

No. _____

In the Supreme Court of the United States

JOEY D. WISEMAN JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
from the Sixth Circuit Court of Appeals
to the United States Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Honorable Court should re-evaluate the inherent inequity in Congress changing the level of the enhancement for prior drug felonies for 21 U.S.C. §§ 841(b)(1)(A)-(B) to prior serious drug felonies but not 21 U.S.C. § 841(b)(1)(C) for prior drug trafficking convictions.

PARTIES TO THE PROCEEDING

The parties appearing here and below are: (1) Joey D. Wiseman Jr., the Petitioner named in the caption; and (2) the United States, the Respondent named in the caption.

No corporations are involved in this proceeding.

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PROOF OF SERVICE

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PETITION FOR A WRIT OF CERTIORARI

Joey D. Wiseman Jr., respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is contained within the Appendix and was recommended for publication.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 26, 2019. A motion to remand the case was denied by the Court of Appeals on October 2, 2019. A timely petition for rehearing en banc was denied by the Court of Appeals on October 17, 2019, and a copy of the order denying rehearing. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There is an inherent inequity in Congress changing the level of the enhancement for prior drug felonies for 21 U.S.C. §§ 841(b)(1)(A)-(B) but not 21 U.S.C. § 841(b)(1)(C).

STATEMENT OF THE CASE

On August 4, 2017, at around 6:30 a.m., Wiseman intercepted an armed robber that entered his home through a window in Elyria, Ohio. Wiseman disarmed the intruder and shot him with a gun already in Wiseman's possession. Wiseman subsequently placed the gun in a safe containing individual baggies of drugs in a vehicle parked in his driveway prior to the police arriving at the scene.

A. PROCEDURAL BACKGROUND

On November 8, 2017, Wiseman was indicted on three counts stemming from events that occurred on August 4, 2017. Count 1 charged Wiseman with possession with intent to distribute approximately .28 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). Count 2 charged Wiseman with possession with intent to distribute approximately 11.28 grams of cocaine in violation of the same statute. Count 3 charged Wiseman with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) & 924. On January 23, 2018, the government filed an information under 21 U.S.C. § 851(a) stating the previous felony drug offense convictions that it intended to rely upon in enhancing his sentence under 21 U.S.C. § 841(b)(1)(C).

Wiseman's jury trial commenced on June 12, 2018. Wiseman was acquitted of Count 1 and convicted of Counts 2 and 3. The jury found via a special verdict form that Wiseman possessed the Lorcin pistol with an obliterated serial number and ammunition.

The quantity of drugs Wiseman was found guilty of possessing in this case was a base offense level of twelve (12) under the guidelines. This low base offense level with

a criminal history category of six (VI) corresponds to a guideline range of thirty (30) to thirty-seven (37) months imprisonment. The career offender determination raised Wiseman's guideline range to 262 to 327 months imprisonment.

The presentence report ("PSR") calculated the adjusted offense level, after grouping, to be 28. The amount of drugs and the government's filing of an information under 21 U.S.C. § 851(a) increased the maximum term of imprisonment from twenty (20) years to thirty (30) years. 21 U.S.C. § 841(b)(1)(C). The PSR then applied the career offender enhancement under § 4B1.1(b), based on the fact that the offense of conviction was a felony controlled substance offense and Wiseman's having at least two prior felony convictions for a controlled substance offense: (1) Trafficking in Cocaine in 2012; (2) Trafficking in Drugs in 2014; and (3) Trafficking in Drugs in 2015. This meant that the offense level increased to thirty-four (34). The resulting guideline range was 262 to 327 months of imprisonment.

Wiseman did not serve any term of imprisonment of more than 12 months on any his previous felony convictions for a controlled substance offense upon which the United States relied upon in its Information to Establish Prior Conviction. Pursuant to 21 U.S.C. §§ 841(b)(1)(C) and 851, the United States relied upon the following "felony drug offense" convictions of Wiseman for the purpose of invoking the increased sentencing provisions of 21 USC § 841(b):

- (1) Having a Weapon Under Disability, Improperly Handling Firearms in a Motor Vehicle and Possession of Cocaine, Case Number 16CR094293, in the Lorain County

Court of Common Pleas, on or about September 23, 2016; **Sentence: 2 years Probation.**

- (2) Illegal Conveyance of Drugs of Abuse onto the Grounds of a Specified Government Facility, Trafficking in Drugs and Possession of Drugs, Case Number 14CR090592, in the Lorain County Court of Common Pleas, on or about April 15, 2015; **Sentence: 3 years Probation, Probation revoked, 90 days confinement.**
- (3) Trafficking in Drugs, Case Number 14CR089201, in the Lorain County Court of Common Pleas, on or about July 16, 2014; **Sentence: 3 years Probation, Probation revoked, 90 days confinement.**¹ Trafficking in Cocaine, Case Number 12CR084681, in the Lorain County Court of Common Pleas, on or about October 17, 2012. **Sentence: 6 months confinement.**

Without the application of the §851 enhancement, Wiseman's base offense level using USSG § 4B1.1 is twenty-nine (29), criminal history category VI, corresponding to a guideline range of 151 to 188 months imprisonment.

