

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD LEONARD STURGIS —PETITIONER

(Your Name)

VS.

UNITED STATES —RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
FROM THE EIGHTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULE ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD LEONARD STURGIS REG.#11248041

(Your Name)

SANDSTONE FEDERAL CORRECTIONAL INSTITUTION

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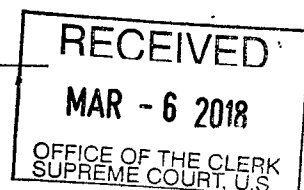
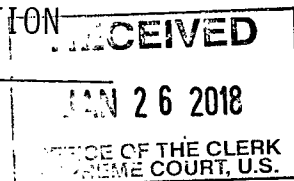
(Address)

SANDSTONE, MINNESOTA 55072

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

I. WHETHER IT WAS CONSTITUTIONAL ERROR TO DENY STURGIS A COA TO PURSUE HIS SIXTH AMENDMENT CLAIMS AS HAS ALREADY SET OUT IN BUCK V. DAVIS, 137 S.CT. 759(2017). WHERE STURGIS PRESENTED HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, A CLAIM HE WHOLEHEARTEDLY BELIEVE REASONABLE JURIST WOULD FIND DEBATEABLE AS TO HOWARD KIEFFER AND STEVE BERGESON INEFFECTIVENESS AS COUNSEL. WAS HOWARD KIEFFER AND STEVE BERGESON INEFFECTIVE ON APPEAL?

II. THEREFORE, DID THE DISTRICT COURT INVERT THE STATUTORY ORDER OF OPERATION BY DECIDING THE MERITS OF AN APPEAL OF A PRO SE LITIGATE, THEN DENYING A COA BASE ON THAT ADJUDICATION AND NOT WHETHER REASONABLE JURIST WOULD FIND THE CLAIM DEBATEABLE. WHICH IS THE STANDARD FOR AN COA.

III. WAS IT A DEBATABLE ISSUE THAT REASONABLE JURIST COULD DEBATE WHETHER DORSEY, 132 S.Ct. 2321(2012), APPLIED TO CASES NOT YET FINAL AS A CONSTITUTIONAL OR STATUTORY ERROR. GREAT NORTHERN R. CO. 52 L.ED 567 (1871). IF SO DID THE FAIR SENTENCING ACT APPLY TO CASES THAT WERE STILL PENDING ON DIRECT APPEAL.

LIST OF PARTIES

- ☒ [X] 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:

TABLE OF AUTHORITY

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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 at Appendix ____ to the petition and is

☒ report at 2017 U.S. APP. LEXIS 20280 No. 17-1100; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States court of appeals at Appendix ____ to the petition and is

☒ report at 2014 U.S. APP. LEXIS 9395 No.13-3373; 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

☐ report 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

☐ report 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 August 08, 2017.

☒ 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: OCTOBER 17, 2017, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for 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 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

III TITLE 28 U.S.C.S. §2253(c)(1) READS: UNLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A CERTIFICATE OF APPEALABILITY, AN APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS FROM--(A) THE FINAL ORDER IN A HABEAS CORPUS PROCEEDING IN WHICH THE DETENTION COMPLAINED OF ARISES OUT OF PROCESS ISSUED BY A STATE COURT; OR (B) THE FINAL ORDER IN A PROCEEDING UNDER SECTION 2255[28 USCS §2255]. (2) A CERTIFICATE OF APPEALABILITY MAY ISSUE UNDER PARAGRAPH(1) ONLY IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. (3) THE CERTIFICATE OF APPEALABILITY UNDER PARAGRAPH (1) SHALL INDICATE WHICH SPECIFIC ISSUE OR ISSUES SATISFY THE SHOWING REQUIRED BY PARAGRAPH(2). MOVANT FILED A RULE 60(B) STATING THAT THE DISTRICT COURT'S RESOLUTION OF HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW. SEE: 28 U.S.C.S. §2253(c) IN BUCK V. DAVIS, 137 S.Ct. 759 (2017), THE SUPREME COURT SOUGHT TO CORRECT THE PROBLEM OF HAVING THE UNITED STATES DISTRICT COURT JUDGE APPLY THE WRONG STANDARD, IN GRANTING OR DENYING A CERTIFICATE OF APPEALABILITY(COA).

THE 1871 SAVING STATUTE PERMITS CONGRESS TO APPLY A NEW ACT'S LENIENT PENALTIES TO PRE-ACT OFFENDERS WITHOUT EXPRESSLY SAYING SO IN THE NEW ACT(FAIR SENTENCING ACT). GREAT NORTHERN R. CO., SUPRA, AT 465 28 S.Ct. 313, 52 L.Ed. 567. IT IS TRUE THAT THE 1871 ACT USES THE WORDS "EXPRESSLY PROVIDE." 1U.S.C. §109. BUT THE COURT HAS LONG RECOGNIZED THAT III THAT THIS SAVING STATUTE ENACTED BY ONE CONGRESS CANNOT BIND A LATER CONGRESS, WHICH REMAINS FREE TO REPEAL THE EARLIER STATUTE.

