22-6137

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BRYAN THORNTON — 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 THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRYAN THORNTON 35397-066
(Your Name)

U.S.P. CANAAN P.O. BOX 300
(Address)

WAYMART, PA 18472
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1.) The question presented here is the same as that presented in Concepcion v. United States, No. 20-1650, on which this Court granted certiorari on September 30, 2021, and heard oral argument on January 19, 2022: Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal developments.

2.) IS A DEFENDANT ELIGIBLE FOR RELIEF PURSUANT TO THE FIRST STEP ACT OF 2018 IF HE WAS CONVICTED UNDER 21 U.S.C. 848?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

UNITED STATES V. BRYAN THORNTON, No. 21-3322 (Third Circuit December 3, 2021)

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STATUTES AND RULES

OTHER

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 & B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix C 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[ ] is unpublished.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[ ] is unpublished.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 AUGUST 5.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 22,2022, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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

STATEMENT OF CASE

In October of 1991, Petitioner Bryan Thornton and 25 co-defendants were charged in an indictment with Conspiracy to Distribute 5 kilograms or more of a substance containing a detectable amount of cocaine, a schedule II narcotic controlled substance, and to Distribute and Possess with the Intent to Distribute a substance containing a detectable amount of Heroin, in violation of Title 21 U.S.S. 841(a)(1).

Specifically, Petitioner Thornton was charged with the following three (3) Counts:

1). COUNT 1-DRUG CONSPIRACY, IN VIOLATION OF 21 U.S.C. § 846

2). COUNT 4-ENGAGING IN A CONTINUING CRIMINAL ENTERPRISE (CCE) IN VIOLATION OF 21 U.S.C. § 848(b)

3). COUNT 11-DISTRIBUTION OF FIVE (5) KILOGRAMS OR MORE OF COCAINE, TO WIT APPROXIMATELY TWO HUNDRED AND THIRTY (230) KILOGRAMS OF COCAINE, IN VIOLATION OF 21 U.S.C. § 841(a)(1).

SEE EXHIBT 1- PETITIONER THORNTON INDICTMENT

Petitioner Thornton proceeded to trial. On April 23, 1992, a jury convicted Petitioner Thornton on all three Counts. Pursuant to the United States Sentencing Guidelines Section 2D1.5(a), the base offense level for the CCE Offense (Count 4) was:

(a) Base Offense Level (Apply the Greater)

(1) 4 plus the offense level from 2D1.1 applicable to the underlying offense; or

(2) 38

SEE U.S.S.G. SECTION 2D1.5(a)

Prior to Sentencing, the Probation Office determined that the conspiracy was responsible for distributing 1,000 kilograms of cocaine and that Petitioner Thornton was responsible for this quantity. *See PSR paragraph 44*. At the time of Sentencing in 1992, this drug amount quantity carried a base offense level of 40. With the guideline-mandated 4-level increase under 2D1.5(a) for the CCE Conviction, Petitioner Thornton's Base Offense Level was 44. Probation then recommended that Petitioner Thornton receive a 2-level enhancement for gun possession[1], resulting in a total offense level of 46. On

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[1] In the instant matter, the Government failed to disclose until after trial two letters from the Drug Enforcement Administration (DEA) detailing payments made to two cooperating government witnesses, Dwight Sutton and Darrell Jamison. Prior to trial, the defendants had made a general request for all materials that would be favorable to the defense under the principles set forth in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, including information concerning arrangements with or benefits given to government witnesses. The government produced witness agreements (including immunity agreements) and information documenting payments to several cooperating witnesses. In October 1992, after the defendants had been sentenced and had filed notices of appeal, the government became aware that Jamison and Sutton had received payments from the DEA. Shortly thereafter, it provided this information to defense counsel. Thornton then moved for a new trial pursuant to Fed.R.Crim.P. 33 on the ground of newly discovered evidence,8 asserting that the failure to disclose the DEA payments deprived him of the ability to cross-examine effectively two witnesses whose testimony and credibility were central to the government's case. The district court, after ascertaining that it had jurisdiction to entertain the post-trial motions, see United States v. Cronic, 466 U.S. 648, 667 n. 42, 104 S. Ct. 2039, 2051 n. 42, 80 L. Ed. 2d 657 (1984), denied the motions on their merits. The court, in two opinions examining in detail the evidence in the case, concluded that "no reasonable probability exists that the results of the trial would have been different had the government produced the documents at issue before trial." App. at 55, S.App. at 93. The Third Circuit stated the following in its opinion: "It is evident that the information that was not disclosed fell within the Brady rule, and should have been disclosed by the government. In Perdomo, we held that "the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." 929 F.2d at 970. More recently, in United States v. Joseph, 996 F.2d 36 (3d Cir.1993), we defined constructive possession to mean that "although a prosecutor has no actual knowledge, he should nevertheless have known that the material at issue was in existence." Id. at 39.

