No. 23-7133

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Garry Hines

Petitioner,

v.

United States of America

Respondent

Petition for Writ of Certiorari

To the United States Court of Appeals

For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Garry Hines, pro se
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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred when determining that Petitioner's Sentence which exceeded the statutory maximum was proper and reasonable

2. Whether the Fourth Circuit erred when determining that Petitioner was not entitled to any reduction for acceptance of responsibility

LIST OF ALL PARTIES

Garry Hines is the Petitioner / Defendant in this matter

United States of America is the respondent in this matter

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Garry Hines respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit denying the Petitioner's appeal of his Section 2255 Petition.

OPINIONS BELOW

The Fourth Circuit's June 20, 2023 opinion is set forth in Appendix 1a. The Fourth Circuit's September 11, 2023 opinion on Petitioner's petition for Rehearing is set forth in Appendix 2a.

JURISDICTION

On June 20, 2023, the United States Court of Appeals for the Fourth Circuit filed its opinion affirming the denial of the Petitioner's Section 2255 petition. See Appx. A. On Septembe 11, 2023, the Fourth Circuit denied Petitioner's timely petition for Rehearing. See Appx. B. Pursuant to this Court's Rule 13.1, this Petition for Certiorari is timely filed within 90 days of September 11, 2023. Petitioner invokes this Court's jurisdiction under 28 USC §1254(1).

STATEMENT OF THE CASE

On November 14, 2018, Petitioner, without a written plea agreement, pleaded guilty to distributing a quantity of heroin and aiding and abetting (Count One), distributing a quantity of heroin (Count Four), and possession with intent to distribute a quantity of heroin (Count Five). The maximum sentence under 21 USC §841 for these counts was 240 months.

On December 16, 2019, the district court held a sentencing hearing. During that hearing, the court adopted the facts set forth in the Presentence Investigation Report ("PSR"). The Petitioner objected to the drug weight calculation and the relevant conduct alleged at the sentencing hearing. As a result of those objections, the Court withheld any reduction for acceptance of responsibility.

The Court calculated the Petitioner's offense level to be 38, and determined his criminal history category was II, and determined that the advisory guideline range was 267 to 327 months of imprisonment for each count. The Court subsequently sentenced the Petitioner to a term of imprisonment of 276 months on each count to be served concurrently.

. . . . . .

REASONS FOR GRANTING THE WRIT

1. Whether the Fourth Circuit Erred When Determining That Petitioner's Sentence Which Exceeded the Statutory Maximum Was Proper and Reasonable

Below, Petitioner argued that his Counsel was ineffective for failing to challenge the sentence on each count that exceeded the statutory maximum of 240 months of imprisonment per count.

The "Sixth Amendment entitles criminal defendants to the effective assistance of counsel - that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms", Bobby v. Van Hook, 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009)(per curiam). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding, including plea negotiations, trial, sentencing, and appeal. See, e.g. Lafler v. Cooper, 566 U.S. 156, 164-65, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). To state a claim of ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. See, Strickland v. Washington, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Appellate Court specifically stated that because Petitioner failed to raise the issue of his sentence exceeding the statutory maximum in the district court, that the issue would only be reviewed for plain error on appeal. However, the Appellate Court also held that the district court plainly erred in sentencing Petitioner to 276 months imprisonment on each of the counts. Despite this, the Appellate Court determined that there was no prejudice since the district court could have sentenced Petitioner to 240 months on Count One and then sentenced the remaining counts to 36 months to run consecutive to Count One.

The Appellate Court erred in this determination. This is because Sentencing

Guideline §3D1.2 specifically states that all counts covered by §2D1.1 should be grouped for sentencing purposes, resulting in a concurrent sentenc for all relevant Counts. This is further proven by the fact that the Court determined that there was additional relevant conduct involved in the offense that substantially increased the Petitioner's guideline range.

As Counts One, Four, and Five had to be grouped for sentencing purposes under §3D1.2, as all of the offense conduct was related to §2D1.1, any sentence for those counts had to be concurrent with each other. Therefore, under no circumstances could Petitioner be sentenced to 276 months for those Counts as Petitioner could only be sentenced to no more than the 240-month maximum sentence.

Defense Counsel was ineffective for failing to challenge the 276-month sentence that exceeded the statutory maximum, and that failure resulted in the appellate court only reviewing the issue under the plain error standard. The appellate court erred in determining that a 276-month sentence was reasonable and proper and that Petitioner was not prejudiced by a sentence that exceeded the statutory maximum by 36 months.