¹ PSR ¶ 39. (PSR, R. 59, PAGE ID 251)

On September 19, 2018, the district court imposed a guideline range sentence of 262 months for Count 2 and 120 months for Count 3, to run concurrently. As a result of Wiseman's conviction pursuant to 21 U.S.C. §841(b)(1)(C) and not §841(b)(1)(A-B), Wiseman is serving an additional one hundred and eleven (111) months imprisonment, or over nine (9) years. Wiseman timely filed his notice of appeal.

B. FACTUAL BACKGROUND

On August 4, 2017, at around 6:30 a.m., several Elyria Police Department officers were dispatched to 201 George Street in Elyria, Ohio and observed blood on the lower part of the frame of an open window of the home. Wiseman soon appeared from between the house and a GMC Yukon parked in the driveway. He held his hands up and informed the officers that there was a handgun laying in the driveway. The handgun was black and stainless steel. The officers entered the home and observed a teenaged male, Jaymone Whitaker, in a pool of blood on the living-room floor close to the window with the bloody frame; he appeared to have been shot multiple times. Paramedics took Whitaker to the hospital, and officers brought Wiseman to the police station.

The police collected the gun, a loaded Taurus PT 709 9mm, from the driveway. They collected a package with approximately .3 grams of white powder containing cocaine from the kitchen floor and several 9mm Luger shell casings from the living room, where there were signs of a struggle. They also observed that there were surveillance cameras on the outside of the home and a monitor in the living room that displayed the security footage. At the police station, officers swabbed Wiseman's hands for gun

residue and collected \$4,949.00 in cash from Wiseman's person.

Wiseman was *Mirandized*, and he indicated that he understood his rights and agreed to talk with the police officers. The interview was recorded on video.

Wiseman informed the police that he had been awoken by a voice, used the restroom, came back, sat down on the couch, and then, aided by his surveillance monitor, he saw Whitaker "coming up to his window, peeking in, wearing the mask." Wiseman stated that he had knocked Whitaker's gun out of his hand as Whitaker entered the home and then Wiseman shot Whitaker with a black Lorcin gun that Wiseman had in the house with him prior to the robber's entry. Wiseman subsequently placed the black Lorcin gun in a safe in the back of the Yukon parked in the driveway. Wiseman admitted that between five and twenty-five grams of cocaine were also inside of the safe. Wiseman stated that he had not called 9-1-1 after shooting.

Wiseman provided the officers with the combination to the safe in the Yukon. The officers obtained a search warrant, towed the vehicle to the police station, and searched the safe. It contained the black Lorcin 9mm handgun with a defaced serial number, 11 individual bags of similar quantities of a white powder containing cocaine, a bag of cutting material, and a shoebox containing a digital scale, spoon, scissors, and baggies. The safe also documents bearing Wiseman's name. The officers obtained Wiseman's consent to view the surveillance video from the home. It showed Whitaker entering the home through the window and holding a black and silver gun. It subsequently showed Wiseman walking outside the home.

REASONS FOR GRANTING THE PETITION

The First Step Act modified the "felony drug offense" language in 21 U.S.C. § 841(b)(1)(A) and (B) to "serious drug felony" but did not modify the language of 21 U.S.C. § 841(b)(1)(C), the statute under which Mr. Wiseman was convicted. The First Step Act now statutorily defines the term "serious drug felony" as an offense described in §924(e)(2) of title 18, United States Code, for which— (A) the offender **served** a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

Although the First Step Act did not modify the language of 21 U.S.C. § 841(b)(1)(C), there is an unfairness and inequity in Congress changing the level of the enhancement drug felonies for 21 U.S.C. §§ 841(b)(1)(A)-(B) but not 21 U.S.C. § 841(b)(1)(C). As the Sixth Circuit stated in its opinion:

"Because Wiseman was convicted under 21 U.S.C. § 841(b)(1)(C), not § 841(b)(1)(A) or (B), the First Step Act's narrowing of qualifying convictions to serious drug felonies rather than felony drug offenses under those provisions would not impact him..."

United States v. Wiseman, No. 18-3904, __ F.3d __, 2019 WL 3367615 (6th Cir. 2019). This inequity provides for unwarranted sentencing disparities between defendants with the same prior convictions. Had Wiseman been convicted with having more drugs under §§ 841(b)(1)(A)-(B), his sentence would have been cut in half due to the fact

that he does not have any prior "serious drug felonies." This is not a proper application of the law.

The Congressional Intent of the First Step Act was to statutorily reform the criminal justice system. Under ordinary principles of statutory interpretation, amending the definition of a prior felony for which an offender's sentence can be enhanced to include a "serious drug felony" would lead one to assume that more serious offenders would be punished under that statute. This amendment does the opposite. It actually requires a defendant to actually serve one (1) year on a prior drug felony offense to be subject to the enhanced penalties of the statute. Wiseman does not have any serious drug felonies but he does have prior felony drug convictions.

As a result of this grave inequity in the law and the unwarranted sentencing disparities between defendants with the same prior convictions, Wiseman has sought and continues to seek equitable relief of applying the serious drug felony definition to 21 U.S.C. § 841(b)(1)(C).

Based upon the foregoing, this Honorable Court should grant certiorari to remedy the "serious drug felony" language to apply to 21 U.S.C. § 841(b)(1)(C) and provide Joey D. Wiseman with relief as he has no prior serious drug felonies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Marisa L. Serrat

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