

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

VIVIAN WOODSTOCK,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the
District Court of Appeal for the
Second District of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may impose a harsher sentence upon resentencing after it was determined the initial sentence violated equal protection and due process of law because it was based on Petitioner's inability to pay restitution?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vivian Woodstock respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION AND ORDER BELOW

The judgment and sentence of the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida (Case No. 18-CF-011566-A) appears at Appendix B to this petition. The opinion of the District Court of Appeal for the Second District of Florida affirming the judgment and sentence (Case No. 2D22-2018) appears at Appendix A to this petition.

JURISDICTION

District Court of Appeal for the Second District of Florida (Case No. 2D22-2018) issued its opinion on March 3, 2023. (App. F). This petition is filed within 90 days of that opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides “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 protection of the laws.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by information with Count I: Grand Theft (\$100,000 or more), in violation of § 812.014(2)(a)1, *Fla. Stat.*; Count II: Grand Theft (\$100,000 or more), in violation of § 812.014(2)(a)1, *Fla. Stat.*; and Count III: Organized Fraud (Over \$50,000), § 817.034(4)(a)1, *Fla. Stat.*

On February 16, 2021, the Petitioner entered into a negotiated plea agreement with the State containing the following stipulation:

Sentencing in this matter will be scheduled 75 days from the date of the plea. If on the date of sentencing [Petitioner] has tendered to Escobar & Assoc., P.A. three cashier checks, \$244,759 to James Byrd; \$300,000.00 to Lester Gonzalez; and \$275,000.00 to Larry Tharington, [Petitioner] will be allowed to withdraw his plea, and the file will be closed for PTI.

The terms of the PTI will be 18 months standard conditions with automatic termination at nine months, if [Petitioner] has completed all the terms and conditions without violating. [Petitioner] will be allowed to purchase the 50 hours of community service work at a rate of \$10 per hour.

Of course, this is an open plea. And, of course, if [Petitioner] has not made the payments as required for the restitution, Your Honor would sentence him.

(App. C).¹

The circuit court accepted the plea and sentencing was set for May 3, 2021. (App. C).

On September 8, 2021, after Petitioner had not paid the agreed-upon restitution amounts, the circuit court adjudicated Petitioner guilty for Counts I, II and III and sentenced Petitioner to concurrent terms of 96 months Florida State

¹ "PTI" stands for pre-trial intervention, a diversion program offered by the Office of the State Attorney for Hillsborough County, Florida.

Prison (App. D). The court awarded 2 days of credit for time-served and ordered restitution in the following amounts: \$244,759.00 as a lien, \$300,000.00 as a lien, and \$275,000.00 as a lien (App. D).

On February 8, 2022, the Petitioner, through counsel, filed a motion to correct an illegal sentence pursuant to Rule 3.800(a), *Fla. R. Crim. P.* (App. E). Citing the Second District Court of Appeal's decision in *Vasseur v. State*, 252 So. 3d 387 (Fla. 2d DCA 2018), Petitioner argued that the 96-month sentence imposed solely because of Petitioner's inability to pay restitution violated due process and equal protection.

The State filed a response to the Rule 3.800(a) motion on April 11, 2022 (App. F). The State argued that Petitioner's sentence was not illegal unless the circuit court was, itself, engaged in some type of illegality with the sentence. The State further argued that the court cannot impose PTI as a sentence. The State claimed that Petitioner himself caused the error and "should not receive the benefit of a new sentencing hearing for any error that he procured, invited, and caused".

At a hearing on May 18, 2022, the circuit court granted the Rule 3.800(a) motion and vacated the sentence imposed on September 8, 2021 (App. G). During that hearing, the court inquired whether Petitioner understood he could receive a harsher sentence than what was initially imposed. The following dialogue occurred:

THE COURT: All right. He understands that a new sentence is wide open. He can get better or he can get worse than what he's got now?

[DEFENSE COUNSEL]: Judge, I would just respectfully disagree. The case law we have, essentially we're talking about equal protection and due process, where if there are two competing sentences, someone is penalized --

THE COURT: There's not two competing sentences. The sentence is illegal, and being it's vacated. So now we're back to square one. All bets are off. And I know you have case law, but it's different -- there is two different areas of that. If he -- I'll have to find them, but I looked at this. I've had my staff attorney look at it. And, I'm pretty sure we're on solid ground. I'm not saying he would get more, but he needs to know that just because you get a sentence, that that's the only sentence you can ever have is found to be illegal, it starts over.

