

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVON RAYMUS STURDIVANT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

Petition for writ of certiorari

Submitted by:
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QUESTIONS PRESENTED

1. If defendants in identical situations are treated differently does this implicate the “equal protection component” of the Due Process Clause of the Fifth Amendment, and ought this Court exercise its supervisory power to clarify?

2. Given that Fourth Circuit precedent urges a reduction in sentence pursuant to *United States v Simmons*, 649 F.3d 237 (4th Cir. 2011), and that Petitioner raised his issue under *Simmons*, ought this Court exercise its supervisory power and order remand for reconsideration?

3. Ought the Court exercise its supervisory authority to clarify whether “clarifying” amendments to the Guidelines may be deemed retroactive in habeas corpus (§ 2255) motions and resolve circuit disagreements?

LIST OF PARTIES

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

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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

XXX For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A and is unpublished.

The order denying rehearing appears as Appendix B.

The opinion of the United States District Court appears at Appendix C and is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals for the Fourth Circuit decided appeal was 08/29/2017.

The date on which the United States Court of Appeals for the Fourth Circuit denied a timely filed Petition for Rehearing was 10/11/2017

☒ The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause's Equal Protection Component of Fifth Amendment

28 U.S.C. § 1746

28 U.S.C. § 2253

28 U.S.C. § 2255

STATEMENT OF THE CASE

This case involved a drug violation. In the plea agreement the prior convictions illegally used to enhance the sentence were agreed not to be used. The Government had withdrawn the § 851 motion as stipulated, but the essence of it was nonetheless used to enhance Petitioner's to career criminal." (Sentencing Transcript, hereinafter "ST," pages 6 and 7.) Counsel did not explain this.

The AUSA and Probation Officer focused on prior criminal activity which, given the sentence the lower court was inclined to impose and the age of Petitioner at ultimate release were irrelevant. Worse, although the lower court departed downward from what it could have imposed—just a little—this caused the court to later reject a motion under 18 U.S.C. § 3582 pursuant to Amendment 782, to deny it because it claimed the sentence was not under the Guidelines but under the Career Criminal section; also the motion raising Amendment 794. (Doc. 60, Case 3:06-cr-00194-RJC.)

The factor which prevented Petitioner from benefitting from this Honorable Court's decision in *Johnson* was that instead of charging him under the ACCA, the court enhanced him pursuant to the Guidelines. Petitioner is aware that Justice Thomas decided in *Beckles* that the "vagueness" ground did not fit the Guidelines in U.S.S.G. §4B1.2 as it did the residual clause in the ACCA. (*Beckles v United States*, 580 U.S. ___, slip op at 13 (2017).)

It is clear also that the district court judge felt that the sentence was unfair because he labored over the matter in dealing with Petitioner's § 2255. Many other jurists of reason have said that U.S.S.G. §4B1.2 relief also ought to have been deemed retroactive as was *Johnson*—See *Welsh v United States*, Case No. 15-6418.

Petitioner has contended that the lower court's enhancement under the career criminal Guideline was wrong. This was irrespective of the decision in *Johnson*. However the fact is that Petitioner's offenses, prior and the instant one, were such as to deny the career criminal enhancement.

This petition follows.

REASONS FOR GRANTING THE WRIT

1. If defendants in identical situations are treated differently does this implicate the “equal protection component” of the Due Process Clause of the Fifth Amendment, and ought this Court exercise its supervisory power to clarify?

In *Beckles v United States*, Case No. 15-8514 (2017), Justice Thomas reminded:

“Our holding today does not render the advisory Guidelines immune from constitutional scrutiny” The Court added that its “holding today also does not render ‘sentencing procedures’ entirely immune from scrutiny under the due process clause.” Justice Thomas’ decision also noted that the Guidelines are only advisory pursuant to *Booker*.

The Fourth Circuit and numerous other courts, have held that it is permissible for judges to vary from career criminal BOLs. In *United States v Newhouse*, 919 F.Supp. 2d 955, 966-967 (N.D.Iowa 2013) that court observed:

“Following this line of Supreme Court precedent, the Eighth Circuit Court of Appeals, as well as other courts of appeals, held that district courts are free to vary from the Career Offender Guideline based on policy disagreements with it. *See United States v. Gray*, 577 F.3d 947, 950 (8th Cir.2009) (holding that district court did not ‘misunderstand its authority to vary from the Career Offender Guideline’ on the basis of policy disagreements, thus implying that a district court has authority to vary from Career Offender Guideline based on policy disagreements with it); *see also United States v. Collins*, 474 Fed.Appx. 142, 144

(4th Cir.2012); *United States v. Mitchell*, 624 F.3d 1023, 1028-30 (9th Cir.2010); *United States v. Corner*, 598 F.3d 411, 416 (7th Cir.2010) (*en banc*); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir.2009); *United States v. McLean*, 331 Fed.Appx. 151, 152 (3d Cir.2009); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir.2008); *United States v. Sanchez*, 517 F.3d 651, 662-63 (2d Cir.2008).”