STATEMENT OF THE CASE

DONALD LEONARD STURGIS, WAS FOUND GUILTY OF CONSPIRACY TO DISTRIBUTE COCAINE BASE AND ABETTING POSSESSION OF COCAINE BASE WITH INTENT TO DISTRIBUTE AND WAS SENTENCE TO A 336 MONTH TERM OF IMPRISONMENT. STURGIS PREVIOUSLY SOUGHT RELIEF FROM THAT SENTENCE ON A VARIETY OF GROUNDS UNDER 28 U.S.C. §2255, ONE BEING HIS COURT APPOINTED APPEAL ATTORNEY WAS INEFFECTIVE AS WAS HOWARD KIEFFER WHO HE HIRE, WHO WAS AN UNLICENSED FRAUDULENT ATTORNEY. AMONG OTHER THINGS STEVE BERGESON WAS INEFFECTIVE FOR NOT ENSURING KIEFFER WAS WHO HE SAY, HE WAS AND FOR VOUCHING FOR HIM WHEN HE FAILED TO FILE OUT THE APPLICATION TO PRACTICE IN THE STATE OF MINNESOTA. ALSO STRUGIS ARGUED THE RETROACTIVE OF THE FAIR SENTENCING ACT, 124 STAT. 2372, PETITIONER SOUGHT THE BENEFIT OF THE FAIR SENTENCING ACT, WHICH WAS PASSED WHILE PETITIONER CASE WAS STILL PENDING ON DIRECT APPEAL. HICKS V. UNITED STATES, 137 S.Ct. 2000(2017). STURGIS PETITIONED FOR COA BECAUSE HE BELIEVED THAT REASONABLE JURIST WOULD FIND RETROACTIVE ACTIVITY DEBATABLE.

THE DISTRICT COURT RULED THAT "ONE ASPECT OF STURGIS'S MOTION ACTS NOT AS A SECOND OR SUCCESSIVE §2255 MOTION, BUT AS AN ATTACK ON THE EARLIER §2255 PROCEEDINGS AS HAVING BEEN CONDUCTED CONTRARY TO THE RULES GOVERNING SECTION §2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURT." HOWEVER NEVERTHELESS; THE COURT DENIED HIS CLAIM."

REASONS FOR GRANTING THE PETITION

IT WAS A CONSTITUTIONAL ERROR ON THE PART OF THE UNITED STATES DISTRICT COURT TO DENY PETITIONER'S STURGIS A COA BASED, ON THE FACT THAT STURGIS'S SIXTH AMENDMENT RIGHT WERE, VIOLATED. THE DISTRICT COURT RULE THAT THE ISSUE WAS MOOT, BECAUSE STURGIS GOT ANOTHER DAY IN COURT. HOWEVER THE OTHER DAY IN COURT HAD NOTHING TO DO WITH HOWARD KIEFFER, THE FAKE ATTORNEY, AND THAT DAY IN COURT WAS ONLY LIMITED TO KIMBROUGH, AND NEITHER PARTY KNEW ANYTHING ABOUT KIEFFER UNTIL AFTERWARDS. THE COURT SAID ON REMAND: THAT IT WAS ONLY GOING TO LISTEN TO ARGUMENT PERTAINING TO KIMBROUGH, FOR THE REST WAS WATER UNDER THE BRIDGE (SEE 2009 RESENTENCING HEARING).

THE EQUAL PROTECTION ACT PROTECTS PEOPLES FROM THE INJUSTICE OF THE LAW. WHAT IS GENERALLY KNOWN AS THE CRACK LAW HAVE UNFAIRLY IMPACTED BLACKS FOR AT-LEAST THE PASS 25 YEARS. TREATING 1 GRAM OF CRACK AS EQUIVALENT TO 100 GRAMS OF POWDER COCAINE FOR SENTENCING PURPOSES, HAVE BEEN ACKNOWLEDGED, IN MANY QUARTERS AND EVEN MOST OF CONGRESS, AS UNJUST AND ADOPTED AND SANCTIONED WITHOUT EMPIRICAL SUPPORT. THEREFORE, THE FAIR SENTENCING ACT LOWERED THE RATIO TO A MORE JUSTIFIABLE RATIO, YET STILL THOUSANDS OF PRISONERS LAY IN PRISON RAVAGED BY A LAW THAT HAD NO JUSTIFICATION AT ITS INCEPTION. THE FOURTEENTH AMENDMENT HERE AND THE 1871 ACT REQUIRES COURTS INTERPRETING A NEW CRIMINAL STATUTE TO APPLY ITS NEW PENALTIES TO PRE-ACT OFFENDERS LIKE PETITIONER STURGIS, TO ASSURE THEMSELVES BY THE "PLAIN IMPORT" OR "FAIR IMPLICATION" OF THE NEW STATUTE THAT ORDINARY INTERPRETIVE CONSIDERATIONS POINTING CLEARLY TO DEFENDANT'S LIKE STURGIS WILL BE GRANTED. WHEN SEARCHING OUT THE STATUTE'S ADVISORY LANGUAGE,

