No. 00-5812

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

FILED
JUN 20 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In re: Ronald L. Boyer,

Petitioner,

-vs-

UNITED STATES OF AMERICA,
and T.C. PETERSON,
Warden, FCI Sandstone,

Respondents.

On Petition for a Writ of Habeas Corpus to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

I. Whether Congress by virtue of the "gatekeeping" provision of the AEDPA, set forth in 28 U.S.C. § 2244(b) and 2255 has effectively suspended the writ of habeas corpus in relation to jurisdictional claims that are otherwise nonwaivable nor subject to a procedural default, in violation of Article I § 9, Clause 2 of the United States Constitution?

II. Whether current precedent previously interpreting the meaning of 28 U.S.C. § 2255's "inadequate or ineffective" clause should be reconsidered in light of AEDPA's harsh legislation?

III. Whether this Court's decision in United States v. LaBonte, 520 U.S. 751, 137 L.Ed.2d 1007 (1997), effectively eviscerated the Seventh Circuit's holding in United States v. Damerville, 27 F.3d 254 (7th Cir. 1994), thus calling into question Damerville's continued validity?

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Ronald Boyer, pro se, respectfully requests that a writ of habeas corpus issue to vacate the petitioner's otherwise unconstitutional imposed sentence in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's judgment dismissing petitioner's § 2241 motion, and treating it as a second or successive § 2255 motion, is reported as **Boyer v. Gilkey, et al., ___ F.3d ___ (7th Cir. 2000)** (unpublished) (**Pet. App. A 1**). The Order of the United States District Court for the Southern District of Illinois, adopting the Magistrate's Report and Recommendation to dismiss Boyer's § 2241, and to treat it as a second or successive § 2255 motion **(Pet. App. A 2a)**, Magistrate's Report and Recommendation **(Pet. App. A 6a)**, and Petitioner's Objections to the Magistrate's R & R **(Pet. App. A 10a)**.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment summarily affirming the district court's decision on February 11, 2000, and its mandate was issued on April 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 2241.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the following constitutional, statutory, and regulatory provisions as set forth herein:

AMENDMENT V: No person shall be ... deprived of life, liberty, or property, without due process of law.

ARTICLE I § 9, Clause 2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

28 U.S.C. § 2255 ¶ 5: An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained ... unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 994(h)(1)(B): (Duties of the Commission).

21 U.S.C. § 846: (Conspiracy).

United States Sentencing Guidelines § 4B1 (Career Offender).

United States Sentencing Guidelines § 4B1.2 (Definitions of Terms Used in § 4B1.1).

STATEMENT

The Prosecution and Sentencing of Petitioner

Petitioner Ronald L. Boyer ("Mr. Boyer") is serving an eighteen year federal prison term on a conviction of one count of conspiracy to possess cocaine with intent to distribute. See, **United States v. Boyer, 931 F.2d 1201 (7th Cir. 1991)**, cert. denied, **112 S.Ct. 209 (1991)**. In June 1989 a federal grand jury returned a three-count indictment against Mr. Boyer. Counts 1 and 2 of the indictment charged Boyer with

distributing a total of 68 grams of cocaine. Count 3 charged Mr. Boyer with conspiracy to possess 500 or more grams of cocaine. The indictment grew out of a sting operation in which a government informant, Robert Gayan, told Mr. Boyer that he wanted to sell cocaine. Mr. Boyer introduced Mr. Gayan to Ralph Green, who bought one kilogram of cocaine from Mr. Gayan. **Id.**

The government dismissed the substantive charges in Counts 1 and 2 of the indictment before trial, and prosecuted only the conspiracy charged in Count 3. A jury found Mr. Boyer guilty. In sentencing Mr. Boyer, the district court determined that, under the United States Sentencing Guidelines ("Sentencing Guidelines" or "U.S.S.G."), his base offense level was 28 and his criminal history category was IV. The district court found that Mr. Boyer merited a two level reduction in his base offense level for acceptance of responsibility. That combination of adjusted offense level (26) and criminal history category (IV) would have resulted in a sentencing range of 92 to 115 months.

Mr. Boyer previously had been convicted of three counts of armed robbery and one of second-degree murder. The district court ruled that the robbery convictions were "related" for purposes of the Sentencing Guidelines and therefore counted as only one conviction, but that the homicide conviction was separate. Mr. Boyer thus had two qualifying prior convictions under the "career offender" provision in § 4B1.1 of the U.S.S.G. Because the conspiracy conviction was assumed to to be a proper predicate offense, the district court

determined that Mr. Boyer was a career offender. Thus, Mr. Boyer was subject to sentencing on a base offense level of 34, and a criminal history category of VI. The acceptance of responsibility reduction lowered the offense level to 32. The resulting sentencing range was 210 to 262 months. The district court sentenced Mr. Boyer to a 216 month prison term.

Events Subsequent To Mr. Boyer's Sentencing

The United States Court of Appeals for the Seventh Circuit affirmed Boyer's conviction and sentence. **Id.** This Court denied certiorari. **502 U.S. 873 (1991).** Mr. Boyer then filed a petition for relief from his sentence pursuant to 28 U.S.C. § 2255. The district court dismissed that petition in February 1992, and the Seventh Circuit affirmed in March 1993. **Boyer v. United States, 989 F.2d 502 (7th Cir. 1993)** (unpublished). On April 23, 1993, the United States Court of Appeals for the District of Columbia Circuit became the first court at any level to hold that a defendant convicted only of conspiracy to commit a drug offense cannot be sentenced as a career. **United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993).**

