No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

Term,

ASKIA WASHINGTON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the imposition of an enhanced mandatory minimum sentence of 20 years' incarceration on a defendant convicted of drug and Hobbs Act offenses flowing from a fictitious stash house robbery sting violate due process where the government is at liberty to manipulate the fictitious drug quantities to trigger the increased mandatory sentence, there is no indication that Congress intended mandatory minimum sentences to apply to stings involving fictitious drugs, and it is uncertain whether the planned stash house robbery is within a defendant's actual ambition and means?

LIST OF PARTIES

In addition to the United States, ASKIA WASHINGTON was a party in these proceedings in the United States Court of Appeals for the Third Circuit in his capacity as appellant in 16-2795.

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

The Petitioner ASKIA WASHINGTON respectfully prays that a writ of certiorari issue to review the precedential Opinion and judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on August 28, 2017.

OPINIONS BELOW

The August 28, 2017 precedential opinion of the United States Court of Appeals for the Third Circuit is reported at United States v. Washington, 869 F.3d 193 (3d Cir. 2017) and is attached as Appendix A, *infra*.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

. .

U.S. Const. amend. V.

A. PROCEDURAL HISTORY

This Petition stems from a phony stash house robbery sting operation that was orchestrated by the Bureau of Alcohol, Tobacco and Firearms ("ATF") in Philadelphia, PA from February to March of 2013. A total of four individuals, including Washington, were arrested. All but Washington plead guilty. Washington went to trial on two Hobbs Act robbery offenses, which carried no mandatory minimum sentence exposure, two title-21 drug offenses, which carried an enhanced 20-year mandatory minimum sentence exposure[1], and two firearm offenses.

After trial, a jury convicted Washington of the Hobbs Act and title-21 drug counts, and acquitted him of the section 924 (c) firearm count, resulting in the government withdrawing a felon in possession count. Over objection, the District Court sentenced Washington to a mandatory minimum sentence of 20 years' incarceration on the title-21 drug counts consecutive to two years' incarceration on the Hobbs Act counts.

Washington, who is African-American, raised three issues in the Court of Appeals for the Third Circuit. Washington first complained that the District Court erred in applying the stringent *Armstrong/Bass*[2] standard to his "selective enforcement" pretrial discovery motion in which he claimed that he had been unlawfully targeted by ATF because of his race.

[1]Washington had a prior conviction for a drug offense which increased the mandatory minimum sentence from ten to 20 years.

[2]United States v. Armstrong, 517 U.S. 456 (1996) and United States v. Bass, 536 U.S. 862 (2002).

The second issue raised by Washington alleged that his trial attorney rendered ineffective assistance in opening the door to the admission of Washington's prior drug conviction at trial which, in Washington's view, showed only that he had a propensity to commit drug offenses like the ones for which he stood trial.

The third issue, and the subject of the instant Petition, involves a due process challenge to the imposition of the 20-year mandatory minimum sentence in his case. Washington argued, in part, that "to allow the Government to increase a defendant's sentencing exposure as dramatically as it has in this case and to manipulate the amount of [fictitious] cocaine to attain that mandatory minimum . . . provides the Government with unbridled discretion to manipulate sentences and was not envisioned by Congress to warrant a doubling of the mandatory minimum sentence."

A panel of the Court of Appeals disposed of the first two issues in a 65-page precedential opinion authored by Judge Fuentes and joined by Judges Cowen and McKee. The Panel agreed with Washington that the District Court erred in applying the *Armstrong/Bass* standard in reviewing Washington's "selective enforcement" discovery claim. The Court ordered a limited remand for the District Court to review Washington's "selective enforcement" discovery request under an analytical framework more relaxed than *Armstrong/Bass*. On the other hand, the Panel disagreed with Washington on the ineffective of counsel claim for reasons unnecessary for consideration of the instant petition.

At issue in this Petition is the Panel's disposition of Washington's due process challenge to the imposition of the 20-year mandatory minimum sentence which the District Court concluded it was "bound" to impose. The Panel upheld imposition of the 20 year mandatory minimum sentence in a split, 2-1 decision joined by Judges Fuentes and Cowen. Judge McKee authored a 21-page dissenting opinion in which he thoughtfully discusses why the imposition of the enhanced mandatory minimum sentence in this case violated due process[3].

Washington thereafter filed a Petition for Rehearing *En Banc* Pursuant to Fed. R. App. P. 35 and/or for Panel Rehearing Pursuant to Rule 40 which the Court of Appeals denied on November 27, 2017. Appendix B. Five of the thirteen judges present voted to grant a rehearing *en banc*.