A. ARGUMENT

DID THE DISTRICT COURT INVERT THE STATUTORY ORDER OF OPERATIONS BY DECIDING THE MERITS OF AN APPEAL AND THEN DENYING STURGIS THE COA BASED ON ADJUDICATION OF THE ACTUAL MERITS? BUCK, 137 S.Ct. 759.

IT WAS ERROR TO DENY STURGIS A COA TO PURSUE HIS SIXTH AMENDMENT CLAIMS ON APPEAL WHERE HE DEMONSTRATED INEFFECTIVE ASSISTANCE WHEN HIS ATTORNEY HIRED A NON-LICENSED FRAUDULENT ATTORNEY, WHO PREPARED A BRIEF AND GAVE TESTIMONY AT STURGIS 2006 FULL RESENTENCING.

IN 2004, DONALD LEONARD STURGIS WAS FOUND GUILTY OF CONSPIRACY TO DISTRIBUTE COCAINE AND COCAINE BASE AND AIDING AND ABETTING POSSESSION OF COCAINE AND COCAINE BASE WITH INTENT TO DISTRIBUTE AND WAS GIVEN A 360 MONTH SENTENCE, BASED IN PART OF HIS CAREER OFFENDER DESTINATION. STURGIS APPEALED THE CONVICTION AND SENTENCE AND WAS REMANDED BACK TO THE DISTRICT COURT IN 2006, FOR RESENTENCING PURSUANT TO UNITED STATES V. BOOKER, 543 U.S. 220 (2005). THIS IS WHERE STEVE BERGESON PROVED TO BE INEFFECTIVE, BY HIRING HOWARD KIEFFER, WITHOUT CHECKING HIS CREDENTIALS AND THEN VOUCHERED FOR KIEFFER WHEN HE FAILED TO FILL-OUT HIS APPLICATION FOR ADMITTANCE, IN THE STATE OF MINNESOTA.

RELIEF UNDER RULE 60(B)(6) IS AVAILABLE ONLY IN "EXTRAORDINARY CIRCUMSTANCES." GONZALES, 545 U.S., AT 535, 125 S.Ct. 2641, 162 L.Ed. 2D 480. DETERMINING WHETHER SUCH CIRCUMSTANCE ARE PRESENT MAY INCLUDE CONSIDERATION OF A WIDE RANGE OF FACTORS, INCLUDING "THE RISK OF INJUSTICE TO THE PARTIES" AND "THE RISK OF UNDERMINING THE PUBLIC'S CONFIDENCE IN THE JUDICIAL PROCESS." LILJEBERG V. HEALTH SERVICES ACQUISITION CORP., 486 U.S. 847, 863-864, 108 S.Ct. 2194, 100 L.Ed. 2D 855. THE DISTRICT COURT'S DENIAL OF STURGIS'S MOTION RESTED LARGELY ON ITS DETERMINATION THAT HOWARD KIEFFER FRAUDULENT REPRESENTATION PLAYED ONLY A DE MINIMIS ROLE IN STURGIS'S SENTENCING AND

THERE IS A REASONABLE PROBABILITY THAT STURGIS WAS SENTENCE TO THE SAME 30 YEAR SENTENCE BASED IN PART ON HIS FRAUDULENT ATTORNEY.

THIS COURT HAS HELD, THAT THE PRINCIPLE TO THE RIGHT TO COUNSEL IS THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. THIS WAS EXPLICATED IN UNITED STATES V. CRONIC, 466 US 648, 80 L.ED 2D 657(1984). THE TEXT OF THE SIXTH AMENDMENT ITSELF SUGGESTED SUCH A RULE, THE SUPREME COURT STATED, THAT THE AMENDMENT REQUIRES NOT MERELY THE PROVISION OF COUNSEL TO AN ACCUSED, BUT "ASSISTANCE" WHICH IS TO BE "FOR HIS DEFENSE"; THUS, THE CORE PURPOSE OF THE COUNSEL GUARANTY IS TO ASSURE "ASSISTANCE" AT TRIAL, WHEN THE ACCUSED IS CONFRONTED WITH BOTH INTRICACIES OF THE LAW AND THE ADVOCACY OF THE PUBLIC PROSECUTOR. IN UNITED STATES V. CRONIC, 466 US 648, 659, THE SUPREME COURT HELD THAT COURTS MAY PRESUME THAT A DEFENDANT HAS SUFFERED UNCONSTITUTIONAL PREJUDICE IF HE "IS DENIED AT A CRITICAL STAGE OF THE TRIAL." HERE IT WAS ON DIRECT APPEAL.