Relying on **Price**, Mr. Boyer filed his second pro se petition for § 2255 relief from his sentence on July 23, 1993, prior to the enactment of the AEDPA. The district court dismissed Mr. Boyer's petition on May 18, 1994. The district court ruled only that Mr. Boyer had not established cause and

prejudice with respect to his prior defaults. [1] The district court did not suggest that consideration of the petition was barred under the non-retroactivity rule in **Teague v. Lane, 489 U.S. 288 (1989).**

Mr. Boyer appealed. On May 24, 1995, the Seventh Circuit affirmed (despite a conflict in the circuits). Even though neither the government nor the district court had ever relied on the point, the court of appeals held that Mr. Boyer's claim was barred under **Teague**. [2] The court of appeals also held that Mr. Boyer had not established cause for his prior defaults. **Boyer v. United States, 55 F.3d 298 (7th Cir. 1995),** cert. denied, **516 U.S. 904 (1995),** rehearing denied, **516 U.S. 982 (1995).**

Mr. Boyer refusing to allow this serious constitutional claim swept under the judicial rug of procedural default took a new and novel approach. Mr. Boyer filed a writ of mandamus, pro se, in the United States District court for the District of Columbia, suing to "compel the United States Sentencing Commission to amend retroactively its guidelines to omit conspiracy as a predicate offense from the 'career offender'

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[1] Mr. Boyer alleged in his second § 2255 motion, in the district court that the sentencing court lacked jurisdiction to impose his enhanced sentence, since Congress did not list conspiracy (21 U.S.C. § 846) as a predicate offense for career offender sentencing in 28 U.S.C. § 994(h)(1)(B). However, the Government nor the district court ever addressed Mr. Boyer's jurisdictional claim.

[2] Notwithstanding, **Teague** has never barred the retroactive application of a substantive non-constitutional decision concerning the reach of a federal statute. **United States v. Mikalajunas, 186 F.3d 490, 499 n. 5 (4th Cir. 1999)** (rejecting the Seventh Circuits reasoning in **Boyer, 55 F.3d at 299).**

enhancement provision." See, **Boyer v. Conaboy, et al., 983 F.Supp. 4 (D.D.C. 1997).** While the district court concluded that notwithstanding Boyer's "novel and creative litigation strategy, his action sounds exclusively in habeas corpus." **Id. at 6.** Therefore, the district court suggested that Boyer return to Illinois on a writ of habeas corpus. **Id.**

Finally, after additional litigation developed concerning the constitutionality of AEDPA, Mr. Boyer filed in the United States District Court for the Southern District of Illinois, in February 1998, his first pro se, petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241. Essentially, Mr. Boyer alleged that the district court lacked jurisdiction to subject him to the career offender enhancement, since Congress did not list (conspiracy 21 U.S.C. § 846), as a predicate offense in its legislative directives to the Commission, 28 U.S.C. § 994(h)(1)(B).

Mr. Boyer argued that he should be permitted to litigate his claim via § 2241, since the enactment of the "gatekeeping" provision § 2255 was "inadequate and ineffective" to test the legality of his detention concerning a jurisdictional claim in a second or successive § 2255 motion. In addition, Mr. Boyer argued that since this Court's decison in **Labonte** effectively eviscerated the Seventh Circuit's holding in **Damerville, supra**, thus calling into question **Damerville's** continued validity, he should be permitted to bring his claim via § 2241.

The Magistrate issued an order to show cause, and the Government filed their response. On December 8, 1998, Magistrate Fraizer, issued his Report and Recommendation. Both he and the Government conceded that Mr. Boyer's claim is a jurisdictional claim; notwithstanding, Mr. Boyer's § 2241 motion was dismissed as a successive § 2255 motion, finding that Boyer did not show that § 2255 was ineffective as a vehicle for resolving his jurisdictional challenge to his sentence.

Therefore, Mr. Boyer timely filed a notice of appeal to the Seventh Circuit Court of Appeals. The Court of Appeals subsequently requested a jurisdictional memorandum from both Mr. Boyer and the Government, to determine whether they had jurisdiction to hear the appeal. Mr. Boyer argued that they had jurisdiction based on **In re Davenport, 147 F.3d 605 (7th Cir. 1998)** (Court concluded that despite the fact that district court treated Davenport's §2241 motion as a second § 2255 motion, and the fact that Davenport did not file a notice of appeal, but requested leave to file a second successive petition. The court had authority to treat his motion as a notice of appeal from the denial of his § 2241 motion).

On February 11, 2000, the Seventh Circuit summarily affirmed the district court's order of dismissal **(Pet. App. A 1a)**.

REASON FOR GRANTING THE WRIT

The decision below depends on a number of sweeping holdings that go directly to the very heart of the availability of habeas corpus relief in cases in which a federal prisoner claims that the sentencing court lacked jurisdiction to impose an enhanced sentence. Most importantly, this case presents this Court with the novel question as to whether Congress when enacting the "gatekeeping" provision of 28 U.S.C. § 2244(b) and § 2255, effectively suspended the avalibility of the writ of habeas corpus to test the legality of sentence imposed by a court lacking jurisdiction, in a second or successive § 2255 motion. When for over one hundred years a jurisdictional claim has been otherwise been non-waivable nor subject to a procedural default.

On the merits, Boyer's petition presents a fundamental and frequently litigated federal sentencing issue, which has evaded review by this Court, and which the courts of appeals are irreconcilably divided -- whether the Sentencing Commission properly determined that the "career offender" sentencing enhancement in § 4B1.1 of the Sentencing Guidelines should apply to defendants convicted only of conspiracy to commit a controlled substance offense. This case will present this Court with an excellent opportunity to resolve that conflict, and also address fundamental questions concerning the application of basic principles of administrative law to the Sentencing Commission. These substantive issues are worthy of review in their own right.