 (2018) [herein after Dimaya] was a new rule of constitutional law, made retroactive

to cases on collateral review by the Supreme Court, that was previously unavailable. Among other things, he argued that Dimaya was made retroactively "through multiple holdings that logically dictate the retroactivity of the new rule."

The court of appeals denied Petitioner Dixon his application concluding, he failed to satisfy the standards for authorization under § 2255(h)(2) because "18 U.S.C. § 924(c)(3)(B) has not been invalidated, and Dimaya has not been made retroactively applicable to cases on collateral review by the Supreme Court." App. A1-A3.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE AN EXTRAORDINARY WRIT TO DECIDE WHETHER THE SUPREME COURT CAN MAKE A NEW RULE RETROACTIVE THROUGH MULTIPLE HOLDINGS THAT LOGICALLY DICTATE THE RETROACTIVITY OF THE NEW RULE

A. Standard for Granting All Writs Act Under Section 1651(a)

The All Writs Act provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). To justify the grant of such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. Sup. Ct. R. 20.1.

B. The Writ Will Aid this Court's Appellate Jurisdiction

Because the denial of an application for leave to file a second or successive habeas petition is not appealable. See 28 U.S.C. § 2244(b)(3)(E); see also Felker v. Turpin, 518 U.S. 651, 658-59 (1996)(Section 2244(b)(3)(E) prevents this Court from reviewing a court of appeals order denying leave to file a second or successive habeas petition by appeal or writ of certiorari). Thus, issuing the instant writ will be in aid of this Court's appellate jurisdiction. Felker, 518 U.S. at 666 (holding that section 2244(b)(3)(E) does not limit our jurisdiction pursuant to the All Writs Act under § 1651(a)).

C. The Relief Sought Cannot be Obtained in any Other Form or From any Other Court

In the instant case, Petitioner Dixon asserts that he has exhausted his other avenues of relief. He has filed his first § 2255 motion, which was denied by the district court, and affirmed by the Fifth Circuit Court of Appeals. He is also probibited from filing a second or successive habeas petition absent an order from the Fifth Circuit authorizing such filing. § 2244(b). Just recently, the Fifth Circuit denied his request for leave to file a second or successive habeas petition based on Dimaya. App. A1-A3.

In addition, Petitioner Dixon cannot seek leave to file a second application for leave to file a second or successive habeas petition based on Dimaya. 28 U.S.C. § 2244(b)(1). Nor can he seek relief under 28 U.S.C. § 2241. See Preston v. Ask-Carlson, 583 Fed. Appx. 462, 463 (5th Cir. 2014) ("[C]laims relating to sentencing determinations do not fall within the

savings clause and are not cognizable under § 2241, even where the petitioner asserts a 'miscarriage of justice' or actual innocence relating to the alleged sentencing error."). For these reasons, the relief sought cannot be obtained in any other form or from any other court. Thus, the issue of the writ is appropriate. Kerr v. United States, 426 U.S. 394, 403 (1976)(the party seeking issuance of the writ have no other adequate means to attain the relief he desires).

D. Exceptional Circumstances

1. Abuse of Discretion

This Court has stated that, "the supplementary review of powers conferred in the Courts by Congress in the All Writs Act is meant to be used only in exceptional cases where there is a clear abuse of discretion." Bankers Life Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). Moreover, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 555 (2014).

In this case, one of the reason to deny Petitioner's application for leave to file a second or successive habeas petition was premise of the fact, there is no case law from this Court expressly holding that Dimaya is retroactively applicable to cases on collateral review. App. A1-A3. (holding that Dixon has not made the required showing because Dimaya has not been made retroactively applicable to cases on collateral review by the Supreme Court). Here, Petitioner Dixon asserts that, the court of appeals ruling is based on an erroneous view of the law, due to the fact, a single case that expressly

holds a rule to be retroactive is not a sine qua non for the satisfaction of the statutory provision of § 2255(h)(2). For instance, in Tyler v. Cain, this Court recognized that "multiple cases can render a new rule retroactively only if the holdings in those necessarily dictate the retroactivity of the new rule." 533 U.S. 656, 666 (2001). Justice O'Connor, in a concurring opinion whose rationale was endorsed by the four dissenting justices, noted that, "a single case that expressly holds a rule to be retroactive is not a sine qua non for the satisfaction of this statutory provision...This Court instead may "make" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." Tyler, 533 U.S. at 668 (O'Connor, J., concurring); see also id at 670-73, J., dissenting, joined by Stevens, Sauter, & Ginsburg, J.,). Accordingly, she wrote, "[i]f we hold in Case One that a particular type of rule applies retroactively...and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively...In such circumstances, we can be said to have 'made' that given rule retroactive." Id. at 668-69. She emphasized, however, that "the holding must dictate the conclusion." Id. at 669. The Court makes "a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holding logically permit no other conclusion than that the rule is retroactive." Id. Finally, she noted that, "It is relatively easy to demonstrate the required logical relationship with respect to the first exception articulated in Teague v. Lane, 489 U.S. 288 (1989). Under this exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe...When the Court holds a

new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal law making authority to proscribe, it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral reivew. The Court has done so through its holdings alone, without resort to dicta and without any application of principles by lower courts." Id. at 669.