CRONIC, ALSO HELD THAT THERE ARE CIRCUMSTANCES THAT ARE SO LIKELY TO PREJUDICE THE ACCUSED THAT IT IS NOT WORTH LITIGATING THEIR EFFECT IN A PARTICULAR CASE. THE DEFENDANT DONALD LEONARD STURGIS, ARGUE THIS IS ONE OF THOSE CASES. WHERE HIS COURT APPOINTED ATTORNEY WAS DUPED INTO HIRING A FAKE WHO, PROBABLY ONLY IN IT FOR THE MONEY, AND NOT TO TAKE ON ANY REAL RESPONSIBILITY OF AN ADVOCATE. THIS COURT HAS SPOKEN AND EMPHASIZED THAT THE SIXTH AMENDMENT RIGHT TO COUNSEL EXIST IN ORDER TO PROTECT THE FUNDAMENTAL RIGHT TO A FAIR CRIMINAL PROCEEDING. SEE STRICKLAND V. WASHINGTON, SUPRA AT 684, 80 L.ED 2D 674, NIX V. WHITESIDE, 475 US 157, 175, 89 L.ED 2D 123(1986).

JUDGE JOAN N. ERICKSEN, APPLIED AN UNREASONABLE APPLICATION OF FEDERAL LAW BECAUSE, FURTHER DEVELOPMENT OF THE RECORD WAS NEEDED.

IF THE DISTRICT COURT WERE TO DETERMINE ☐ STURGIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. THE SUPREME COURT HAS SOUGHT TO CORRECT THE PROBLEM OF HAVING THE UNITED STATES DISTRICT COURT JUDGE APPLY THE WRONG STANDARD, IN GRANTING OR DENYING A COA. SEE: 28 U.S.C.S. §2253(c). BUCK V. DAVIS, 137 S.Ct. 759(2017).

THE FLAW IN WHAT THE UNITED STATES DISTRICT COURT JUDGE DONE HAS ALREADY BEEN SET OUT IN BUCK V. DAVIS, 137 S.Ct. 759(2017) AND IS FULLY RELIED ON HERE FOR SUPPORTING CLAIM HERE. THAT IS BECAUSE IT CLARIFIED THE STANDARD FOR COA, FOR PRISONERS AND CLARIFIED AN AVENUE FOR PRISONERS WHO HAVE HAD THEIR §28 U.S.C. 2255 DENIED ERRONEOUSLY, WHO SEEK TO REOPEN THEIR CASE PURSUANT TO RULE 60(B)(6). THIS WAS ☐ BECAUSE LIKE STURGIS, BUCK CASE ORIGINATED WITH A RULE 60(B). WHERE THE JUDGE BELIEVE STURGIS DID NOT PROVE THAT REASONABLE JURIST WOULD FIND HIS CASE DEBATABLE, AFTER DECIDING THE MERITS OF HIS §2255. EVEN THOUGH STURGIS CASE WOULD SEEM TO MEET AT-LEAST THE STANDARD OF EXCEPTIONAL CIRCUMSTANCES. WHERE A FRAUDULENT ATTORNEY WAS HIRED TO DEFEND THE PETITIONER ON APPEAL, WHO HAD NEVER PASS A BAR EXAM WOULD SEEM LIKE A CASE A JURIST WOULD FIND DEBATABLE AS FAR AS INEFFECTIVE ASSISTANT DURING THE CRIMINAL PROCEEDING. THE DISTRICT COURT JUDGE, "SAID THIS WAS A MOOT ISSUE" THE FACT STURGIS HAD A FRAUDULENT ATTORNEY DURING A CRITICAL STAGE OF HIS CRIMINAL PROCESS, DURING HIS FIRST DIRECT APPEAL. JUDGE ERICKSEN, BELIEVED BECAUSE STURGIS WON A SECOND REMAND WHICH HAD NOTHING TO DO WITH KIEFFER'S REPRESENTATION OF STURGIS, AND WAS LIMITED ONLY TO THE ISSUE OF KIMBROUGH V. UNITED STATES, 552 U.S. 85, 128 S.Ct. 558 (2007), WHETHER THE CRACK GUIDELINE WAS ADVISORY.

