

19-844
No. 19-7353

IN THE
SUPREME COURT OF THE UNITED STATES

April Term, 2020

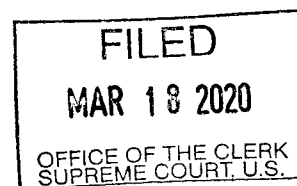
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FREDDIE LEE CURRY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

*



On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

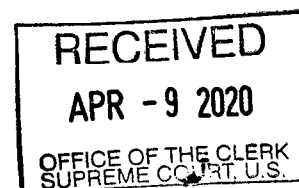
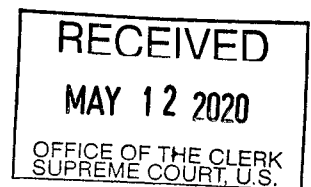
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PETITION FOR WRIT OF CERTIFICATE

_____*_____
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FREDDIE LEE CURRY #15498-071
PRO SE REPRESENTATION

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QUESTIONS PRESENTED FOR REVIEW

Did the District Court abused its discretion when it failed to apply Alleyne to Appellant's sentence reduction under Section 404(b) of the First Step Act of 2018? Had the District Court applied Alleyne, it would have relied on the required threshold under Appellant's convicted statute penalty of §841(b)(1)(B) which is at least 28 but less than 280 grams of crack cocaine when it reduced Appellant's sentence under Section 404(b) of the First Step Act of 2018.

Did the District Court abused its discretion when it failed to apply the language and authority under Section 404(b) to Appellant's sentence reduction which clearly states, "Impose a reduce sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." Had the District Court applied the language and authority under Section 404(b) of the First Step Act of 2018, it would have applied the Alleyne and thus, under the convicted statute penalty of §841 (b)(1)(B), it would have only relied upon the required threshold drug amount of at least 28 grams but less than 280 grams of crack cocaine, not 280 grams or more of crack cocaine which increased Appellant's enhanced statutory mandatory minimum of 10 years even after applying Appellant's 4-level leadership role and 2-level gun enhancement.

Was the District Court's decision not to apply the language and authority under Section 404(b) of the First Step Act of 2018 and this Court's decision in Alleyne and Mubdi in conflict with other courts who are applying Section 404(b) and Alleyne as it should be applied?

PARTIES TO THE PROCEEDINGS

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I.
CITATIONS OF OPINIONS AND ORDERS IN CASE

The sentence reduction under Section 404 of the First Step Act of 2018 was ORDERED on September 12, 2019. Appellant never received a copy of the ORDER from the District Court and it appears to be unpublished.

Appellant timely appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit and on February 5, 2020, it affirmed the district court's decision. That opinion is attached hereto as Appendix "1".

Appellant filed a motion for rehearing en banc on February 23, 2020, and on March 3, 2020, the Fourth Circuit denied it for being untimely. That opinion is attached hereto as Appendix "3" and the motion for en banc motion is attached hereto as Appendix "2".

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II.
JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 5, 2020, and its last judgment which was a denial on Appellant's motion for rehearing en banc was entered on March 3, 2020. The jurisdiction of this Court is now invoked as this writ for certiorari is timely filed with this Court.

Petitioner, Freddie Lee Curry, prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above proceeding on February 5, 2020.

*

III.

CONSTITUTIONAL PROVISIONS AND AN ACT OF CONGRESS INVOLVED

1. In Alleyne, this Honorable Court held the Sixth Amendment to the Constitution requires that any fact that increases the mandatory minimum is an element of the crime that must be charged in the indictment and proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).
2. In Mubdi, this Honorable Court held that the District Court violated defendant's Fifth and Sixth Amendment rights by increasing mandatory minimum sentence he faced based on 290.05 grams the district court found that defendant actually possessed, rather than 50 grams to which defendant was charged for and plead guilty to, and the error affected defendant's substantial rights.
3. Under Section 404(b) of the First Step Act of 2018, Congress stated, "A court that impose a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the Attorney for the Government, or the court, impose a sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed."
4. The statute under which Petitioner sought Modification of Term of imprisonment was §3582(c)(1)(B) because Courts in this district all throughout the Fourth Circuit held that the proper mechanism to seek relief under the First Step Act is 18 U.S.C. §3582(c)(1)(B). United States v. Banks, No. 1:07-00157, 2019 U.S. Dist. LEXIS 85913, 2019 WL 2221620, at *4 (S.D.W. Va May 22, 2019) (Faber, J.)(citing (2019 U.S. Dist. LEXIS 5) United States v. Shelton, No. 3:07-329, 2019 U.S. Dist. LEXIS 63905, 2019 WL 1598921, at *3(D.S.C. April

