19-6920

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

COURTNEY OMAR BOYD

VS.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Courtney Omar Boyd, PRO SE & IN FORMA PAUPERIS
Federal Correctional Complex-Low
P.O. Box 1031
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QUESTION(S) PRESENTED

I. WHETHER THE LOWER COURT ABUSED ITS DISCRETION AND VIOLATED MR. BOYD'S CONSTITUTIONAL DUE PROCESS RIGHTS WHEN IT DENIED BOYD'S FIRST STEP ACT MOTION?

II. WHETHER THE LOWER COURT IGNORED SUPREME COURT PRECEDENT IN FAILING TO ADDRESS MR. BOYD'S MOTION UNDER 18 U.S.C. §3582(c)(2)?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1, Boyd hereby certifies that the following persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualifications or recusal pursuant to the local rules of the court.

1. Boyd, Courtney; Petitioner
2. Davis, Mark S.; Chief U.S. District Judge
3. Hurt, Eric M.; AUSA

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2, 3
REASONS FOR GRANTING THE WRIT	3, 4, 5, 6, 7, 8, 9, 10, 11
CONCLUSION	12

INDEX OF APPENDICES

APPENDIX A: Opinion of the U.S. Court of Appeals for the Fourth Circuit

APPENDIX B: Verdict Form

APPENDIX C: Sentencing Transcripts Exceprts

TABLE OF AUTHORITIES CITED

	Page Number
CASES	
Apprendi v. New Jersey, 530 US 466, 146 LEd2d 435, 120 SCt 2348 (2000)	3
Bousley v. United States, 140 LED2d 828, 523 U.S. 614 (1998)	11
Christianson v. Colt Indus., Operating Corp., 486 U.S. 800, 815-16, 100 L Ed 2d 811, 108 S. Ct. 2166 (1988)	6
EOCC v. International Longshoremen's Assoc., 623 F.2d 10 4, 1058 (5th Cir. 1980)	7
Hughes v. United States, 138 S. Ct. 1765 (2018)	2, 7, 10, 11
Sejman v. Warner-Lambert Co., 845 F.2d 66, 69 (4th Cir. 1988)	7
United States v. Aramony, 166 F.3d 655 (4th Cir. 1999)	2, 7
United States v. Ford, 184 F.3d 566, 578 n. 3 (6th Cir. 1996)	8
United States v. Hairston, 754 F.3d 258 (4th Cir. 2014)	7
United States v. Jones, 17 Fed. Appx. 240 (4th Cir. 2001)(unpublished)	4
United States v. Peters, 843 F.3d 572, 575 (4th Cir. 2016)	5
United States v. Powell, 360 F. Supp. 3d 134 (March 14, 2019)	6
United States v. Rader, 2019 U.S. Dist. LEXIS 40366 (W.D. VA. 4/13/19)	6
United States v. Rhynes, 196 F.3d 207 (4th Cir. 1999)	4
STATUTES AND RULES	
18 U.S.C. §1956	3
18 U.S.C. §3582	1, 2, 6, 7, 8, 9, 10, 11
21 U.S.C. §841	4, 5
21 U.S.C. §1254(1)	1

OTHER

Fifth Amendment	1
The Fair Sentencing Act	2, 4, 5
The First Step Act	1, 2, 3, 4, 5, 7
Sentencing Reform Act of 1984	10

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

The opinion by the U.S. Court of Appeals for the Fourth Circuit is found at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 23, 2019. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Costitution:

No person shall be held for a capital, or otherwise infamous crime, ..., without due process of law[.]

Section 404 of the First Step Act expressly permits a court to impose a reduced sentence as if the Fair Sentencing Act were in effect.

