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ORIGINAL
Supreme Court, U.S.
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Docket No.

In The
United States
Supreme Court

Bernard Weiters Jr.
petitioner
v
United States of America
Respondent

On a writ of Certiorari to the Supreme Court
From the Fourth Circuit Court of Appeals

Docket No.

20-6499

Originating in The
United States District Court
For The District of South Carolina
Docket No.

2:09-cr-00987-PMD

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Question(s) Presented

I Whether the court committed error by declining to "resentence" the petitioner under section 404 of the First Step Act when the Court earlier reduced the petitioner's "guideline" level, but not the statutory penalty thereby resulting in the petitioner's statutory maximum range exceeding his prescribed statutory maximum.

List of Parties

All parties to this instant matter appear in the Caption of the case on the Cover page.

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Opinion(s) Below

Please refer to Appendix "A" attached

Jurisdiction

The date in which the Court of Appeals for the Fourth Circuit affirmed the District Court opinion denying the petitioner relief pursuant to Section 404 of the First Step Act was August 25, 2020.

A petition requesting a rehearing or a hearing En Banc was not requested from the Fourth Circuit.

This Honorable Court has jurisdiction to hear the case pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Fair Sentencing ACT

First Step ACT

18 U.S.C. § 3582 (a)(1)(B)

21 U.S.C. § 841 (b)(1)(A)

21 U.S.C. § 841 (b)(1)(B)

21 U.S.C. § 841 (b)(1)(C)

28 U.S.C. 1254 (1)

28 U.S.C. § 1746

United States Constitution; Amend V

Table of Authorities

- Alleyne v United States 510 US 99 (2013)
Apprendi v New Jersey 530 US 466 (2000)
Danforth v Minnesota 552 US 264 (2008)
Rust v Sullivan 500 US 173 (1991)
United States v Dorsey 567 US 260 (2012)
United States v Wirsing 943 F.3d 186 (4th Cir. 2019)

Procedural Posture

On September 8, 2009, the petitioner was indicted alleging a violation of, inter alia, count three (3) which alleged...

"... Count three - possession with the intent to deliver crack cocaine in violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A) and (b)(1)(C)."

The petitioner proceeded to a trial by jury and was convicted on Count three above, among other counts.

On Sentencing, which occurred March 1, 2011, the Court, with respect to count three (3) imposed a term of Life imprisonment.

The petitioner was subsequently resentenced on Count three whereby the Court imposed a sentence of 360 months.

On December 21, 2018, President Trump signed into law The First Step Act¹ which made retroactive section 404 of the First Step Act [the Fair Sentencing Act]²

As a result, the petitioner filed a motion pursuant to 18 U.S.C. § 3582 (c)(1)(B) requesting that his sentence, more specifically Count three be reduced in accordance with the First Step Act.

The District Court denied the petitioner's request, and as a result, the petitioner filed a timely Notice of appeal with the Fourth Circuit court of appeals who affirmed the District Court on August 25, 2020.

This timely request for a writ of Certiorari follows:

¹ P.L. 115-391, 132 Stat. 5194

² P.L. 111-220, 124 Stat. 2372 (August 3, 2010)

Statement of the Case

In 2009, the petitioner was indicted, specifically with respect to Count three with possessing and distributing "50 grams" or more of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A)

§ 841(b)(1)(A) has a statutory range of ten (10) years to life.

The petitioner was sentenced on March 1, 2011 to life imprisonment under § 841(b)(1)(A)

Subsequent to the United States Supreme Court holding in Dorsey³, the Court reduced the petitioner's sentence with respect to Count three from a term of life imprisonment to 360 months.

In doing so, however, the court simply reduced the petitioner's "guideline" level in accordance with the retroactive application of the guidelines, however, the petitioner's "statutory" range was never corrected.

With the passage of the First Step, more specifically, the retroactive application of Section 404 [the Fair Sentencing Act] the petitioner's sentencing statute, should have been corrected to reflect a statutory range of five (5) years to forty (40) § 841(b)(1)(b) ... 50 grams or more of crack cocaine ...

The petitioner's sentence, as it stands, is now exceeding the statutory maximum of forty (40) years.

³ Dorsey v United States 567 US 260 (2012)

Reasons for Granting the Writ

Circuits around the Country are in agreement that a "covered offense" under section 404 of the First Step act is determined by the "Statute of Conviction" of the Petitioner requesting a modification under the act.