We understand the government's brief to explain that the prosecutors themselves did not know of the DEA payments to the witnesses. That is hardly an acceptable excuse. The prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses. See Perdomo, 929 F.2d at 970-71.

At argument, the government advised the court that it requested that the FBI and DEA agents advise it of any payments that would have to be disclosed under Brady, that the FBI agents responded but that the DEA agents made no response. There is no indication that the prosecutors made any follow-up inquiry. In light of the non-disclosure by the DEA agents in this case, we believe that the prosecutors have an obligation to establish procedures, such as requiring written responses, which will ensure that the responsible agents are fully cognizant of their disclosure obligations.

..... In denying defendant Thornton's motion for a new trial, the district court found

Sutton did not provide any testimony, on either direct or cross examination, about Thornton. Jamison provided only minimal testimony regarding Thornton. He testified that he saw Thornton on one occasion ... in 1989 with co-conspirator Aaron Jones and Reginald Reaves and on another occasion at Jamison's house when Thornton

August 5, 1992, the District Court sentenced Petitioner Thornton to life imprisonment. Petitioner Thornton's conviction and sentence was affirmed on appeal by the Third Circuit Court of Appeals. *SEE UNITED STAES V. THORNTON, 1 F.3d 149, 151-52 (3d Cir. 1993)*.

On November 3, 1999, Petitioner Thornton filed a Motion to Vacate, Set Aside or Correct sentence pursuant to 28 U.S.C. 2255. On January 7, 2000, the District Court denied Petitioner Thornton's 2255 Motion. Petitioner Thornton filed a second 2255 motion on January 31, 2001.Petitioner Thornton's second 2255 petition was dismissed without prejudice on February 21, 2001. Petitioner Thornton proceeded to file a third 2255 petition on May 28, 2002, which was later denied also. Petitioner Thornton filed his fourth 2255 Petition on July 10, 2006, which was dismissed with Prejudice.

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had a gun in his possession. Jamison did not implicate Thornton in any specific criminal conduct. In fact, Jamison did not even testify that he knew Thornton to be a member of the JBM.

S.App. at 92 (record citations omitted). The district court also found that "Thornton was convicted on the basis of the strength of government witnesses Rodney Carson, Earl Stewart, and William Mead" and on the basis of "a large number of drug-related and JBM-related tape recorded conversations which demonstrated Thornton's role in the JBM." S.App. at 92. Thus, the court concluded that there was no reasonable probability that the outcome of the trial would have been different had the DEA payments been disclosed.

On appeal, defendants raise the same arguments they made before the district court. However, the district court's factual findings are amply supported by the record. The court conducted the paradigmatic review required when the government fails to meet its Brady obligation. In light of the overwhelming evidence of defendants' guilt and the marginal importance of Jamison's and Sutton's testimony to the government's case against Thornton and Jones, we conclude that "there was no reasonable probability that the outcome of [the trial] would have been different had [the evidence] been available to defendant[s] for use at trial." Hill, 976 F.2d at 139. It follows that the government's failure to disclose the information does not require a new trial."

What the Appellate Court failed to take into account is the fact that Jamison's testimony concerning Petitioner Thornton allegedly possessing a firearm has a dramatic effect concerning Petitioner Thornton's offense level at Sentencing, in which the sentencing guidelines were applied in a mandatory fashion from 1987 until 2005. This 2-level enhancement is the difference between a 30-year sentence versus a life sentence. Who's to say Judge Katz would have applied the firearm enhancement if he knew about the undisclosed DEA payments to Jamison? The validity and veracity of Jamison's testimony comes into question once knowledge of the undisclosed DEA payments came to light. It's highly likely that Jamison committed perjury when he testified due to the fact that he failed to disclose the DEA payments he received. Does Judge Katz apply the 2-level firearm enhancement if Jamison perjured himself?