TO OBTAIN A CERTIFICATE OF APPEALABILITY, A PETITIONER IS REQUIRED TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL

RIGHT, 28 U.S.C. §2253(c)(2). BECUASE THE EIGHTH CIRCUIT COURT OF APPEAL, AS DID THE DISTRICT COURT INVERT THE STATUTORY ORDER OF OPERATIONS BY EITHER ONLY LOOKING AT THE ACTUAL MERITS AND PLACING TOO HEAVY A BURDEN ON THE DEFENDANT, AT THE COA STAGE. IN DEFENDANT'S CASE FOR SIXTH AMENDMENT PURPOSES THE DEFENDNAT DEMONSTRATED PREJUDICE DURING THE SENTENCING PHASE WHERE HIS COURT APPOINTED ATTORNEY WITHOUT THE DEFENDANT'S CONSENT HIRED SOMEONE HE BELIEVED TO BE A LICENSED ATTORNEY AND A SENTENCING SPECIALIST. IT WAS DEBATABLE THAT THE CAREER SENTENCE WOULD NOT HAVE BEEN IMPOSE ABSENT INEFFECTIVE ASSISTANCE. WHERE THE DEFENDANT HAD A COUPLE OFFENSES THAT COULD BE SEEN AS MINOR OFFENSES, WHERE THE DEFENDANT DID ONE OR TWO YEARS FOR THE OFFENSES. SEE: UNITED STATES V. JONES, 507 F.3D 657(8TH CIR.2007).

IT SHOULD HAVE BEEN CLEAR TO THE LOWER COURT THAT MOVANT MAY HAVE RECEIVED THE SAME 360MONTH CAREER OFFENDER SENTENCE DUE TO INEFFECTIVE ASSISTANCE. DUE TO A FRAUDULENT FAKE ATTORNEY AND A DUPED INEFFECTIVE LEAD ATTORNEY. THIS COURT HAVE STATED "THE SIXTH AMENDMENT RIGHT TO COUNSEL EXIST IN ORDER TO PROTECT THE FUNDAMENTAL RIGHT TO A FAIR CRIMINAL PROCEEDING. STRICKLAND V. WASHINGTON, SUPRA AT 684,80 L.ED 2D 674.

STURGIS ARGUMENT IS HE WAS DENIED DUE PROCESS OF LAW, AS IT PERTAIN TO HIS SIXTH AMENDMENT ISSUE IN THE ERRONEOUS MISTAKE IN THE COURT RULING THAT STURGIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL HAD BECOME MOOT STURGIS MOVED THE UNITED STATES COURT OF APPEALS ALTHOUGH, AN APPEAL CANNOT BE TAKEN FROM A FINAL ORDER DENYING A MOTION UNDER §2255 WITHOUT A CERTIFICATE OF APPEALABILITY. SEE: 28 U.S.C. :2253(c)(1). MOVANT ALSO MOVED THE UNITED STATES COURT OF APPEALS AS WELL AS THE UNITED STATES DISTRICT COURT FOR RELIEF PURSUANT TO RULE 60(B)(6). STURGIS NOW MOVES THIS COURT FOR RELIEF.

II ARGUMENT

WAS IT A DEBATABLE ARGUMENT THAT REASONABLE JURIST COULD DEBATE WHETHER DORSEY, 132 S.Ct. 2321(2012), APPLIED TO CASES NOT YET FINAL? THOSE WHO WERE STILL ON DIRECT SENTENCES WERE NOT YET FINAL. BUCK V. DAVIS, 137 S.Ct. 759(2017).

DOES A DECISION OF THE UNITED STATES SUPREME COURT IN DORSEY, APPLY HERE? DOES A CONSTITUTIONAL DETERMINATION AS IN DORSEY V. UNITED STATES, 569 U.S. 260, 281, AND GRIFFITH V. KENTUCKY, SHOW WHEN CONGRESS AMELIORATE PARTICULAR CONDUCT OR PERSONS COVERED BY STATUTE BEYOND THE STATE'S POWER TO PUNISH MORE HARSHLY. SUCH AS THOSE WHO COMMITTED AN OFFENSE PRIOR TO AUGUST 3, AND WERE SENTENCE PRIOR TO AUGUST 3, AND NOVEMBER 1, 2010 A PERIOD AFTER THE NEW ACTS EFFECTIVE DATE. HOWEVER THEIR SENTENCES WERE NOT YET FINAL BECAUSE, THEY WERE ON DIRECT REVIEW. BEFORE THE NEW GUIDELINES FIRST TOOK EFFECT. WAS IT DEBATABLE WHETHER THE ACT'S NEW MANDATORY MINIMUM APPLIED TO THEM? THAT IS THE RETROACTIVITY OF THE FAIR SENTENCING ACT'S. TO PIPELINE CASES CHARGED CRIMINAL CONDUCT, THIS MUST BE APPLIED RETROACTIVELY TO ALL CASES NOT YET FINAL IN ORDER NOT TO AFFEND THE CONSTITUTION'S EQUAL PROTECTION CAUSE. "WITH NO EXCEPTIONS". THIS HAS GENERALLY BEEN UNDERSTOOD AS A RULE ON THE THE RETROACTIVITY OF NEW DECISIONS. SEE: DORSEY V. UNITED STATES, 132 S.Ct. 2321 (2012).