The Fourth Circuit court of appeals opined in United States v Wirsing 943 F3d 186 (4th cir 2019) that covered offense is determined by the Statute of Conviction.

Although the District Court reduced or otherwise modified the petitioners "guideline" sentence in accordance with this circuit's holding in Dorsey, supra, the petitioners "Statute of Conviction" was never corrected.

Therefore, as the petitioners sentence stands today, although the petitioners indictment alleged 50 grams or more of crack cocaine, and despite the fact that the jury found that the petitioner was responsible for 50 grams of crack cocaine, the petitioner continues to be sentenced under § 841(b)(1)(A) which mandates a "statutory range" of ten (10) years to life when his statute of conviction should be § 841(b)(1)(B) otherwise five (5) years to forty (40).

This court should therefore Grant this petitioners writ.

Question(s) Presented

I Whether the court committed error by declining to "resentence" the petitioner under section 404 of the First Step Act when the Court earlier reduced the petitioner's "guideline" level but not the statutory penalty thereby resulting in the petitioner's statutory maximum range exceeding his proscribed statutory maximum.

The First Step Act was officially signed into law by President Donald J. Trump on December 21, 2018. Among the many issues addressed by the act was the retroactive application of Section 404 of the Act otherwise The Fair Sentencing Act of 2010.

When this petitioner was originally sentenced for his violation [21 U.S.C. § 841 (b)(1)(A)] on March 1, 2011, the petitioner was sentenced to his statutory maximum sentence of life [the indictment alleged the possession of 50 grams or more of crack cocaine]. Pre-Sentencing [Fair Sentencing] Act statutory violation for 50 grams of crack cocaine mandated a "statutory" range of ten (10) years to life.

Subsequent to his sentencing, this court released its opinion in Dorsey, *supra*, which held that defendants sentenced

Subsequent to the ratification of the Fair Sentencing Act will receive the benefit of The Fair Sentencing Act's sentencing provision, irrespective of when the offense was initially committed.

As a result of the Dorsey decision, the petitioner was resentenced on Count three from a previous imposition of life to 360 months.

The District Court However, in refashioning the petitioner's sentence, adjusted the "guideline" level only to reflect an 18 to 1 post-Fair sentencing act ratio. But never changed the statute to reflect a change from 841(b)(1)(A) to 841(b)(1)(B) now based on the new thresholds of 28 and 280 grams as opposed to the pre-Fair sentencing Act threshold of 5 and 50 grams.

The petitioner's indictment alleged 50 grams of crack cocaine and the jury so found 50 grams of crack cocaine. With that said, in accordance with the First Step Act, more specifically Section 404, the petitioner's statute of conviction should read 21 U.S.C. § 841(b)(1)(B) [28 grams or more of crack cocaine] and not, § 841(b)(1)(A) which alleges a quantity of 280 grams or more of crack cocaine.

(i) Section 404 of The First Step Act

Application of the Fair Sentencing act

(a) Definition of a covered offense --

In this section, the term, "covered offense" means a violation of a federal criminal statute, the

Statutory penalties for which were modified by Section 2 or 3 of the Fair Sentencing Act that was committed before August 3, 2010.

(b) Defendant's previously sentenced - -

A court that imposed a sentence for a covered offense on a motion of the defendant, the Director of the Bureau of Prisons, the Attorney for the Government, or the Court, imposed a reduced 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.

The operative language at issue in this petition is Subsection (c) of Section 404 of the First Step Act which reads as follows:

(c) Limitations - -

No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by Section 2 and 3 of the Fair sentencing Act of 2010...

Sections 2 and 3 of the Fair Sentencing Act addressed the statutory thresholds of a crack cocaine violation in other words the statutory range of zero to 5 years was predicated on an amount alleged of less five (5) grams as opposed to the new threshold amount of less than 28 grams.

A statutory range of five years to 40 years was previously determined from a threshold amount of 5 grams of crack cocaine

which now requires a threshold of 28 grams, and lastly a statutory range of ten (10) years to life was previously predicated on a threshold amount of 50 grams of crack cocaine and now requires a quantity of 280 grams or more.

This petitioner submitted to the District Court a motion pursuant to 18 U.S.C. § 3582 (i)(1)(B) alleging that although his "guideline" range was previously reduced ... his statute of conviction was not resulting in an unlawful sentence.

The Court denied the petitioner's motion citing subsection (c) claiming that his sentence was previously amended.