[DEFENSE COUNSEL]: Judge, again, I would respectfully disagree. The position in the case law is essentially, because of equal protection, someone has to be treated the same way under the law, as if someone who has money to pay restitution up front or not. There --

THE COURT: No, no, I'm not saying that it has to be a condition of restitution. That's illegal.

[DEFENSE COUNSEL]: Right.

THE COURT: And I agree with that.

[DEFENSE COUNSEL]: So, following that proposition, the remedy is, if someone is penalized and given a longer incarcerative period because he can't pay, the correct remedy is to return him back to that original position as to where he was before --

THE COURT: Well, I agree with you that you don't give him a sentence because he can't pay. But this was a plea agreement, right? I don't know any -- so, if it was an illegal sentence just based on the way it was worded, I think when we go back to square one, we start over.

[DEFENSE COUNSEL]: Again, in *Vasseur*, Judge, that -- when that went back and the trial court did it, they went back and gave her the initial plea as if she had the money, the funds to pay restitution. So, the remedy was to go back to the original sentence, right. That's the point of the agreement. They are locked into that agreement. The only thing illegal about it, Judge, was the inflating of incarcerative period because they didn't pay.

Had [Petitioner] gone, and restitution wasn't an issue, he would have gone and gotten the PTI resolution in this case.

THE COURT: All right. Well, I mean, I'll, I'll look into that. I'll read your case law.

(App. G).

The circuit court concluded the sentence was illegal, vacated the sentence and released the Petitioner on ROR.

The State filed a motion for reconsideration on June 7, 2022 (App. H). The State reargued the same issues it had raised in the response to the Rule 3.800(a) motion and noted that if the motion for reconsideration is denied, the lowest sentence the court could impose would be the lowest permissible sentence of 63 months, with a maximum exposure of 90 years.

Petitioner filed a memorandum of law proposing the appropriate remedy in this instance is judicial enforcement of the plea agreement (App. I). Petitioner further noted that jeopardy had attached once the court accepted the plea with the PTI proviso. Petitioner further pointed out that no determination had been made as to whether Petitioner's inability to pay restitution was willful prior to the court imposing the 96-month prison term in lieu of Petitioner being placed in PTI.

A resentencing hearing was held on June 21, 2022. (App. J). At the outset, the circuit court denied the State's motion to reconsider. Petitioner agreed to be resentenced before Judge Fuson, even though Judge Polo imposed the original sentence. The court stated for the record that it had acquainted itself with the facts of the case, the history, and read the presentence investigation report.

Petitioner argued he was entitled to be resentenced according to the terms of the agreement, which called for 18 months of PTI. Petitioner noted the original sentence was illegal because it elevated Petitioner's sentence from 18 months of PTI

to 96 months in prison solely because of Petitioner's inability to pay restitution.

Petitioner urged that any new sentence in excess of 18 months of PTI would likewise amount to an illegal sentence in violation of equal protection and due process.

Petitioner explained:

[DEFENSE COUNSEL]: At this juncture, Judge, the plea is still valid. That has not been touched. We're here on a 3.800(a) motion, which is just to correct the illegal sentence. And Your Honor found that the sentence was illegal because [Petitioner] was punished for inability to pay the restitution. His sentence was elevated from -- he would have had access to PTI, to eight years in prison. And that elevation was illegal, because it violates due process and equal protection. Because he was discriminated against, upon his inability to pay.

Now, the Court can't punish [Petitioner] for his inability to pay. The reasoning behind that, Your Honor, is you can't be punished for something that is not your fault. There's been obviously a history of this case law. We used to be able to put people in custody because they couldn't pay. And now we do not have that. Because equity and fairness is the cornerstone -- cornerstone of our justice system.

So, in order for the Court to have sentenced [Petitioner] to anything other than PTI, the Court would have to determine that he had the ability to pay. And he didn't. So, just like a violation of probation based on nonpayment of a monetary sum, the Court, in order to punish someone, has to determine whether they had the capacity to pay, and didn't. Same here. Same principle, Judge. In order to go above PTI the Court would have had to have an evidentiary hearing and made a ruling based on the facts in those evidentiary hearings.

