

MAY 20 2021

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20-8429

No. _____

IN THE

Supreme Court of the United States

Christopher Forman,

Petitioner

v.

Commonwealth of Pennsylvania,

Respondent

On Petition For Writ Of Certiorari
To The Pennsylvania Superior Court

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Christopher Forman
Pro se Petitioner
DOC No. NR 1850
SCI Mahanoy
301 Morea Road
Frackville, PA 17932

QUESTIONS PRESENTED

1. Did the Commonwealth of Pennsylvania defy the due process clause of the Fourteenth Amendment to the United States Constitution by permitting a conviction and unlawful sentence on an offense of conspiracy to commit burglary not alleged in the Information?
2. Is the Pennsylvania Superior Court's departure from acceptable and usual course of appellate review going to continue to violate the due process clause where it enlarged the burglary statute and applied it retroactively to petitioner?
3. Should the mandatory minimum sentence imposed under 42 Pa.C.S.A. §9714 be vacated as the statute is unconstitutional as currently drafted?

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OPINIONS BELOW

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

The opinion of the highest state court, the Superior Court, to review the merits appears at Appendix A to the petition and is reported at Commonwealth v. Christopher Forman, 2020 Pa.Super.Unpub. LEXIS 3379, No. 3389 EDA 2019 (Pa. Super. October 27, 2020), CP-51-CR-0006295-2014.

The April 13, 2021, per curiam order of the State's Highest available court, The State's Supreme Court, appears at Appendix B to the petition and is unreported.

The January 13, 2020, opinion of the trial court, the Court of Common Pleas of Philadelphia County, appears at Appendix D to the petition and is unreported.

JURISDICTION

The date on which the highest state court decided petitioner's case was April 13, 2021. A copy of the decision appears at Appendix D.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States

Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

18 Pa.C.S.A. §3502(a)(1)(ii). Pet. App. A., pg. 1.

42 Pa.C.S.A. §9714. Pet. App. A., pg. 3.

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

Tried by a jury in the Court of Common Pleas of Philadelphia before the Honorable Anne Marie B. Coyle, Christopher Forman ("petitioner") was alleged to have broken into the home of Eliezer Colon and Moraima Alicea on February 10, 2014. [Pet. App. A., 1] The victims returned home at approximately 7:15 pm with their two children when they discovered, from their vehicle, that the upstairs lights were on. Id. Colon asked Alicea whether she forgot to turn off the lights; when she said no, he assumed that she was mistaken. Id. The family exited their vehicle. Alicea noted that she could not unlock the front door. Id. Colon further noticed that blinds were partially cracked. Id. At that point, Colon "realized somebody was inside the house," because the deadbolt could only be physically latched from inside. Alert, Colon told his family to get back into the car. Once inside the vehicle, Alicea called 911 to report a burglary. Id. Colon drove his family to the rear of the house by route of the common alley way behind the homes on their street. Id. He spotted a truck idling by the back door and alleged that petitioner and another male were attempting to depart with a several hundred pound gun-safe. Id. Upon seeing the vehicle coming

down the alley way, petitioner and an unidentified male fled. Petitioner allegedly sucessfully fled the scene via the truck, while the other man left the scene on foot. Id. With the family still in the vehicle, Colon pursued petitioner down Roosevelt Boulevard at high rates of speed. Petitioner eventually lost control of the truck and crashed into a tree. Id. After the crash, petitioner attempted to flee on foot, but colon pursued him, wrestled him to the ground and made a "citizens arrest" until law enforcement arrived and made a formal seizure of petitioner's liberty. Id.

Petitioner was convicted of burglary, criminal trespass, criminal conspiracy to commit burglary, and two counts of recklessly endangering another person. Id.

Sentencing for the aforementioned convictions was deferred until the outcome of pre-sentence investigation. [Pet. App. A., 2] Prior to sentencing, the Commonwealth notified petitioner that it was pursing a mandatory minimum sentence pursuant to Pennsylvania's "second strike" law codified at 42 Pa.C.S.A. §9714, which was in regards to a second or subsequent crime of violence conviction. Petitioner stipulated that he was previously convicted of a crime of violence. Id. But challenged whether the instant burglary conviction, in the first degree, qualified as a "crime of violence" under §9714. Through counsel, petitioner argued that because the evidence at trial exhibited beyond a reasonable doubt that

the victims were not present during the burglary the burglary conviction does not and could not constitute a "crime of violence" on its face. Id. The sentencing court disagreed and imposed the mandatory 10 to 20 year sentence for the burglary conviction, noting that "those people came home. It was their house, and when they tried to enter, they were stopped because of you and your cohorts *** this matter does qualify under the statute... based upon the facts that this court heard with respect to the victims attempted entry into their own home." Id.

