NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

CHARLES BRAYE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Mr. Braye's due process rights were violated when the court of appeals determined that Mr. Braye was eligible for a sentence reduction under the First Step Act but then failed to remand his case to the district court for an opportunity to be heard on reducing his sentence?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Charles Braye, No. 04-14029-Cr-Marra (December 5, 2019)

United States Court of Appeals (11th Cir.):

United States v. Charles Braye, No. 19-13884 (September 30, 2020)

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PETITION FOR WRIT OF CERTIORARI

Charles Braye respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-13884 in that court on September 30, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 30, 2020. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. Under that order, the deadline for filing a petition for writ of certiorari is March 1, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V: "No person shall . . .be deprived of life, liberty, or property, without due process of law. . . ."

First Step Act of 2018, Pub. Law 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018), in pertinent part:

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF 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 of 2010 ..., that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed 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 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.

(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 sections 2 and 3 of the Fair Sentencing Act of 2010 ... or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

STATEMENT OF THE CASE

On May 13, 2004, a federal grand jury in Martin County in the Southern District of Florida, returned a two-count indictment against Mr. Charles Braye charging him with possession with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (Count I); and possession of a firearm, during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count II). Pursuant to a written plea agreement, Mr. Braye pled guilty to both counts of the indictment on August 18, 2004. The plea agreement listed a drug quantity of "5 grams or more" of crack. Before sentencing, Mr. Braye filed an objection pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to the presentence investigation report's recommendation that he be sentenced as a career offender. He objected on both Fifth and Sixth amendment grounds. The report determined that his base offense level pursuant to U.S.S.G. § 2D1.1 was 28, based on the amount of 30.3 grams of cocaine base. This determination became irrelevant, however, because the report also determined that that Mr. Braye was a career offender facing a maximum penalty of forty years imprisonment which made his offense level 34 pursuant to U.S.S.G. § 4B1.1. After an adjustment for acceptance of responsibility, the total offense level was 31. At sentencing the district court overruled the career offender objection for two reasons:

> [O]ne, because the enhancement in this case is not based upon anything other than prior convictions which are not, as I understand the law in *Apprendi* and *Blakely*, are not facts which are required to be set forth in

> the indictment or require a jury determination beyond a reasonable doubt, and secondly, even if they are, the Eleventh Circuit at this point has directed the district courts to follow the Federal Sentencing Guidelines in the *United States v. Reese* case, and, therefore, I'm obligated to apply the guidelines at this point as written.

The district court then confirmed with the probation officer that the lowest sentence he could give Mr. Braye under the guidelines was 262 months as to Count I and 60 months as to Count II. On November 12, 2004, the district court sentenced Mr. Braye to a term of 262 months imprisonment to be followed by four (4) years of supervised release as to Count I and a term of 60 months imprisonment as to Count II, which was to be served consecutively to Count II. The district court also imposed a four (4) year term of supervised release as to Count II which was to be served concurrently with Count I. Mr. Braye timely filed a notice of appeal.

On appeal, Mr. Braye filed a brief with the Eleventh Circuit Court of Appeals, arguing that his Fifth and Sixth amendment rights had been violated and that he should be resentenced because he had been sentenced unconstitutionally under mandatory, rather than advisory, guidelines. The government filed a motion to dismiss the appeal based on an appeal waiver in Mr. Braye's plea agreement. The language in the plea agreement stated that "defendant Braye hereby waives his right of direct appeal in this case, except in the event that the sentence imposed by the Court is based on an upward departure from the applicable Sentencing Guidelines range, as that range is determined by the Court, or is in excess of the maximum

statutory sentences permitted for the violations. . . ." This Court then dismissed Mr. Braye's appeal based on the appeal waiver in his plea agreement.