But if you go back to the sentencing, Judge, [Petitioner] testified to the contrary. He testified that he couldn't pay because he had immigration issues. And those immigration issues hindered him from getting a driver's license, opening a bank account, and obtaining employment. Therefore, he could not pay.

So the only remedy that cures the taint of the due process equal protection violation is to give [Petitioner] the original sentence that puts him in the same place before he was discriminated against. Because if the Court sentences him to anything above PTI, it still is a violation. Because any greater sentence than PTI doesn't cure the taint.

(App. J).

The circuit court disagreed with Petitioner, finding the entire agreement was illegal from the outset because Petitioner could never have been punished for not paying if he did not have the ability to pay. The court reasoned:

THE COURT: But see, in no circumstances could he be punished under the original plea agreement for failing to pay if he had no ability to pay. That's what you're hanging your hat on.

[DEFENSE COUNSEL]: Say that again, Judge.

THE COURT: Under no circumstances, under the original plea agreement that you entered, and under the law, he could have never been punished for not paying if he didn't have the ability to pay. Right?

[DEFENSE COUNSEL]: If he didn't have the ability --

THE COURT: That entire agreement, and the entire structure of that agreement that you entered into was illegal. That's what I vacated. Which puts us, and I said this in no uncertain terms. Which is why I let him stay out on bond. I'm resetting this to the day he came in here and we took his plea, right. We took his plea. But the agreement, which is the sentencing, was illegal, and I vacated it. So now we're right back as if he is standing in here today, I've taken his plea, and I will sentence him to what I think is just.

(App. J).

The circuit court reiterated that it was not concerned with Petitioner's ability or inability to pay restitution because "We're at the beginning of sentencing... And just for the record, I believe that we're here today for a *de novo* resentencing." (App. J).

Petitioner highlighted how the facts of the instant case are on all fours with what occurred in *Vasseur* and that, in reversing the illegal sentence in that case, the

Second District Court of Appeal expressly found the sentence had been illegally increased from six months in the county jail to seven years in prison based on the inability to pay. Petitioner pointed out that, on remand, the defendant in *Vasseur* was resentenced in accordance with the terms of the agreement.

The circuit court dismissed that portion of *Vasseur* as dictum and determined that because *Vasseur* is silent as to the appropriate remedy, the court has broad discretion to conduct a *de novo* resentencing. The court concluded that the reason the trial judge in *Vasseur* imposed the originally agreed upon sentence on remand is simply because that's what the judge chose to do: "Nowhere in the *Vasseur* opinion does it state that this is not a *de novo* sentencing. The Court did whatever it wanted to do. The Court did whatever they felt was right, based on the facts and circumstances." (App. J).

The exchange concluded as follows:

THE COURT: My finding is that the sentence was illegal. He was not able to agree to an illegal sentence. That's why it was vacated. As I said from the very beginning, all the cards are off the table. We have a new deck and we're starting over. I understand your point. You've made it for the record. And I'll listen to anything else you want to place on the record.

[DEFENSE COUNSEL]: Judge, I would say anything that you -- that if the Court were to go above the PTI agreement would, again, be the same type of problematic, equal protection, due process violation. Because if the State was fine in offering it, and he entered an agreement in having it, then there should be no reason now that he shouldn't be able to have that sentence, Judge, but for his inability to pay.

(App. J).

In rebuttal, the State deferred to the circuit court's analysis and specifically refused to address *Vasseur* ("I'm not going to address *Vasseur*. I believe the Court fully -- I agree with the Court in regards to its analysis of that case.") (App. J). The State called the three victims to testify as to resentencing.

The circuit court ultimately resentenced Petitioner to an even harsher term than what was originally imposed: 13 years in Florida State Prison (App. B; J).

Petitioner appealed the new judgment and sentence and the Second District Court of Appeal affirmed, without opinion, on March 3, 2023. (App. A).

This petition timely follows.

REASON FOR GRANTING THE PETITION

Petitioner's original sentence was vacated because it was based on his inability to pay restitution, in violation of equal protection and due process of law. Yet, upon resentencing, the court imposed an even harsher sentence. Not only did this outcome transfer the constitutional taint over from the initial sentence, it amplified it. This Court should grant certiorari to articulate the appropriate remedy when a sentence is determined to be improperly based on a defendant's inability to pay restitution.