Our Constitution guarantees justice and equal treatment under law. The notion that an error which adds a lengthy period to Appellant’s sentence ought to go uncorrected is so foreign to the standard of justice, and a clear violation of the Due Process Clause’s equal protection component as to cause citizens who witness it to shudder, fearful that they might be victimized in other ways; that is, that if one person’s rights are disregarded, what trust ought they have in the Constitution’s stated rights? Especially is this true where the decision is based on “expediency.” The lower court felt that he didn’t have the needed discretion that Justice Thomas decided was true of Guideline sentencing.

Although set into law for a different purpose, Title 42 U.S.C. § 1981, states in part that “All persons within the jurisdiction of the United States shall have the same right[s].” In *United States v Dimasi*, Case No.09-10166 (D.Mass. 2016), that court spoke of the “essential [need] to administer equal justice under law.” In *United States v Dayi*, 980 F.Supp. 2d 682 (D.Ariz. 2013), that court spoke of a “command to ensure that sentences comport with the

notion of equal justice under the law.” But, in the instant case, (no disrespect intended) the lower court ignored this imperative under our Constitution.

In *United States v Blewett*, Cases 12-5226 and 12-5582 (6th Cir. 2013), that court noted that “disparities in cocaine sentencing produced equal protection problems... [This is] a very, very serious problem in equal justice in our systems.” In *United States v Linder*, 561 F.3d 339 (4th Cir. 2009), dissenting Judge Diana Gibbon Motz expressed concern that “by refusing to grant ... habeas relief, a panel of this court has not only seriously erred, but utterly failed to vindicate our Constitution’s promise of equal justice under law.”

In *United States v Williams*, Case No. 15-15254 (11th Cir. 2017), the court quoted the Supreme Court’s decision in *Griffin v Illinois* (1956) regarding “equal justice” in criminal trials. In *Dodds v United States Dept. of Education*, Case No. 16-4117 (6th Cir. 2016) dissenting Judge Sutton stated: “Similar treatment of similar plaintiffs is the essence of equal justice under law.” In *United States v McDade*, 121 F.Supp. 2d 26 (D.D.C. 2014), that court spoke of “this clemency imitative ... will go far to promote the most fundamental of American ideals – equal justice under law.” In *United States v Young*, Case No. 12-cr-4107 (N.D.Iowa 2013) that court noted that “the DOJ [has] deep concern for sentencing disparity ... much more can and must be done to ensure Equal Justice Under Law for all.”

In *United States v Plate*, case No. 15-13928 (D.Mass. 2016) footnote 3

states:

“[T]he Supreme Court stated in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956), although “[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem, our constitutional guaranties of due process and equal protection ‘both call for procedures in criminal [cases] which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”

2. Given that Fourth Circuit precedent urges a reduction in sentence pursuant to *United States v Simmons*, 649 F.3d 237 (4th Cir. 2011), and that Petitioner raised his issue under *Simmons*, ought this Court exercise its supervisory power and order remand for reconsideration?

In *Whiteside v United States*, 748 F.3d 541, 543 (4th Cir. 2014), that court dealt with a virtually identical situation and ruled differently from its and the lower court’s decisions in the instant case.

“The facts relevant to this appeal are brief and largely undisputed. In July 2009, the petitioner-appellant, Deangelo Whiteside, was indicted on charges of possession with intent to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1). Shortly thereafter, the government filed an Information pursuant to 21 U.S.C. § 851 notifying Whiteside that it intended to seek an enhanced penalty based on a 2002 North Carolina felony drug conviction.

“Whiteside then entered into a plea agreement with the government. The agreement acknowledged the possibility that Whiteside might be designated a career offender under U.S.S.G. § 4B1.1. It also contained several waivers of Whiteside's rights to challenge his conviction and sentence in an appeal or collateral proceeding. As discussed in more detail below, the parties dispute whether these provisions bar Whiteside's current claim.

