

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 20-7737

IN THE
SUPREME COURT OF THE UNITED STATES

MARJUAN S. FLEMING — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARJUAN SITOMONEL FLEMING # 15605-040
(Your Name)

P.O. Box 019001 - USP ATWATER
(Address)

ATWATER, CA 95301
(City, State, Zip Code)

MA
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

WHETHER THE TERM "COVERED OFFENSE" IN THE FIRST STEP ACT OF 2018, INCLUDES VIOLATIONS OF TITLE 21 USC. 841(a), INVOLVING CRACK COCAINE, TO WHICH APPLY THE PENALTY PROVISION IN SUB PARAGRAPH (b)(1)(C) (AS THE U.S. COURT OF APPEALS FOR THE FIRST, FOURTH AND SEVENTH CIRCUITS HAVE DETERMINED) OR NOT (AS THE U.S. COURT OF APPEALS FOR THE THIRD, SIXTH, TENTH, AND ELEVENTH CIRCUITS HAVE HELD).

THIS QUESTION IS PENDING BEFORE THIS COURT IN PENDING PETITION, BIRT v. UNITED STATES, CALENDAR NO. 20-291.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was DECEMBER 09, 2020

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THE FIRST STEP ACT OF 2018, PUB. L. NO. 115-391, 132 STAT. 5194; § 401 AND § 404(c);
2. 21 USC § 841(a);

3. 21 USC § 841(b)(1)(C);
4. 21 USC § 851;
5. U.S.S.G. § 4B1.1
6. FAIR SENTENCING ACT OF 2010

STATEMENT OF THE CASE

IN 2011, A JURY CONVICTED FLEMING OF DISTRIBUTION OF COCAINE BASE, IN VIOLATION OF 21 U.S.C. § 841(a). PRIOR TO TRIAL, THE GOVERNMENT FILED A NOTICE OF SENTENCE ENHANCEMENT PURSUANT TO 21 USC § 851, BASED ON FLEMING'S PRIOR FELONY DRUG CONVICTIONS. FLEMING WAS ALSO DETERMINED TO BE A CAREER OFFENDER UNDER U.S.S.G. § 4B1.1. BASED ON A TOTAL OFFENSE LEVEL OF 37 AND A CRIMINAL HISTORY CATEGORY OF VI, FLEMING'S APPLICABLE GUIDELINES RANGE WAS 360 MONTHS TO LIFE IMPRISONMENT.

DURING THE SENTENCING HEARING, FLEMING REQUESTED THAT THE DISTRICT COURT SENTENCE HIM UNDER THE FAIR SENTENCING ACT OF 2010 ("PSA"), USING THE LOWERED TOTAL OFFENSE LEVEL OF 34 AND RESULTING GUIDELINES RANGE OF 262 - 327 MONTHS. THE DISTRICT COURT AGREED AND SENTENCED FLEMING TO 276 MONTHS OF IMPRISONMENT. SEE, UNITED STATES v. FLEMING, NO. 11-2094 (6th Cir. 2013).

IN JANUARY 2019, FLEMING FILED A MOTION FOR A REDUCED SENTENCE, UNDER THE FIRST STEP ACT OF 2018, REQUESTING THE DISTRICT COURT APPLY THE LOWER STATUTORILY MAXIMUMS SET FORTH IN § 401 OF THE ACT AND SENTENCE HIM USING A TOTAL OFFENSE LEVEL OF 29 AND A RESULTING GUIDELINES RANGE OF 151 - 188 MONTHS. FLEMING ACKNOWLEDGED THAT HE HAD BEEN SENTENCED UNDER THE FAIR SENTENCING ACT OF 2010.

IN AN AMENDMENT TO HIS MOTION, FLEMING HAS ARGUED

THAT HE IS ALSO ENTITLED TO A DOWNWARD VARIANCE BECAUSE SECTION 491 OF THE FIRST STEP ACT CHANGED THE REQUIREMENTS FOR PRIOR CONVICTIONS THAT MAY QUALIFY AS PREDICATES FOR ENHANCEMENTS UNDER 21 U.S.C. § 841(b)(1)(C).