ARGUMENT

This Court has long recognized "[t]here can be no equal justice where the kind of [treatment] a man gets depends upon the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). In *Bearden v. Georgia*, 461 U.S. 660 (1983), this Court observed, "[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." *Id.* at 667-68.

In this case, the State indeed determined that restitution was an appropriate and adequate penalty. The State agreed that if Petitioner paid the restitution in full, he could avoid imprisonment and would only be required to complete 18 months of the PTI program. However, when Petitioner was not able to pay the restitution, he was sentenced to serve 96 months in prison.

When Petitioner subsequently challenged the 96-month sentence as improper because it was based solely on his inability to pay the restitution amount, the circuit court agreed and vacated the sentence. Remarkably however, instead of enforcing the 18-month term of PTI that Petitioner would have received had he been able to pay the restitution, the court resentenced Petitioner to an even harsher term of 13 years in prison.

This Court should grant the petition because the remedy applied by the circuit court did nothing to cure the constitutional taint resulting from the initial 96-month sentence. It makes no logical sense for a court to find that a sentence was unlawfully increased due to Petitioner's inability to pay restitution and then to vacate that sentence, only to impose an even harsher sentence upon resentencing. The constitutional taint remains because the newly imposed sentence still results from the Petitioner's inability to pay the restitution. The new sentence did not somehow magically disassociate from the infirmity caused by the initial sentence. The fact remains that had the Petitioner been able to meet the restitution requirement, he would have received the benefit of the lesser penalty of 18-months PTI. Because Petitioner was unable to pay the restitution he received a prison sentence, and then,

inconceivably, he received an even harsher sentence after successfully challenging the first sentence as being unconstitutional.

This Court has long recognized that, in the context of constitutional violations, “remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” *U.S. v. Morrison*, 449 U.S. 361, 364 (1981).

The State of Florida undoubtedly has a fundamental interest in punishing individuals who violate its criminal laws, regardless of economic status. Indeed, “[a] defendant’s poverty in no way immunizes him from punishment.” *Bearden*, 461 U.S. at 669. In addition, the State of Florida has a strong penological interest in obtaining restitution for the victims of crime. To that end, the circuit courts are required by Florida’s restitution statute, section 775.089, *Fla. Stat.*, to order restitution for damage or loss caused by or related to the defendant’s criminal conduct. Courts must order restitution “unless it finds clear and compelling reasons not to order such restitution.” § 775.089(1)(a), *Fla. Stat.* Further, the court must make the payment of restitution a condition of probation in accordance with section 948.03, *Fla. Stat. Id.* Restitution orders are therefore routinely issued as a condition of a probationary term that follows a prison term.

However, Florida law does not expressly permit a circuit court to structure a prison sentence such that the prison term is reduced if the defendant pays restitution. This type of conditionally mitigated sentence, which offers the defendant an opportunity to “buy” a shorter sentence, blurs the line between rewarding restitution

and impermissibly imposing a longer sentence based solely on a defendant's inability to pay. A defendant who cannot and does not come forward with restitution will have to serve additional time in prison solely because of his poverty. Since only a defendant with access to funds can avoid the lengthier sentence, a conditionally mitigated sentence creates different consequences for two categories of defendants: those who have the financial resources to pay restitution and those who do not. Of course, this Court has long established that any such sentence is contrary equal protection and due process of law. *Bearden*.

While cases applying the principle illuminated by this Court in *Bearden* are plentiful in various jurisdictions throughout the country, discussion involving the appropriate remedy appears to be scarce. Some courts merely vacate the sentence and remand for further inquiry regarding the defendant's ability and/or willingness to pay. *See e.g.*, *State v. Farrell*, 207 Mont. 483, 676 P.2d 168 (Mont. 1984). Other courts have determined that the defendant is entitled to the sentence that a defendant with the financial wherewithal to make the payment would have received under the same circumstances. *See e.g.*, *Reddick v. State*, 327 Md. 270, 608 A.2d 1246 (Md. App. Ct. 1992).

In this case, the circuit court agreed that Petitioner's initial 96-month sentence was constitutionally infirm because it was based upon his inability to pay restitution. Yet, instead of conceiving an amicable remedy, the court amplified the injury by vacating the sentence and imposing an even harsher one. This Court should grant

certiorari, vacate the judgment and articulate the appropriate remedy to be applied upon remand.

CONCLUSION

For the reasons stated herein, Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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