

No. 21-5350 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JUN 04 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Bobby "Earl" Keys — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Bobby Earl Keys, 03344-043
(Your Name)

P.O. Box 1031
(Address)

Coleman, Florida 33521-1031
(City, State, Zip Code)

Pro Se/ Incarcerated
(Phone Number)

QUESTION(S) PRESENTED

DID THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE WRONGED APPELLATE STANDARD OF REVIEW TO CLAIM THAT DISTRICT COURT COMMITTED STATUTORY ERROR UNDER 18 U.S.C. §§3142(g), 3553(a), BY FAILING TO ADDRESS THE STATUTORY FACTORS WHETHER IT IS "NECESSARY TO MAINTAIN THE PRISONER TERM OF IMPRISONMENT DESPITE THE EXTRAORDINARY AND COMPELLING REASONS [FOR GRANTING RELEASE] IN ORDER TO ACHIEVE THE PURPOSES OF PUNISHMENT THAT COMPELLED THE COURT TO IMPOSE THE ORIGINAL TERM OF IMPRISONMENT?"

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the coverage page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Shundra H.Cole, Assistant U.S.Attorney
2. Gaines H. Cleveland, Assistant U.S.Attorney
3. Darren J.LaMarca, Acting U.S.Attorney
4. Carlos Tanner III, Assistant U.S.Attorney
5. Honorable Judge Ozerdene, U.S.District Judge
6. Bobby Earl Keys, Petitioner
7. Lyle W. Cayce, Clerk - U.S.Court of Appeals, Fifth Circuit
8. Erica L. Rose, Assistant United States Attorney

RELATED CASES

UNITED STATES V. BOBBY EARL KEYS, U.S.DIST.NO. 1:11cr79HSO, SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION: AND

UNITED STATES V. BOBBY EARL KEYS, U.S.COURT APPEAL NUMBER 20-61192, FIFTH CIRCUIT COURT OF APPEALS

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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

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix 1 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 is unpublished.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 _____ 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 April 30, 2021.

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

A federal prisoner may file a motion or bring a motion under title 18, United States Code, Section 3582, as amended by the First Step Act (often referred to as the compassionate release statute). According to the statute, the courts "may reduce the term of imprisonment after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with application policy statements by the [United States] Sentencing Commission." 18 U.S.C. §3582(c) (1)(A)(i). The factors listed in §3553(a) include the nature of the crime, the defendant's characteristics and history, the danger to the public, and the sentencing range. 18 U.S.C. §3553(a).

The Policy Statement [USSG §1B1.13] has not been amended since the First Step Act was passed, so the USSC has not yet weighed in on the change. But several circuit courts that have addressed this question ["Whether the Policy Statement 1B1.13's applies to motions for compassionate release filed by prisoners?"] reached the conclusion that §1B1.13's text does not applied to compassionate releast motions filed by prisoners. See, United States v. Jones, 980 F.3d 1098 (6th Cir.2000); United States v. McCoy, 981 F3d 271, 281 (4th Cir.2020); United States v. Brooker, 976 F3d 228, 235-237 (2d Cir.2020)("[T]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for a compassionate release"); United States v. Long, Case No.20-3064, 2021 US App LEXIS 14682 (DC Cir. May 18, 2021)

~~(holding that Guideline 1B1.13 does not limit compassionate release motions when those motions are brought by prisoner instead of the BOP), including the Fifth circuit also as announced in United States v. Shkambi, Case No. 20-40543, 2021 WL 1291609 (5th Cir. April 7, 2021)(same). Neither Application Note 1(D), nor anything else in the now-outdated version of the Guideline §1B1.13 limits the district court discretion. See USSG §1B1.13.~~

