

No. 20-7984

In the Supreme Court of the United States

EDDIE LAMONT LIPSCOMB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITIONER'S APPLICATION TO SHORTEN THE TIME BEFORE
ISSUING JUDGMENT

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court
and Circuit Justice for the Fifth Circuit.

Pursuant to Supreme Court Rule 45.3, Petitioner Eddie Lamont Lipscomb respectfully moves the Court to shorten the time before issuing its judgment, and to immediately issue the judgment, upon granting his Petition for Certiorari.

Basis for Jurisdiction

The district court had original jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231. Mr. Lipscomb filed a motion to vacate his Armed Career Criminal Act sentence, and the district court had jurisdiction to grant relief under 28 U.S.C. § 2255. The Fifth Circuit had jurisdiction over the Government's appeal under 18 U.S.C. § 3742(b) and 28 U.S.C. § 2253(a).

This Court has jurisdiction to review the Fifth Circuit's judgment in favor of the Government pursuant to 28 U.S.C. § 1254(1).

Judgment to be Reviewed and Opinions Below

The Fifth Circuit panel's opinion is published at 982 F.3d 927. It is reprinted at pages 1a–6a of the Petition Appendix. The Fifth Circuit's prior opinion on direct review was published at 619 F.3d 474, and is reprinted on Pages 29a–61a of the Petition Appendix.

Facts in Support of Application

Mr. Lipscomb successfully moved to vacate his Armed Career Criminal Act sentence under 28 U.S.C. § 2255(h). Years after he was released from prison, the Fifth Circuit reversed the district court's decision granting relief and order the court to reinstate the original, ACCA-enhanced sentence. Pet. App. 6a. The Government now acknowledges that the Fifth Circuit's decision should be vacated. U.S. Mem. 2. Because the Fifth Circuit's decision resulted in Mr. Lipscomb's reimprisonment, he asks this Court not to wait the typical 25 days before issuing its judgment. *See* S. Ct. R. 45.2, 45.3. He asks instead that the Court issue its judgment immediately, so that he might seek immediate release in the courts below.

1. Mr. Lipscomb moved to vacate his Armed Career Criminal Act sentence, arguing that Texas robbery would not count as a “violent felony” without the ACCA's unconstitutional residual clause. 18 U.S.C. § 924(e)(2)(B)(ii). The district court agreed, and on July 9, 2018, the court re-sentenced Mr. Lipscomb to the non-ACCA statutory maximum of 120 months in prison. Pet. App. 21a–23a; *see* 18 U.S.C. § 924(a)(2). Because Mr. Lipscomb had already served much longer than ten years in prison, he was immediately released. Pet. App. 2a.

2. The Government appealed the district court’s decision, but successfully moved for several stays of the appeal while it sought to overturn the precedent upon which the district court relied on granting relief. Pet. App. 5a–6a. The Fifth Circuit eventually decided those issues in the Government’s favor. Most importantly for present purposes, the Fifth Circuit held that Texas robbery was categorically violent under the ACCA’s elements clause even though the crime could be committed by recklessly causing another person injury while fleeing from a botched attempt at theft. *See United States v. Burris*, 920 F.3d 942, 951–52 (5th Cir. 2019), *cert. granted, judgment vacated*, 19-6186, 2021 WL 2519042 (U.S. June 21, 2021), and *abrogated by Borden v. United States*, 141 S. Ct. 1817 (2021); *on remand*, 856 F. App’x 547 (5th Cir. Aug. 19, 2021).

3. Mr. Lipscomb urged the Fifth Circuit not to decide this case until this Court handed down its decision in *Borden*. The Fifth Circuit refused to “delay” the case “any longer.” On December 8, 2020, the appellate court vacated the district court’s decision granting collateral relief, and ordered the district court “to reinstate its original judgment.” Pet. App. 6a. The court issued its mandate immediately. The district court did as directed, and Mr. Lipscomb was returned to federal prison, where he remains to this day.

Reasons for Granting the Application

Mr. Lipscomb was sent back to federal prison because of an error. The Fifth Circuit had held—erroneously—that Texas robbery was categorically violent under the ACCA’s elements clause, even though the offense could be committed by recklessly causing another person to suffer bodily injury. Pet. App. 5a–6a. The Fifth

Circuit refused to delay the decision below because it believed the question of recklessness was “settled on the firmest foundations of our court.” Pet. App. 5a.

In fact, the issue was not settled. *Borden* unequivocally overruled *Burris*, and specifically citing a Texas robbery prosecution as an example of a reckless crime that should not count as a violent felony. *Borden*, 141 S. Ct. at 1831 (discussing *Craver v. State*, 2015 WL 3918057, *2 (Tex. App., June 25, 2015)). Recognizing this, the Fifth Circuit itself vacated the ACCA-enhanced sentence in *Burris* after that case was remanded from this Court: “[S]imple robbery is not a violent felony for purposes of applying the ACCA’s mandatory fifteen-year minimum enhancement because it could be committed simply by recklessly causing another to suffer injury during a theft.” *United States v. Burris*, 856 F. App’x 547 (5th Cir. 2021).

The Government now agrees that the Fifth Circuit’s decision here should be vacated, too. U.S. Mem. 2. So long as the Fifth Circuit’s decision remains in place, Mr. Lipscomb remains imprisoned. Once the decision is vacated, Mr. Lipscomb will have an opportunity for release, whether that happens by operation of law as soon as the Fifth Circuit’s decision is vacated or if he must take additional action in the Fifth Circuit or district court.

Petitioner’s counsel has conferred with the Office of the Solicitor General. The Government has stated that it has no objection to any expedited processing that the Court deems appropriate.

Every day that Mr. Lipscomb remains in prison represents an additional, irreparable injury. *See Glover v. United States*, 531 U.S. 198, 203 (2001) (recognizing

that “any amount of actual jail time” is sufficient to show prejudice on collateral review). The Government agrees that the Fifth Circuit’s decision below should be vacated, and so there is no reason to further delay Mr. Lipscomb’s release.

Conclusion

For all these reasons, Petitioner respectfully requests that the Court shorten the time to issue judgment, and that the judgment be issued immediately, when the Court grants the petition for certiorari.

Respectfully submitted on September 22, 2021,

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