

IN THE SUPREME COURT OF THE UNITED STATES

20-7524

ORIGINAL

MATHEW BYRD
Petitioner

VS.

UNITED STATES OF
AMERICA
Respondents

Supreme Court, U.S.
FILED

MAR 16 2021

OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MATHEW BYRD # 70281-061
(FCI) McDowell
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Welch, W.V. 24801

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether in interpreting the statutory meaning of "use and carry" element pursuant to 924(c) Petitioner is entitled to Relief.

TABLE OF AUTHORITIES CITED

CASES

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Bailey V United States, 116 S.Ct. 501 (1995) — — — — 2

Bousley V United States, 523 U.S. 614 (1998) — — — — 4

McCarthy V United States, 394 U.S. 459 (1969) — — — — 4

North Carolina V ALford, 400 U.S. 251 (1970) — — — — 1

Picard V Connor 404 U.S. 270 (1971) — — — — 2

Jones, 226 F.3d 328 (4th Cir 2000) — — — — 2

United States V Paz 927 F.2d 176 (4th Cir 1991) — — — — 2

STATUTES AND RULES

RULE 11(b)(1)(G)

CONSTITUTIONAL PROVISIONS

Fifth Amendment

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APPENDIX (A)

List of Parties

All parties appear in the caption of the case

RELATED CASES

United States District Court (Southern District of West Virginia, Huntington Division), No: 19-cr-00080 (Feb 4, 2020)

United States Court of Appeals (4th Cir): United States v BYRD, No: 20-4116

OPINION BELOW

The opinion of the court of appeals is not published in the federal reporter, but is attached at Appendix (A).

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2021. A petition for rehearing was denied on February 2, 2021. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Following a North Carolina v Alford (1970) guilty plea in the Southern District Court for the Southern District of West Virginia, petitioner plead guilty to one count possession of firearm in violation of 18 U.S.C. 924(c)(1)(A), and one count distribution of heroin in violation of 21 U.S.C. 841(a)(1). Petitioner were ultimately sentence to forty six (46) months as to the violation of 21 U.S.C. 841(a)(1) (distribution count), and a mandatory sixty month (60) as to the violation of 18 U.S.C. 924(c) (count). Before accepting an Alford plea, a court must find a proper factual basis pursuant to Federal Rules of Criminal Procedure Rule 11(f), to protect a petitioner due process right protected by the fifth amendment of the United States Constitution.

REASONS FOR GRANTING THE PETITION

Petitioner plead guilty pursuant to North Carolina v Alford, 400 U.S. 251 (1970) on the count using or carrying a firearm in violation of 18 U.S.C. 924(c) in relation to a drug trafficking offense. In Alford the Supreme Court held that a defendant "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. 400 U.S. at 37. But before accepting an Alford plea to a 18 U.S.C. 924(c), a court must find a proper factual basis pursuant to Federal Rules of Criminal Procedure Rule 11(b)(1)(G) (Requiring that a defendant understand the essential

elements of the offense to which he pleads guilty is rooted in fundamental principles of due process protected by the fifth amendment of the United States Constitution. *Picard v Connor* 464 at 278 (1971) (Holding that a defendant need not cite book and verse on the Federal Constitution).

Petitioner pleads guilty to the Supreme Court opinion of *Bailey v United States*, 116 S.Ct. 501 (1995), the Supreme Court clarified what is necessary to convict a defendant under 924(c)(1) of using a firearm during drug trafficking. In order to demonstrate use, the government must demonstrate more than mere possession, proximity, and accessibility of the firearm. The government must show active employment of the firearm by the defendant. *Bailey*, 116 S.Ct. at 506. Thus, "Use" requires actual "Use" --- "action and implementation" such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm" not mere possession or intended use. *Id.* at 506, 508.

The *Bailey* *supra* holding overruled the prior law of the Fourth Circuit, which was that the government could establish "Use" of a firearm under 924(c)(1) by proving that "the firearm was present for protection and to facilitate the likelihood of success, whether or not it was actually used. See, *In Re: Byron Jones*, 226 F.3d 328 (4th Cir 2000) (overruling *United States v Paz*, 927 F.2d 176 (4th Cir 1991), that mere constructive possession of a firearm in connection with a drug trafficking offense cannot establish "Use" of a firearm pursuant to 924(c).

Petitioner was charged under the "Use and Carry" prong of 924(c) statute. However, no factual basis was established in the record during the plea colloquy pursuant to Rule 11(b)(1)(G) that petitioner admitted to the "Use" and Carry prong of 924(c). See, plea colloquy attached.

The COURT: All Right. Now let's turn to Count Five. There you're charged with violating Section 924. That law says: Any person who, during and in relation to any crime of violence or drug trafficking crime for which the person may be prosecuted in a court of the United States, uses or carries a firearm or who, in furtherance of any such crime, possesses a firearm shall be guilty of another crime against the United States.

As to Count Five, the government would have to prove beyond a reasonable doubt these elements: first, that you committed a drug trafficking crime for which you may be prosecuted in a court of the United States, such as the one you just admitted in Count Three, and, second, during and in relation to the commission of that crime, you knowingly used or carried a firearm or, in furtherance of such crime, possessed a firearm.

Possession with intent to distribute heroin is a drug trafficking offense. The phrase "uses a firearm" means the active employment of a firearm. To carry a firearm means the knowing possession and bearing, movement, conveyance or transportation of a firearm.

So considering this explanation, do you believe you're guilty of Count Five?

The COURT: Tell me what you did that makes you guilty of this.

The Defendant: On February the 5th, the police came to my house, and I had drugs in one room and a gun in another room. And that's basically it. See, plea colloquy transcript attached.

In *McCarthy v United States*, 394 U.S. 459 (1969) the Supreme Court has held that Rule 11(b)(1)(C) must be strictly adhered to, to protect a defendant Fifth Amendment due process. In interpreting the requirements of Rule 11, the Court in *McCarthy* said the Rule has two main purposes: To assist the District Judge in making the constitutionally required determination that a defendant guilty plea is ~~from~~ voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered to the voluntariness determination.

The Supreme Court also made clear that a trial Judge must make certain that the defendant admits to conduct which would establish a factual basis for a plea of guilty, *United States v Tucker*, 425 F.2d 624 (4th Cir 1969) (citing *McCarthy v United States*, 394 U.S. at 467, 89 S.Ct. at 1171 (1969).

In this petition as mentioned above, as well as supported with the attached plea colloquy transcripts, the lower district court did not adhere to the Supreme Court precedent in accepting a plea pursuant to Rule 11(b)(1)(C), nor the lower district court precedent in accepting a plea pursuant to Rule 11(b)(1)(C). As petitioner admission in the plea colloquy that the police came to my house, and I had drugs in one room and a gun in another room does not establish a factual basis for "use" and "carry" pursuant to 924(c) elements. And this Supreme Court has repeatedly ruled that a admission of guilt pursuant to a plea agreement under Rule 11(b)(1)(C) to 924(c), that guns and drugs in the proximity of one another, do not establish a factual basis for a plea to comply with due process protected by the Fifth Amendment of the United States Constitution, *Bousley v United States*, 523 U.S. 614 (1998).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Mathew Byrd

Date: 3-10-21