IT IS A DEBATABLE ISSUE WHETHER A "REPEALED STATUTE" APPLIES RETROACTIVELY WHEN A NEW STATUTE DIMINISHES THE PENALTIES THAT THE OLDER STATUTE SET FORTH WHEN, THE SENTENCE WAS YET FINAL. (CITING DORSEY V. UNITED STATES, 132 S.Ct. 2321(2012)). THE 1871 SAVING STATUTE PERMITS CONGRESS TO APPLY A NEW ACT'S LENIENT PENALTIES TO PRE-ACT OFFENDERS WITHOUT EXPRESSLY SAYING SO IN THE NEW ACT. GREAT NORTHERN R. CO., SUPRA. AT 465 28 S.Ct. 313, 52 L.Ed. 567. IT IS TRUE THAT THE 1871 ACT USES THE WORDS "EXPRESSLY PROVIDE." 1 U.S.C. §109. BUT THE COURT HAS LONG RECOGNIZED THAT THIS SAVING (567 U.S. 274) STATUTE

ENACTED BY ONE CONGRESS CANNOT BIND A LATER CONGRESS, WHICH REMAINS FREE TO REPEAL THE EARLIER STATUTE, TO EXEMPT THE CURRENT STATUTE FROM THE EARLIER STATUTE, TO MODIFY THE EARLIER STATUTE, OR TO APPLY THE EARLIER STATUTE BUT AS MODIFIED. SEE, E.G., FLETCHER V. PECK, 10 U.S. 87, 6 CRANCH 87, 135, 3 L.ED. 162 (1810); REICHELDERFER V. QUINN, 287 U.S. 315, 318, 53 S.Ct. 177, 77 L.ED. 331 (1932). AND CONGRESS REMAINS FREE TO EXPRESS ANY SUCH INTENTION EITHER EXPRESSLY OR BY IMPLICATION AS IT CHOOSES. HICK V. UNITED STATES, 137 S.Ct. 2000 (2017).

IN HICKS V. UNITED STATES, 137 S.Ct. 2000, EVERYBODY AGREED THAT MR. HICKS WAS WRONGLY SENTENCED TO A 20 YEAR MANDATORY MINIMUM SENTENCE UNDER A DEFUNCT STATUTE AS DID MR. STURGIS, WHO PRESERVED THE ARGUMENT IN HIS 2009 RESENTENCING. IT'S TRUE THAT MR. STURGIS LIKE MR. HICKS DIDN'T ARGUE THE POINT IN THE COURT OF APPEALS ON DIRECT REVIEW. HOWEVER, IN HICKS THE GOVERNMENT ADMITS HICKS' SENTENCE IS PLAINLY WRONG AS A MATTER OF LAW, AND THAT WAS ENOUGH FOR THE COURT TO SEE THAT THE GOVERNMENT WAS RIGHT, AND STURGIS PRAY THE GOVERNMENT WILL DO THE SAME HERE. AS IN HICKS. THIS COURT SHOWED TO UNDO AND REVISE A SENTENCE UNDER THE PLAIN ERROR STANDARD, A COURT MUST NOT ONLY (1) DISCERN AN ERROR, BUT THAT ERROR MUST (2) BE PLAIN, (3) AFFECT THE DEFENDANT'S SUBSTANTIAL RIGHTS, AND (4) IMPLICATE THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS. UNITED STATES V. OLANO, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.ED. 2D 508 (1993). "AND ALTHOUGH THE GOVERNMENT CONCEDED THE FIRST TWO LEGAL ELEMENTS OF THE PLAIN ERROR TEST, IT ASKED THIS COURT TO REMAND THE CASE TO THE COURT OF APPEALS FOR IT TO RESOLVE THE LATTER TWO QUESTIONS IN THE FIRST INSTANCE."