Because this Court may make a ruling retroactive through multiple holdings that logically dictate the retroactivity of the new rule. Tyler, 533 U.S. at 666-69. Thus, the court of appeals ruling is based on an erroneous view of the law. For these reasons, the Fifth Circuit ruling constitutes an abuse of discretion, which warrants issue of the writ. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964)(The writ is appropriately issued, however, when there is...a clear abuse of discretion).

2. Circuit Split

Several Courts have adopted Justice O'Connor's Tyler analysis to determine whether a recent decision by this Court satisfies the standards for authorization under § 2255(h)(2). See Price v. United States, 795 F.3d 731, 734-75 (7th Cir. 2015)(citing collected cases). Other circuits have applied the Tyler analysis to deny authorization, specifically looking to the Teague exceptions for new substantive rules or watershed procedural rules to see if the Court has made a new rule announced in a subsequent decision by "logically necessity" and concluding it had not. Id. However, the Fifth Circuit interprets § 2255(h)(2) differently, it requires this Court to expressly hold a rule to be retroactive before a prisoner can satisfy § 2255(h)(2). Such interpretation,

conflicts with this Court's precedent, as well as, other circuits. Tyler, 533 U.S. at 669; Price, 795 F.3d at 735. Because the courts of appeals have adopted divergent interpretations of the gatekeeping standard. Thus, this Court should issue a writ to review: whether the Supreme Court can make a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule. Felker, 518 U.S. at 667 (The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeping standard). Moreover, the Fifth Circuit conclusion that, Petitioner Dixon failed to meet the required showing of § 2255(h)(2) because, 18 U.S.C. § 924(c)(3)(B) has not been invalidated--evaluates the merits of second or successive habeas petitions at the initial stage. However, other circuits disagree with the Fifth Circuit § 2255(h)(2) standard. See e.g., Goldblum v. Klem, 510 F.3d 204, 219 n.9 (3d Cir. 2007)("[S]ufficient showing of possible merit" in this context does not refer to the merits of the claims asserted in the petition. Rather, it refers to the merits of a petitioner's showing with respect to the substantive requirements of § 2244(b)(2)); In re Hubbard, 825 F.3d 225, 231 (4th Cir. 2016)(holding that "it is for the district court to determine whether the new rule extends to the movant's case, not for this court in this proceeding); In re Williams, 759 F.3d 66, 72 (D.C. Cir. 2014)(holding that whether the qualifying new rule "extends" to the petitioner "goes to the merits of the motion and is for the district court, not the court of appeals"); In re Hoffner, 870 F.3d 301, 309 (3d Cir. 2017) (same). For these additional reasons, this Court should issue the writ. Felker, 518 U.S. at 667.

E. Whether Petitioner Satisfies the Standards for Authorization Under Section 2255(h)(2)

Petitioner Dixon asserts that, applying the retroactivity analysis this Court recognized in Tyler, 533 U.S. at 666-69. He can satisfy the standards for authorization under § 2255(h)(2). As detailed below, Petitioner Dixon will demonstrate how he satisfies the standards for authorization under § 2255(h)(2).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") limited the ability of federal courts to grant relief to prisoners who file second or successive habeas corpus applications. § 2244(b)(3); § 2255(h). Before a second or successive application may be filed in the district court, it "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain...a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2).

1. Dimaya is a New Rule of Constitutional Law

Petitioner Dixon asserts below, Dimaya, which held that, " 18 U.S.C. § 16(b) is unconstitutionally vague"--"is a new rule of constitutional law."

In Teague, this Court defined a new rule as a rule that breaks new ground, imposes a new obligation on the states or federal government, or was not "dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (plurality opinion). Later, in Saffle v. Parks, this Court acknowledged that "[t]he explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends

the reasoning of our prior cases." Id. at 488. This Court further explained, "our task is to determine whether a state court considering [defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Defendant] seeks was required by the Constitution." Id. (emphasis added). This Court fleshed out this principle in Graham v. Collins, stating "[t]hus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor, we are barred from doing so now." 506 U.S. 401, 467 (1993)(citing Saffle, 494 U.S. at 488).