Petitioner Thornton then filed a Motion to Reduce Sentence based on Amendment 505 of the U.S.S.G., which was denied. Petitioner Thornton's other two motions, Motion to Correct Sentence pursuant to Federal Rule of Procedure 52(b) and Motion to Appoint Counsel, were also denied. On February 24, 2006, Petitioner Thornton was granted a 2-level sentence reduction in his total offense level (from level 46 to level 44) under Amendment 505 of the U.S.S.G., which eliminated the base offense levels of 40 and 42 and replaced them with a revised maximum base offense level of 38.. Unfortunately, despite this reduction, Petitioner Thornton's new guideline range (44) still mandated a term of life imprisonment.

On April 2, 2009, the District Court denied Petitioner Thornton's second Motion to Correct an incorrect application of the Guidelines pursuant to 18 U.S.C. 3582(C)(2) and Motion for Appointment of Counsel. On January 11, 2010, Petitioner Thornton filed a Motion for Relief pursuant to Fed.R.Civ.P 60(b)(6), in which Petitioner Thornton argued that the Court had jurisdiction to grant relief whereby his total offense level could be reduced by removing the two-level gun enhancement under Section 2D1.1(b)(1) for Possession of s Firearm during a drug trafficking Offense due to the Third Circuit Court of Appeals ruling in United States v. Bernard Fields, Petitioner Thornton's co-defendant. The District Court denied Petitioner Thornton's Rule 60(b) Motion under this reasoning:

> ".....As such, the Court does not have the jurisdiction to adjudicate the instant claim. *See Mortimer, 2007 U.S. District LEXIS 24734, at *3(holding that where the defendant Has no civil action pending and sought to have his criminal sentence amended, "Civil Rule 60 does not apply and provides no basis for jurisdiction for this Court to amend Defendant's criminal sentence in this case").*
>
> For these reasons, the Court will deny Petitioner's motion for relief under Rule 60(b)(6)."

See District Court Order, dated August 16, 2010

In April of 2014, Petitioner Thornton filed a Motion to Reconsider Sentence. Petitioner Thornton argued that the District Court should have conducted a *de novo* resentencing when the District Court was considering to reduce his sentence pursuant to Amendment 505 and Section 3582(c)(2). The Court denied this motion as an untimely motion to reconsider its April 2009 order denying his motion to modify his sentence. Petitioner Thornton did not appeal this decision, but, in June of 2014, filed a motion to modify his sentence, which was captioned "Nunc Pro Tunc Review 18 U.S.C. 3582(c) Motion Amendment 505." The Court denied this motion due to the fact that the motion asserted the same grounds for relief as the April 2014 motion. Petitioner Thornton appealed this decision. The Third Circuit Court of Appeals rejected Petitioner Thornton's arguments and affirmed the District Court's ruling. *See United States v. Thornton, 600 fed App'x 819 (3d Cir. 2015)*.

On October 22, 2015, Petitioner Thornton filed a Motion for a Reduction of Sentence pursuant to Amendment 782 of the United States Sentencing Guidelines. *SEE DDE #56*. On November 10, 2015, the government filed a response in opposition of the sentence reduction. The government's position was that Petitioner Thornton was ineligible for a sentence reduction because Amendment 782 did not lower his guideline range. The Court agreed with the government's position and denied the motion on February 6, 2019. *SEE DDE #617*. The Court was cognizant that Amendment 505 reduced Petitioner Thornton's Base Offense Level to 38, and his Total Offense Level to 44. The Court specified that Amendment 782 did not further reduce Petitioner Thornton's Offense Level because the quantity of cocaine involved in his offense continued to carry a Section 2D1.1 Base Offense Level of 38, which applied to all offenses involving 450 or more kilograms of cocaine. The Court concluded that Petitioner Thornton's Total Offense Level remained 44, and his guideline range remained life in prison.

On June 5, 2019, Petitioner Thornton filed a document captioned "Amendment Motion 782". *SEE DDE #619*. The government filed its response on July 2, 2019. The Court denied Petitioner Thornton's motion on September 3, 2019. Petitioner Thornton did not appeal the Court's decision.

On September 24, 2020, Petitioner Thornton filed a third (3) Motion for a Reduction of Sentence pursuant to Amendment 782. The Court denied the motion on October 16, 2020, stating that it was Petitioner Thornton's third request for relief pursuant to Amendment 782 and that Petitioner did not provide a basis to revisit its prior rulings. On November 10, 2020, Petitioner Thornton filed a Motion for Reconsideration of the Court's October 16, 2020 order denying his motion. On September 9, 2021, the District Court denied Petitioner Thornton's Motion for Reconsideration.