WHEN THIS COURT IDENTIFIES A LEGAL ERROR, IT ROUTINELY REMANDS THE CASE SO THE COURT OF APPEALS MAY RESOLVE WHETHER THE ERROR WAS

HARMLESS IN LIGHT OF OTHER PROOF IN THE CASE-AND SO DECIDE IF THE JUDGMENT MUST BE REVISED UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52(A). AFTER IDENTIFYING AN UNPRESERVED BUT PLAIN LEGAL ERROR, THIS COURT LIKewise ROUTINELY REMANDS THE CASE SO THE COURT OF APPEALS MAY RESOLVE WHETHER THE ERROR AFFECTED THE DEFENDANT'S SUBSTANTIAL RIGHTS AND IMPLICATE THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS-AND SO (AGAIN) DETERMINE IF THE JUDGMENT MUST BE REVISED, THIS TIME UNDER RULE 52(B).

THIS COURT REMAND IN CASES LIKE THESE NOT ONLY WHEN THEY ARE CERTAIN THAT CURING THE ERROR WILL YIELD A DIFFERENT OUTCOME. BUT ALSO IN CASES WHERE THEY THINK THERE'S A REASONABLE PROBABILITY THAT WILL HAPPEN. SEE, E.G., *SKILLING V. UNITED STATES*, 561 U.S. 538, 414, 130 S.Ct. 2896, 177 L.Ed. 2d 619 (2010) (HARMLESS ERROR); *TAPIA V. UNITED STATES*, 564 U.S. 319, 335, 131 S.Ct. 2382, 180 L.Ed. 2d 357 (2011) (PLAIN ERROR); *UNITED STATES V. MARCUS*, 560 U.S. 258, 266-267, 130 S.Ct. 2159, 176 L.Ed. 2d 1012 (2010) (PLAIN ERROR) (INTERNAL QUOTATION MARKS OMITTED).

HERE THE TOUCHSTONE OF THE CONSTITUTION'S EQUAL PROTECTION CLAUSE AND THE RULE OF LENITY THE DEFENDANT BELIEVES ARE INTERWINED WITH THE FUNDAMENTAL FAIRNESS OF JUSTICE. TO CONSTRUE A CRIMINAL STATUTE IN FAVOR OF LENITY TOWARD AN ACCUSED IN SITUATIONS IN WHICH A REASONABLE DOUBT PERSISTS ABOUT THE APPLICATION OF THE STATUTES INTENDED SCOPE EVEN AFTER RESORTING TO THE STATUTE'S LANGUAGE AND THEREFORE MUST APPLY HERE. *LINKLETTER V. WALKER*, 14 L.Ed 2d 601 (1965).

CAN A JURIST FIND IT DEBATABLE HOW A STATUTE IS USED WHEN DETERMINING RETROACTIVITY FROM THE LANGUAGE USED. IS IT THE WORDS THE LEGISLATURE USE OR EMPLOY TO DETERMINE WHETHER A CASE IS WITHIN THE INTENTION OF A STATUTE, ESPECIALLY OF A PENAL ACT. DOES ITS LANGUAGE

HELP TO AUTHORIZE SUCH DETERMINATION (AS IS THE CASE HERE WITH THE FAIR SENTENCING ACT). AND CONGRESS REMAINS FREE TO EXPRESS ANY SUCH INTENTION EITHER EXPRESSLY OR BY IMPLICATION AS IT CHOOSES. HICK V. UNITED STATES, 137 S.Ct. 2000(2017), GREAT NORTHERN R.CO., 28 S.Ct. 313, 52 L.Ed. 567.

WHEN DECIDING ON A COA, THE STATUTE SETS FORTH A TWO-STEP PROCESS FOR DECIDING TO GRANT A COA. THAT IS AN INITIAL DETERMINATION WHETHER A CLAIM IS REASONABLY DEBATABLE, AND IF SO, AN APPEAL IN THE NORMAL COURSE. THE DISTRICT COURT NEVER GOT PAST THE INITIAL STAGE AND THAT IS WHETHER STURGIS HAD SHOWN THAT "JURIST OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF STURGIS'S CONSTITUTIONAL CLAIMS. THAT IS WHETHER STURGIS WAS DENIED EFFECTIVE ASSISTANCE AND WHETHER THE FAIR SENTENCING ACT SHOULD APPLY TO THOSE WHO SENTENCE AND OR CONVICTIONS WERE NOT FINAL, BECAUSE OF AN DIRECT APPEAL ECT.

STURGIS SUBSTANTIAL RIGHTS ARE, INDEED, IMPLICATED HERE. A PLAIN LEGAL ERROR AS HERE INFECTS THIS JUDGMENT. A MAN HAS BEEN WRONGLY SENTENCE TO A 28 YEAR SENTENCE IN PRISON UNDER A DEFUNCT STATUTE. NO DOUBT, TOO, THERE'S A REASONABLE PROBABILITY THAT CLEANING THIS ERROR WILL YEILD A DIFFERENT OUTCOME. OF COURSE, MR. STURGIS'S CONVICTION WON'T BE UNDONE, BUT THE SENTENCING COMPONENT OF THE DISTRICT COURT'S JUDGEMENT IS LIKELY TO CHANGE, AND CHANGE SUBSTANTIALLY. HICKS V. UNITED STATES, 137 S.Ct. 2000 (INTERNAL QUOTATION MARKS OMITTED).