For the latter of the convictions arising from the burglary, petitioner received 3½ years to 20 years for conspiracy to commit burglary, consecutive to the judgement on the burglary count; the sentence for the criminal trespass merged with the judgement for burglary; he received a 1 to 2 years sentence for each recklessly endangering another person count(s) ran consecutive to the burglary offense and to the former counts. Total judgement of sentence of total incarceration in this matter is not less than 15½ years to not more 44 years.

Petitioner timely appealed.

B. State Appellate Proceedings

On April 24, 2017, petitioner filed a Motion Seeking Reconsideration and Reduction of the sentence imposed on April 17, 2017. That motion was denied by operation of law

without an opinion or memorandum until November 19, 2019, and after requested by petitioner.

On November 23, 2019, a timely notice of appeal was filed on petitioner's behalf. On December 6, 2019, petitioner submitted a timely 1925(b) statement. On January 13, 2020, the trial court submitted it's 1925(a) statement and memorandum of law.

The Superior Court heard the petitioner's appeal docketed at No. 3389 EDA 2019. Pet. App. A.

Petitioner requested the following grounds be addressed by the Superior court:

- "i. Was the defendant/appellant illegally sentenced pursuant to 42 P.A.C.S.A. §9714 insofar as the Commonwealth did not sufficiently establish that defendant committed a crime of violence with respect to the charge of burglary in the matter sub judice as no person was present in the residence at the time of any alleged burglary?
- ii. Should the mandatory minimum sentence imposed by the trial court under 42 P.A.C.S.A. §9714 be vacated, and this matter remanded for a new sentencing hearing, due to the fact that §9714 is unconstitutional as currently drafted insofar as it violates defendant's rights under the Fifth and/or Sixth Amendment to the U.S. Constitution (made applicable in this matter by the Fourteenth Amendment to the U.S. Constitution) and Article I, §9 of the Pennsylvania Constitution?"

The Superior Court, on October 27, 2020, denied petitioner relief on all grounds and affirmed the judgements imposed on April 17, 2017. Pet. App. A.

Petitioner sought review of the state's Supreme Court via Petition for Allowance of Appeal, and asked the state's high court to answer the following questions:

- "i. Did the Superior Court panel err, and enter a ruling that conflicts with a holding of this court, and/or another holding of the Superior Court, when it held that defendant/appellant was not illegally sentenced pursuant to 42 P.A.C.S.A. §9714 where the Commonwealth did not sufficiently establish that defendant committed a crime of violence with respect to the charge of burglary in the matter sub judice as no person was present in the residence at the time of a burglary?
- ii. Did the Superior Court panel err, when it held that the mandatory minimum sentence imposed by the trial court pursuant to 42 P.A.C.S.A. §9714 is a legal sentence where §9714 is unconstitutional as currently drafted?"

By Per Curiam order dated April 13, 2021, the Supreme Court declined to provide the lower court's with guidance on the above areas of law when it had the ripest opportunity to do so. Pet. App. B.

This timely request for Certiorari follows.

REASONS FOR GRANTING THE PETITION

- I. The Fourteenth Amendment to the United States Constitution requires setting aside petitioner's conviction and sentence for conspiracy to commit burglary where it was not alleged in the Information.

The District Attorney of Philadelphia filed an Information alleging conduct that violated seventeen (17) criminal statutes. Pet. App. C.

The only two conspiracy counts alleged in the Information are at counts four (4) and eleven (11), and both attach to the inchoate offenses of Assault and Robbery. Pet. App. C, pgs. 1, 2.

~~This Court has held in Cole v. State of Arkansas, "To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the Fourteenth Amendment to the United States Constitution."~~ 92 L.Ed.2d 644, 647, 333 U.S. 196, 200.

Furthermore, the Cole court elaborated, "it is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." 92 L.Ed. at 647-649, 333 U.S. at 201. (internal page numbers and citations omitted).