ON JUNE 17, 2020, THE DISTRICT COURT DENIED THE MOTION CONCLUDING THAT PLEMING HAD ALREADY RECEIVED THE BENEFITS APPONDED UNDER THE FAIR SENTENCING ACT OF 2010, AND THAT § 404(c) OF THE ACT PROHIBITS COURTS FROM FURTHER REDUCING THE SENTENCE OF DEFENDANTS SENTENCED UNDER THE FAIR SENTENCING ACT OF 2010.

PLEMING APPEALED.

ON DECEMBER 8, 2020, THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMED THE JUDGMENT OF THE DISTRICT COURT ON THE GROUNDS THAT SECTION 404(c) OF THE FIRST STEP ACT OF 2018 PROHIBITS DISTRICT COURTS FROM REDUCING A DEFENDANT'S SENTENCE IF THE SENTENCE WAS PREVIOUSLY IMPOSED IN ACCORDANCE WITH THE FAIR SENTENCING ACT. SEE, FIRST STEP ACT § 404(c), 132 STAT. AT 5222.

THE SIXTH CIRCUIT ALSO DENIED RELIEF AND AFFIRMED THE DISTRICT COURT'S JUDGMENT ON THE GROUNDS THAT THE ACT "DID NOT ALTER THE DEFINITION OF 'FELONY DRUG OFFENSES' THAT SERVE AS QUALIFYING CONVICTIONS UNDER 21 U.S.C. § 841(b)(1)(C)," SEE, UNITED STATES v. WISEMAN, 932 F.3d 411, 417 (6TH CIR. 2019), CERT. DENIED, 140 S.Ct. 1237 (2020).

THE INSTANT PETITION FOR WRIT OF CERTIORARI NOW
ENSUES ON THE QUESTION OF WHETHER THE TERM "COVERED
OFFENSE" IN THE FIRST STEP ACT OF 2016 APPLIES TO VIOLA-
TIONS OF 21 U.S.C. 841(a) AND PENALTY PROVISION (b)(1)(C).

REASONS FOR GRANTING THE PETITION

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN UNITED STATES V. WISEMAN, 932 F.3d 411, 417 (6th Cir. 2019), CERT. DENIED, 140 S.Ct. 1237 (2020), HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS, TO WIT: UNITED STATES V. SMITH, 954 F.3d 446, 449 (1st Cir. 2020); UNITED STATES V. WOODSON, 962 F.3d 812, 812 (4th Cir. 2020), AND UNITED STATES V. HOBSETT, APPEAL NO. 3465 (7th Cir. Dec. 7, 2020), ON THE SAME IMPORTANT MATTER.

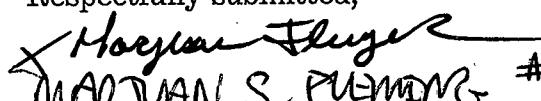
PETITIONER RESPECTFULLY SUBMITS, THE UNITED STATES COURTS OF APPEALS FOR THE THIRD CIRCUIT, UNITED STATES V. BIRT, 966 F.3d 257, 265 (3rd Cir. 2020), CERT. NO. 20-291; UNITED STATES V. WISEMAN, 932 F.3d 411, 417 (6th Cir. 2019), CERT. DENIED, 140 S.Ct. 1237 (2020); UNITED STATES V. MARTINEZ, 777 FED. APP'X. 946-947, (10th Cir. 2019); AND UNITED STATES V. POLEY, 798 FED. APP'X. 534, 536 (11th Cir. 2020), ARE ON OPPOSITE ON THE IMPORTANT QUESTION AS TO WHETHER CONVICTIONS UNDER PENALTY PROVISION § 41 (b)(1)(C) ARE "COVERED OFFENSES."

THIS QUESTION, WHETHER CONVICTIONS UNDER 21 USC § 41(a), AND PENALTY PROVISION § 41 (b)(1)(C), IS A "COVERED OFFENSE" IS CURRENTLY PENDING BEFORE THIS COURT AT COMPLIANCE. SEE, BIRT V. UNITED STATES, 20-291 (PENDING PETITION).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


MARIANO S. PLUMBE #15605-040

Date: March 3, 2024