

20-6374

NO.

ORIGINAL

IN THE
SUPREME COURT of the United States

Terrance Nathaniel Brown, Jr.,
petitioner,

v.

United States of America,
Respondent,

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

Petition For A Writ Of Certiorari

Terrance N. Brown, Jr., (Pro Se Defendant) #21574084

Federal Defendant (Inmate)

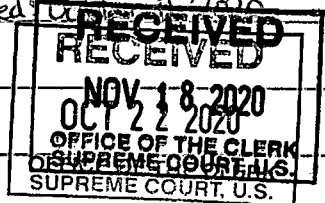
Federal Correctional Institution Beckley

P.O. Box 350

Beaver, West Virginia 25813

PRO SE Defendant/Petitioner

Dated: October 11, 2020



I. QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS MISAPPLIED THE HARMLESS
ERROR DOCTRINE ANNOUNCED IN UNITED STATES V. HARGROVE
and AGAIN IN UNITED STATES V. GOMEZ-JIMENEZ, WHEN IT
AFFIRMED BROWN'S SENTENCE FOR DRUG CONSPIRACY?

II. STATEMENT OF RELATED CASES

United States v. Brown, et al., No. 7:16CR30026, U.S. District Court for the Western District of Virginia. Judgment entered May 1, 2018.

United States v. Brown, et al., No. 18-4295 (L), U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 1, 2020.

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V. Petition for writ of certiorari

Terrance Nathaniel Brown, Jr., an inmate currently incarcerated at Federal Correctional Institution Beckley, in Beavers, West Virginia by and through pro se Defendant Mr. Brown, respectfully petitions this court for a writ of certiorari to review the judgement of the Fourth Circuit Court of Appeals.

VI. Opinions Below

The decision by the Fourth Circuit Court of Appeals denying Mr. Brown's direct appeal is reported as, *United States v. Terrance Brown*, No. 18-4295 (May 1, 2020, 4th Circuit doc: 122-2). The United States Court of Appeals for the Fourth Circuit denied Mr. Brown's petition for rehearing and rehearing en banc on May 29, 2020, (Fourth Circuit doc: 130) That order and Judge Thacker's dissent is attached at Appendix (Dissent, App. 2a) (Ret, App. 1a)

VII. Jurisdictional Statement

The United States District Court for the Western District of Virginia asserted subject matter jurisdiction pursuant to 18 U.S.C. § 3231 (Lawyers Edition 2013). The district court entered a final judgement on May 1, 2018. (7:16-cr-30026-MFR-4)

Brown filed a timely notice of Appeal to the United States Court of Appeals for the Fourth Circuit. The appellate court had jurisdiction to hear Brown's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On May 1, 2020, the United States Court of Appeals for the Fourth Circuit's majority on the panel affirmed Brown's sentence. (No. 18-4295, Fourth Cir. doc: 122-2).

Mr. Brown then filed a Petition for Panel Rehearing and Rehearing En Banc. In an Order dated May 29, 2020 the Fourth Circuit denied Brown's Petition for Panel Rehearing and Rehearing En Banc. (Pet. App.

Mr. Brown invokes this Court's jurisdiction under this Court's Rule 10, having timely filed this petition for a writ of certiorari within a hundred and fifty days from the date of the denial of the petition for rehearing, Sixty (60) days extended due to the COVID-19 virus.

VIII. Constitutional Provisions Involved

United States Constitution, Amendment V:

United States Constitution, Amendment VI:

United States Constitution, Amendment XIV:

IX. STATEMENT OF THE CASE

Terrance Nathaniel Brown, Jr., ("Brown") petitions for certiorari review by the United States Supreme Court of the Fourth Circuit Court of Appeals majority on the panel affirming his sentence.

1. Proceedings in the District Court

Mr. Brown was named as a defendant along with seven others in a multi-count Superseding Indictment on August 9, 2017. (J.A. 91.) Brown was charged in several counts, including Count Two (drug conspiracy in violation of 21 U.S.C. § 846. (J.A. 3190.) Following trial, a jury convicted Mr. Brown as charged in Count Two. Mr. Brown noted a timely appeal of his sentence.

2. Proceedings in the Court of Appeals

Among the issues Mr. Brown raised on appeal was whether the district court had misapplied the harmless error doctrine when it misattributed a Co-conspirator's massive drug weight to Mr. Brown. Rejecting Mr. Brown's challenges to his sentence on Count Two, the United States Court of Appeals for the Fourth Circuit's majority on the panel embraced the government's harmless error argument and affirmed the district court in a Judgement and published Opinion filed on May 1, 2020. (Opinion, Doc. 122-2, 121, pp. 15-21.) and a subsequent Order denying Brown's Petition for Panel Rehearing and Rehearing En Banc on May 29, 2020. (Pet. App. 1a)

X. STATEMENT OF MATERIAL FACTS

The question raised and addressed in this petition regarding harmless error analysis is one of exceptional importance that arises frequently when the Court reviews sentencing Challenges in drug conspiracy prosecutions under 21 U.S.C. § 846. Alternatively, Supreme Court review is warranted so that the Court may address this question of exceptional importance squarely and resolve the inconsistency the opinion creates among the Court's precedent concerning the harmless error doctrine in the sentencing arena.