15, 2019)(listing cases)). As such, the language of the First Step Act controls the Court's ability to grant relief. See Wright v. United States, 393 F. Supp. 3d 432, 2019 WL 3046096, at *4 (E.D. Va. 2019).

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IV.
STATEMENT OF THE CASE

On April 22, 2008, Petitioner was served a federal indictment charging Petitioner, Freddie Lee Curry and various other co-defendants with the offenses of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine [Count One], possession with intent to distribute 5 grams of crack cocaine [Count Sixteen] and possession with intent to distribute powder cocaine and marijuana.

On March 30, 2010, Petitioner was sentenced to a term of 360 months imprisonment on each count to run concurrently and 10 years supervised release.

Petitioner timely appealed his sentence and conviction with the United States Court of Appeals for the Fourth Circuit.

On June 28, 2011, Petitioner's sentence and conviction was affirmed.

On April 1, 2019, Petitioner filed a pro se §3582(c)(1)(B) motion for modification of term of imprisonment under Section 404(b) of the First Step Act of 2018.

On September 12, 2019, the district court GRANTED Petitioner's motion for modification of term of imprisonment and reduced his sentence from 360 months to 262 months imprisonment. Petitioner

timely appealed his reduced sentence with the United States Court of Appeals for the Fourth Circuit and on February 5, 2020, the Fourth Circuit affirmed.

On February 23, 2020, Appellant filed a motion for rehearing en banc with the Fourth Circuit and on March 3, 2020 it was denied.

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V.
REASONS FOR GRANTING THE WRIT
THE COURT OF APPEALS HAS DECIDED
A FEDERAL QUESTION IN DIRECT CONFLICT
WITH THE APPLICABLE DECISION OF THIS COURT

The Fourth Circuit Panel Opinion affirming the district court's ruling to ignore this Court decision in Alleyne, and Mubdi is in conflict with Section 404(b) of the First Step Act of 2018 because Congress stated, "A court that impose a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the Attorney for the Government, or the court, impose a sentence as if Sections 2 and 3 for the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed."

Appellant's new statute penalty is now §841(b)(1)(B) and the threshold drug amount under this statute is at least 50 grams but less than 280 grams of crack cocaine. The district court relied on its judicial factfindings from the original sentencing hearing of 4 kilos of crack cocaine which triggers the statute penalty of §841(b)(1)(A) (10 years to life). Under §841(b)(1)(B) Appellant's statute penalty is 5 to 40 years.

If Appellant was held responsible for 279 grams of crack cocaine under his statute penalty of §841(b)(1)(B), (the highest drug amount that he could be properly held responsible for under the above statute penalty), Appellant's Base Offense Level would have been 28. Reapplying Appellant's 4-Level leadership role and 2-Level gun enhancement would give Appellant a total Offense Level 34.

Ultimately, reapplying the 1 to 1 ratio by using the powder cocaine U.S. Sentencing Guidelines would give Appellant a Base Offense Level 16 and a total Offense Level after reapplying Appellant's 4-Level leadership role and 2-Level gun enhancement, a total Offense Level 22.

Appellant's Criminal History Category is VI as it remains unchanged. At criminal History category VI, Appellant's new U.S. Sentencing Guidelines range with a total Offense Level 22 is 84 to 105 months imprisonment. Appellant's new statutory mandatory minimum of 5 years is increased to 10 years because of an 851 enhancement.

