

No. 21-7478

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK JEROME SPENCER- PETITIONER

VS.

UNITED STATES OF AMERICA- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Derrick Jerome Spencer

#14779-041

Federal Prison Camp

P.O. BOX 1000

Duluth MN 55814

FILED

MAR 23 2022

CLERK OF THE COURT

ORIGINAL

QUESTIONS PRESENTED

1. Whether Petitioner Is Being Deprived Of His Civil Right Of Personal Liberty Against Law (Without Due Process Of Law) In Violation Of The Constitution And Laws Of The United States
2. Whether Section 404 Of The First Step Act Authorize a "Full Resentencing" Entitled To Due Process Protection
3. Federal Courts Around The World Are Depriving Defendants 1881 Crack Cocaine Sentences Against Law By Denying Them Resentencing Under The New Crack Cocaine Guidelines

LIST OF PARTIES

[x] All parties appear in the caption on the cover page.

RELATED CASES

United States v Derrick Jerome Spencer,
07-cr-174-JRT-JJG, U.S. District Court
of Minnesota. Judgment entered
12-20-21

United States v Derrick Jerome Spencer,
No. 22-1026, United States Court of
Appeals for the Eighth Circuit. Judgment
entered 3-17-22

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TABLE OF AUTHORITIES CITED

CASES

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Apprendi v. New Jersey,
530 U.S. 466 (2000)

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Poe v. Ullman, 367 U.S. 497 (1961)

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United States v. Spencer,
998 F.3d 843, 845 (8th Cir. 2021)

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STATUTES AND RULES

Section 404 of the First Step Act (2018)

(5-6)

Federal Rules of Criminal Procedure 32

(11)

United States Sentencing Guidelines

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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

☒ For cases from Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

☒ is published

The opinion of the United States District Court appears at Appendix B to the petition and is

☒ is published

JURISDICTION

[X] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was 3-17-22

[X] No petition for rehearing was timely filed in petitioner's case.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

Judgment was entered 3-17-22

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment

Section 404 of the First Step Act (2018)

STATEMENT OF THE CASE

1. In 2007, Petitioner was convicted and sentenced for felony crimes presented on a criminal complaint never submitted to a Grand Jury for its lawful return.
2. On December 21, 2018, the First Step Act was enacted.
3. On May 27, 2021, the Eighth Circuit Court of Appeals reversed the district court's decision denying petitioner resentencing under Section 404 of the First Step Act.
4. On December 20, 2021, the district court issued a final decision.
5. On March 17, 2022, the court of appeals summarily affirmed the decision.
6. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Fifth Amendment provides in relevant part:

No person shall be deprived of liberty without due process of law.

This provision stands that no person can be deprived of any of the (civil rights) individual rights of personal liberty guaranteed by the United States Constitution.

The First Step Act, § 756, was enacted on December 21, 2018. It provides:

a) DEFINITION OF COVERED OFFENSE - In this section, the term "covered offense" means the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) that was committed before August 3, 2010.

b) DEFENDANT'S PREVIOUSLY SENTENCED - A court that imposed a sentence for a covered

offense may, on motion of the defendant, the Director of the Bureau of Prisons, the Attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

c) LIMITATIONS- No court shall entertain a motion made in this section to reduce a sentence if the sentence was previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of the enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Section 404 mandates a court upon motion of a defendant to impose a sentence applicable to the changes made from the 100:1 ratio to the 18:1 ratio in regard to sentences involving crack cocaine. Section 2 of the Fair Sentencing Act of 2010 (hereafter FSA 2010) reduced the penalties for offenses involving cocaine base or crack cocaine by increasing the threshold amounts of crack need to trigger mandatory minimum sentences under Section 841(b)(1).

After the Statute's effective date of August 3, 2010, the amount of crack necessary to trigger the 5 to 40 year imprisonment range under 21 U.S.C.S. 841(b)(1)(B) increased from 5 to 28 grams. Likewise, the quantity of crack needed to trigger the 10 years to life imprisonment range under 21 U.S.C.S. 841(b)(1)(A) increased from 50 to 280 grams.

As long as the offense committed prior to August 3, 2010 involves the modified sections of the Statute in which 5 grams of crack increased to 28, and 50 grams

increased to 280, a defendant is covered by this section. See 404(a) (DEFINITION OF COVERED OFFENSE).

And a court has a mandatory duty to establish a reduced sentence for the modified sections of the Statute, as long as the sentence includes a covered offense. In other words, if a sentence includes a conviction of 5 grams or more of crack or 50 grams or more of crack, the court must not look beyond those modified sections of the statute while applying a reduced sentence.