18 U.S.C. §3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point.

STATEMENT OF THE CASE

In or about December 2014 Boyd filed a Motion to Reduce Sentence, pursuant to 18 U.S.C. §3582(c)(2). See Docket Entry ("DE") #262). On February 24, 2015 the United States filed its Response opposing Boyd's motion. In its response the government argued that the drug quantity made Boyd ineligible for relief. (DE #269). The district court ordered the Public Defender's Office to file a brief on Boyd's behalf addressing "the drug weight finding made at sentencing." (DE #272). On or about April 2, 2015, the Public Defender's Office filed a Memorandum in Support of Boyd's motion. (DE #284). On December 18, 2015 the district court entered an Order denying Boyd's motion. (DE #313). The decision of the district court was affirmed by the Fourth Circuit Court of Appeals on May 23, 2016. In November 2017 Boyd filed a "Successive Motion for Modification of Sentence". (DE #338). On March 26, 2018 the district court issued an Order denying Boyd's motion based on "the law of the case doctrine". (DE #341). On December 21, 2018 the First Step Act was signed into law. On June 4, 2018 this Court -in **Hughes v. United States**, 138 S. Ct. 1765 (2018)- held that: "A district court imposes a sentence that is 'based on' a Guidelines range for purposes of §3582(c)(2) if the range was a basis for the court's exercise of discretion in imposing a sentence." As a direct result of these two events -on March 25, 2019- Boyd filed a document titled "Motion to Reduce Sentence Pursuant to Title IV, Section 404 of The First Step Act, 18 U.S.C. §3582(c)(2), Hughes v. U.S. (S. Ct. 2018)/U.S. v. Aramony (4th Cir. 1999)". (DE #348) On April 25, 2019 the government filed a response that only partially addressed Boyd's motion. (DE #350). Boyd filed a timely reply addressing the government's arguments and asking the district court to find that the government had effectively conceded Boyd's remaining argument(s). On June 7, 2019 the district court entered an Order denying Boyd's motion for the reasons

stated in the government's opposition motion; While failing to address the independent and alternate ground raised by Boyd in his motion. (DE #343). Boyd filed a timely appeal that was denied August 23, 2019. This request for Writ of Cert. now follows.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURT ABUSED ITS DISCRETION AND VIOLATED MR. BOYD'S DUE PROCESS RIGHTS WHEN IT DENIED HIS FIRST STEP ACT MOTION.

Section 404 of the First Step Act expressly permits a court to impose a reduced sentence as if the Fair Sentencing Act were in effect. The limitations on this are: "No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act [], or if a previous motion made under this section to reduce the sentence, was, after the date of enactment of this Act, denied after a complete review of the motion on the merits." §404(c). No limits on the extent to which the court may reduce a sentence, or on what the court may consider when imposing a reduced sentence are mentioned. As such, under The First Step Act, Boyd's sentence currently exceeds the statutory maximum applicable by law.

Twenty years ago this Court set the framework for how statutory maximums should be applied in jury trials. **Apprendi v. New Jersey**, 530 US 466, 147 LEd2d 435, 120 SCt 2348 (2000). For almost as long courts have experimented with how to apply **Apprendi** to various circumstances. Mr. Boyd was charged and convicted on two counts in this case. Count III, conspiracy to launder money, 18 U.S.C. §1956(h), carries a statutory maximum term of 20 years. At the time of Mr. Boyd's

conviction and sentence he was exposed to a 40 year statutory maximum sentence on Count II. Count II, charged Mr. Boyd with conspiracy to possess with intent to distribute cocaine and **cocaine base.** The Verdict Form in this case stated: "Refer to the Indictment for a description of the charges." (See APPENDIX B). In effect Mr. Boyd has what is referred to as a "general verdict". Based on the law -in effect at the time of the original sentencing- the district court sentence Mr. Boyd to "a term of 360 months. The term consist[ed] of 360 months on count 2, and a term of 240 months on Count 3, all to be served concurrently." (Appendix C). Mr. Boyd's position is that this sentence has been invalidated by the **First Step Act;** therefore it exceeds the statutory maximum for the lesser of the two statutory objects of the conspiracy on which the verdict could have been based.

".....[A] defendant convicted under a general verdict of conspiring to violate §841 may be sentenced only to the statutory maximum for the least - punished offense on which that conspiracy verdict might have been based."....."That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." **United States v. Rhynes,** 196 F.3d 207 (4th Cir. 1999); See generally **United States v. Jones,** 17 Fed. Appx. 240 (4th Cir. 2001)(unpublished opinion).