Under Appellant's new statute penalty of §841(b)(1)(B), his drug quantity (relevant conduct) of 279 grams is not enough to raise his guideline range above his statute penalty of 10 years imprisonment. Therefore, Appellant's sentence should not be greater than his enhanced statutory mandatory minimum of 120 months imprisonment.

The district court relied on drug quantity that exceeded the required threshold amount under §841(b)(1)(B) which increased the statutory sentence that Appellant faced to an erroneous sentencing guideline range of 262 to 327 months imprisonment by also using an erroneous total Offense Level of 34.

Appellant's reduced sentence was applied by the district court without it meeting the goals and authority that Congress set forth under Section 404(b) of the First Step Act of 2018 because it did not impose a reduced sentence under the statute penalty §841(b)(1)(B) (sections 2 and 3) for a covered offense as if it were in effect at the time the covered offense was committed.

Appellant's reduced sentence was not applied with applicable holdings by this Court, specifically, Alleyne, and Mubdi, which further demonstrate that the district court clearly ignored an Act of Congress by ignoring full language under Section 404(b).

Mubdi was a pre-Fair Sentencing Act of 2010 case that appealed the district court's judicial factfindings of 290.05 grams of crack cocaine when he was indicted for conspiracy to possess with intent to distribute 50 grams of more crack cocaine. This Court held that defendant's Fifth and Sixth Amendment rights were violated because 290.05 grams exceeded the threshold drug amount required under §841(b)(1)(B) for which he was charged and plead guilty to. Mubdi v. United States, 133 S. Ct. 2851, 186 L. Ed. 2d 902, 2013 (U.S. LEXIS 4848 (U.S. 2013)).

District courts have recognized this Court's decision. United States v. Stanback, 2019 U.S. Dist. LEXIS 75413 Case No. 5:02-CR 30020-01 (W.D. Va. May 2, 2019).

In Jackson, the district court held that Alleyne applied because his indictment charged him with possession with intent to distribute 5 grams or more of crack cocaine but 28.05 grams of crack cocaine were attributed to him at his original sentencing because this amount is greater than the required statutory threshold amount that he would be sentenced under today, his statutory penalty is now

0 to 20 years under §§41(b)(1)(C) for an amount of less than 28 grams of crack cocaine. United States v. Jackson, 2019 U.S. Dist. LEXIS 188823 Criminal Action No. 3:05-00184-01 (S.D.W. Va. Oct. 31, 2019); United States v. Brown, 2019 U.S. Dist. LEXIS 39499 Case No. 7:02-CR-00046 (W.D. Va. March 12, 2019); United States v. McFly, 2019 U.S. Dist. LEXIS 115957; 2019 U.S. Dist. LEXIS 11 Case No. 1:08CR00024-005 (W.D. Va. July 12, 2019); United States v. French, 2019 U.S. Dist. LEXIS 64500 Case No. 7:02-CR-0599-SLB-TMB-3 (N.D. Alabama April 2019); and all citing Alleyne v. United States, 133 S. Ct. 2151, 186 F. Ed. 2d 314 (2013).

Based on all of the above authority, it is clear that the district court erred by failing to apply applicable law to Appellant's reduced sentence.

Based on all of the above authority, it is clear that the U.S. Court of Appeals for the Fourth Circuit erred in affirming the district court's decision that Alleyne have no application to Appellant's sentence in this case.

Based on all of the above authority, it is clear that the U.S. Court of Appeals erred by concluding that the district court did not err by relying on drug quantity from Appellant's original sentencing although it violated principles set out by this Court in Alleyne.

Ultimately, based on all of the above authority, it is clear that the U.S. Court of Appeals has decided a federal question in direct conflict with the applicable decision of this Court..This Court should exercise its supervisor powers over the lower courts and issue the writ.

CONCLUSION

Petitioner, Freddie Lee Curry, based on the arguments and authorities presented herein, prays this Court will issue a writ of certiorari and reverse the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted on this 18th day of March 2020.



PRO SE REPRESENTATION