B. BASIS FOR FEDERAL JURISDICTION

This litigation began as a criminal prosecution against Washington for an alleged violation of the laws of the United States. The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this prosecution. 18 U.S.C. § 3231.

The Court of Appeals for the Third Circuit had appellate jurisdiction to review the final judgment of the District Court in accordance with 18 U.S.C. § 3742(a)(1) and 28 U.S.C. § 1291.

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

C. FACTS

The Court of Appeals succinctly summarized the facts of this case in its precedential opinion:

> "Askia Washington was ensnared by a 'stash house reverse sting' operation—one which hit many of the by-now-familiar beats. Acting on what appeared to be insider information from a drug courier, Washington and his three co-conspirators planned to rob a Philadelphia property where they thought 10 kilograms of cocaine were being stored for

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[3]The Panel ruled that the limited remand on the discovery issue did not affect the judgment of conviction or sentence.

distribution. But as they discovered on the day of the robbery, the 'stash house' was a trap set by law enforcement. Their 'courier' was an undercover federal agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF'), which had developed the scenario from the ground up. The cocaine did not exist.

United States v. Washington, 869 F.3d 193, 196 (3d Cir. 2017) (footnote omitted). Appendix A-1

"Codefendant and ringleader Dwight Berry came to the attention of the ATF in late 2012, when he made it known that he was interested in conducting robberies of drug users and dealers. In the course of asking around, Berry spoke to an acquaintance who, unbeknownst to him, was an ATF confidential informant ('CI'). The CI alerted the ATF, which determined that Berry's criminal history fit its required profile for a sting operation and opened an investigation in February 2013, under the supervision of ATF Special Agent John Bowman. From here on out, many of the meetings and phone calls about the developing robbery plan would be surreptitiously recorded for playback at trial.

"Meanwhile, the CI kept Berry on the line with word of a connection: a drug-courier friend who frequented a South Philadelphia stash house on his trips to and from New York. When Berry and the CI met again, they were joined by the supposed drug courier—in reality, undercover ATF Special Agent Patrick Edwards, a veteran of over a dozen robbery scenarios. In his role as the courier, Edwards reported seeing over 10 kilograms of cocaine (in the context of cocaine 'bricks') inside a cooler during a trip to the stash house. Berry indicated that he knew of a crew who might be interested in participating in the robbery and that he was willing to engage in violence if necessary.

"Washington first entered the picture about a week and a half after this encounter as one of two members of Berry's proposed robbery crew (the other man, never identified, apparently dropped out of the plan shortly afterwards). At another meeting in early March 2013 with Berry, Edwards, and the CI, Washington probed Edwards about the logistics of the robbery: what level of resistance they could expect, whether the house would be watched from the outside, and so on. Prompted by Edwards, the conspirators also discussed how to move and sell the stolen cocaine.

“In a subsequent phone discussion, Edwards pressed Berry on the professionalism of his crew. Berry, in an attempt to reassure, told Edwards that ‘[t]his is what [our crew] do[es].’ When Edwards singled out Washington for concern over a perceived lack of robbery experience, Berry said that Washington ‘rock[ed] out’ and ‘put work in,’ which Edwards interpreted to mean that Washington was some sort of shooter or enforcer.

“On the day of the robbery, Washington and Berry met at Berry's mother's house, where Berry picked up two guns and hid them in an Eggo Waffles box. The group, which had added two new members—codefendants Antonio Ellis and Jermau Johnston—then gathered in the parking lot of the Philadelphia Airport Hilton to review its plan. (Washington's girlfriend was also present, although she did not participate and remained in her parked car.) Edwards went over the salient details once more, emphasizing the 10 kilograms of cocaine and explaining that no money would be found in the house.
In three cars—Berry, Ellis, and Johnston in a minivan; Washington and his girlfriend (the latter driving) following behind in a Chrysler 300; and Agent Edwards bringing up the rear—the crew made its way to the chosen address on Passyunk Avenue in southwest Philadelphia. As the caravan moved in, agents swooped down. All but Berry surrendered;

> Berry fled on foot but was apprehended shortly afterwards. From the minivan, law enforcement recovered two guns, ammo, gloves, and zip-ties. From Washington's Chrysler 300, they recovered a backpack, gloves, a mask, a lighter, and lighter fluid."

Id. at 198–99 (footnotes omitted). Appendix A-2.

