

FILED
MAY 24 2013
[Signature]
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF SOUTH DAKOTA

Tyler Brown

Petitioner,

vs.

Case No.4:07-CR-40055-LLP

Cv.No.4:11-CV-04151-LLP

UNITED STATES OF AMERICA

Respondent.

Motion Pursuant

To

Fed.R.Civ.P.60(b), (5) and (6)

Comes Now, Tyler Brown, your Petitioner in the above enumerated case, respectfully files with this Honorable Court, (here-and-after), Fed.R.Civ.P.60(b), to correct the procedural error and remand back for resentencing. In support of,

Petitioner states the following:

STATEMENT OF JURISDICTION

The United States District Court for the District of South Dakota, Southern Division, has jurisdiction over offenses against laws of the United States which occur in that district, 18 U.S.C. section 3231.

REQUEST FOR LIBERAL CONSIDERATION

Petitioner does not have any training in legal reserach, therefore requests this Honorable Court to liberally construe

this motion pursuant to Fed.R.Civ.P.60(b), drafted by the Petitioner, in accordance with ruling in HAINES v KERNER, 404 U.S.519 (1972), where a pro-se Petitioner is held to a less stringent standard than formal papers drafted by attorneys. Therefore, Petitioner urges this Court to liberally construe the pleading in this proceeding.

STATEMENT OF CASE FACTS

ON February 3, 2009, a federal grand jury returned a one count indictment charging Petitioner with Conspiracy to Distribute a Controlled Substance in of 21 U.S.C. section 841(a)(1) and 846.

Petitioner pled not guilty and went to trial. He was found to be guilty by the jury on May 26, 2009.

A sentencing hearing was held on April 2, 2010, and Petitioner was sentenced to 120 months by the United States Sentencing Guidelines.

filed a timely notice to appeal his conviction and sentence. Petitioner made several claims of ineffective assistance of counsel, and moreover, did the District Court err by failing to consider it's authority to impose a variance sentence to reflect a 1 to 1 ratio.

The 8th Circuit Court of Appeal Affirmed the judgment stating in part, that, "general savings statute, 1 U.S.C. section 109, requires application a penalties in place at the time crime was committed unless new enactment expressly provides for it's own retroactive application; Fair Act 2010 contains no express statement that it is retroactive and no such express intent can be inferred from its plain language. Thus, the

statutory minimum existing at the time offense was committed governs judgment was entered on October 12,2010

On October 19,2011, Petitioner filed a timely motion to vacate,set aside or correct sentence pursuant to 28 U.S.C. section 2255, arguing the Fair Act 2010 and Ineffective assistance of Counsel..

Certificate of was filed untimely on February 25,2013 and dismissed on May 2,2013.

Petitioner now files a timely motion pursuant to Fed.R.Civ.P.60 (b) Challenging procedural errors made in the District and Appellate Courts.

Petitioner Claims there has been a procedural error to The Fair Sentencing Act 2010, by the Courts not applying retroactivity to his case while on DIRECT REVIEW, violating his 5th Amendment right to equal protection and constitutional criminal procedures. Petitioner was sentenced April 2,2010 to the mandatory minimum of 10 years and/or 120months, with a guideline sentence based on a 1 to 1 ratio, 41 to 51 months. SEE. Pre-sentence Report made by Senior US Probation officer Kim H. Williams. Dated October 29,2009. On April 8,2010, Petitioner filed a timely notice of appeal and on October 12,2010 a judgment was entered. On August 3,2010 The Fair Act was enacted, leaving Petitioners case pending DIRECT REVIEW. The Supreme Court has ruled that new constitutional rules of criminal procedures "should always be applied to cases on direct review. See: MACKAY v. UNITED STATES". On certiorari, the United States Supreme Court reversed the judgement of the

Supreme Court of Virginia and remanded the case for further proceedings. In an opinion by Thomas, J., joined by Blackmun, Stevens, Scalia, and Souter, JJ., and joined in part (as to point 3-5) by Kennedy and White, JJ., it was held that (1) When the United States Supreme Court applies a rule of federal law to the parties before it, such rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review events predate or postdate the Supreme Courts announcement of the rule. Citing: HARPER v. VIRGINIA DEPT. OF TAXATION, It was held that the rule BATSON v. KENTUCKY is applicable to litigation that was pending on direct state of federal review, or not yet final, when Batson was decided, since (1) A new rule for conduct of criminal is to be applied retroactively to all cases, state or federal, which are then pending on direct review or not yet final. Citing: GRIFFITH v. KENTUCKY. In the Supreme court for reasons which have never been explained, the Courts appear to have assumed that if a new rule is announced and retroactivity applied in one habeas corpus case; See TEAGUE v. LANE, that it must be applied retroactively in all other cases on direct review coming before the Courts

The government has argued that the general savings clause applies, which preserves conviction and sentenced entered is preserve. The Savings clause does not preserve a superceded criminal law when this law (1) No longer serves any legislative purpose, (2) Undermines the Constitution, See; HAMM v. CITY OF ROCKHILL, 379 U.S. 309 (1965). i UNITED STATES v. CHAMBERS, 291 U.S. 217 (1934) instead the application law

is the law in effect while the case is still pending. ie, THE FAIR SENTENCING ACT 2010. In addition, The Fair Sentencing Act 2010, must be interpreted in Petitioners case to avoid Constitutional concerns. The Doctrine of Constitutional avoidance requires that these statutes not be interpreted in such a way that they might offend the Constitution. Finding The FSA does not apply simple disregards the Principle of Equal Protection and settled Supreme Court Authority.

The Courts has also stated that it does not have authority to sentence Petitioner to The Fair Sentencing Act based on the FSA not being enacted at the time of sentencing. The Courts stated they were bound by the Statutory mandatory minimum. Now that the Fair Sentencing Act of 2010 passed while Petitioner was on direct review, there are has been recent discrepancies amongst circuits as to how to apply retroactivity. Petitioner argues that, the Sixth Circuit of Appeals on , May 17, 2013, ruled that The FSA of 2010 is retroactive on a 2 to 1 decision by a 3 panel judge, which shows that The Courts has and had the authority to sentence Petitioner to a 18 to 1 ratio sentence. See: UNITED STATES v. BLEWETT, No 12-5226 (2013). Although Petitioners case may have seemed without review inapplicable at the time of direct review. The Supreme Court ruled clearly on, GRIFFITH v. KENTUCKY, HARPER v. VIRGINIA DEPT. OF TAXATION, TEAGUE v. LANE, and MACKAY v. UNITED STATES, that case always on direct review be made retroactively. Therefore Petitioner should be resentenced under The New Fair Sentencing Act 2010.

CONCLUSION

WHEREFORE, The Petitioner respectfully request that the Courts vacate or remand Petitioner back for resentencing, finding The Fair Sentencing Act 2010 to be applied, by regarding the principle of Equal Protection and settled Supreme Court Authority. Therefor, sentencing this Petitioner to the new mandatory minimum of 60 months (5 years).


CERTIFICATE OF SERVICE

I, TYLER BROWN, hereby certify that I served a true and correct copy of this Fed.R.Civ.P 60 (b), (5), and

(6). Which is deemed filed at the time the inmate places the filing in the internal prison mail system. See HOUSTON v. LACK, 487 U.S. 266 (1988) (Prison Mailbox Rule). Addressed

to: CLERK OF COURTS
U.S. DISTRICT, OF SOUTH DAKOTA
400 S. PHILLIPS AVENUE
SIOUX FALLS, SD 57104

Filed 20 day of May 2013


TYLER BROWN