No. 20-6374

IN THE

Supreme Court of the United States

Terrance Nathaniel Brown, Jr.,

petitioner

v.

United States of America

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

PETITION FOR REHEARING

Terrance N. Brown, Jr.
Terrance N. Brown, Jr.
Pro Se Representation
FED. NO. 21574-084
U.S.P. Hazelton

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS MISAPPLIED 18 U.S.C. 3553(a) (LAWYERS EDITION 2018) WHEN IT AFFIRMED PETITIONER'S SENTENCE FOR DRUG CONSPIRACY?

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III. Reasons why Petition Should Be Reheard

The petitioners Writ for Certiorari should be reheard because Supreme Court precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose { solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. } see Ring [v. Arizona, 536 U.S. 584.] [...] In other words, Sentencing judges necessarily have "discretion to draw conclusions about the testimony given and evidence introduced at sentencing, "but "due process requires that sentencing determinations be based on reliable evidence not speculation or unfounded allegations." United States v. England, 555 F.3d 616, 622 (7th Cir. 2009), United States v. Brown, 417 F.3d 1077, 1079-80 (9th Cir. 2005)

In this instant case the sentence was inproper from the begining. The Judge must properly calculate the advisory Guideline range as the First Step in the sentencing process.

The correct advisory guideline range provides the starting point and initial benchmark in the sentencing process. United States v. Schmitz, 717 F. 3d 536, 541 (7th Cir. 2013).

According to the Constitution, a sentencing court violates a defendants federal due process rights when it relies on disputed information in rendering a sentence. This is a violation even where there is other undisputed information on which the sentence could be based. United States v. Gattling, 95 N. J. Super. (alterations omitted) (internal quotation marks omitted).

2.)

At sentencing, the petitioner objected to the drug weight calculation in his presentence investigation report "(PSR)". Specifically, he contended that his Sentencing Guidelines range was overstated because the base offense level calculation attributed to him 180 Kilograms of marijuana equivalent distributed by a subordinate drug dealer, Corey Owens.

Based on evidence provided by Owens and a F. B. I. agent at the sentencing hearing, the district court concluded that the drugs attributable to Owens were reasonably foreseeable to the petitioner and, thus, were attributable to the petitioner. And the district court adopted the petitioner's PSR in its entirety. As a result, the district court varied upward from the petitioner's sentencing guidelines range of 188 to 235 months to impose the statutory maximum of 240 months imprisonment. The district court also indicated it would have imposed the same sentence based on the 18 U.S.C. § 3553(a) factors irrespective of the drug weight calculation.

3.)

Pursuant to the Sentencing Guidelines, a sentencing court determines a defendant's offense level by evaluating his "relevant conduct," that is, his 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 the jointly undertaken criminal activity"; (2) "in furtherance of that criminal activity"; and (3) "reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1. 3(a)(1)(B)(2016).

All three aspects of this joint activity must be proven by a preponderance of the evidence. United States v. Bell, 667 F.3d 431, 440 (4th Cir. 2011). Acts of others outside the scope of the conspiracy in which the defendant agreed to participate -- even if those acts are known or reasonably foreseeable -- are not "relevant conduct" for sentencing purposes. see U.S.S.G. § 1B1.3 & cmt 3B.

For a sentence to be procedurally reasonable, a district court must "make particularized findings with respect to both the scope of the defendants agreement and the foreseeability of the conduct" in question. Flores-Alvarado 779 F.3d at 256 (alterations omitted) (internal quotation marks omitted). That is, a district court must supply specific findings as to the "critical factual question of the scope of the criminal activity [the defendant] agreed to jointly undertake." Id. A courts failure to make these findings warrants remand for resentencing. Id. at 254-55

4)

The petitioner takes issue with the

calculation of his relevant conduct. He claims that the district court did not make adequate factual findings regarding the scope of his agreement with his co-conspirator, Owens, and that the Government did not provide adequate evidence to support holding the petitioner accountable for Owens's marijuana and cocaine transactions, which totaled 180 Kilograms of marijuana equivalent under the Sentencing Guidelines. In particular, the petitioner argues that no evidence connected him to Owens's cocaine dealing.

This brings up another Apprendi Issue, where the district court failed to determine which drug the jury used to convict the petitioner being that the petitioner was charged with multiple drugs within his conspiracy Count. See. Ballard v. U.S., 400 F. 3d 404, 408-09 (6th Cir. 2005).

Consequently, a district court has an obligation to assure itself that the information upon which it relies in sentencing defendants is both reliable and accurate.

In the instant case, the district court did not satisfy this rule 32 obligation. Instead, it relied on the allegations of the PSR and acquitted conduct from another district. Expressions of a fixed view based on the presentence report made prior to a hearing are inconsistent with the due process obligations imposed on a sentencing court to consider only reliable and accurate information. Blakely v. Washington, 542 U.S. 296. Apprendi v. New Jersey, 530 U.S. 466.

The Government avers that the petitioner's "supervision of Owens" provided the basis for the PSR's attribution of Owens's drugs to the petitioner, Appellant's Br. 32, though it acknowledges Owens's own testimony at the sentencing hearing was that he was not the petitioner's subordinate. The district court confused the racketeering conspiracy with the drug conspiracy. See. United States v. Avila, 465 F.3d 796 (7th Cir. 2006).