The court must specifically "resentence" a defendant using only the modified "crack" sections of the Statute. Those sections that have been increased to 28 grams or more and 280 grams or more. See 404(b) "A court that imposed a sentence for a covered offense" must "impose a reduced sentence as if."

Congress intent is to eliminate unconstitutional sentences of defendants still serving time for harsh penalties of crack cocaine prior to FSA 2010, and replace them with a sentence prescribed by law as it stands today, "without Government interference."

This is understood by mandatory language used in 404(b). The words "may" (must, shall, is required to) and "impose" (establish, apply as mandatory) are used to compel a court to create a sentence in accordance with Sections 2 and 3 of FSA 2010.

Footnote: The word "may" has been found to be synonymous with shall by many courts. See Black's Dictionary at "may."

This understanding is reiterated by Congress restricting relief to those that previously benefited from FSA 2010 and those denied a motion after "complete review" of it on the merits. See 404(c). See also (c) at, nothing in this section shall be construed to require a court to reduce any sentence pursuant to this Section.

By this language, Congress prevented the government from advocating for a reduction of a defendant's original sentence. Resentencing is intended.

Here, the petitioner was convicted of and sentenced to 50 grams or more of crack cocaine in violation of 21 U.S.C.S. 841(a)(1)(b)(1)(A) and 846 prior to August 3, 2010. In accordance with the modified sections of 21 U.S.C.S. 841(A)&(B), the petitioner's statutory penalties are no longer 10 years to life imprisonment but only 5 years to 40. Furthermore, under the new crack cocaine guidelines, 50 grams or more of crack cocaine which is at least 28 but less than 112 grams of crack

(10)

activate base offense level 24 as opposed to the base offense level 30, for at least 50 grams of crack cocaine but less than 150 grams, prior to 2010.

Section 404 of the First Step Act authorizes a "full resentencing" for all defendants with a covered offense under this section.

This resentencing is protected by the Due Process Clause, Rule 32 of the Federal Rules of Criminal Procedure establish sentencing procedures.

As the Honorable Justice Harlan wrote, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961):

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational

Continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

Applicable Guideline Range For Petitioner's Multi Drug Offense (Converted Drug Weight)

The Eighth Circuit Court of Appeals found Petitioner eligible for resentencing under Section 404 of the First Step Act. *United States v. Spencer*, 998 F.3d 843, 845 (8th Cir. 2021).

Section 404(b) of the First Step Act authorizes a reduced sentence for a "covered offense" as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed. See Section 404(b).

Petitioner was convicted of, and sentenced for a conspiracy to distribute at least 5 kilograms of cocaine, and at least 50 grams of cocaine base both in violation of Title 21, United States Code

(12)

Sections 841(a)(1), 846, and 841(b)(1)
(A) & (B).

Under the United States Sentencing Guidelines, 1 gram of cocaine = 200 grams of converted drug weight. 5 kilograms of cocaine is 5,000 grams which amounts to 1,000,000 grams of converted drug weight. 1,000,000 grams of converted drug weight equals 1,000 kilograms of converted drug weight.

Furthermore, 1 gram of cocaine base = 3,571 grams of converted drug weight. 50 grams of cocaine base is 178,550 grams of converted drug weight. 178,000 grams of converted drug weight equals 178.55 kilograms of converted drug weight.

5 kilograms of cocaine and 50 grams of cocaine base is equivalent to 1,178.55 kilograms of converted drug weight.

This sum of converted drug weight establish a base of level of 30, at least 1,000 kilograms but less than 3,000 kilograms of converted drug weight. See U.S.S.G. 2D11(c)

Offense level 30 in criminal history category 3 provide a guideline range of 121-151 months of imprisonment, which is petitioner's applicable guideline range for his covered offense.

The guideline range presented is absolutely accurate based on the jury's verdict and the principles articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000) (Any fact other than a prior conviction that increases the penalty for a crime beyond the "Prescribed Statutory Maximum" must be submitted to a jury and proved beyond a reasonable doubt).

Based on the foregoing Petitioner is being deprived of his civil right of personal liberty against law, and is currently unlawfully restrained of his liberty.

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CONCLUSION

Petitioner has exceeded his prison time authorized by law being that he has served approximately 15 years of imprisonment.

In accordance with due process of law, the petitioner is entitled to immediate discharge. The petition for writ of certiorari should be granted.

Derrick Jerome Spencer submits this petition for writ of certiorari on this 20th day of March, 2022.

Respectfully submitted,

s/ *Derrick Spencer*

Dated: 3-20-22