The Court was in error.

The court's conclusion is tantamount to a petitioner receiving a two (2) level reduction resulting from the "retroactive guideline" amendment, amendment 750 (q)(1)(c). But alleging that the same petitioner would not be eligible for a section 404 reduction although his statute of conviction did not properly represent the quantity of crack cocaine alleged and convicted of.

(ii) the petitioner's sentence is unlawful and in violation of Appendix.⁴

This Court in Appendix held that outside the fact of a "prior conviction", any sentence that exceeds the statutory

⁴ Appendix v New Jersey 530 U.S. 466 (2000)

maximum violates the Constitution of the United States of America^s

Here, when the petitioner was first sentenced, on an allegation of 50 grams of crack cocaine and Subsequent Finding of guilt By a jury, the petitioners statutory range with respect to the statutory violation [21 U.S.C. § 841 (b)(1)(A)] was a ten (10) year statutory mandatory minimum, and a statutory maximum of life

While it is true That the court subsequently reduced the petitioners sentence from a previous imposition of life to 360 months, however, that reduction was predicated on the crack cocaine to powder ratio having been lowered from an 100 to 1 ratio down to 18 to 1 ratio. However, that change is reflected in the "offense" level only and not the statutory range.

The Court in Reducing the petitioners Sentence did not change the statutory range, In other words, as subsection (c) of Section 404 states, sections 2 and 3 which were modified were not done so in this instant matter.

In the End, although the petitioners Sentence actually falls within the statutory range as proscribed by 21 U.S.C. § 841 (b)(1)(B) which is 5 to 40 years, the petitioner nonetheless continues to be sentenced to the statutory range proscribed

^S please See Amend V of the U.S. Const, more specifically the, "due process clause."

by § 21 U.S.C. § 841(b)(1)(A) which is ten (10) years to life.... the statutory maximum, life, therefore exceeds his true statutory range, forty (40) years and is therefore an Apprendi violation.

While it is true that the last sentence of Subsection (c) of Section 404 states...

"... Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."

Essentially Congress authorized the Courts to exercise their discretion with respect to whether or not to grant relief... This petitioner acknowledges as much... Congress, however, did not authorize the court to exercise their discretion with respect to the imposition of the proper statute.

Here, the issue is very clear.

The petitioner was indicted and subsequently found guilty of possessing 50 grams or more of crack cocaine in violation of then § 841(b)(1)(A) and sentenced to life.

Subsequent to Dorsey and prior to the First Step Act the petitioner's offense level was reduced thereby reducing his sentence to 360, however, he continues to be sentenced pursuant to § 841(b)(1)(A), when, the violation of 50 grams of crack cocaine should now be § 841(b)(1)(B).

(iii) This petitioner should be sentenced
To 50 grams of crack cocaine, only.

This Court, in Alleyne v United States 510 US 99 (2013) and Apprendi, explained that the rights recognized by these cases, although not made retroactively applicable, may not be ignored when Congressional mandates require the retroactive application of a statute as in this instant matter.

In Danforth v Minnesota 552 US 264 (2008) this Court stated that, when we declare that a new constitutional rule of Criminal procedure is not retroactive [expressly] we are implying that the right at issue was always in existence ... even "prior" to the announcement of the new rule. We have always stated that the "source" of a new rule is the Constitution itself, not any judicial power to create the new rule of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." 6

Furthermore, in terms of the enactment of a new statute, such as the First Step Act, and especially in light

⁶ Danforth 552 US at 271

of the retroactive application of Section 404, This Court stated in Aust v Sullivan 500 US 173 (1991) That,

"... We assume that congress legislates in light of constitutional limitations..."⁷

Therefore, the petitioner's sentence ought to be draped with all the Constitutional trappings since the day the petitioner was originally sentenced.

Here, the indictment alleged that the petitioner possessed a quantity of 50 grams of crack cocaine.

The jury also found that the petitioner possessed a quantity of 50 grams of crack cocaine.

In accordance with the principles announced in Alleyne, the petitioner should be resentenced using a quantity of 50 grams of crack cocaine equating to an offense guideline level of 24.

⁷ Aust 500 US at 176

Conclusion

Wherefore this petitioner respectfully submits
that his sentence is Unlawful and unconstitutional
as it exceeds the Statutory maximum as
prescribed by law and as a result, his sentence
should be vacated.

Respectfully Submitted

Bernard Weathers Jr. 18672-171

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