CONCLUSION

IN CLOSING THE PETITIONER ARGUE THAT HE HAD AT-LEAST TWO DEBATABLE ISSUES, THAT HE HONESTLY BELIEVE THAT JURIST OF REASON COULD FIND DEBATABLE. THAT IS HIS INEFFECTIVE ASSISTANCE CLAIM, WHERE ON REMAND FROM THE EIGHT CIRCUIT, THE DISTRICT COURT RESENTENCE PETITIONER TO 360 MONTHS' IMPRISONMENT. (1ST RESENTENCING HRG. TR. [DOCKET NO. 231

AT 15-19.). STURGIS RAISED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS APPEALS AND RE-SENTENCING PROCEEDINGS BECAUSE (1) HIS APPELLATE ATTORNEY RETAIN HOWARD KIEFFER, A MAN WHO FALSELY MISREPRESENTED HIMSELF AS AN ATTORNEY, TO ASSIST WITH STURGIS APPEAL, AND TWO STURGIS SHOULD HAVE BEEN ENTITLED TO THE NEW COCAINE BASE STATUTE WHICH MADE COCAINE BASE 18 TO 1 INSTEAD OF A 100 TO 1. PURSUANT TO THE FAIR SENTENCING ACT WHICH WAS PASSED AND MADE RETROACTIVE WHILE STURGIS WAS STILL ON DIRECT APPEAL.⁴ ALTHOUGH FEDERAL CONSTITUTION'S ARTICLE I, § 9 CL. 3, PROHIBITED APPLYING NEW CONGRESSIONAL ACT'S HIGHER PENALTIES TO PRE-ACT CONDUCT, CLAUSE DID NOT PROHIBIT APPLYING LOWER PENALTIES. IN SUPREME COURT CASELAW WHICH APPLY WHEN CONGRESSIONAL INTENT WITH RESPECT TO RETROACTIVITY IS UNCLEAR. IN BRADLEY V. SCHOOL BOARD OF CITY OF RICHMOND, 416 U.S. 696 (1974), THE COURT EXPLICITLY REJECTED THE THEORY THAT NEW LAWS ARE TO BE APPLIED RETROSPECTIVELY ONLY WHERE THAT INTENTION IS COMPLETELY CLEAR, INSTEAD STATING THAT "A COURT IS TO APPLY THE LAW IN EFFECT AT THE TIME IT RENDERS A DECISION. THE DECISION TO DENY STURGIS APPEAL WAS RENDERED ON AUGUST 29, 2011. THE TIME ISSUE BEFORE UNITED STATES SUPREME COURT IS DIFFICULT, BUT IMPORTANT TO CASES THAT WERE PENDING ON DIRECT APPEAL BECAUSE, RELEVANT LANGUAGE IN DIFFERENT STATUTES, ARGUE IN OPPOSITE DIRECTIONS. THE WORD "REPEAL APPLIES RETROACTIVELY WHEN A NEW STATUTE SIMPLY DIMINISHES THE PENALTIES, THAT THE OLDER STATUTE SET FORTH, IF THE SENTENCE IS NOT YET FINAL (CITING DORSEY V. UNITED STATES, 132 S.Ct 2321, 567 U.S. ____ (2012), AND WARDEN V. MARRERO, 417 U.S. 653 (1974)).

⁴ THE FAIR SENTENCING ACT OF 2010 ("FSA") AMENDED THE SECTION 841(B)(1)(A)(III) TO INCREASE THE QUANTITY OF CRACK COCAINE REQUIRED TO TRIGGER THE TEN-YEAR MANDATORY MINIMUM AND LIFE MAXIMUM FROM 50 GRAMS OR MORE TO 280 GRAMS OR MORE. THE FSA'S MORE LENIENT PENALTIES FOR CRACK COCAINE CONVICTIONS APPLIED TO OFFENDERS WHO COMMITTED A CRACK COCAINE CRIME BEFORE AUGUST 3, 2010, BUT WERE NOT SENTENCED UNTIL AFTER THAT DATE.

CONCLUSION

The petition for a writ of certiorari should be granted. CASE REMANDED CONSISTENT WITH HIS OPINION. THIS IS THE PRAYER OF THE PETITIONER.

Respectfully submitted,

Donald Sturgis

Dated this 16 day of JANUARY 2018.