

No. _____

19-7957

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Damar D. Ruffin — PETITIONER
(Your Name)

FILED
FEB 24 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S Court of Appeals For the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Damar D. Ruffin # 64694-060
(Your Name)

POB 2000 - USP Hazelton
(Address)

Bruceston Mills, WV. 26525
(City, State, Zip Code)

none
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Sixth Circuit Court of Appeals ruling is in direct conflict with the laws of the Supreme Court regarding "Plain Error" for application of the first step Act section 401 enacted on direct appeal?
2. Whether the District Court committed reversible error regarding the jury charge and jury verdict form to determine amount of controlled substance pursuant 21 USC 846?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. United States v. Damar D. Ruffin, 5:16 CR 362 District
2. United States v. Damar D. Ruffin, 18-3507 Appellate

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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

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is
 reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is
 reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is
 reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is
 reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7/31/19.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: unknown, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including February 20, 2020 (date) on November 22, 2019 (date) in Application No. 19 A 575.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 5th Amendment Due process of law - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The First Step Act - P. Law no. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (2018) - Section 401 of the First Step Act 2018 changed mandatory minimum penalties and conditions under which they apply. Higher mandatory minimums penalties apply if the defendant has a prior conviction for a "serious drug felony", ... and the prosecutor files a notice of enhancement under 21 USC 851. In addition, for any "serious drug felony" ... based on 18 USC 3559(c) (2), the offense must have been punishable by a term of imprisonment of ten years or more. However, the Act provides that these changes shall apply to any offense that was committed before the date of enactment of the Act if a sentence for the offense has not been imposed as of such date of enactment, December 21, 2018.

STATEMENT OF THE CASE

This case was tried by Jury in the U.S District Court Northern District of Ohio Judge Donald C. Nugent, by super-seding indictment on one count of conspiracy to possess with intent to distribute approximately 2,210.7 grams of a mixture or substance containing a detectible amount of methamphetamine, in violation of 21 USC 841(a)(1) and (b)(1)(A)(viii), on February 1, 2018.

The United States called the following witness(es):

(1). Postal Inspector Michael Adams; (2). Detective Chris Carney; (3). Special Agent Timothy Edquist; (4). Detective Paul Hill; and (5). Jalila Stoudemire. (6). Randolph Harris; and (7). Inspector Marc Kudley. These witnesses testified in different aspects to drugs shipped from California via mail parcels to Akron, Ohio, between the dates of or on the date of November, 13-2015, regarding two separate mail parcels. The packages were delivered to postal worker co-defendant Jalila Stoudemire, suspected of being involved in the distribution of methamphetamine. Law enforcement followed Stoudemire to numerous locations and eventually arrested her in the driveway of a private residence in Akron, Ohio, where appellant was visiting, who was stopped and arrested upon leaving that residence. Stoudemire told law enforcement that she did not know the appellant and her contact was another individual at that residence.

Appellant was found guilty on February 6, 2018. On May 15, 2018 Appellant was sentenced to life imprisonment and ten years supervised release based on the total weight of

STATEMENT OF THE CASE
(continued):

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the entire conspiracy; prior convictions pursuant 851 and a general verdict form. Thereafter a timely appeal was taken on May 29, 2018. On direct appeal before the decision was rendered, the First Step Act passed. The Appellant was denied the first step Act on direct appeal as being too late. Rehearing was taken and denied. When counsel died, Appellant received an extension of time to file certiorari in this matter.

REASONS FOR GRANTING THE PETITION

The compelling reasons as to this issue is that a National Public Law is involved. The First Step Act, P. Law 115-391, §401 (a)(2), 132 Stat. 5194, 5220 (2018) (amending 21 USC 841(b)(1)(A)(viii)), that did not apply retroactively, only prospectively from December-21, 2018. However, cases such as the petitioner's, who was on direct appeal, did not receive their rights under the first step Act relieving sec. 851 applications. See United States v. Olan, 507 US at 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 ("[I]n procedural principal is more familiar to this Court than that a Constitutional right, or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'"). Here, the sixth Circuit (Appx. A, p. 8, par. 3 of appellate opinion), stated that:

"... Ruffin requests resentencing under the first step Act P. Law 115-391, §401(a)(2), 132 Stat. 5194, 5220 (2018) (amending 21 USC 841(b)(1)(A)(viii)). The first problem with this argument is that Ruffin waited until his reply brief to raise it. That is too late." citing "United States v. Campbell, 279 F.3d 392, 401 (6th Cir. 2002).

The second problem is that this portion of the Act doesn't apply retroactively. See United States v. Potter, 927 F.3d 446, 455 (6th Cir. 2019); and circuit Judges Gilman, Sutton and White affirmed in error of this court's precedents in Henderson v. United States,

Reason for Granting the Petition (Continued):

185 Fed 2d 85, 568 US 246 (2013) for plain error, F.R.C.P. 52(b).

The Henderson Court held that as long as the error was plain as of the time of appellate review the error is "plain" within the meaning of F.R.C.P. 52(b). And the Court of Appeals "may consider" the error even though it was not brought to the trial court's attention.

