

22-6658

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JAN 17 2023

OFFICE OF THE CLERK

WADE BONK — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Wade Bonk
(Your Name)

Henry Hill Correctional Center
(Address)

P.O. Box 1700
Galesburg, IL. 61402
(City, State, Zip Code)

N/A
(Phone Number)

LIST OF PARTIES

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:

QUESTION(S) PRESENTED

Did the District Court err by refusing to apply the Seventh Circuit's ruling in U.S. v. Carnell retroactively since Petitioner's conviction was not finalized?

Did the District Court err by including two point Leadership role where Petitioner never exercised any control or authority over anybody in the conspiracy and the record does not support this enhancement?

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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 B 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 is unpublished.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 A to the petition and is

reported at Bonk v. U.S., 2022 U.S. DIST. LEXIS 24862; 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 is unpublished.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 is unpublished.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 is unpublished.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 October 31, 2022.

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

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the

sentecne to vacate, set aside, or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the application has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is adequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

Petitioner Wade Bonk was charged by superseding indictment with conspiracy to distribute and possess with intent to distribute at least 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The charges alleged that Mr. Bonk along with Darcy Kampas and Timothy Wood, were part of a conspiracy to distribute a substantial amount of methamphetamine in the Central Illinois area. The conspiracy ended on September 15, 2017, when Kampas was pulled over for speeding and methamphetamine was subsequently found in her car. The government claimed Mr. Bonk distributed 1.5 kilograms of ice methamphetamine.

In July of 2018, Mr. Bonk pled guilty without a written plea agreement. After resolving objections in earlier versions, the United States Probation Office prepared a third revised Presentence Investigation Report (PSR) prior to the sentencing hearing. The PSR claimed Mr. Bonk purchased methamphetamine from a guy named "Coupland" in Galesburg, IL. with Lewis Lowrey, all of which was of poor quality. [d/e 127, ¶7] Then they bought methamphetamine from some "man" in Monmouth, IL., but they went back and "beat the man" because it was poor quality. They discovered the man's source was Coupland so they went back to Coupland to purchase poor quality methamphetamine. None of this methamphetamine was tested and they calculated it to total 453.6 grams, yet they calculated it as "ICE" quality, being over 80% purity.

After Mr. Bonk had a falling out with Lewis Lowrey, he had co-defendant, Timothy Wood drive him seven times to purchase methamphetamine. Each purchase was through Coupland or different dealers as Mr. Bonk searched for a better supply of drugs. None of the methamphetamine was tested and it totaled 805.45 grams. The PSR doesn't allege it was ICE quality (over 80% pure) but it was calculated as ICE [d/e doc 127, ¶ 10].

The PSR states that three trips with Wallace McCreary to purchase methamphetamine in Clinton, Iowa, a different source than previous deals. None of it was tested and totaled 170.1 grams, yet it was calculated as ICE quality.

After Mr. Bonk was arrested in an unrelated State charges, his co-defendants in this case, Darcy Kampas and Timothy Wood tried to purchase four ounces of methamphetamine. None of their regular sources had any, so they purchased one ounce from a new source and then another three ounces from a different new source. As Kampas and Wood returned to Pekin, IL. they were pulled over and officers found several packages of methamphetamine that totaled 111 grams, with 25.3 grams had a purity of 98% and 83.2 grams had a purity of 84%. [d/e doc. 127 1119-20]. There is no doubt that the 111 grams of methamphetamine that was confiscated and tested is ICE quality.

The PSR calculated all of the methamphetamine attributed to Mr. Bonk as ICE quality with a base offense level calculated as 36. Along with a two-point enhancement for his role in the offense, his adjusted base offense level was 38. The PSR also found that Mr. Bonk was a career offender under USSG §4B1.1, but because the career offender base offense level was lower (37), the higher adjusted offense level applied. After a three point reduction for acceptance of responsibility, his total level was 35. Combined with his criminal history score of VI, his sentencing guidelines range was 292 to 365 months' imprisonment.

However, prior to Mr. Bonk's conviction being finalized, the Seventh Circuit decided *U.S. v. Carnell*, 972 F.3d 932 (7th Cir. 2020), which held the government failed to meet its burden of establishing that the drugs at issue were "at least 80% pure methamphetamine because proof consisted predominantly of circumstantial evidence by users, dealers,

and law enforcement that the drugs appears to be ICE, based on look, smell, and nomenclature. Further, this Court held dealers and users cannot detect the difference between 65%, 79%, and 80% purity of methamphetamine".

Mr. Bonk filed his §2255 motion claiming the District Court erred in calculating all of the methamphetamine attributed to him as ICE quality (being over 80% pure), along with the incorrect sentencing guidelines that included the two points for his role in the offense. The District Court denied the motion and the certificate of appealability. Mr. Bonk filed a notice of appeal and asked the Seventh Circuit to allow him to appeal, which the Seventh Circuit denied on October 31, 2022. This writ follows.