The Fair Sentencing Act changed the amounts necessary to trigger the statutory minimum and maximum when it comes to cases dealing with cocaine base. The threshold amount required for the 5 to 40 year statutory minimum and maximum was 11 grams. Under the Fair Sentencing Act of 2010it became 28 grams. The First Step Act of 2018 made the Fair Sentecing Act of 2010 fully retroactive to defendants sentenced before 2010. So that defendants -such as Mr. Boyd- who could not benefit from the Fair Sentencing Act, because it was not retroactive, now can.

Count II of Mr. Boyd's Indictment lists cocaine and cocaine base. For statutory purposes -as it relates to cocaine base- Boyd was charged with conspiracy to "Distribute five (5) grams or more of a mixture or substance containing a detectable amount of cocaine base commonly referred to as "crack"....'" Five grams is far below the 28 grams required for the five to forty statutory range. As such under the retroactive application of the Fair Sentencing Act -as mandated by the First Step Act- the maximum penalty that Mr. Boyd could receive is 20 years.

The district court denied Boyd's motion based on its finding that Boyd was not convicted of a "covered offense". Without citing any legal authority, the district court opined that because Mr. Boyd was not convicted/sentenced on a count involving only cocaine base (i.e. crack) that made him ineligible for relief. (See DE #353). The Appellate court affirmed the decision of the district court "for the reasons stated by the district court." The First Step Act defines a "covered offense" as "a violation of a Federal Criminal statute, the **statutory penalties** of which were modified by sections 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-22; 124 Stat 2372, that was committed before August 3, 2010" Id. §404(a)(emphasis added).

In this case, it is undisputed that Boyd's offense of conviction is a "covered offense" for purposes of the First Step Act. The offense was committed before August 3, 2010 and the applicable statutory penalties were modified by section 2 of the Fair Sentencing Act. See **United States v. Peters**, 843 F.3d 572, 575 (4th Cir. 2016). As relevant to the instant case, section 2 of the Fair Sentencing Act increased the amount of cocaine base required to trigger the statutory penalties set forth in §841(b)(1)(B) from 5 to 28 grams. Accordingly, the district court was authorized to "impose a reduced sentence as if [section 2] were in effect at the time the covered offense was committed." 115 Pub. L.

391, §404(b). This is so even in cases where the count of conviction involved powdered cocaine and cocaine base. See for example UNITED STATES V. POWELL, 360 F. Supp. 3d 134 (March 14, 2019); also UNITED STATES V. RADER, 2019 U.S. Dist. LEXIS 40366 (W.D. VA. March 13, 2019). Boyd's position is that the application of the First Step Act to his case is no different than how it has been applied to the many cases across the country where the defendant was deemed to be a Career Offender.

Boyd's sentence has been invalidated by the First Step Act. His sentence currently exceeds the statutory maximum for the lesser of the two statutory objects of the conspiracy on which the verdict could have been based. (See Appendix B). This violates due process of law and requires this court to remand to the lower court with instructions to grant Boyd's request.

II. THE LOWER COURT IGNORED SUPREME COURT PRECEDENT IN FAILING TO ADDRESS MR. BOYD'S MOTION UNDER 18 U.S.C. §3582(c)(2).

"As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." **Christianson v. Colt Indus. Operating Corp.**, 486 U.S. 800, 815-16, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988)(internal quotation marks omitted)(alteration in original).....Under the law of the case doctrine, as a practical matter, once the "decision of an appellate court establishes 'the law of the case,' it 'must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal...unless: (1) a subsequent trial produces different evidence, (2) **controlling authority has since made a contrary decision of law applicable to the issue,** or (3) **the prior decision was clearly erroneous and would work**

manifest injustice." Sejman v. Warner-Lambert Co., 845 F.2d 66 69 (4th Cir. 1988)(quoting **EOCC v. International Longshoremen's Assoc.**, 623 F.2d 1054, 1058 (5th Cir. 1980)); See also **United States v. Aramony**, 166 F.ed 655 (4th Cir. 1999)(emphasis added).