2. Whether the Fourth Circuit Erred When Determining That Petitioner Was Not Entitled to Any Reduction for Acceptance of Responsibility

The District Court determined that since the Petitioner objected to the relevant conduct guideline calculation at sentencing that he was not eligible for a sentence reduction under §3E1.1(a) or §3E1.1(b). As there was no plea agreement, there was no stipulation as to any drug weight calculation.

Both the district court and the appellate court failed to acknowledge that there is a dispute among the courts of appeals as to whether a defendant's Fifth Amendment rights are violated when he is denied an offense level reduction for not accepting

responsibility for crimes related to his offense of conviction. Courts have held that a reduction of acceptance of responsibility should not be conditioned on a defendant admitting to his related criminal conduct, and courts have held that such a denial of that reduction is a penalty against the defendant for exercising his Fifth Amendment right to be free from self-incrimination. See, e.g. U.S. v. Piper, 918 F.2d 839, 840-41 (9th Cir. 1990)(per curiam); U.S. v. Oliveras, 905 F.2d 623, 626-28 (2nd Cir. 1990) (per curiam); U.S. v. Perez-Franco, 873 F.2d 455, 461-64 (1st Cir. 1989).

Importantly, the U.S. Sentencing Commission has amended the sentencing guidelines, effective November 1, 2023. One of those amendments pertains to the reduction for the acceptance of responsibility. The Sentencing Commission's amendment now states that acceptance of responsibility points under §3E1.1(b) should only be withheld if the government had to prepare for trial, and the new §3E1.1(b) defines the term "preparing for trial" as "substantive preparations taken to present the government's case against the defendant to a jury (or judge in the case of a bench trial). Preparing for trial is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered 'preparing for trial' under this subsection..."

Regarding §3E1.1(a), the guideline states that "if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels". Here, there is no dispute that Petitioner satisfied §3E1.1(a) when he pled guilty. The issue at hand arises solely from Application Note 1(A) which states:

> In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following: (A) truthfully admitting the conduct comprising the offense(s) of

> conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3... A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous."

The district court determined that the relevant conduct alleged by the government was true, and determined that Petitioner had falsely denied the relevant conduct, and therefore withheld the reduction for acceptance of responsibility. The appellate court, however, failed to determine whether the district court was correct in determining whether Petitioner had falsely denied or frivolously denied the alleged relevant conduct. As stated by the above guideline commentary, the fact that the Petitioner was unsuccessful in his objection to relevant conduct does not mean that his objection was false or frivolous. The Appellate Court never addressed this issue.

Moreover, the denial of the acceptance of responsibility reduction was based solely on the application note, not the §3E1.1 guideline itself. Courts have held that the application notes are not binding law, and that they are only advisory commentary to assist in the application of the statute, U.S. v. Pinto, 875 F.2d 143, 144 (7th Cir. 1989). But, those application notes are not binding because the "commentary to the guideline", unlike the guideline themselves, "never passes through the gauntlets of Congressional review or notice and comment", a court may not rely on a commentary note that inconsistently expands the scope of the corresponding guideline, U.S. v. Havis, 927 F.3d 382, 386 (6th Cir. 2019).

The Supreme Court in Stinson v. U.S. 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) stated that an Application Note "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is

inconsistent with, or a plainly erroneous reading of, that guideline". And, as stated above, the denial of the acceptance of responsibility reduction based on the denial of alleged relevant conduct may violate the Fifth Amendment. Therefore, the Application Note itself clearly violates the Constitution, and is also inconsistent with the text and purpose of the §3E1.1 guideline itself. Further, Application Note 2 specifically states that "[c]onviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction." It would seem contradictory to allow a defendant to obtain the reduction after having put the government to its burden of proof at trial, but deny the reduction to a defendant who timely pleads guilty and only objects to relevant conduct at sentencing or disputes an alleged drug weight to determine the proper offense level. The appellate court erred in not addressing these issues on Petitioner's appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse judgment of the United States Court of Appeals for the Fourth Circuit affirming the Petitioner's appeal, or in the alternative, vacating the sentence and/or conviction of the United States District Court and remand for re-sentencing addressing the issues herein when fashioning a fair sentence.

Respectfully Submitted,

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