REASONS FOR GRANTING THE PETITION

- I. THE DISTRICT COURT FAILED TO APPLY THE SEVENTH CIRCUIT'S RULING IN U.S. v. CARNELL, 972 F.3d 932 (7th Cir. 2020), RETROACTIVELY TO PETITIONER'S CASE SINCE HIS CONVICTION WAS NOT FINALIZED WHEN CARNELL WAS DECIDED AND THE SENTENCING GUIDELINES CALCULATED IN THE FINAL PSR CLAIMED ALL OF THE METHAMPHETAMINE ASSOCIATED WITH THE CONSPIRACY WAS "ICE" QUALITY (OVER 80% PURE) EVEN THOUGH THE MAJORITY OF THE DRUGS WERE CONSIDERED POOR QUALITY

As alleged in the conspiracy, Mr. Bonk was responsible for distributing 1,540.15 grams of methamphetamine with a purity of 80% or higher. The third and final revised PSR claimed Mr. Bonk purchased methamphetamine from multiple sources. The PSR cited four people that Mr. Bonk purchased the drugs with. Lewis Lowrey claimed he drove Mr. Bonk purchased a total of 453.6 grams of poor quality methamphetamine. See District Exhibit (d/e) document 127 at ¶ 8). Yet, the PSR calculated the methamphetamine associated with Lewis Lowrey at high quality "ICE".

The PSR further claimed Wallace McCreary drove Mr. Bonk to purchase methamphetamine on three occasions that totaled 170.1 grams. None of it was tested and the PSR alleged it was ICE quality. The PSR also claimed Timothy Wood, a co-defendant in the conspiracy, drove Mr. Bonk seven times to purchase methamphetamine and it totaled 805.45 grams. Each time Timothy Wood drove Mr. Bonk it was poor quality, yet, it was calculated as "ICE" (over 80% pure).

The PSR also claimed the methamphetamine both co-defendants, Timothy Wood and Darcy Kampas, had in their possession when they were arrested, 111 grams. 25.3 grams had a purity of 98% and 83.2 grams had a purity of 84%. (d/e doc. 127 at ¶¶19-20). There is no doubt that the 11 grams associated with co-defendants Wood and Kampas should be calculated as "ICE", being it was tested and proven to be over 80% pure.

After Mr. Bonk pled guilty and the PSR was drafted, the District Court imposed a 262 month sentence, 30 months below the sentencing guidelines. Mr. Bonk filed a notice of appeal and the Seventh Circuit affirmed the judgment on July 24, 2020. U.S. v. Bonk, 967 F.3d 643 (7th Cir. 2020). However, on August 28, 2020, the Seventh Circuit held that the government failed to meet its burden of establishing that the drugs at issue were "at least 80% pure methamphetamine because its proof consisted predominantly of circumstantial evidence by users, dealers, and law enforcement that the drug appears to be ICE, based on look, smell, and nomenclature. Further, the Court held dealers, and users cannot detect the difference between 65%, 79%, and 80% purity of methamphetamine."

Mr. Bonk raised this claim in his §2255 motion. The District Court agreed that Mr. Bonk "may have had a valid claim that at least some of the methamphetamine involved in the conspiracy was not ice". (d/e doc. 187 at page 11). The District Court further stated "that the evidence supplied in the PSR would have not been sufficient to find by the preponderance of the evidence that all 1,540.15 grams were ICE without impermissibly relying on statements from drug users and dealers...At the very least, Mr. Bonk has made a strong case that, after Carnell, his drug purity findings would have been different." (d/e doc. 187 at page 12). However, the District Court denied the claim because Carnell came out after Mr. Bonk pled guilty and trial counsel was not ineffective for not raising a novel claim.

However, as alleged in his §2255 motion and the District Court failed to acknowledge, this claim should have been applied retroactively as applied to Mr. Bonk, because his direct appeal was not finalized when the Seventh Circuit ruled on U.S. v. Carnell, 972 F.3d 932). Mr. Bonk's appeal was decided on July 24, 2020, and his appeal was finalized 90 days

later, which is the time for filing a writ of certiorari expires, which was October 24, 2020. This Court has held, "Federal judgment becomes final when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or if a petitioner does not seek certiorari, when the time for filing a certiorari petition expires." *Gonzales v. Thaler*, 132 S.Ct. 641 (2012). The Seventh Circuit decided the Carnell case on August 28, 2020. Thus, the Carnell ruling should have been applied retroactively to him. *Griffith v. Kentucky*, 107 S.Ct. 708 (1987). See also, *Schriori v. Summerlin*, 542 U.S. 348 (2004) ("Apprendi apply retroactively to cases in which direct appeal were not finalized").

Here, the District Court erred in not applying the Carnell ruling retroactively to Mr. Bonk's case, since his direct appeal was not finalized. The Sentencing Guidelines imposes harsher sentences for methamphetamine that is deemed to be over 80% purity, also known as "ICE" quality. However, with the claim at bar, only 111 grams should have been calculated as ICE and 1,429.15 grams should have been calculated as methamphetamine mixture.