The latter scenario is ever present here. Petitioner's conviction and judgment of sentence for criminal conspiracy to commit the offense of burglary was obtained outside the breadth of the Fourteenth Amendment, thus departing from the accepted and usual course of judicial proceedings as to call for an exercise of Certiorari. Respectfully.

II. The Pennsylvania Superior Court's rationale sustaining petitioner's burglary conviction is flawed and deviates from *Bouie v. Columbia*.

The provision of 18 Pa.C.S.A. §3502 that petitioner was found guilty of reads:

"(a) A person commits the offense of burglary if, with the intent to commit a crime therein, the person:
(1)(ii) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present."

Pet. App. A., pg. 2

The Superior Court completely disregarded the deliberate placement of the words "in which," and instead opined that the portion reading "at the time of the offense any person is present," is so indefinite as to include when any person is "in the vicinity" of the building or occupied structure, or separately secured or occupied portion thereof at the time of the offense. Pet. App. A, pg. 3.

Thus, in the view of the Superior Court, so long as any person is in the vicinity of the burglary in progress they are "present" for purposes of satisfying the "in which

any person is present" proviso. Id.

In the case sub judice, we have a Pennsylvania statute that expresses with definitiveness the conduct it seeks to forbid, i.e., entering a building or occupied structure with the intent to commit a crime therein and at the time that criminal conduct is occurring any person is present in that structure. Pet. App. A., pg. 2.

The evidence adduced by the state reflects without a doubt that the victims of the burglary did not enter their residence; there was no porch nor occupied portion of the residence they entered during the burglary; and when they encountered petitioner fleeing from the rear of the home the victims were in a vehicle in the common alley way.

[Pet. App. A., pg.1] The Superior Court knew it was constrained to vacate the judgement of sentence and reverse the verdict on the burglary count. But they did not.

Instead, the Superior Court decided to sustain the conviction by the very act of broadening with retroactive affect a definitive state criminal statute. Such an action was contemplated then forbidden by *Bouie v. Columbia*, 84 S.Ct. 1697, 12 L.Ed.2d 894, 378 U.S. 347.

Under the Forman court's enlarged burglary statute, alleged burglars can now be tried for the more serious first degree felony provision of §3502 if the resident(s) of the structure were down the street witnessing the defendant in the house through a picture window; or if they were a thousand miles away watching the burglar on an

in-home security system; or if the resident is re-shingling his/her roof and the burglar is in the basement thieving. This is because the "in which at the time of the offense any person is present" portion is now superfluous under **Forman**. Pet. App. A., pg. 3.

Here's one factual scenario the **Forman** court's enlarged interpretation will not encompass: as the burglar is in an occupied residence thieving, the postman walks upon the porch and places a parcel in the mailbox. Under this new enlarged provision, the defendant was in the structure in which at the time of the offense the postman was present.

The Superior Court effectively rendered the entire "in which at the time of the offense any person is present" statement meaningless. This type of appellate action was expressly stricken down by **Bouie**, in which it was expressed: "If this view is valid in the case of a judicial construction which adds a clarifying gloss to a vague statute, making it narrower or more definite than its language indicates, it must be *fortiori* so where the construction unexpectedly broadens a statute which on its face has been definite and precise." 378 U.S. at 353 (internal quotations omitted).

The crux of the **Forman** court rationale relies heavily upon a pre-§3502 "sentencing interpretation" regarding the "likelihood of greater mischief," upon a resident "returning home and finding the sanctity and security of

the residence violated." [Pet. App. A., pg. 3] Aside from the obvious concerns where it requires presence of a criminal intent component in order to aggravate a crime under a penal statute (not a sentencing statute), these references in the rationale are misplaced and frankly irrelevant. Put another way, the statutory prerequisites of §3502 are definitive. Any attempt to broaden the scope thereof for the purposes of sustaining a conviction is at odds with *Bouie*, thus wholly detracts from due process of law guaranteed to petitioner and all alleged criminal defendants charged with burglary under §3502.

For this reason, Certiorari is required.

III. The Court should revisit *Almendarez-Torres* as its underpinnings have been eroded by constitutional law, yet permits continued application of Pennsylvania's unconstitutional mandatory minimum sentence at 42 Pa.C.S.A. §9714 upon petitioner.

