

No. _____

19-6838

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA SMITH

Petitioner

v

WARDEN BUTLER

Respondent

ORIGINAL

FILED

NOV 13 2019

OFFICE OF THE CLERK
SUPREME COURT U.S.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Courts of Appeals have incorrectly interpreted the 'savings clause', found in 28 USC 2255(e), to require that a defendant be sentenced under mandatory guidelines in order to proceed under 28 USC 2241 by way of 2255(e) when a sentence was based on an incorrect guideline range and subsequent caselaw reveals the error.

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

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IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA SMITH
Petitioner

Case No. -

v

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The judgment of the United States District Court, Eastern District of Kentucky at London, appears at Appendix A and is unpublished.

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B and is unpublished.

The order denying Petitioner's Motion For Rehearing appears at Appendix C and is unpublished.

JURISDICTION

The Eastern District of Kentucky denied Petitioner's petition for a writ of habeas corpus, pursuant to 28 USC 2241, on: 5/6/2019.

The Sixth Circuit Court of Appeals affirmed the district court's denial of Petitioner's petition for a writ of habeas corpus on: 9/25/2019.

Petitioner's motion for rehearing was denied by the Sixth Circuit Court of Appeals on: 11/1/2019.

The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC 2241(a)- 'Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions.'

28 USC 2255(e)- 'An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'

18 USC 3553(a)- '(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, indetermining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, USC, subject to any amendments made to such guidelines by act of Congress; and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a supervised release violation, the applicable guidelines or policy statements issued by the Sentencing Comm;
- (5) any pertinent policy statement--
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, USC, subject to any amendments made to such policy statement by act of Congress; and
 - (B) that is in effect on the date defendant is sentenced.;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to victims.'

STATEMENT OF THE CASE

In 2008, a jury convicted Petitioner of various federal offenses. These offenses included conspiring to distribute 5 kilograms of cocaine and 100 kilograms of marijuana and use of a communication facility to commit a drug offense, in violation of 21 USC 841, 843, and 846. At sentencing, the district court found Petitioner to be responsible for distributing 50 kilograms of cocaine, imposed the Leader/Organizer enhancement, and an enhancement for possessing a firearm during the commission of a drug offense. The court also imposed the career offender enhancement. Petitioner's final offense level was 360-Life. The court imposed a sentence of 380 months.

Petitioner filed a direct appeal, but the United States Court of Appeals for the Sixth Circuit affirmed Petitioner's conviction and sentence. He then filed a motion to vacate under 28 USC 2255, but it was also denied.

In 2019, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 USC 2241 and 28 USC 2255(e) in the Eastern District of Kentucky where Petitioner is currently incarcerated. The district court denied the petition and Petitioner appealed to the Sixth Circuit Court of Appeals. The denial of Petitioner's petition was affirmed. He then filed a Motion For Rehearing, which was also denied, both finding that because Petitioner 'was sentenced under advisory guidelines, he does not satisfy the savings clause requirements'. This Petition For Certiorari follows.

REASONS FOR GRANTING THE PETITION

Congress has granted federal district courts 'within their respective jurisdictions', the authority to hear application for habeas corpus by any person who claims to be held 'in custody in violation of the Constitution or laws of the United States.' See *Rasul v Bush*, 542 US 466 (2004)(quoting 28 USC 2241(a),(c)(3)). The statute traces its ancestry to the first grant of federal court jurisdiction:Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are 'in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same.' See *id.* In 1867, Congress extended the protections of the writ to 'all cases where any person may be restrained of his liberty in violation of the constitution, or of any treaty or law of the United States.' *Id.* (citing *Felker v Turpin*, 518 US 651 (1996)).

The statutory provisions on habeas corpus appear as sections 22441 to 2255 of the 1948 Judicial Code. The recodification done that year set out substantial procedural limitations, with additional procedural changes in 1966. The scope of the writ remained essentially the same until 1996, when Congress enacted the Anti-terrorism and Effective Death Penalty Act, setting out new habeas corpus procedures.

