

No. 20-8234

ORIGINAL

SUPREME COURT OF THE UNITED STATES

ARIAN BROWN
Petitioner



v.

UNITED STATES OF AMERICA
Respondent

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

Appeal No. 18-5084 (6th Cir.)
District Court No. 5:16-cr-00097 (E.D. KY - Lexington)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit abuse its discretion and err by denying the Motion to Recall the Mandate, when The United States Court of Appeals for the Sixth Circuit elected to rehear en banc the precedential foundation for affirming the sentence enhancement under the Career Criminal Guideline, on the day the conviction became final in this case, and subsequently reversed the erroneous precedent relied upon to affirm the excessive and incorrect sentence in this case?

LIST OF PARTIES

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

RELATED CASES

United States v. Brown, No. 5:16-cr-00097-DCR-CJS (E.D. KY-Lexington)

United States v. Brown, No. 18-5084 (6th Cir.)

United States v. Brown, No. 5:19-cv-00244-DCR-CJS (E.D. KY-Lexington)

United States v. Brown, No. 19-6269/6270 (6th Cir.)

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The order of The United States Court of Appeals for the Sixth Circuit appears at Appendix A to the Petition and is unpublished.

The Judgment of The United States District Court for the Eastern District of Kentucky appears at Appendix B to the Petition and is unpublished.

JURISDICTION

Defendant-Petitioner Arian Brown was charged with committing an offense against the United States of America, for which The United States District Court had subject matter jurisdiction pursuant to 18 U.S.C. §3231, granting to The United States District Courts original exclusive jurisdiction over all offenses committed against the laws of the United States of America, including Brown's offense of conviction under 21 U.S.C §841(a)(1).

The United States Court of Appeals for the Sixth Circuit had appellate jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742 over the final judgment and sentence of the District Court for the Eastern District of Kentucky, entered against Brown.

[Appendix B] The United States Court of Appeals affirmed Brown's sentence and conviction. [Appendix C] After issuing the Mandate, The United States Court of Appeals refused to recall that Mandate on December 19, 2019. [Appendix A]

Petition for Rehearing was denied by The United States Court of Appeals for the Sixth Circuit. [Appendix D] This denial was on March 2, 2020.¹ This Honorable Court now has discretionary jurisdiction pursuant to 28 U.S.C. §1257(a).

1. Brown requested additional time to file This Petition, and was notified that 60 additional days were permitted by This Court's March 19, 2020 Order.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clauses in The United States Constitution.

STATEMENT OF THE CASE

On November 3, 2016, Defendant-Petitioner Arian Brown was indicted with one count of possession with intent to distribute 40 grams or more of fentanyl, and one count of possessing with intent to distribute heroin. Both of these counts cited violations of 21 U.S.C. §841(a)(1). [RE 1:Indictment]² A Superseding Indictment [RE 52] was returned on May 4, 2017, adding one count of conspiracy to possess with intent to distribute heroin, citing violation of 21 U.S.C. §841.

Plea negotiations revealed a dispute regarding Brown's qualification as a Career Offender under the United States Sentencing Guidelines Manual (USSG). Therefore, Brown entered a plea of guilty to the original two counts on September 22, 2017 [RE 106], pursuant to a written Plea Agreement [RE 107] which indicated enhanced statutory punishments of imprisonment from 10 years to life as to Count One, and imprisonment for up to 30 years as to Count Two. [Id., pp.2-3] The parties stipulated that the relevant conduct included the equivalency of at least 400kg but less than 700kg of marijuana for USSG calculations. [Ibid.]

The Probation Office then prepared a Presentence Investigation Report (PSI), employing the 2016 version of the USSG. [RE 138] The PSI indicated a base offense level of 26, pursuant to USSG

2. "RE" indicates the "Record Entries" in the underlying criminal case number 5:16-cr-00097 (E.D. KY-Lexington).

§2D1.1(c)(7) [RE 138, p.6], and a criminal history category of IV. [Id., p.7] The resulting guideline range recommended 92 to 115 months of imprisonment, which failed to reach the mandatory minimum threshold regarding Count One (10 years), thereby increasing Brown's USSG prescribed sentence to 120 months by default. See USSG §5G1.1(b).

However, the PSI found Brown to be a Career Offender pursuant to USSG §4B1.1(a) because the instant offenses constituted controlled substance offenses, which Brown committed when he was at least eighteen years of age, and after acquiring two prior convictions which the PSI deemed to be either a "crime of violence" or a "controlled substance offense" as those phrases are defined in USSG §4B1.2. [RE 138, p.7] This Career Offender designation bumped Brown's offense level up to 37, and simultaneously increased his criminal history category to VI. See USSG §4B1.1(b). Brown made objections to the Career Offender enhancement [see RE 127], and the District Court overruled them [RE 130], adopting the USSG calculations outlined in the PSI.