On December 21, 2018 the First Step Act was signed into law. On June 4, 2018 this Court held that: "A district court imposes a sentence that is "based on" a Guideline range for purposes of §3582(c)(2) if the range was a basis for the court's exercise of discretion in imposing a sentence. Given the standard legal definition of "base," there will be no question in the typical case that the defendant's Guidelines range was the basis for his sentence."....."Thus, in general, §3582(c)(2) allows district courts to **reconsider** a prisoner's sentence based on a new starting point -that is, a lower Guidelines range- and determine whether a reduction is appropriate." **Hughes v. United States**, 138 S. Ct. 1765 (2018)(emphasis added).

In his motion before the district court, Boyd asserted that, the First Step Act and this Court's decision in **Hughes** met at least one -if not two- of the exceptions to the law of the case doctrine. Where Boyd's original sentence was "based on" the drug quantity (150kg) articulated by the sentencing court. Therefore allowing the district court to "reconsider" it's prior denial of Boyd's previous §3582 motion(s). The government failed to address this issue before the district court. In his Reply, Boyd pointed out to the district court that his motion was expressly titled/labeled in bold and capital letters: "MOTION TO REDUCE SENTENCE PURSUANT TO TITLE IV, SECTION 404 OF THE FIRST STEP ACT, 18 U.S.C. §3582(c)(2), HUGHES V. U.S. (S. Ct. 2018)/U.S. V. ARAMONY (4th Cir. 1999). Boyd also pointed out to the district court that the government had failed to brief this issue. Therefore Boyd should have been granted this issue by default. See **United States v. Hairston**, 754 F.3d 258 (4th Cir. 2014). "Even appellees

waive arguments by failing to brief them." **United States v. Ford**, 184 F. 3d 566, 578 n. 3 (6th Cir. 1996). Despite this the district court failed to rule on this separate/independent issue. The appellate court likewise pretended that the issue was not before it, despite Boyd's presentation of this failure by the district court to the Appellate court.

In or about December 2014 Boyd filed a Motion to Reduce Sentence, pursuant to 18 U.S.C. §3582(c)(2). (DE #262). The district court opined that Boyd may be eligible for a reduction. However the district court withheld judgment until the government had an opportunity to respond. The government objected to a reduction on the grounds that Boyd's sentence was based on a drug quantity of more than 450 kilograms of cocaine. (DE #284). The district court then appointed the Federal Public Defender's Office to file a motion in place of Boyd's Pro Se motion. Having received the motion filed by the Public Defender's Office, the government realized that it's 450 kilogram argument was flawed. Therefore -in a Second Supplemental brief- the government "highlight[ed] new portions of the case record not previously argued by the Government, namely: (1) **the order of forfeiture** entered by the sentencing judge at the time of sentencing which relied on a total cocaine quantity well in excess of 450 KG." (DE #313). Based on the government's **forfeiture** argument the district court "modifie[d] its earlier partial findings and [held] that [Boyd was] ineligible for a §3 82 sentence reduction." (DE #313).

On February 3, 2017, Boyd filed a motion for reconsideration, which was denied by the district court. (DE #321). On December 4, 2017 Boyd filed a successive motion pursuant to §3582. On March 26, 2018 the district denied this motion based on the law of the case doctrine. (DE #341). On March 25, 2019 Boyd filed the motion that was at issue before the appeals court; alleging that he had met at least one -if not two- of the exceptions to the law of the case

doctrine. Boyd alleged that those exceptions granted the district court authority to reconsider its prior denials of Boyd's §3582. Boyd's argument lay on the position that his sentence could not have been based on forfeiture; as alleged by the government -and accepted by the district court- in his previous §3182. Yet, as stated before, the district failed to even acknowledge that Boyd had raised this issue in his motion. The appellate likewise failed to address the issue.