Founded in 1996, Mad Stone Blood (MSB), a gang founded in Rikers Island jail. The MSBs have a pyramid hierarchy structure with tiers of leadership within various sets. The head of each set is known as a Godfather. Mr. Brown's Codefendant Jones was a Godfather of one New York set, the Mad Stone Henchmen. The New York MSBs oversee sets and members in other states, including Virginia.

The Virginia MSBs have similar pyramid structure with tiers of leadership within similarly named sets. Mr. Brown was an acting Godfather of one Virginia set until the New York MSBs demoted him and Jennings, another one of Mr. Brown's Codefendants was also a Godfather of a Virginia set.

In 2012, law enforcement began using Adrienne Williams a member of a female set of MSB in Virginia — as a confidential informant. She continued in that role, for which she was paid, for four years. Throughout that time, law enforcement had Williams

Coordinate controlled buys of illegal drugs, and she wore a wire for hundreds of recorded conversations with both New York and Virginia MSB members, including conversations with Jones, Mr. Brown, and Jennings.

In 2016, twelve MSB members were named in an indictment, which was later superseded, in the U.S. District Court for the Western District of Virginia, alleging violations of federal Racketeer Influenced and Corrupt Organizations Act ("R.I.C.O.") and drug laws, as well as related underlying substantive offenses. Mr. Brown, Jones and Jennings exercised their right to a jury trial and were tried together. At the close of the Government's case, Mr. Brown moved for a judgement of acquittal ("Rule 29 motion"), on four VICAR Counts, arguing the Government failed to prove venue was proper in the Western District of Virginia. The district court agreed and granted Mr. Brown's Motion of acquittal. As a result, the court charged the jury with deciding only two counts for each of the Defendants: Conspiracy to violate RICO and drug conspiracy. The jury found each one guilty of drug conspiracy and couldn't decide on RICO conspiracy for Mr. Brown and Jennings, but found Jones not guilty of RICO conspiracy.

Thereafter, the district court conducted individualized sentencing hearings for the Defendants. It sentenced Jones to 41 months imprisonment, Jennings to 144 months imprisonment, and Mr. Brown to 240 months' imprisonment.

Following a transfer of the case pursuant to Rule 21

and a superseding indictment on October 31, 2017, Mr. Brown chose to continue pro se with the assistance of stand by counsel.

A final superseding indictment, dated October 24, 2018, included a total of 27 counts and 9 defendants. Mr. Brown was charged with Counts 1-11 and 17-20, a jury trial commenced for Mr. Brown and seven of his codefendants on May 14, 2019. See. *United States v. Brown*, EDVA, 2:17-cr-00150.

Mr. Brown was acquitted on Counts 1-11, which includes RICO conspiracy and several VICAR counts in aid of racketeering, and convicted on 17-20, which was the same exact drug conduct from the first trial.

XI. REASONS FOR GRANTING THE WRIT

A. To avoid Defendants from getting sentenced on drug

distribution conspiracies with no regards to the quantity of drugs distributed, this court should clarify the

assumed harmless error standard under *Hargrove*

and *Gomez-Timenez* that applies only if those two

conditions coalesce.

As the Supreme Court has explained, "[t]he burden of showing

something by a preponderance of the evidence... simply requires

the trier of fact to believe that the existence of a fact is more

probable than its nonexistence." *Mannigan*, 592 F.3d at 631 (citing

Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension

Trust for S. Cal., 508 U.S. 602, 622 (1993) (internal quotation marks omitted)).

In Count 2 the grand jury charged Mr. Brown with violating 21 U.S.C. §§ 841 and 846, which criminalizes conspiracy to distribute heroin, cocaine, cocaine base and marijuana. Mr. Brown challenges the procedural reasonableness of his sentence, claiming the Fourth Circuit Court of Appeals panel majority misapplied assumed error harmless review as defined in published precedent of the United States Court of Appeals for the Fourth Circuit.

In arriving at a defendant's offense level for purposes of the Guidelines, a sentencing court must consider and count all his "relevant conduct." Under U.S.S.G. § 1B1.3 (a)(1)(B), relevant conduct, "Including the defendant's own acts as well as... in the case of a jointly undertaken criminal activity..., "all acts and omissions of others that were (1) within the scope of jointly undertaken criminal activity, (2) in furtherance of that criminal activity, and (3) reasonably foreseeable in connection with that criminal activity. *Id.* The government bears the burden of proving all three elements at sentencing. United States v. Bell, 667 F.3d 431, 440 (4th Cir. 2011).

