Supreme Court, U.S.
FILED
NOV 20 2000
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NO.: 00-7330

In The

SUPREME COURT OF THE UNITED STATES OF AMERICA

IN RE: ORESTES BRUZON, and

JESUS BRUZON-GONZALEZ,

Petitioners.

ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS

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SUPREME COURT, U.S.

Respectfully submitted,

ORESTES BRUZON, and

JESUS BRUZON-GONZALEZ
F.C.C. Coleman Low
P.O. Box 879
Coleman, FL 33521-0879

QUESTIONS PRESENTED

1. Whether petitioners' sentences, 293 months and 240 months concurrently to be followed by 10 years supervised release for Orestes Bruzon, and 248 months, 240 months and 240 months concurrently to be followed by 5 years supervised release for Jesus Bruzon-Gonzalez, both of which exceeded the statutory maximum available under 21 U.S.C. § 841(B)(1)(C) where the drug quantity was not charged in the indictment and proven to the jury beyond a reasonable doubt, but was determined by the sentencing court under the preponderance of evidence standard when both petitioners previously challenged drug quantity attribution, but were overruled by the district court which was affirmed by the Eleventh Circuit Court of Appeals, must be vacated in light of Apprendi v New Jersey, 120 S.Ct. 2348 (2000)?

2. Whether petitioners were sentenced under unconstitutional statutes?

3. Whether the new rule of constitutional law first noticed under Jones v United States, 526 U.S. 227 (1999), and established as a rule of constitutional law under Apprendi v New Jersey, 120 S.Ct. 2348 (2000) must be applied retroactively to cases under collateral review, and is a new rule which establishes the right to file successive collateral attacks under Federal Habeas statutes?

set forth in Apprendi v New Jersey, 120 S.Ct. 2348 (2000). Petitioners submit that: 1) granting the instant habeas petition will be in aid of the Court's appellate jurisdiction because a split exists among the federal appeals circuits on the question of retroactive application to collateral attack; 2) this case presents exceptional circumstances warranting the exercise of this Court's discretionary and supervisory powers; and 3) relief by way of successive 2255 is statutorily foreclosed, and no other judicial vehicle remains available to resolve the constitutional issues presented herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of 21 U.S.C. § 841(a), § 841(b), 28 U.S.C. §§§ 2241, 2244, 2255, along with the Fifth and Sixth Amendments to the United States Constitution are set forth in Appendices C, D, E, F, G, H. and I.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In 1995, petitioners were charged in a multi-count indictment for violations of 21 U.S.C. §§ 841(a)(1) and 846. The indictment made no mention of a specific amount of drugs, nor did it list the penalty section of 841(b) containing the elements of the crime purportedly committed.

Petitioners chose a jury trial and were convicted in 1996. Orestes Bruzon was sentenced to 293 months for the conspiracy count and 240 months for the substantive count, to be served concurrently and followed by a 10 year period of supervised release. Jesus Bruzon-Gonzalez was sentenced to 248 months on the conspiracy count, 240 months and 240 months on the substantive counts, to be served concurrently and followed by a 5 year term of supervised release.

Appeal was taken to the Eleventh Circuit Court of Appeals which affirmed both petitioners' convictions and sentences on October 2, 1998.

Petitioners filed a joint 28 U.S.C. § 2255 motion on October 1, 1999, which was summarily denied by the district court on October 12, 1999, Subsequently, on October 27, 1999, petitioners filed a Motion for Want of Subject Matter Jurisdiction pursuant to Rule 12(b)(2), Federal Rules of Criminal Procedure.

On December 16, 1999, the district court denied the Rule 12(b) motion and appeal was taken. Appeal number 99-15406 is currently pending before the Eleventh Circuit.

On July 18, 2000, the Eleventh Circuit dismissed the Bruzons' attempt to appeal their § 2255 motion because of a late notice of appeal.