Brown was sentenced on January 12, 2018 [RE 131], where he renewed his objections to the Career Offender classification [RE 138, pp.24-28] to no avail. The District Court found Brown to qualify for the enhancement. [Id., pp.33-34] After the 2 level reward for acceptance of responsibility, pursuant to USSG §3E1.1(a), Brown's final offense level was 35, in criminal history category VI. [RE 138, p.7] The resulting recommended sentencing range

was 292-365 months of imprisonment. Brown received 330 months in prison, to be followed by 8 years of supervised release. [RE 133]

Brown filed a timely Notice of Appeal on January 22, 2018. [RE 134] Appointed appellate counsel filed a Motion to Withdraw Pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), which indicated that "legal research revealed no good-faith issues to appeal." [RE 167, p.2] After reviewing the record in accord with Pension v. Ohio, 488 U.S. 75,82-83, 109 S.Ct. 346, 102 L.Ed.2d 300,310 (1988), The United States Court of Appeals for the Sixth Circuit stated "no arguable grounds for appeal exist," [RE 167, p.2], granted counsel's Motion to Withdraw on October 16, 2018, and affirmed the District Court's Judgment. [Id., p.6] Brown then submitted a Petition for Rehearing, pro se, on October 28, 2018. Rehearing was denied January 17, 2019. The Mandate in question here was issued on January 24, 2019. Brown then filed a pro se Petition for Rehearing en banc. but due to Brown's legal illiteracy, such a petition was not timely. Therefore, the Clerk returned this late Petition back to Brown unfiled. No Petition for Writ of Certiorari was filed to This Court.

Brown's conviction became final on April 18, 2019. See Clay v. United States, 537 U.S. 522,524-25, 123 S.Ct. 1072, 155 L.Ed.2d 88,92-93 (2003), see also Sup. Ct. Rule 13(1). However, that very same day, The United States Court of Appeals for the Sixth

Circuit called into question the integrity of the Panel's affirmation of Brown's sentence, and granted rehearing en banc in United States v. Havis, 907 F.3d 439 (6th Cir. 2018)(reh'g en banc granted, Opinion vacated, 921 F.3d 628 (6th Cir. 2019), and on reh'g en banc, 927 F.3d 382 (6th Cir. 2019)(en banc)(per curiam)). That rehearing concluded by rescinding the exact same binding precedent which had been cited by The United States Court of Appeals for the Sixth Circuit, in order to affirm Brown's sentence and endorse Brown's two previous convictions (for violating conspiracy and attempt statutes), as requisite crimes to engage USSG §4B1.1. See United States v. Evans, 699 F.3d 858, 866-67 (6th Cir. 2012)(abrogated by Havis, 927 F.3d at 384,386-87). It was this now defunct precedent which mandated Brown's erroneous sentence be affirmed.

After the United States Court of Appeals for the Sixth Circuit abrogated Evans by rehearing Havis en banc, Brown filed his Motion to Recall the Mandate, at issue here. The United States Court of Appeals for the Sixth Circuit denied Brown's Motion. [Appendix A] Brown then requested rehearing, which was also denied. [Appendix D] This Petition now follows.

REASONS FOR GRANTING PETITION

Here, This Court is asked to decide if the Sixth Circuit abused its discretion for failing to recall its Mandate in this case. It has already been established that Circuit Courts of Appeals possess the "inherent" power to recall their own mandates. Calderon v. Thompson, 523 U.S. 538,549, 118 S.Ct. 1489, 140 L.Ed.2d 728,743 (1998). And the Sixth Circuit itself asserts this may be done, "in effect reopening the case, without limit of time, although only in exceptional circumstances." Patterson v. Haskins, 470 F.3d 645,661 (6th Cir. 2006)(quoting Patterson v. Crab, 904 F.2d 1179,1180 (7th Cir. 1990)).

In this case, Petitioner-Defendant Arian Brown was sentenced as a Career Offender, pursuant to United States Sentencing Guidelines (USSG) §4B1.1. Brown's predicate convictions consisted of conspiracy to commit first-degree robbery, and attempt to possess with intent to distribute cocaine. [RE 190, p.3:Order] As explained below, at the time of Brown's sentencing, under then Sixth Circuit precedent, see United States v. Evans, 699 F.3d 858,866-67 (6th Cir. 2012), those convictions were adequate to apply the enhancement. However, after Brown's sentencing, in fact on the very day Brown's conviction became "final," The Sixth Circuit began the process which then put Brown's prior convictions ultra vires of USSG §4B1.1. All without a single word of USSG §4B1.1 ever being changed, revised, or amended. The Sixth Circuit merely changed their previous position by re-

interpreting the exact same language. See United States v. Havis, 927 F.3d 382 (6th Cir. 2019)(en banc).