The sentencing court must "make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of [the conduct at issue]. United States v. Flores - Alvarado, 779 F.3d 250, 256 (4th Cir. 2015) [emphasis in original].

The Fourth Circuit has cautioned that the assumed harmless error standard is not designed to "...allow district courts to ignore their responsibility to consider the guidelines in a meaningful manner when sentencing a defendant." United States v. Hargrave, 701 F.3d 156, 163 (4th Cir. 2012). Under this variant of the harmless error doctrine, a Guidelines mistake is harmless if two conditions coalesce. First, the record below must demonstrate the district court would have reached the same result even if it had decided the Guidelines issue in favor of the defendant. Second, the Fourth Circuit must be convinced the sentence imposed would remain reasonable even if the Guidelines issue were resolved in the defendant's favor. United States v. Gomez-Jimenez, 750 F.3d 370, 382 (4th Cir. 2014).

As Judge Thacker pointed out in dissent, "Here the district court did not consider the extent of a 194-month variance in issuing its sentence." (Opinion, p. 27 Thacker, J. dissenting) [emphasis in original]. The trial court's failure to consider a variance of this magnitude is a material error which requires resentencing. While trial courts certainly may impose an above-Guidelines sentence, they "...must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." Gall v. United States, 552 U.S. 38, 50 (2007). The district court did not identify any agreement between Mr. Brown and Owens to distribute cocaine. The district court also did not

explain how Owen's cocaine trafficking was foreseeable to Mr. Brown. In the absence of any judicial fact finding on these critical issues, the 240 month sentence cannot be deemed procedurally and substantively reasonable. Flores-Alvarado, 779 F.3d at 256.

In the majority's view, the district court adequately explained its 240 month sentence by alluding to alleged crimes of violence Mr. Brown committed in and around Norfolk, Virginia. [But how can a Western District Judge sentence Mr. Brown based off alleged crimes that he had no jurisdiction/venue on?], The majority acknowledged that a federal jury in Norfolk acquitted Brown of these charged crimes of violence in a separate trial. Undeterred by the Norfolk jury's resounding verdict in favor of Mr. Brown, the majority pointed in passing to case law which permits courts to consider acquitted conduct at sentencing. (Opinion, p. 20 and note 5.)

As Judge Thacker noted in dissent, "I acknowledge that both the Sentencing Guidelines and our precedent allow for the use of acquitted conduct at sentencing. See U.S.S.G. § 1B1.3 (2016) cmt., backg'd; United States v. Lawing, 703 F.3d 229, 241 (4th Cir. 2012) (citing United States v. Watts, 519 U.S. 148, 152 (1997)). However, given everything else I find lacking in the sentencing calculation in this case, the consideration of acquitted conduct adds too much insult to injury for me." Opinion, p. 27, Thacker, J. dissenting) [internal quotations and citations omitted].

Mr. Brown's acquittal on the same allegations of violence upon which the district court relied to justify a variance of this

magnitude above the advisory Guidelines range exacerbates the procedural and substantive unsoundness of Brown's sentence. Judge Thacker made this important point succinctly:

... As we have previously explained, our assumed harmless error standard is not meant to allow district courts to ignore their responsibility to consider the [G]uidelines in a meaningful manner when sentencing a defendant. I fear that the majority's decision -- utilizing harmless error analysis to uphold a 194-month variance primarily based on a defendant's acquitted conduct as opposed to the actual offense of conviction -- does just that.

(Opinion, p. 28, Thacker, J. dissenting) [internal quotations and citations omitted].

The majority's misapplication of assumed error harmless review renders Guidelines calculations based on drug weight superfluous. As a result of the Opinion, a district court can insulate its faulty drug quantity analysis from meaningful judicial review by reciting on the record that it would impose the same sentence no matter the defendant's offense level and no matter how much drug weight is fairly attributable to him as a conspirator. Judge Thacker's grave concerns, about this evisceration of judicial review of sentencing decisions in narcotics conspiracy cases should be shared by the Supreme Court.

... I have grave concerns that following this case, with a wave of the hand and the disclaimer that the sentence imposed for a drug distribution conspiracy would be the same regardless of the quantity of drugs distributed, district courts can essentially disregard the relevant Sentencing Guidelines range and count on us to credit their 18 U.S.C. § 3553(a) analysis as sufficient, even absent a requisite finding as to the nature and scope of the conduct at issue.

(Opinion, p. 22, Thacker, J. dissenting) [emphasis in the original]

XII. CONCLUSION

For the foregoing reasons, Mr. Terrance Nathaniel Brown, Jr., respectfully requests that this Honorable United States Supreme Court issue a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

DATED this 11th day of October, 2020.

Respectfully submitted,
Terrance N. Brown, Jr.

Terrance N. Brown, Jr.

Federal Defendant Pro Se

Federal Correctional Institution Beckley