Because the District Court refused to apply retroactively the Carnell ruling, and the Seventh Circuit denied Mr. Bonk the ability to appeal the District Court's ruling, this Court must grant certiorari to correct this error.

II. DISTRICT COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO THE INACCURATE SENTENCING GUIDELINES CALCULATED IN THE FINAL REVISED PSR THAT INCLUDED THE TWO POINT LEADERSHIP ROLE, WHERE MR. BONK NEVER EXERCISED ANY CONTROL OR AUTHORITY OVER ANYBODY IN THE CONSPIRACY, AND THE RECORD DOES NOT SUPPORT THIS ENHANCEMENT

The government claimed Mr. Bonk and his two co-defendants, Darcy Kampas and Timothy Wood, were part of a conspiracy to distribute and possess with intent to distribute at least 50 grams of methamphetamine. This conspiracy occurred between May and September of 2017. After pleading guilty, the PSR claimed Mr. Bonk was responsible for distributing 1,540.15 grams of ICE quality (80% purity or higher) of methamphetamine. They calculated his total offense level at 35, which included two points for his leadership role, with a Criminal History Category VI, resulting in an advisory guideline range of 292-365 months in prison. (d/e doc. 127 at ¶¶35. 120).

The Sentencing Guidelines allows for sentencing enhancements based on a defendant's leadership role in the offense. USSG § 3B1.1. Although the Sentencing Guidelines are no longer mandatory, *U.S. v. Booker*, 543 U.S. 220 (2005), the district court is still required to consult, consider, and calculate the guideline range when imposing a sentence. *U.S. v. McGee*, 985 F.3d 559 (7th Cir. 2021). The plain language of Section 3B1.1 sets forth seven explanatory factors that illuminate whether a defendant is an organizer, leader, or manager, and these factors must be considered in whether to apply the adjustment for an aggravating role in the offense:

"(1) exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime. (5) the degree or participation in planning or organizing the offense. (6) the nature and scope of the illegal activity, and (7) the degree or control and authority exercised over others."

These factors are merely consideration for the sentencing judge. However, Section 3B1.1 requires the exercise of some authority in the organization, the exertion of some degree or control, influence, or leadership. Typically, this means that "the defendant had some real and direct influence on other participants in the criminal activity. U.S. v. Mankiewicz, 122 F.3d 399 (7th Cir. 1997). Although the terms used for each role are not defined by the Guidelines, the Seventh Circuit has held that a supervisor or manager "tells people what to do and determine whether they've done it." U.S. v. Figueroa, 682 F.3d 694 (7th Cir. 2012).

With the case at bar, there is no evidence indicating that the defendant exercised any control or authority over anybody in the conspiracy. The Seventh Circuit has held "the finding of a three level supervisory role enhancement was improperly imposed absent evidence that a drug dealer supervised his buyers, who were also drug dealers." U.S. v. Weaver, 716 F.3d 439, 443-44 (7th Cir. 2013).

The District Court claimed there were other enhancements that were contemplated in the PSR, including a firearm enhancement and a higher potential leadership enhancement, but that the parties mutually agreed to forego these objections." (d/e doc. 187 at page 13). However, at sentencing, Mr. Bonk asked his trial counsel about the leadership role enhancement and trial counsel told him "that's what the government is claiming", but there is no evidence to support this enhancement. Trial counsel should have objected to the two-point enhancement for Mr. Bonk's role in the offense.

It is well-established that every person charged with a crime has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV. **Strickland v. Washington**, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner

must satisfy the two-prong test set forth in Strickland and establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant. *Id.* at 674.

Here, trial counsel's performance fell below an objective standard of reasonableness when he refused to object to the two-point enhancement for Mr. Bonk's role in the offense. There is no evidence to support this enhancement. Even the minimal competent attorney would have objected to the enhancement.

To satisfy the second-prong in Strickland, Mr. Bonk must establish that but for counsel's unprofessional errors, there is a reasonable probability that the court proceeding would have been different. With the claim at bar, prejudice can be shown as the outcome would have been different if trial counsel would have been different. If the two-point enhancement for leadership would have been objected to, the Total Level base Offense would have been 33 (as oppose to 35). This would have reduced his sentencing guidelines significantly.

The District Court imposed a sentence that was 30 months below the sentencing guidelines. If the two points for his leadership role were removed, and the sentencing guidelines would have been 232-262. It is reasonable to assume that the District Court would have imposed a sentence 30 months below the minimum sentencing range. Nevertheless, this Court has held "[w]hen a defendant is sentenced under an incorrect Guidelines range - the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. U.S.*, 136 S.Ct. 1338 (2016) The Seventh Circuit and District Court are out of step with this Court. Certiorari should be granted to correct this error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Wade Bonk

Wade Bonk

Date: 1-15-23 W.B.