After enactment of the First Step Act of 2018, Mr. Braye filed a motion requesting sentencing relief under that Act (as well as retroactive guideline amendments). The district court ordered the government to file a response, which it did on August 20, 2019. Mr. Braye subsequently filed a reply to the government's response. The district court then denied the motion stating:

> Based on the amount of crack cocaine Defendant admitted possessing during his change of plea colloquy, his advisory guideline range does not change. Defendant admitted to possessing with the intent to distribute in excess of 30 grams of cocaine base. Therefore, Defendant admitted possessing with the intent to distribute an amount of cocaine base sufficient to trigger the statutory penalties now in effect after the passage of the Fair Sentencing Act of 2010. This case does not present a situation where the Court had made a factual finding which would increase Defendant's statutory maximum sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). *See United States v. Means*, 2019 WL 4302941 *2 (11th Cir. September 11, 2019) (unpublished)(the First Step Act did not modify the process by which the district court determines the quantity of drugs attributable to a defendant for sentencing purposes).
>
> Moreover, even if Defendant is considered eligible for consideration of a reduction of his sentence, this Court does not believe defendants who admitted having sufficient quantities of cocaine base to trigger the statutory penalties now in effect after the passage of the Fair Sentencing Act should be treated differently than those being charged under the law currently in effect.

Mr. Braye filed a timely notice of appeal.

On appeal, Mr. Braye argued that he was eligible for relief under Section 404 of the First Step Act and the district court erred in concluding otherwise. The

Eleventh Circuit Court of Appeals agreed that the district court erred in concluding Mr. Braye was ineligible for relief under the First Step Act but declined to remand the case back to the district court for a hearing on a sentence reduction. Instead, the Eleventh Circuit concluded that the district court did not abuse its discretion in denying Mr. Braye's request for a reduced sentence even though that denial was based on ineligibility.

REASON FOR GRANTING THE WRIT

ISSUE

Mr. Braye's due process rights were violated when the court of appeals determined that Mr. Braye was eligible for a sentence reduction under the First Step Act but then failed to remand his case to the district court for an opportunity to be heard on reducing his sentence.

Signed into law on December 21, 2018, § 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010's reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before the Act's passage. First Step Act of 2018, Pub. Law 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018). In particular, Section 404 of the First Step Act states that a defendant may be eligible for a reduced sentence if a court previously sentenced him for a "covered offense," which is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." §§ 404(a)&(b). If a defendant was sentenced for a "covered offense," the Court may, on the defendant's motion, "impose 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." § 404(b).

Here, the district court found that Mr. Braye was not eligible for relief under the Act but the Eleventh Circuit Court of Appeals ruled that this was error and that

Mr. Braye is eligible for a reduced sentence under the Act. Instead of then remanding the case to the district court for a determination of whether to reduce Mr. Braye's sentence, the Eleventh Circuit simply affirmed the denial of Mr. Braye's motion. This procedure denied Mr. Braye his due process right to be heard.

The Due Process Clause guarantees a litigant both notice of the proceeding and "the right to be heard." *Richards v. Jefferson Cty.*, 517 U.S. 793, 799 (1996). Even in proceedings involving an executive branch decision on whether to grant a benefit that a prisoner has a "mere hope" of obtaining, due process requires notice and the chance to be heard. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 16 (1979) (due process in parole proceedings is satisfied as long as the procedure used affords the inmate an opportunity to be heard).

Mr. Braye has experienced a loss of liberty through the Eleventh Circuit's failure to allow compliance with the First Step Act's requirement that the district court conduct a complete review of the defendant's motion on its merits. Under the Due Process Clause, "[a] person's liberty is equally protected, even when the liberty itself is a statutory creation of the state." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Section 404(b) of the First Step Act allows a court that imposed a sentence for a covered offense to impose a reduced sentence. Section 404(c) makes clear that every defendant sentenced for a covered offense has a right to a complete review of their motion on the merits. Courts are barred from entertaining a successive motion if the first was denied "after a complete review of the motion on the merits." The

Act's requirement that a judge perform a complete review of each eligible inmate's motion creates a protected liberty interest in that process. Under Section 404(c), no court is required to reduce any defendant's sentence. Due process, however, may not be denied because the liberty interest at stake can arguably be characterized as an act of grace. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.4 (1973).

In the instant case, the Eleventh Circuit's decision denied Mr. Braye the opportunity to effectively present arguments to the district court regarding a reduction once the district court's legal error regarding eligibility was corrected. By ruling in such a summary fashion, the Eleventh Circuit effectively denied Mr. Braye his one opportunity to fully litigate this important question. Because Mr. Braye was denied the opportunity to be heard on the subject, the Eleventh Circuit violated his due process rights.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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