The Court of Appeals identified the troublesome nature of stash house reverse sting investigations:

> "Developed by the ATF in the 1980s to combat a rise in professional robbery crews targeting stash houses, reverse sting operations have grown increasingly controversial over the years, even as they have grown safer and more refined. For one, they empower law enforcement to craft offenses out of whole cloth, often corresponding to statutory offense thresholds. Here, the entirely fictitious 10 kilograms of cocaine triggered a very real 20-year mandatory minimum for Washington, contributing to a total sentence of 264 months in prison—far more than even the ringleader of the conspiracy received. For another, and as Washington claimed on multiple occasions before the District Court—and now again on appeal—people of color are allegedly swept up in the stings in disproportionate numbers.

Id. at 197. Appendix A-2. Indeed, the Court of Appeals went on to "acknowledge Washington's concerns, which are well stated and logical, that the drugs did not exist, and that his ironclad mandatory minimum has no real world foundation." Id. at 211-212. Appendix A-10. Nonetheless, the Court of Appeals went on to reject the suggestion that the agents in this case were involved in impermissible sentencing manipulation. Id. at 212. Appendix A-10.

D. REASONS FOR GRANTING THE WRIT

Due process is violated by the imposition of an enhanced mandatory minimum sentence of 20-years' incarceration in a stash house robbery sting where no actual drugs existed; the ATF had unbridled discretion to select the type and quantity of the fictitious drugs; and there is no indication that Congress envisioned application of these "draconian" mandatory sentences to stash house stings involving fictitious drugs.

The imposition of a 20-year mandatory minimum sentence in a stash house robbery sting orchestrated by a law enforcement agency like the ATF implicates fundamental issues involving due process, congressional intent underlying mandatory minimum sentences and judicial sentencing policy. As observed by the Ninth Circuit:

> In fictional stash house operations . . . , the government has virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant. In fact, not only is the government free to set the amount of drugs in a fictional stash house at an arbitrarily high level, it can also minimize the obstacles that a defendant must overcome to obtain the drugs. . .

United States v. Briggs, 623 F.3d 724, 729-730 (9th Cir. 2010) (citations and quoted passages omitted).

Stash house robbery stings play Russian roulette with due process violations and are fraught with racial and socio-economic overtones. The majority opinion in the court of appeals reiterated that court's past "misgivings . . . about the wisdom and viability of reverse stash house stings" and warned that even though Washington's case ". . . fell on the safe side of the due process divide, [this] should not be taken to indicate that all such prosecutions will share the same fate." 869 F.3d at 213. Appendix A-10. Judge Mckee, by contrast, concluded, for a myriad of reasons, that Washington's mandatory minimum sentence fell on the unsafe side of the due process divide. Id. at 223-234. Appendix-16—21. Given these contrary conclusions of a sentencing issue that literally implicates decades in the life of an individual, this Court should weigh in on which side of the due process divide this case falls by granting the instant Petition and reviewing the due process implications of Washington's sentence.

Allegations of racial and socio-economic bias are endemic to stash house robbery stings. These stings serve as a perverse inducement to people of color to commit crimes that they would not otherwise dream of committing but for the contrivance of the ATF for a big payday. Whether in the Third Circuit, as demonstrated by the remand of this case for further discovery on the issue of racial profiling, the Fourth Circuit[4] the Seventh Circuit[5] or the Ninth Circuit[6], to name of few, courts are troubled with the reality that virtually all of the defendants caught up in these contrived stash house robbery cases are people of color. That these stings target the poor, with potential $400,000 paydays like the one that lured Washington into this contrived scheme, only serve to provide an "extraordinary inducement" for the less fortunate to "do everything possible to earn the promised reward." Id. at 224 (McKee, J. dissenting). Appendix A-17.

It is true that Washington ultimately agreed to participate in the contrived robbery. Even Judge McKee found some of Washington's ideas "disturbingly violent." Id. But Washington was a secondary target in this investigation who had no experience either in stash house robberies or in moving large quantities of cocaine. Indeed, Washington exclaimed in one of the recorded conversations that "I don't fuck with coke" and was heard saying that he didn't "really do this," which the undercover agent took to mean home invasion robberies. As Judge McKee succinctly summarized,

. . . the Government created a criminal scheme that would not have otherwise existed.

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[4]United States v. Hare, 820 F.3d 93 (4th Cir. 2016).

[5]United States v. Davis, 793 F.3d 712 (7th Cir. 2015) (*en banc).*

[6]United States v. Briggs, 623 F.3d 724 (9th Cir. 2010).