Secondly, in balancing the §3553(a) Statutory Factors the government stated that the "applicable" Factors are "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrence to criminal conduct." But the only specific argument the government put forward as to why these factors necessitate Petitioner's continued incarceration boils down to its assertion, backed up by nearly three-decade year old prior armed bank robbery offense, that relief should be denied. [Doc.115]. This was a statutory procedural error, in assessment of the evidence the judge failed to consider (1) prison records, Bureau of Prisons ["BOP!"] data established Petitioner's non-threat to the community and now have designated him as minimum-custody-camp placement eligible; (2) non-violent nature of his primary mail fraud offense; (3) served approximately 67% of his applicable term of imprisonment; (4) the plea agreement itself is invalid because it contain[ed] explicity provision that restricted the Petitioner's from filing appeal and any collateral attack proceeding under 28 U.S.C. §2255 whatsoever and (5) In balancing the Section 3553(a) factors with respect to the community safety factor the district court had authority to consider sentencing law changes, including claim[s] that, "if he would be sentence today he would not be subject to harsh 150-month prison term because the original prison

~~"result in unlawful improper expansion of USSG §2B1.1"~~, citing United States v. Gee, ____ U.S. ____, 2021 WL 1168980 (10th Cir. Mar. 29, 2021), and United States v. Riccardi, 989 F.3d 374 (6th Cir. 2021). "Ibid.

STATEMENT OF THE CASE

Compassionate Release is a statutory discretionary sentence reduction for "extraordinary and compelling reasons" as permitted in certain circumstances by 18 U.S.C. §3582(c)(1)(A). It is typically reserved for extreme cases where an incapacitated or sick inmate is able to demonstrate, among other things, that he is suffers from a severe condition that substantial diminishes his ability to care for himself in prison and from which he is not expected to recover. USSG §1B1.13, comment. (n.1)(A)(ii). The COVID-19 pandemic has led to a todal wave of compassionate release motions in district courts across the country. This Writ of Certiorari arise from one of them. Bobby Earl Keys is in relatively bad health and the BOP's has prescribe several medications in effort to provide some treatment to his high blood pressure, Obesity, high cholesterol, Type 2 Diabetes via insulin dependent, including many other alignments-medical conditions such as stomach hernia [i.e. been untreated due to health risk of hernia surgery] and neuropathy [i.e. been untreated despite of tingle, numbness, rash, and burning which may caused legs or arms amputation].

In October 2020, with more than half of his 150 month prison sentence been served, Petitioner's file in the district court request for compassionate release pursuant to the First Step Act of 2018 and 18 U.S.C. §3582(c)(1)(A). He initially argued that compassionate release was warrant because (1) he was 58 years old; (2) he suffered from high blood pressure, congestive heart failure, diabetes-mellitus, obseity and neuropathy; and (3) if he were to contract COVID-19, he would be at increased risk of seriously complications accordance with CDC-guidance risk factors due to his pre-existing

~~medical conditions and age. He also provide medical records of his current Health or his Medical History.~~ Appendix 4.

The district court denied compassionate release because the Petitioner had "not sufficiently demonstrated that he has a serious medical condition that substantially diminishes his ability to care for himself." See Appendix 5 (citing USSG §1B1.13, comment (n.1)). Subsequently, the district court also denied relief under §3553(a) because of nearly three-decade-year old prior armed bank robbery offense is evidence that he is danger to the community or person. 18 U.S.C. §§3142(g), 3553(a).

Petitioner appeal the district court's determination that his health and the pandemic are not extraordinary and compelling reasons for compassionate release. And, district court committed procedural statutory error under §§ 3142(g), 3553(a) assessment of the evidence that he has been a danger in the past, whereas his past conduct bear no connection to any likelihood of future misconduct.

Given fact[s] that Petitioner's is suffering from stomach-hernia medical condition that flare up in his gut every time he sneeze or cough causing unbearable pain at time, including neuropathy medical condition that have got so severe causing numbness, tingle, burning in feets and may result[ed] in possible amputation, both of these medical conditions had went untreated by the BOP's Health Service Provider, taken together, met statutory Policy Program Statement U.S.S.G. App. C, Amend. 799 at 132 (effective Nov. 1, 2016) criteria that his medical conditions fall into that Category because if continue go untreated by BOP's and its Health Care Service such medical conditions would "substantially diminished his ability to provide self-care within Coleman-Low Facility".

REASONS FOR GRANTING THE PETITION

In reviewing the petitioner claims on appeal the appellate court's applied the wronged appellate standard of review to his claim that "district court committed statutory error under U.S.C. §§§, 3142(g), 3553(a) and USSG 1B1.1 et seq"; by failing to address the statutory factors "evidence that Petitioner's has been a danger in the past, which past conduct does not suggests the likelihood of any future misconduct". See United States v. Gunn, 980 F.3d 1178, 1181 (7th Cir.2020)(finding that until §1B1.13 is amended to reflect the First Step Act's change to its procedures, district judges must operate under the statutory criteria-extraordinary and compelling reasons - subject to deferential appellate review).