“Whiteside pled guilty to the offense in October 2009 and the probation office began preparing a presentence report. The probation officer concluded that Whiteside was responsible for 1,951.9 grams of powder cocaine and 468.3 grams of crack cocaine, generating a base offense level of 32... The enhancement raised Whiteside's base offense level to 37 and his criminal history category from V to VI. After a three-level reduction for acceptance of responsibility, Whiteside's Sentencing Guidelines range was 262 to 327 months in prison. In light of the government's § 851 Information, the prior felony drug convictions also subjected Whiteside to a mandatory minimum term of imprisonment of twenty years.

“Prior to Whiteside's sentencing hearing, the government filed a § 5K1.1 motion seeking a downward departure based on the petitioner's substantial assistance. The government recommended that Whiteside receive a sentence based on a total offense level of 32 and a criminal history category VI, which yielded a 210 to 262 month Guidelines range. The district court granted the government's motion and, on July 9, 2010, sentenced Whiteside to 210 months' imprisonment, a sentence below both his Guidelines range and the twenty-year mandatory minimum...

“Whiteside argues that without those enhancements he would have faced a Guidelines range of 140 to 175 months and a statutory term of ten years to life. Assuming the same downward departure based on substantial assistance -- eighty percent of the low end of the Guidelines -- Whiteside contends that his sentence would have been 112 months, roughly eight years shorter than the sentence he received.”

The court there decided that this was sufficient to challenge and succeed in a collateral motion. The sentencing court ought to have recognized that even

a career criminal sentence that was based upon the Guidelines can be lowered under an Amendment to the Guidelines such as 782. In *United States v. Dominguez*, 794 F.3d 440 (4th Cir. 2015), that court decided that an error which upped the Base Offense Level 8 levels higher than was proper was “not harmless.”

3. Ought the Court exercise its supervisory authority to clarify whether “clarifying” amendments to the Guidelines may be deemed retroactive in habeas corpus (§ 2255) motions and resolve circuit disagreements?

There is the added problem of the lower court having denied Petitioner’s § 2255 by construing it as a motion under § 3582. In that case, whether or not Amendment 794 is listed in U.S.S.G. §1B1.10 is irrelevant.

In *United States v. Carter*, Case No. 12-cr-20066 (D.Kan. 2017), that court said:

“Assuming that Amendment 794 is a ‘clarifying’ amendment, the Court also applies it retroactively under Section 2255. *See United States v. Torres-Aquino*, 334 F.3d 939, 941 (10th Cir. 2003) (clarifying amendment relates to correctness of sentence which should be raised on direct appeal or in Section 2255 motion); *see also United States v. Armstrong*, 347 F.3d 905, 909 (11th Cir. 2003) (clarifying amendments ‘may only be retroactively applied on direct appeal of a sentence or under a § 2255 motion’).”

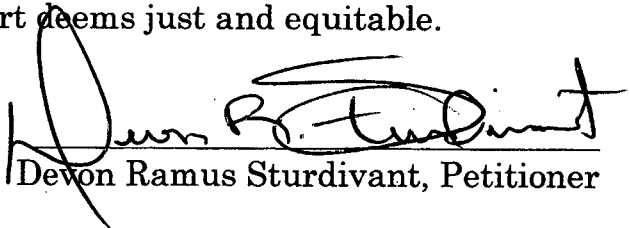
Also see *Hernandez v United States*, Case No. 15-cv-2962 (S.D.Cal. 2017). That court said that a “clarifying amendment ... could only occur in the context of a direct appeal or a 28 U.S.C. § 2255 petition and not in a ... § 3582(c).” That is what Appellant filed and the lower court denied it, construing it as a § 3582(c) motion.

However, some circuits and their district courts have ruled that clarifying amendments may on be raised on direct appeal. With the burgeoning population of federal prisons it is clear that any reasonable direction to reduce it would be not only just but proper. All citizens suffer from the costs of imprisonment. Especially is this appropriate given a couple of facts. (1) The BOP/DOJ has decided not to renew contracts with private prisons. This will add about 14,000 prisoners to this overpopulation. (2) A *USA Today* article on April 10, 2017, entitled "Federal prison bonuses stir outrage," noted that they "paid more than \$2 million in bonuses to top administrators ... while the agency was confronting persistent overcrowding, subpar inmate medical care, chronic staffing shortages and a lurid sexual harassment lawsuit ..."

By executing this document this 28th day of November, 2017, Petitioner declares that the statements contained herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

CONCLUSION

WHEREFORE, Petitioner prays the Court will grant certiorari and for such other and further relief as the Court deems just and equitable.


Devon Ramus Sturdivant, Petitioner