Contrary to what the district court was led to believe, Boyd's sentence was **not** based on any forfeiture, but on a drug quantity. And whether Boyd was eligible for a sentence reduction is to be determined by what drug quantity - not forfeiture amount- informed his sentencing range. The record in this case makes it plain to see that Boyd's sentence was "based on" 150 kilograms of cocaine. At sentencing the government's position was that:

> AUSA HURT: For a level 38 of the Sentencing Guidelines, which is the highest level, there must be at least 1 0 kilograms of powder coaine. And so we know that if the evidence establishes 1 0 kilos, everything else above that is interesting but not necessarily relevant to what sentencing guideline number is going to be used as a base offense level. (Appendix C, Page 15).

In other words, regardless of what quantity was possibly attributable to Mr. Boyd, his sentence -according to government argument- was to be "based on" 150 kilograms of cocaine. The district court likewise agreed when it stated that:

> THE COURT: I think I'm going to overrule the objection. I think the evidence at trial, when combined with the evidence here in the PSR, is sufficient to estblish 150 kilos or more, which is the threshold here. Whether it's 800 or 600 is really sort of **a matter of irrelevancy for purposes of calculating a guideline range.** (Appendix C, Page 18).

18 U.S.C. §3582 authorizes a district court to reduce a defendant's sentence if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." A district court imposes a sentence that is **"based on"** a Guidelines range if the range was the basis for the court's exercise of discretion in imposing a sentence. To "base" means "[t]o make, form, or serve as a foundation for," or "[t]o use (something) as the thing from which something else is developed." BLACK'S LAW DICTIONARY 180 (10th ed. 2014). Likewise, a "base" is "[t]he starting point or foundational part of something," or "[a] point, part, line, or quantity from which a reckoning or conclusion proceeds." Ibid.; see also ibid. (Similarly defining "basis"). **Hughes v. United States**, 138 S. Ct. 1765 (2018)(emphasis added).

Based on this definition of "based on" for purposes of §3582 -handed down after Boyd's denial of his previous §3582 motion(s)- the district court was within its authority to find that Boyd had met an exception(s) to the law of the case doctrine. The district court should have therefore revisited its finding/position that Boyd was sentenced based on forfeiture. The appellate court had a duty to remand the case to the district court for that express purpose.

To reiterate, the forfeiture at issue in this case did not inform the sentencing court on what the Guidelines range should be. In fact the forfeiture proceeding occurred **after** the sentence had been pronounced. At page 38, Line 7-14 (of Appendix C) the sentencing court stated:

> "Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Courtney O. Boyd, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 months. The term consists of 360 months on Count 2, and a term of 240 months on count 3, all to be served concurrently.

The defendant is remanded to the custody of the United States Marshall."

After the sentence was imposed -based on a drug quantity (not forfeiture)- the sentencing then moved on to the forfeiture proceeding. At Page 41, Line 9-19 (of Appendix C) the sentencing court stated:

"All right. Now Mr. Boyd, you have the right to appeal the sentence that the court has imposed. This is a right you have in addition to the right to appeal your conviction. And you need to talk to Mr. Rabin about how to do that and whether it's a wise thing to do.

All right. Now, I think we still have outstanding something in the forfeiture world here. I see Ms. Perez at counsel table, so, Ms. Perez, tell me what we've got here that we need to deal with."

"In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant will be eligible for relief under §3582(c)(2) absent a clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines." **Hughes v. United States**, 138 S. Ct. 1765 (2018). It is clear from the record that the sentencing judge actually considered imposing a lower sentence on Mr. Boyd. After disposing of arguments from both sides the court addressed AUSA Hurt by saying:

"Mr. Hurt, I tell you candidly, 30 years for this seems like a long time to me. (Appendix C, Page 20).

For reasons unknown to Boyd the district court completely ignored this issue when it denied Boyd's motion. (See DE's #348 & 353). The appellate court ignored the fact that the district ignored the issue. Warranting a Writ of certiorari from this Court. See **Bousley v. United States**, 140 LED2d 828, 523 U.S. 614 (1998).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

X _____

Courtney Omar Boyd

Date: October 14 2019