On In November of 2021, Petitioner Thornton filed a Motion for a reduction of Sentence pursuant to the First Step Act. Petitioner Thornton argued that the process in determining whether a defendant is eligible for relief pursuant to the First Step Act is straightforward. First, the Court must identify the defendant's "Statute of Conviction". *See United States v. Jackson, Case No. 19-2499 (3d Cir. July 1, 2020)*. The Court then determines whether the penalties for the defendant's statute of conviction were modified by the Fair Sentencing Act of 2010. The Court then considers 3553(a) factors and whether to reduce a defendant's sentence. See United States v. Easter, case no. 19-2587 (3d Cir. September 15, 2020). Petitioner Thornton then argued that the lead Count in his case was Count 4, the CCE Count (21 U.S.C. 848). The CCE Count is the "Statute of Conviction" in the instant matter. The Fair Sentencing Act of 2010 did modify 21 U.S.C. 848. In *Jackson*, the Third Circuit Court of appeals clarified the eligibility requirements by stating:

> "**To summarize, § 404 eligibility turns on a defendant's statute of conviction, not on his possession of a certain quantity of drugs**. The last antecedent rule and other textual indicia of

congressional intent supports this conclusion, and the government's various counterarguments are unavailing."

Furthermore, Petitioner Thornton then argued that pursuant to the Third Circuit's decision in *Easter*, this Court must take into account 3553(a) factors when deciding whether to grant or deny a Motion requesting relief pursuant to the First Step Act. Petitioner Thornton raised the following in his First Step Act Motion in the District Court:

1. **RUTLEDGE ISSUE**

   Petitioner Thornton was convicted by a jury for Drug Conspiracy (Count 1) in violation of 21 U.S.C. 846 and for Engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. 848. In *Rutledge v. United States, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996)*, the Supreme Court held that " A guilty verdict on a §848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of §846; Conspiracy is therefore a lesser included offense of CCE. Because the Government's arguments have not persuaded us otherwise, we adhere to the presumption that congress intended to authorize only one punishment. Accordingly, "one of petitioner's convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated." Petitioner Thornton's current sentence and conviction for Conspiracy is in violation of the Fifth Amendment's Double Jeopardy Clause of the United States Constitution.

2. **RICHARDSON ISSUE**

   At petitioner Richardson's trial for violating 21 U. S. C. § 848-which forbids any "person" from "engag[ing] in a continuing criminal enterprise," § 848(a), and defines "continuing criminal enterprise" (CCE) as involving a violation of the drug statutes where "such violation is part of a continuing series of violations," § 848(c)-the judge rejected Richardson's proposal to instruct the jury that it must unanimously agree on which three

acts constituted the series of violations. Instead, the judge instructed the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses but did not have to agree as to the particular offenses. The jury convicted Richardson, and the Seventh Circuit upheld the trial judge's instruction. The Supreme held that "A jury in a § 848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series." *See Richardson v. United States, 516 U.S. 813, 817-824 (1999)*.

In Petitioner Thornton's case, the Court gave the following jury instructions regarding the §848 Count:

"...A continuing series of violations means at least three violations of the Federal Controlled Substances Act and heroin and cocaine, as I told you, are controlled substances.

Those violations, the continuing series, must be over a definite period of time as charged in the indictment. It requires a finding that those violations were connected together as a series of related activities as distinguished from isolated or disconnected events.

You must agree unanimously on which three acts constituted the continuing series of violations and that five individuals were being supervised...."

See EXHIBIT 1-Jury Instructions, pgs. 106-107

In Petitioner Thornton's case, the three acts constituting a continuing series of violations were never unanimously agreed upon by the jury and the fact that Petitioner Thornton's Conspiracy conviction should be vacated pursuant to *Rutledge* should be reviewed.

REASONS FOR GRANTING THE PETITION

In the instant matter, the District Court never took into consideration the

intervening changes in law (*Rutledge, Richardson, Apprendi, Booker, Alleyne, Peppers,* etc. in determining whether a reduction of sentence was justified. The Appellate Court was under the impression that it could not consider any of the intervening changes in law when it denied Petitioner Thornton relief. See Appellate Opinion Footnote 1.

CONCLUSION

Pursuant to the facts of the case, this Honorable Court should grant a writ of certiorari to Petitioner Thornton.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bryan Thornton

Date: 10/31/22