The "general rule" is that an appellate court must apply the law "in effect" at the time it renders its decision. See *Thorpe v. Housing Authority of Durham*, 393 US 268, 281, 89 S.Ct. 518, 21 LEd 2d 474 (1969). See *Zitfin v. United States*, 318 US 73, 78, 63 S.Ct. 465, 87 LEd 621 (1943).

The Henderson Court quoted Chief Justice Marshall writing long ago:

"It is the general rule that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied... In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." see *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 LEd 49 (1801).

Because this law has been clearly established for over 200 years, the Sixth Circuit departed from the acceptable practice

Reason for Granting The Petition (continued):

of this Court.

finally, the S.Ct. in *Olano*, said that Rule 52(b) authorizes an appeals court to correct a forfeited error only if (1) there is "an error", (2) the error is "plain" and (3) the error "affect[s] substantial rights", 507 US at 732. The S.Ct. added that the standard that should guide the exercise of remedial discretion under Rule 52(b) is whether the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings; (quoting *United States v. Atkins*, 297 US 157, 160, 56 S.Ct. 391, 80 Led 555 (1936)).

In establishing *Olano's* criteria, first there is error in light of this Court's 200 year history of precedents; second, the error is plain because the S.Ct. laws were clearly established on the issue; and third the error affects substantial rights under the constitution 5th amendment due process of law in light of established S.Ct. precedents, and has caused discriminative application of the first step Act 2018 and unfair and unreasonable sentence of life, in the face of the first step Act statutory mandate of 10 to 25 years under the revised sec. 851. Additionally, fairness, integrity or public reputation of judicial proceedings would be the discrimination applied that violates equal protection of law and usurpation of the S.Ct by the sixth circuit over-riding this Court's laws. It also creates erroneous information for census in the DOJ.

May the Court therefore supervise and issue a (GVR - Grant - Remand - Vacate) to the appropriate court for review of the first step Act sec. 401(a)(2) application that modifies sec. 851.

Reason for Granting the Petition

The Compelling reasons as to this issue is that the Supreme Court's laws were not followed in this case by the Sixth Circuit, regarding defendant specific drug quantities for conspiracy offenses. According to this Court in *Apprendi v. New Jersey*, 530 US 466 (2000) and *Alleyne v. United States*, 133 S.Ct. 2151 (2013), drug quantities are elements of the offense. The Sixth Circuit committee had revised their Jury instructions and special verdict forms in the wake of *Apprendi* and *Alleyne*, that was not followed by the district courts, in violation of due process of law 5th amendment. This constituted an unreasonable determination of the facts and unreasonable sentence of life imprisonment based on Jury verdict ambiguity or nonuniformity as to the proper drug quantity.

According to the Sixth Circuit Committee's revised Jury charge under 14.07B Unanimity required: Determining Amount of Controlled Substance (3846) reads as follows:

- (1) The defendant is charged in Count _____ of the indictment with conspiracy to _____. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the conspiracy that was attributable to him as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. You will be provided with a special verdict form for this purpose.

Reason for Granting The Petition (continued):

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(2). If you find by unanimous agreement that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of _____ was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate this finding on the special verdict form.

[(3). If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that quantity of at least _____ of a mixture or substance containing a detectable amount of _____ was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate that finding on the special verdict form.]

(4). In determining the quantity of the controlled substance, you need not find that the defendant knew that his offense involved this quantity of drugs. see (Appendix D).

The Committee instructs the court that this instruction explains the requirements of Apprendi and Alleyne in a controlled substance conspiracy case. Further, recommends that the court give this instruction and use a special verdict form; in relevant part as follows:

Reason for Granting The Petition (continued):

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The committee recommend the relevant threshold amounts be inserted in the instruction and special verdict form;

7. Methamphetamine

_____ 50 grams or more

_____ 5 grams or more but less than 50 grams

_____ less than 5 grams

Authority: § 841(b)(1)(A)(viii) and (b)(1)(B)(viii). See (special verdict form § 846; Form 14.07B-1, 2)(appendix D).

Jury Charge

The district court, case no. 5:16-362-DCN, Doc. # 99, Page 10 # 104. Jury Charge, Lines 6-25 read:

"Now, to assist you in reaching the proper verdict I'm going to submit a verdict form to you. And when you have reached a unanimous agreement as to your verdict, either finding that the government has proved the charges against the defendant beyond a reasonable doubt or the government did not prove the charge against the defendant beyond a reasonable doubt, you will have your foreperson fill it in. And I will read and display it to you now, and it will be self-explanatory.