Petitioner Dixon conviction and sentence became final on January 30, 2003, i.e., the date the time expired for filing a petition for writ of certiorari to this Court. At the time his conviction and sentence became final, there was no existing Supreme Court precedent, nor any circuit precedent holding that § 16(b) or § 924(c)(3)(B) was unconstitutionally vague. Therefore, no reasonable jurists hearing his claim at the time his conviction and sentence became final would have felt compelled by existing precedent to rule in his favor.

Moreover, in Butler v. McKellar, this Court made it clear that a court may rely heavily on existing precedent, and the rule announced by the court would still be a "new rule" for Teague purposes. 494 U.S. 407 (1990):

> But the fact a court says that its decision is within the "legal compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "govered" by prior opinions even when aware of reasonable contrary conclusions reached by other circuits. In Roberson, for instance, the court found Edwards controlling but acknowledge a significant difference of opinion on the part of several courts that had considered the question previously. Id, at 415.

Therefore, mere reliance on existing precedent is insufficient to render a decision an "old rule." The "legal landscape" must be such that "reasonable jurists...'would have felt compelled by existing precedent," to reach a specific conclusion. Graham, 506 U.S. at 467-68. Further, Dimaya rests on the notice requirement of the Due Process Clause of the Fifth Amendment, and thus, the rule it announce is one of constitutional law. For the foregoing reasons, Dimaya is a "new rule of constitutional law."

2. The Supreme Court has made Dimaya Retroactive to cases on Collateral review Through Multiple Holdings

This Court, as well as other circuits, has recognized that, "the court can establish that a ruling applies retroactively either expressly or "through multiple holdings that logically dictate the retroactivity of the new rule." Tyler, 533 U.S. at 666-69; Price, 795 F.3d at 735; Hughes v. United States, 770 f.3d 814, 817 9th Cir. 2014); In re Watkins, 810 F.3d 375, 381-82 (6th cir. 2015). This Court did not expressly make the rule in Dimaya retroactive, but, Petitioner Dixon asserts that the new rule was made retroactive through multiple holdings. This is so because, Dimaya, when taken together with one of the exceptions to the presumption of non-retroactivity articulated in Teague, which was later reiterated in Schriro v.

Summerlin, 542 U.S. 348, 351-52 (2004) and reaffirmed most recently in Welch v. United States, 136 S.Ct. 1251, 1265-68 (2016), "necessarily dictate[s]" the retroactivity of Dimaya's holding. In Schriro, this Court summarized the various ways in which new rules affect cases. When the court announce a new rule, "that applies to all criminal cases still pending on direct review. 542 U.S. at 351. For convictions that are already final, however, new rules apply only in limited situations:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpretating its term...as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Id. at 352.

Relying on Justice O'Connor's Tyler analysis, Petitioner Dixon asserts that Dimaya falls into the first category of Teague because it announced a substantive rule. In other words, by striking down the residual clause in § 16(b), as void for vagueness, Dimaya changed the substantive reach of § 16(b), altering "the range of conduct or the class of persons that § 16(b) punishes." Schriro, supra at 353. Before Dimaya, § 16(b) applied to any person who had a prior conviction, even if one of those convictions fell only under the residual clause of § 16(b). An offender in that situation was subject to punishment, if his or her conviction meet the definition of crime of violence under § 16(b)'s residual clause. After Dimaya, the same person engaging in the same conduct is no longer subject to the Act and no longer faces punishment resulting from it. The residual clause is invalid under Dimaya, so it can no longer mandate or authorize punishment. Dimaya establishes, in other words that, "even the use of impeccable factfinding

procedures could not legitimate punishment based on that clause. United States v. Coin of Concurrency, 401 U.S. 715, 729 (1971).

For the reasons given above, it follows that Dimaya is a substantive decision because it "prohibit [] a certain category of punishment for a [certain] class of defendant's because of their status or offense." Accordingly, by the combined effect of the holding in Dimaya itself and the first Teague exception, Dimaya was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under Tyler, 533 U.S. at 666-69.

3. The Dimaya Rule was Previously Unavailable to Dixon

Dixon was convicted on December 8, 1997 and re-sentenced on June 26, 2000. His direct appeal was affirmed in the year of 2002. This Court denied his petition for writ of certiorari in 2002. Therefore, Dimaya was decided well after Dixon conviction became final, thus, the Dimaya rule was previously unavailable to him. Further, until Dimaya was decided, any successive collateral attack on the basis that § 16(b)'s residual clause is unconstitutionally vague, or that § 924(c)(3)(B) is also unconstitutionally vague would have been futile.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to issue the writ.

Respectfully Submitted,

By /s/: Jimmie L Dixon

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