> Washington had no prior history of stash-house robberies (or violent crimes generally, for that matter), and he expressed reluctance to get involved with cocaine. Thus, here, as in similar cases, there is a strong possibility that had Washington not been "fooled into conspiring and attempting to steal fictitious drugs," he may well not have been sucked back into the criminal justice system.

Id. at 225 (McKee, J. dissenting) (footnote omitted). Appendix A-17.

The unbridled discretion that the ATF has in selecting the drug type and quantity to use in the sting implicates due process concerns. Washington would not have faced a mandatory minimum sentence had the contrived amount been less than 500 grams of fictitious cocaine. Because of a prior drug conviction, Washington would have faced a mandatory minimum of ten years had the fictitious quantity been over 500 grams but less that five kilograms of cocaine. 21 U.S.C. § 841 (b) (1)(B)(ii). Only because ATF selected a quantity over five kilograms (ten in this case) did Washington face a mandatory minimum sentence of twenty years. Had the drug of choice in this sting been marijuana, Washington would have faced a mandatory minimum sentence of twenty years only if the quantity of marijuana had been 1000 kilograms!

The ATF justified the 10-kilogram amount to make the scheme "credible." But Judge McKee saw the due process violation through the fog of this ostensible justification when he wrote: "Despite the Government's claim that the 10-kilogram quantity was only selected to make the scheme credible, nothing suggests that Washington was motivated by any knowledge of a specific drug quantity, nor is there any evidence of him having any involvement with stash-house robberies." Id. at 225 (McKee, J. dissenting) (footnote omitted). Appendix A-17. As Judge McKee noted, there was no relationship between the contrived 10-kilogram amount and Washington's capacity or intent to deal in that amount "'but for the temptation of a big payday, a work of fiction spun out by government agents to persons vulnerable to such a ploy who would not otherwise have thought of doing such a robbery.'" Id. (footnote and citation omitted). Appendix A-17.

Citing Reports to Congress by the United States Sentencing Commission, as well as Legislative History, Judge McKee noted that "Congress intended for the 10-year mandatory minimum sentences to apply to "major traffickers," i.e., "manufacturers or the heads of organizations." The 5-year mandatory minimums were intended to apply to "serious traffickers," i.e., "managers of the retail level traffic ... in substantial street quantities." Id. at 232 (McKee, J. dissenting) (footnotes omitted). Appendix A-20. Judge McKee observed that the automatic imposition of a mandatory minimum sentence in a phony stash house robbery sting defeats Congressional intent that district courts impose sentences that are guided by the factors set forth in 18 U.S.C. § 3553 (a), and are "sufficient, but not greater the necessary, to comply with the purposes of [sentencing]." Id. at 232 (McKee, J. dissenting) (footnotes omitted) Appendix A-20. While this parsimony provision does not necessarily trump application of the mandatory minimum sentencing provisions of 21 U.S.C. § 841 (b), Judge McKee nevertheless found it difficult to believe that Congress intended that mandatory minimum sentences be

> "reflexively appl[ied] in stash-house cases where, as here, the defendant is not only a low-level 'drug' offender, but also became involved with non-existent drugs at the government's urging. . . [and] [t]here are no drugs that would otherwise endanger the community, and the criminal conspiracy probably would never have been hatched but for law enforcement's intervention and direction."

Id. at 232-234 (McKee, J. dissenting) (footnotes omitted) Appendix A-20—21.

In describing due process in the context of criminal law enforcement, Justice Powell once wrote:

> Due process in essence means fundamental fairness, and the Court's cases are replete with examples of judgments as to when such fairness has been denied an accused in light of all

the circumstances. . . .

Hampton v. United States, 425 U.S. 484, 494 n. 6 (1976) (Powell, J., concurring).

Mandatory minimum sentences in cases involving **real** drugs have been called "draconian." See United States v. Williams, 299 F.3d 250, 258 (3d Cir. 2002). Under the circumstances of this case, it is fundamentally unfair to impose an enhanced mandatory minimum twenty year sentence on Washington where (1) no actual drugs exist, (2) ATF had the unbridled discretion to select the type and quantity of the fictitious drugs sufficient to trigger mandatory minimums and (3) Congress did not envision application of these "draconian" sentences to stash house stings; particularly where, as acknowledged by the majority in the Court of Appeals, the imposition of the mandatory minimum in this case "has no real world foundation." 869 F.3d at 211-212. Appendix A-10. Washington urges this Court to grant the instant petition and rule that the otherworldly 20-year mandatory minimum sentence imposed on Washington violates due process.

CONCLUSION

WHEREFORE, Petitioner respectfully prays for the issuance of a writ of certiorari for the reasons stated herein.

Respectfully submitted,

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