We have one verdict form, and you'll see here we have the caption up on top, and then the title of the case. And then right here in print it says, "we the Jury, being duly impaneled and sworn, find the defendant Damar D. Ruffin," and there's a blank space. Next to the blank space in

Reason for Granting The Petition (continued):

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bold I put, "insert in ink either guilty or not guilty, according to your findings" -- insert that in ink -- "of conspiracy to possess with intent to distribute methamphetamine, a schedule II controlled substance, in violation of Title 21, U.S Code, section 841(a)(1) and (b)(1)(A), as charged in the super-seding indictment."

Further, on page 10 # 1015 of Doc. 99, Lines 1-6, the Court continues; (in relevant part):

"you'll notice down below there are 12 signature bars. Your foreperson signs on the first signature bar, and then the other 11 concurring Jurors sign in whatever order you want, and then you affix the date that you sign this verdict form. Again, just looking at it, it will be self-explanatory to you." Also see (page 10 # 1032 of Doc. 99, Lines 1-4, the Court stating verdict form correct and accepting verdict).

The Verdict Form

The verdict form was contained in the Court's Judgment attached, (appendix B). On page 2, reads:

Verdict Form Court 1

"We the Jury, duly impaneled and sworn, find the Defendant DAMAR O. RUFFIN, GUILTY of conspiracy to possess with intent to distribute Methamphetamine, a schedule II controlled substance, in violation of Title 21, United States Code Section 841(a)(1) and (b)(1)(A) as charged in the Super-seding Indictment."

Reason for Granting the Petition (continued):

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The Sixth Circuit Committee revised the instruction and special verdict form, not only in the wake of *Apprendi* and *Alleyne*, but due to an internal circuit inconsistency. The inconsistency was whether in addressing mandatory minimum sentences for § 846 drug conspiracy offenses are determined by conspiracy wide or defendant specific drug quantities. Here, the district court departed and used the conspiracy wide approach, after the Sixth Circuit resolved this issue under the defendant specific drug quantity. See *United States v. Gibson*, 2016 WL 6839156, 2 (6th Cir. 2016) (unpublished), rehearing en banc granted, 854 F.3d 367 (6th Cir. 2017), aff'd without opinion by an evenly divided court, 874 F.3d 544 (6th Cir. 2017) (en banc), cert. denied, 138 S.Ct. 1180 (2018); *United States v. Young*, 847 F.3d 328, 366-68 (6th Cir. 2017); (cf) compare *United States v. Swiney*, 203 F.3d 397, 405-06 (6th Cir. 2000) (holding that "Pinker-ton principles, as articulated in the relevant conduct guideline, U.S.S.C. § 1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841 (b)(1)(c)") with *United States v. Robinson*, 547 F.3d 632, 639-40 (6th Cir. 2008) (holding that the quantity of drugs involved in the conspiracy as a whole determines the statutory range).

Because of this inconsistency, the committee recommended that juries be charged pursuant to the earlier decided *Swiney*. See *United States v. Reid*, 888 F.3d 256, 258 (6th Cir. 2018) ("[W]hen a later decision of this Court conflicts with one of our prior-published decisions, we are still bound by the holding of the earlier case.").

Reason for Granting the Petition (continued):

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Thus, the committee amended the instruction to delete the phrase "involved in the conspiracy as a whole" throughout the text and in the two special verdict forms and substituted language stating that Juries need to find the quantity of controlled substances that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. (see Appendix D, verdict forms)

Here, the district court's jury charge and verdict form lessened the government's burden of proof and a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence. See *Gilmore v. Taylor*, 508 US 333 (1993), that implicated the due process clause. For example, on page IO # 1026 - 1030 of Doc. 99, the jury asked several questions, two relevant here: Q. no. 2. "In layman's terms, is conspiracy the only charge to Mr. Ruffin?" . . . Q. no. 3. "Does it matter if we think he was going to distribute the narcotics or if he was part of the conspiracy to bring it to northeast Ohio?" . . . (page IO # 1027 of Doc # 99, Lines 18-25, page IO # 1027 of Doc 99, Lines 1-3). This clearly implicates the principles above in *Gilmore v. Taylor*, supra. The district did not have a discretion to depart from clearly established laws of this Court and the Sixth Circuit, that violated due process of law, fair trial and an unreasonable sentence of life under the unconstitutional conspiracy wide criteria.

wherefore, May the Court Grant (GVR - Grant, Vacate and Remand) to the district court to either grant new trial or resentence Mr. Ruffin to the catchall statute of 841(b)(1)(B)(viii), of 5 grams

Reason for Granting The Petition
(continued):

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or more of methamphetamine under the penalty of 5 years and not more than 40 years ; to save Judicial expenses and Mr. Ruffin acceptance of his responsibility in this matter, re: specific defendant quantity and reasonable foreseeability of Codefendant's quantities, as law provides.

CONCLUSION

Mr. Ruffin's 5th Amendment right to Fair trial and reasonable sentence was violated. He was entitled to the FSA 2018 law on direct appeal and further-entitled to a new trial or resentencing pursuant law.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 2/21/20