On Appeal in the State's Superior Court, petitioner submitted that the mandatory minimum sentence imposed pursuant to §9714 is illegal because that statute defies the constitution as currently drafted. [Pet. App. A., pgs. 2-4] Although the panel of the Superior Court held that §9714 falls within a narrow exception to the rule announced in *Alleyne v. United States*, 570 U.S. 99 (2013), that exception is based on reasoning which is no longer sound due to developments in the law. Petitioner submitted this very argument to the Superior Court based upon subsequent developments that call for change in existing law. Change that would bring existing law up-to-date with sound jurisprudence.

In this matter, the crime of burglary under §3502(a)(1) carries a mandatory minimum sentence of 10 years of imprisonment under Pennsylvania's "three strikes" statute - §9714. The version of that statute in effect at the time of petitioner's sentencing hearing provided, in pertinent part:

Sentences for second and subsequent offenses.

(b) Mandatory Sentences.-

(1) Any person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a total minimum sentence of at least ten

years of total confinement, [...]

(g) Definition.--As used in this section, the term "crime of violence" means [...] burglary as defined in 18 Pa.C.S. §3502(a)(1)[...][.]

42 Pa.C.S.A. § 9714(b)(1), (g).

With respect to the procedural prerequisites to the imposition of a mandatory "second strike" sentence, §9714 provides, in relevant part:

Sentences for second and subsequent offenses.
(d) Proof at sentencing.--Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, [...]. The applicability of this section shall be determined at sentencing. [...]. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offense and, if this section is applicable, shall impose the sentence in accordance with this section.

42 Pa.C.S.A. §9714(d).

Pennsylvania state appellate courts have repeatedly held statutes requiring materially identical provisions to those above are unconstitutional as being volatile to due process protections. e.g., Commonwealth v. Wolfe, 106 A.3d 800 (Pa. Super. 2014); Commonwealth v. Hopkins, 117 A.3d 247, 250, 260-62 (Pa. 2015); Commonwealth v. Newman, 99 A.3d 86 (Pa. Super. 2014); Commonwealth v. Valentine, 101 A.3d 801 (Pa. Super. 2014); Commonwealth v. Fennell, 105 A.3d 13 (Pa. Super. 2014).

Successful bouts against the unconstitutional

provisions in Pennsylvania's mandatory minimum statutes does not end the inquiry here however.

The Alleyne Court declined to address whether the fact triggering a mandatory minimum sentence is to be considered an "element" of the crime if that fact is a "prior conviction." Alleyne, 133 S.Ct. 2151, n. 1. The Alleyne Court found itself in a position where it could not properly address this "narrow exception" conceptualized in Almendarez-Torres v. United States, 532 U.S. 224 (1998). This is notable because the decision in Almendarez-Torres has been, sub judice, exhausted in the courts below and is now ripe to be revisited by this Court. This is of exceptional importance because, *inter alia*, Almendarez-Torres' underpinnings have been eroded by subsequent developments of constitutional law. Consider first, that four Justices dissented in Almendarez-Torres. Thereafter, Justice Thomas, who joined in the Almendarez-Torres majority, has subsequently stated that he believes the case was wrongly decided. see United States v. McDowell, 745 F.3d 115, 124 (4th Cir. 2014)(citing Shepard v. United States, 544 U.S. 13, 28, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)(Thomas, J., concurring)).

As a consequence thereof Almendarez-Torres, innumerable criminal defendants, including the instant petitioner, have been unconstitutionally sentenced under that flawed rule, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of

the individual defendant afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements. *Id.* *Shepard*, 544 U.S. at 28 (Thomas, J., concurring)(citing *Harris v. United States*, 536 U.S. 545, 581-582 (2002)(Thomas, J., dissenting)).

Accordingly, petitioner has made every good faith effort possible to have the courts below rule in accordance to the above developments, and render §9714 unconstitutional as it violates Due Process protections of the Fourteenth Amendment to the United States Constitution. It declined the opportunity, relying wholly on *Almendarez-Torres* and the state's equivalent. Pet. App. A.

For these reasons, petitioner submits a writ of certiorari should therefrom follow. Respectfully.

Respectfully Submitted By:



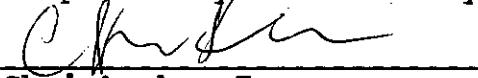
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This 31st day of May, 2021.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted by:



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This 31st day of May, 2021.