

21-5928
IN THE

SUPREME COURT OF THE UNITED STATES

In Re ANTHONY TERRY

ORIGINAL

Supreme Court, U.S.
FILED

SEP 15 2021

OFFICE OF THE CLERK

On Petition for Writ of Habeas Corpus
From the United States District Court for the
Middle District of Florida
Dist. Ct. Dkt. No. 3:10-cr-00017-MMH-JRK-1

Petition For Writ of Habeas Corpus
Under This Court's Original Jurisdiction

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Questions Presented

In a previous holding (Borden v United States, 141 S.Ct. 1817 (2021)), this Court determined that a mens rea element of "knowing and purposeful" is required to trigger the "elements clause" under the Armed Career Criminal Act. At similar time, this Court remanded back to the Tenth Circuit Ash v United States, No. 18-9639 (U.S. June 21 2021); dealing with the applicability of Borden to the Sentencing Guidelines Career Offender Section, to determine whether the same issue applies there.

The Questions Presented in this petition are:

- 1) Whether Borden's substantive interpretation of statute should be extended to Terry in light of the fact that Eleventh Circuit precedent prevents him from raising a Borden claim in the Eleventh Circuit.

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Statement of Reasons For Not Making Application
To the District Court of the District In Which the Applicant is Held

Terry is prevented from filing for habeas relief under 28 U.S.C. § 2255(e)'s "saving clause" which allows for filing for "traditional habeas relief" due to the McCarthan v Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1093 (11th Cir. 2017)(en banc), wherein the Eleventh Circuit held that a prisoner may only file under §2255(e) when "the sentencing court is unavailable". This holding prevents Terry's ability to file for traditional §2241 relief in the Eleventh Circuit.

Jurisdiction

The Supreme Court of the United States has original jurisdiction to hear a petition for Habeas Corpus under Article III of the United States Constitution.

Constitutional Provisions Involved

A. Article I, Section 9, Clause 2, United States Constitution

"The Priviledge of the Writ of Habeas Corpus shall not be Suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

B. Article III, Section 2, Clause 2, United States Constitution

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Statement of the Case

This case presents a pressing and dire question of great importance to all prisoners in both the Tenth and the Eleventh Circuits. That of how to handle the retroactivity of claims raised under Borden v United States, 141 S.Ct. 1817 (2021) for those prisoners who have previously filed a 28 U.S.C. § 2255 petition which did not raise the mens rea elements invalidated Borden. In Borden, this Court declared that only a mens rea of "knowing and purposeful" may trigger the "elements clause" for prior offenses to count as predicates for purposes of the Armed Career Criminal Act. The same language is used in the United States Sentencing Guidelines' Career Offender enhancement, and this Court remanded to the Tenth Circuit Ash v United States, No. 18-9639, manuscript op. at 1 to determine in light of Borden. Terry was sentenced to career offender status under the "elements clause" of U.S.S.G. § 4B1.1 for a previous conviction in Florida for "Lewd and Lascivious Battery", which carries strict liability and carries no mens rea element. The new rule in Borden, though is not Constitutional, but rather a statutory interpretation which makes Terry now actually innocent of his career offender status. This prevents him from being able to file his claim under both §2255 and §2241 in the Eleventh Circuit. No other extraordinary Writ is available to Terry at this time, as he is still incarcerated. This leaves him only able to file for the instant Petition for Writ of Habea Corpus under this Court's Original Jurisdiction in order to gain relief from what is now an unconstitutional sentence.

Reasons For Granting the Petition

I. Terry Is Currently Serving A Sentence That He Is Actually Innocent Of

In Borden v United States, 141 S.Ct. 1817 (2021), this Court announced that the "elements clause" of the Armed Career Criminal Act requires a mens rea of "knowing and purposeful", and that holding was extended to the United States Sentencing Guidelines § 4B1.1 in Ash v United States, No. 18-9639 (U.S. June 21, 2021). In the instant case, Terry was sentenced to "career offender" status under U.S.S.G. § 4B1.1; a section of the Guidelines with an "elements clause" worded identically to the "elements clause" of the ACCA. In Terry's case, a strict liability offense was used in order to justify this enhancement, i.e., a Florida conviction for "Lewd and Lascivious Battery".

The new rule announced in Borden is retroactively applicable to cases on collateral review because Bousley v United States, 523 U.S. 614 (1988) in combination with Bailey v United States, 516 U.S. 137 (1995) necessarily "logically dictate the retroactivity of the new rule" In re Henry, 757 F.3d 1151, 1160 (11th Cir. 2014). This Court has previously declared that "new substantive rules generally apply retroactively" Welch v United States, 136 S.Ct. 1257, 1264 (2016)(cleaned up). And the Suspension Clause – as demonstrated in Bailey, 516 U.S. 137, and Bousley, 523 U.S. 614 – requires that this retroactivity applies with equal force to cases on collateral review. See also: Montgomery v Louisiana, 136 S.Ct. 718, 731 (2016) "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void."

More particularly, Borden's rule is a new rule of substantive law because it is a new rule of statutory law that clarifies that courts have, until the issuance of the Borden rule, construed 18 U.S.C. § 924(e)(2)(B)(i) too broadly, in violation of the separation of powers, to criminalize conduct that Congress did not, in fact, criminalize. Borden, therefore "alters the range of conduct or the class of persons that the law [is understood to] punish[.]" Id., at 1264-65. It does so by "narrow[ing] [the previously understood] scope of a criminal statute by interpreting its terms..." Id at 1265.