In United States v. Slade, 631 F.3d 185 (CCA 4 2011), This case deals with the propriety of imposing a leadership sentencing enhancement where the defendant was mid-level drug dealer who did not supervise others. Slade argues that the district courts' determination that he was a manager or supervisor of the drug conspiracy was erroneous because the record evidence is insufficient to show that he actually "managed" or "supervised" persons involved in the conspiracy: This instant case reflects the same aspect. See. also. United States v. Llamas, 599 F.3d 383, 389-90 (4th Cir. 2010).

5.)

The majority's harmless error evaluation at least correctly recognized that the courts must consider the reasonableness of the variance from the Sentencing Guidelines range calculated without Owens's drug quantity included -- i.e. as though "the [G]uidelines issue had been decided in the defendants favor. "Gomez-Jimenez, 750 F.3d at 382 (internal quotation marks omitted). As the majority then explains, the courts must still decide whether the district court's analysis of the 18 U.S.C. § 3553(a) factors can support the sentence.

When the court "decides that an outside Guidelines sentence is warranted [it] 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). Here, the district court did not consider the extent of a 194-month variance in issuing its sentence. When a court "settle[s] on the appropriate sentence, [it] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. Id. (citation omitted). Their's exactly NO PROOF on record that the court did so here.

A 240-month sentence for drug conspiracy involving one Kilogram of marijuana equivalent avoids unwarranted sentence disparities among defendants with similar conduct". 18 U.S.C. § 3553(a). Though adopting the PSR "can be a satisfactory means of resolving factual disputes," Flores-Alvarado, 779 F.3d at 256 (citation omitted), the PSR here did not identify an agreement between Owens and the petitioner involving drug distribution, nor did it explain how such distribution would have been foreseeable to the petitioner. The district court needs to make these determinations on the record and its failure to do so interferes with the appellate courts ability to fairly review the petitioner's sentence.

"[T]o determine the defendants' accountability for the conduct of others under [the Sentencing Guidelines], the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e. the scope of the specific conduct and objectives embraced by the defendant's agreement." U.S.S.G. § 1B1.3 cmt. 3B (2016).

Without such a finding you cant proceed to determine which of Owens drugs are within the scope of the petitioner's agreement with Owens. "How CAN you?" The district court itself did not explain the scope of that agreement. The district court erred in failing to recognize that Owens's drug weight included cocaine. The government attempts to avoid drawing attention to this by arguing that the district court "credited the trial testimony... that the petitioner and Owens sold drugs together." Gov 4 Br. 33-34. But the relevant trial testimony and the court's conclusion referenced marijuana alone. See J.A. 3031-32 (reflecting that even the Government at Sentencing said the evidence indicated the petitioner should be responsible for "specifically the marijuana").[2]

At Sentencing both the Government and the district court referred to the petitioner as being responsible for Owens's marijuana, <u>Not his cocaine</u>. Indeed, when determining the sentence, the district court referred only to the petitioner's connection to Owens's marijuana dealing. In Flores-Alvarado, its clear that the district court must define "the scope of the criminal activity the particular defendant agreed to jointly undertake." 779 F. 3d at 256 (quoting U.S.S.G. § 1B1.3, cmt. 2). ("[T]he scope of the criminal activity jointly undertaken by the defendant... is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant..." (emphasis in original) (quoting U.S.S.G. § 1B1.3 cmt. 2)).

6.)

By holding the petitioner responsible for the full drug weight in the PSR, the district court attributed Owens's cocaine distribution to him without the requisite "particularized findings with respect to both the scope of the petitioner's agreement and foreseeability of the conduct" involving that drug. Flores-Alvarado, 779 F.3d at 255 (emphasis omitted). It wouldn't be fair to conclude that this error -- which caused an Under-supported 194-month upward variance -- was harmless. See also U.S. v. Correy, 773 F.3d 276, 280-81 (1st Cir. 2014); U.S. v. Rowe, 919 F.3d 752, 762 (2d Cir. 2019); U.S. v. Roberts, 919 F.3d 980, 988 (6th Cir. 2019) (Rule 32 violation when court did not adequately explain sentencing calculation and merely adopted factual findings in PSR after defendant objection).

The Supreme Court has clarified that the statutory maximum under Apprendi is the maximum sentence that a court may issue based on the facts found by the jury, not the maximum sentence that could be imposed for the base crime and any conceivable sentence set of aggravating factors. See. Blakely v. Wash, 542 U.S. 296, 303-04 (2004)

IV. <u>CONCLUSION I.)</u>

The petitioner was denied the right to be sentenced based on the facts found by the jury. As Judge Thacker pointed out in dissent, "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 essentially disregard the relevant Sentencing Guidelines range and count on us to credit their <u>18 U.S.C. § 3553(a)</u> 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 original].

Therefore, the petitioner would respectfully request for this honorable Supreme Court of the United States, grant his writ of certiorari petition On Rehearing.

DATED this 11th day of May, 2021.

Respectfully Submitted:

Terrance N. Brown, Jr.

PRO SE REPRESENTATION

FED. NO. 21574-084

United States Penitetiary

U.S.P. Hazelton

P.O. Box 2000

Bruceton Mills, 26525 WV