Several other appellate courts that have conduct appellate review have held that, "appellate review is subject to de novo both determinations about a defendant's eligibility for a Section 3582(c) sentence reduction and questions of statutory intrepretation." United States v. St. Amour, 886 F.3d 1009, 1013 (11th Cir.2018); United States v. Jones, 962 F.3d 1290, 1296 (11th Cir.2020); see also Dillion v. United States, 560 U.S. 817, 826-27, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010)(treating the eligibility determination as one of statutory intrepretation).

"Review de novo the interpretation of a sentencing guideline." See United States v. Warren, 820 F.3d 406, 407 (11th Cir.2016).

DISCUSSION

Here, a Fifth Circuit Court of Appeals panel applied wronged appellate standard of review to a claim that district court committed statutory error

under ~~18 U.S.C. §§ 3142(g), 3553(a) and USSG 1B1.1 et seq.~~, in reviewing his legal claim[s] that district court committed statutory procedure error in determined that he's met the criteria been dangerous to the community or any person. 18 U.S.C. §§ 3142(a), 3553(a) and USSG 1B1.1 et seq. The petition for a Writ of Certiorari should be granted.

As discussed in detailed below, Petitioner Keys had presented "some evidence" favorable to him relevant to the endangerment factors. While the government's relied exclusively on nearly three-decade-old prior armed bank robbery [1992] offense support it assessment that Petitioner's is a danger to the community. But the Petitioner's may not be denied compassionate release "based on evidence that he has been a danger nearly three-decade ago in the past", his past conduct is relevant only to the extent it suggests he will endanger the community in the future. See United States v. Dominguez, 787 F.2d at 707.

The Government evidence regarding the 1992 armed back robbery prior offense does not even attempt to connect the Petitioner's in the past to any potential future dangerousness. Otherwise, the Government-District Court's predicate finding reflects a misperception of §§ 3142(g), 3553(a) and 1B1.1 et seq."

The FIRST STEP Act plainly provides a potential avenue of compassionate release to prisoners who have served over 10 years, a population that likely received lengthy sentence by committing serious crimes decades prior. As evidence by the Petitioner's record of rehabilitation and lack of dangerousness in the past 29 years must be viewed holistically in concert with the extremely violent conduct back in 1992. These factors, on balance, such as entired record, the Petitioner's history and chatacteristics during the past 29 years demonstrate his rehabilitation and lack of dangerousness.

As a rule, the clear error appellate standard applies not only to the factual underlying the district court's decision, but "also to its assessment, based on those predicate facts, as to the danger presented by defendant release." United States v. Abuhamra, 389 F.3d 309, 317 (2nd Cir.2004). That is, "[t]he determination that "no condition or combination of conditions will reasonably assure the safety of the community" from a purportedly dangerous defendant is a mixed question of law and fact which court of appeals review for clear error." United States v. Ferranti, 66 F.3d 540, 542 (2d Cir.1995)(citation omitted); but see United States v. Shajkur, 817 F.2d 189, 197 (2d Cir. 1987)("[T]he court's ultimate finding may be subject to plenary review if it rests on a predicate finding which reflect a misperception of a legal rule applicable to the particular factors involved."); United States v. Gunn, 980 F.3d 1178, 1181 (7th Cir.2020)(finding that until §1B1.13 is amended to reflect the FIRST STEP Act's change to its procedure, district judges must operate under the statutory criteria-extraordinary and compelling reasons- subject to deferential appellate review).

In reviewing statutory finding or conducting its assessment, based on those predicate facts, as to the danger presented by defendant release, the appellate court's 'abuse of discretion' appellate standard of review was wronged, and thus, writ of certiorari should be granted in order to resolve conflict amongs of circuits i.e. Fourth, Fifth, Sixth, Seventh and Eleventh that has been applying different appellate standard in reviewing compassionate release judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bobby Earl Keys, Pro Se

Date: June 24, 2021