Since 1948, federal prisoners who contend that they were sentenced in violation of the Constitution or laws of the United States have been required in most cases to present that claim through a motion under 28 USC 2255. The motion must be filed in the district of conviction and functions as a substitute for the writ of habeas corpus that it largely replaced. But, Congress recognized that there would be cases in which 'remedy by motion is inadequate or ineffective to test the legality of one's detention.' See 28 USC 2255(e).

Many courts have interpreted this 'savings clause' as narrowly as possible to minimize the benefit prisoners are able to receive from changes in law. Most have held that whether 2255 is 'inadequate or ineffective' depends on whether it allows

a petitioner a 'reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence' because the law changed and rendered an enhancement erroneous. See *Hill v Masters*, 836 F.3d 591 (6th Cir 2016); *Brown v Caraway*, 719 F.3d 583 (7th Cir 2013); *In Re Davenport*, 147 F.3d 605 (7th Cir 1998); *United States v Wheeler*, 886 F.3d 415 (4th Cir 2018). Some courts, however, have refused to permit any reliance on the 'savings clause', claiming that motion under 2255 is never inadequate or ineffective even after the restrictions placed on it after passage of the AEDPA. See *Prost v Anderson*, 636 F.3d 578 (10th Cir 2011); *McCarthan v Dir of Goodwill Industry*, 851 F.3d 1076 (11th Cir 2017). Other circuits have developed various tests, but all have imposed a requirement that a case of statutory interpretation, that was previously unavailable and is retroactive on collateral attack, has rendered a sentence enhancement erroneous or a defendant 'actually innocent', and that the error constitutes a miscarriage of justice or a fundamental defect in sentencing. Petitioner does not dispute that to proceed under 2241 he must rely on a new case of statutory interpretation that is retroactive and has rendered him 'actually innocent' or an enhancement erroneous. What he does dispute, however, is the finding of lower courts that an erroneous enhancement only qualifies as a fundamental defect in sentencing if a defendant was sentenced under mandatory guidelines.

The Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence. See *Nelson v Campbell*, 541 US 637 (2004). An erroneously extended sentence, by misapplication of a sentencing enhancement whether 'advisory' or mandatory, constitutes an 'illegally extended sentence' as it violates 18 USC 3553 and the parsimony provision. As the Court held in *Molina-Martinez v United States*, 136 S Ct 1338 (2016), 'a district court that improperly calculates a defendant's guideline range has committed a significant procedural error', and, 'will suffice to show an effect on the defendant's substantial rights'. See *id*. The Court went on to hold that 'from the centrality

of the Guidelines in the sentencing process, it must follow that when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.' See *id.*

As there, a defendant should not be barred from relief when it is determined that his sentence was erroneously enhanced, merely because the window for direct appeal has passed and he was sentenced under 'advisory' guidelines. An error as significant as erroneously applying the drastic career offender enhancement should be corrected at ANY point that it may determined that the enhancement did not apply.

In determining a sentence 'sufficient, but not greater than necessary', courts MUST take into account the factors enumerated in 18 USC 3553(a). One factor, and most likely the factor carrying the greatest weight, is the applicable guideline range. Courts are directed that the applicable guideline range must be calculated correctly. When subsequent caselaw reveals that an imposed enhancement was erroneous, it also reveals that any defendant's sentence impacted by an erroneous application of the enhancement was based on an incorrect guideline range. The district court has the responsibility to ensure that sentences are based on a correct range, and that when they are not, to correct the sentences. To hold that sentencing a defendant based on the wrong guideline range does not constitute a 'fundamental defect in sentencing', thereby barring a defendant to get his erroneous sentence corrected under 2241 when 2255 is inadequate AND ineffective, merely because he was sentenced under 'advisory' guidelines, is wrong and constitutes a miscarriage of justice and should be corrected by the Court.

CONCLUSION

The courts of appeals are very divided on the issue of the correct interpretation of the 'savings clause', contained in 28 USC 2255(e). And, the courts that have permitted some kind of relief under 2255(e) have interpreted it to limit available relief so narrowly as to invalidate the Great Writ. This is a matter of national importance, as many prisoners are languishing in prison for decades longer than they should be, as revealed by subsequent caselaw. These prisoners need relief from illegal sentences but are barred from receiving it. The Court should resolve this issue once and for all.

Respectfully Submitted,
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