In August 2000, petitioners filed an application for leave to file a second or successive 2255 with the Eleventh Circuit Court of Appeals which was denied in September.

The Bruzons remain incarcerated at F.C.C. Coleman Low, in Coleman, Florida.

II. FACTS OF THE CASE

The Bruzons were indicted as members of a conspiracy which distributed cocaine in the Atlanta, Georgia area. Evidence against father and son came largely from a parade of cooperating witnesses with three notable exceptions.

Although under almost continuous investigation from 1988 until the time of his arrest in 1996, DO NOT " hard evidence existed linking Orestes Bruzon to this conspiracy. No audio tape recordings of transactions, no video tapes or any substantive proof was put forward at trial. However, during the course of this investigation, government agents sent a confidential informant to purchase one-half a kilo from Mr. Bruzon. The informant was "wired" for the meeting, under surveillance at all times, both photographically and by agents. The informant returned with less than one-half a kilo of drugs, but none

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of habeas corpus under its original jurisdiction because: 1) a conflict exists between the federal appellate circuits; 2) the questions presented are serious constitutional issues; 3) exceptional circumstances exist which warrant the exercise of the Court's discretionary and supervisory powers; and 4) avenues with which to seek appropriate relief are barred by statute (28 U.S.C. § 2244(b)(3)(A)), and by precedential Eleventh Circuit case law which creates a discriminatory situation whereby similarly situated individuals are denied access to judicial avenues for their claims simply by virtue of their geographic location.

The Bruzons' avenues of review on this issue have been exhausted. Direct appeals were taken to the Eleventh Circuit wherein both petitioners argued drug quantity attribution. The district court's findings were affirmed by the court of appeals. Collateral attack was jointly initiated and summarily denied. Petitioners, acting pro se, were jurisdictionally barred from seeking further review because of an untimely notice of appeal.

On June 26, 2000, this Court released its decision in Apprendi v New Jersey, 120 S.Ct. 2348 (2000), and announced a new rule of constitutional law. In August 2000, petitioners filed an application for permission to file a second or successive section 2255 petition based on the new rule expressed in Apprendi.

On August 30, 2000, the Eleventh Circuit decided In Re Joshua, 224 F3d 1281 (11th Cir. 2000). In Joshua, the Court held that because the Supreme Court had not expressly stated that Apprendi was to be applied retroactively to cases on collateral review, the statutory requirements authorizing successive 2255's had not been met. The Bruzons' application was denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 14 2000
THOMAS K. KAHN
CLERK

No. 00-14473-D

IN RE: ORESTES BRUZON,
JESUS BRUZON-GONZALEZ,

Petitioners.

Application for Leave to File a Second or
Successive Motion to Vacate, Set Aside, or
Correct Sentence, 28 U.S.C. §§ 2255, 2244(b)(3)(A)

Before **ANDERSON, Chief Judge, BIRCH and CARNES, Circuit Judges.**

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255 and 2244(b)(3)(A), as amended by §§ 105 and 106 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Orestes Bruzon and Jesus Bruzon-Gonzalez ("petitioners") have filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, 28 U.S.C. § 2255. The AEDPA provides that a petitioner may not file a second or successive § 2255 motion in the district court without an order from the court of appeals authorizing the district court to consider it. Such authorization may be granted only if this Court certifies that the proposed motion contains:

(1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255. The petitioners identify one claim that they wish to raise in a second or successive § 2255 motion: their sentences were error because the amount of drugs attributed to them was determined by the sentencing court, rather than having been charged in the indictment and proven to the jury beyond a reasonable doubt. The petitioners allege that this claim relies upon a "new rule of constitutional law," citing Apprendi v. New Jersey, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

As to this claim, the petitioners must show that Apprendi established "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255. They have failed to make the requisite showing. Accordingly, because the petitioners have failed to make a prima facie showing of the existence of the statutory grounds, the application for leave to file a second or successive motion is hereby DENIED.