And new rules of statutory law are retroactively applicable to the same extent that new substantive rules of constitutional law are. The Supreme Court has stated that it does not distinguish between the retroactivity of new substantive rules of law that statutory in nature and those which are constitutional in nature. See Id at 1264-65.

For example, in Bailey, 516 U.S. 137, and Bousley, 523 U.S. 614, this Court considered a new substantive rule of statutory law that, for purposes of determining retroactivity, is materially indistinguishable from the rule announced in Borden. In

Bailey, the Court construed 18 U.S.C. § 924(c)(1), which, at the time, imposed a prison term upon a person who "during and in relation to any... drug trafficking crime... uses or carries a firearm," to require evidence that the defendant actively employed the firearm during and in relation to the predicate crime. Bailey, 516 U.S. at 142-43. Previously, some courts had interpreted the provision to require evidence of only accessibility and proximity of a firearm during a drug trafficking crime, not of active employment.

Based on the Bailey's reading of §924(c)(1), the Court identified Bailey as a "decision of this Court holding that a substantive federal criminal statute does not reach certain conduct" and determined that pre-Bailey applications of §924(c)(1) "necessarily carr[ied] a significant risk that a defendant st[ood] convicted of an act that the law does not make criminal." Bousley, 523 U.S. at 620 (cleaned up). That, the Court explained, presented a constitutional problem, "[f]or under our federal system it is only Congress, and not the courts, which can make conduct criminal." Id, at 620-21. As such, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude [a prisoner] from relying on our decision in Bailey in support of his claim that his guilty plea [to 924(c)(1)] was constitutionally invalid" Id at 621.

As a result, this Court determined that Bailey's new substantive rule of statutory law was necessarily retroactively applicable under Teague v Lane, 489 U.S. 288 (1989) (abrogated on other grounds by Edwards v Vannoy, 141 S.Ct. 1547 (2021))

Precisely the same must be true of a Borden claim. In Borden, this Court considered what the government must prove for the ACCA enhancement to be applicable. The ACCA subjects a defendant to a mandatory minimum term of imprisonment of 15 years where that defendant has previously been convicted three times of a "violent felony" or a serious drug offense, or both, committed on occasions different from one another. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony," in relevant part, as "any crime punishable by a term of imprisonment exceeding one year that... has an element the use, attempted use, or threatened use of physical force against the person of another." Id, § 924(e)(2)(B)(i). Before this Court issued Borden, some courts (including Terry's sentencing court), construed this provision to mean that offenses with a mens rea below "knowing and purposeful" could qualify as "violent felon[ies]" under the ACCA. But in Borden, this Court concluded that the statutory text precludes that construction.

Accordingly, Borden announced the same type of new substantive rule of statutory law that Bailey did. In both cases, this Court issued a "decision[]... holding that a substantive federal criminal statute does not reach certain conduct" that, before the applicable decision, courts routinely applied to reach the non-covered conduct. See Bousley, 523 U.S. at 620. As a result, as the Court determined in Bousley with respect to pre-Bailey applications of §924(c)(1), pre Borden applications of career offender

status under the "elements clause" of the ACCA (and by use of identical language, U.S.S.G. § 4B1.1) that incorrectly recognized offenses with a mens rea element below "knowing and purposeful" to qualify as "violent felon[ies]" "necessarily carr[y] a significant risk that a defendant stands convicted of an act that the law does not make criminal." Id. And "it would be [just as] inconsistent with the doctrinal underpinnings of habeas review to preclude [a prisoner] from relying on [the Supreme Court's] decision in Borden in support of his claim that his [career offender enhancement] was constitutionally invalid," Id., at 621, as this Court determined it would be to preclude a prisoner from invoking Bailey to support his habeas claim that his conviction under §924(c) was invalid.

CONCLUSION

Bailey and Bousley logically and necessarily demand the conclusion that Borden announced a new rule of substantive law that is retroactively applicable under Teague (and the Suspension Clause) to cases on collateral review. See also, Montgomery v Louisiana, 136 S.Ct. 718, 729-31 (2016) ("substantive rules must have retroactive effect regardless of when the defendant's conviction became final"). That means that a prisoner with a Borden claim **must** be able to seek Habeas Relief, even though Eleventh Circuit precedent precludes a prisoner's ability to file for Habeas Relief in either the district court of sentencing, or the district court where he is imprisoned, when he has previously filed a 28 U.S.C. § 2255 petition. As does AEDPA's bar on second or successive §2255 petitions. For the foregoing reasons, I Anthony J. Terry, hereby request this Court's relief in the form Granting a Writ of Habeas Corpus under Borden v United States, 141 S.Ct. 1817 (2021).

Respectfully Submitted,

Anthony Terry

Anthony J. Terry

9-14-2021

Date

with inmate assistance by Christopher D. Cobb #37691-051

Certificate of Service

I, Anthony J. Terry, hereby swear under penalty of perjury that the foregoing was placed in the hands of the FSL Jesup Legal Mail Representative on 9-15-2021 and ask the Clerk of Court to provide copies to:

Attorney of Record

U.S. Attorney's Office, Middle District of Florida

Respectfully Submitted,

Anthony Terry
Anthony J. Terry

9. 14 - 2021
Date