In Evans, The Sixth Circuit held that the USSG Commentary, which purported to add aiding and abetting, conspiracy, and attempt crimes to the offenses already explicitly listed within the text of the Guideline itself, did so properly under the authority granted to the Sentencing Commission pursuant to 18 U.S.C. §994. But after Brown's sentencing, The Sixth Circuit reviewed Evans during the en banc rehearing in Havis. It was subsequently decided that the Sentencing Commission actually overstepped its authority when it attempted to add inchoate crimes, through the use of Commentary Application Notes, to the bonafide list of crimes explicitly enumerated within the text of the Guideline itself. Havis, at 443. The Havis interpretation takes Brown's previous convictions outside the range of crimes permitted for use to invoke the Career Offender enhancement under USSG §4B1.1.

The issue here is whether Brown should get the benefit of this new interpretation, or if instead, he should spend two extra decades in prison due to The Sixth Circuit's mistake. Havis was granted rehearing en banc on the day Brown's conviction became "final." See Clay v. United States, 537 U.S. 522, 524-25, 123 S.Ct. 1072, 155 L.Ed.2d 88, 92-93 (2003); see also Sup. Ct. Rule 13(1). Brown filed a subsequent Motion to Correct Sentence pursuant to 28 U.S.C. §2255 [RE 172], which was denied [RE 191] because, unbelievably, The Sixth Circuit fails to recognize an

erroneous Career Offender enhancement as affecting substantial rights, and correctable under 28 U.S.C. §2255. Bullard v. United States, 937 F.3d 654 (6th Cir. 2019).

Due to the timing of the Havis reinterpretation, Brown then filed his Motion to Recall the Mandate, which is the subject of the instant Petition. Brown properly alleged the extraordinary circumstances, but was denied relief. This denial creates a manifest miscarriage of justice, and represents an abuse of discretion by The Sixth Circuit, as Brown identified similar cases where The Sixth Circuit has done the right thing, acting in the interests of justice. See United States v. Solomon, 2019 U.S. App. LEXIS 19861 (6th Cir. 2019)(granting Motion to Recall the Mandate in light of change in law by Havis); United States v. Murray, 20 F.Appx. 398,400 (6th Cir. 2001)(unpublished)(Recall of Mandate in light of change in law).

In denying Brown's Motion, The Sixth Circuit relied on the fact that "Brown has not alleged fraud or raised a clerical error." [Appendix A, p.3] However, literally two sentences prior to that statement, The Sixth Circuit concedes these two reasons are not exclusive, and that Brown may "'demonstrate good cause for that action through a showing of exceptional circumstances,' including, but not limited to 'fraud...[or] clerical mistake.'" [Id., pp.2-3 (emphasis added)(quoting Patterson v. Haskins, 470 F.3d 645,662 (6th Cir. 2006)(in turn quoting BellSouth Corp. v. FCC, 96 F.3d 849,851-52 (6th Cir. 1996))). The Sixth Circuit

then asserted a Second Circuit case which dismissed a motion to recall mandate after a subsequent decision altered governing law. See Bottone v. United States, 350 F.3d 59 (2d Cir. 2003). But in Bottone, the intervening decision came after This Court had already denied certiorari, hence the judgment was "final." This case is markedly different, in that Brown's case was just determined to be final on the day The Sixth Circuit began the law change in the Circuit.

The Sixth Circuit recalled its Mandate in Murray because This Court decided Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which then "call[ed] into question the 'integrity' of" the earlier panel decision and amounted to "extraordinary circumstances that merited recall of the Mandate." Murray, at 400 (citing Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988)). And in Solomon, the Mandate was recalled because the case was not final when Havis was decided. To correct their error Murray, and not just any error, but the exact same error in Solomon, yet not in this case, is the very definition of abuse of discretion. Such arbitrary and capricious action should never be condoned, and indeed, should be reversed.

Simply put, a new offender could have a dozen prior convictions for attempted murder, and would receive the ten-year mandatory minimum. But Brown must serve twenty more years in prison than the new offender because Brown once attempted to possess cocaine with intent to distribute it. This is a ridiculous result that

needs to be corrected in the interests of justice, fundamental fairness and judicial integrity. This Court should remand for recall of the Mandate "in order to prevent the actual inequity that results when the court chooses which of many similarly situated defendants should be the chance beneficiary..." Griffith v. Kentucky, 479 U.S. 314,328, 107 S.Ct. 708, 93 L.Ed.2d 649,661 (1987)(quoting United States v. Johnson, 457 U.S. 537,556,n.16, 102 S.Ct. 2579, 73 L.Ed.2d 202,218,n.16 (1982)).

CONCLUSION

Wherefore, Brown prays This Honorable Court grant this Petition for writ of certiorari in the interests of justice and to decide this substantial question of law.

Respectfully Submitted,

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