No: 04-6201

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 31 2004
OFFICE OF THE CLERK

IN RE: DALE BROWN

Petitioner,

ORIGINAL PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

Respectfully Submitted,

Dale Brown
Register #: 29087-004 / Unit A3
Federal Correctional Complex – Low
P.O. Box 1031
Coleman, Florida 33521-1031

Petitioner Pro-Se

QUESTIONS PRESENTED

1. WHETHER PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE UNITED STATES SENTENCING GUIDELINES, INSOFAR AS THEY PERMITTED THE JUDGE TO INCREASE PETITIONER'S BASE OFFENSE LEVEL PREMISED ON A QUANTITY OF DRUGS, ROLE IN THE OFFENSE AND OBSTRUCTION OF JUSTICE FACTS NOT CHARGED IN THE INDICTMENT, SUBMITTED TO A JURY OR PROVEN BEYOND A REASONABLE DOUBT.

2. WHETHER BLAKELY SHOULD BE APPLIED RETROACTIVELY TO PETITIONER'S CASE ON COLLATERAL REVIEW.

ORIGINAL PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

DALE BROWN, (Hereinafter, "Petitioner"), respectfully petitions for an extraordinary writ of Habeas Corpus on the grounds that his Fifth Amendment Indictment, Due Process Clause, and Sixth Amendment Right to a trial by jury were violated by the United States Sentencing Guidelines, where it permitted the court to sentence Petitioner based on facts not charged in the indictment, nor submitted to a jury and proven beyond a reasonable doubt. Petitioner's claim is supported by this court's recent decision in Blakely v Washington, 124 S.Ct. 2531, WL 1402697 (U.S. June 24, 2004), and prays that a writ be granted, because although he preserved his constitutional right to have had a jury finding of the facts essential to determining his sentence, there is now no other means or avenue available to obtain judicial relief and vacatur of his illegal sentence of 300 months imprisonment.

Petitioner's instant issue is extraordinarily unique and original in that prior to the decision in Apprendi v New Jersey, 530 U.S. 466, 490, 147 L.Ed.2d 435, 120 S.Ct. 2348, (2000), and Blakely, he asserted his Sixth Amendment right by vigorously objecting that the facts used to enhance his sentence, (specifically for his role in the offense), were not proven beyond a reasonable doubt, and he thereby believes that this court has the authority and the power to grant this writ on the facts and law set forth in this petition. Petitioner invokes Haines v Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972), and states that as a pro-se litigant, this court should construe his petition liberally.

OPINIONS BELOW

1. The unpublished order of the Eleventh Circuit Court of Appeals denying Petitioner's Application to file a Second or Successive 28 U.S.C. 2255 is attached herewith and marked as ***Appendix A***.

2. The published opinion in the Eleventh Circuit Court of Appeals affirming Petitioner's conviction and sentence on direct appeal and cited as United States v Brown, *43 F.3d. 618 (11th Cir. 1995)*, marked as ***Appendix B***.

3. The opinion of the Seventh Circuit Court of Appeals in United States v Booker, 2004 WL 1535858, marked as ***Appendix C***.

4. The District Court's partial transcript of sentencing hearing of 6/28/04 in United States v FanFan, case No: 03-P-H. , marked as ***Appendix D***.

JURISDICTION

This court has jurisdiction to hear this case pursuant to Supreme Court Rule 20(1), (2).

CONSTITUTIONAL, STATUTORY AND GUIDELINE PROVISIONS INVOLVED

The pertinent provisions as set forth in ***Appendix E***.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of Florida, Petitioner was convicted on a four count indictment. The indictment charged in counts 1 and 2 that Petitioner; (I) conspired with others to import *(an unspecified)* quantity of a mixture and substance containing a detectable amount of cocaine in violation of 21 U.S.C. 952(a) and 21 U.S.C. 963, and, (II) conspired with others to possess with intent to distribute *(an unspecified)* quantity of a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. In counts 3 and 4, the indictment charged that Petitioner alone possessed with intent to distribute *(an unspecified)* quantity of a mixture and substance containing a detectable amount of marijuana, (hash oil), in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. (***See Appendix F – Indictment***). The jury's verdict did not specify a finding as to the quantity of either drug. Petitioner was sentenced to 300 months imprisonment to be followed

by five years supervised release. (***See Appendix G – Sentencing Transcripts at 34-35***). Petitioner's conviction and sentence were affirmed on direct appeal.

1. **The Underlying Facts**:

The facts relating to Petitioner's arrest and conviction are as recorded in the opinion of United States v Brown, 43 F.3d 618 (11th Cir. 1995). (***See Appendix B***).

2. **The District Court Proceedings**:

Following Petitioner's conviction by the jury, the Pre-Sentence Report, (PSR), recommended that Petitioner be held responsible for conspiracy to import and possession with intent to distribute 30 kilograms of cocaine, (in which the actual substance was *sugar* and *flour* used as sham cocaine in the reverse sting operation by the DEA agents), and the actual delivery of 2,721.8 grams of hash oil, pursuant to Section 2D1.1(a)(3) of the United States Sentencing Guidelines, (USSG). (***See Appendix H – Pre Sentence Report***).

The PSR recommended a base offense level of 34 which has a sentencing range of 151 to 188 months imprisonment, and a statutory sentence of 10 years to life imprisonment pursuant to 21 U.S.C. 841(b)(1)(B) and 21 U.S.C. 960(b)(1)(B). The PSR also recommended that Petitioner's sentence be enhanced by three (3) levels for a managerial role in the offense pursuant to USSG Section 3B1.1(b), ***Appendix (E)(9)***, and two (2) levels for obstruction of justice, perjury, pursuant to USSG Section 3C1.1., ***Appendix (E)(10).*** Petitioner filed timely objections to the PSR's recommendations.

At Petitioner's sentencing hearing held on July 20, 1992, Petitioner vigorously objected to the increased penalties, by stating specifically that the evidence the court is relying on to increase his sentence, particularly for his role in the offense, "***were not found beyond a reasonable doubt at trial.***" The court responded to Petitioner's objections by stating that the

evidence would not be found by using the beyond a reasonable doubt standard, "***but by a preponderance of the evidence.***" ***(See Appendix G – Sentencing Transcripts at 27-28***). The court then proceeded to make its own findings of fact and in conclusion adopted the recommendations of the PSR in its entirety. Petitioner was subsequently sentenced to 300 months imprisonment, the middle of level 39 of the USSG. ***(See Appendix G – Sentencing Transcripts at 32-34***).

3. **Direct Appeal Proceedings**:

On direct appeal, Petitioner argued, under the same premises of his objections at sentencing that; (a) The trial court erred by finding that, Petitioner was a manager or supervisor, and , (b) that the trial court erred by finding that Petitioner had obstructed justice. ***(See Appendix I – Statement of Issues on Direct Appeal)***. In January 1995, the court of appeals concluded that Petitioner's sentencing issues are without merit and chose not to discuss them. ***(See Appendix B – United States v Brown , 43 F.3d 618 footnote #1 (11th Cir. 1995)***).

4. **First Habeas Corpus Proceedings**:

In 2000 when this court decided Aprendi v New Jersey, Petitioner's first Habeas Corpus motion was before the Eleventh Circuit Court of Appeals. Shortly thereafter, Petitioner requested to supplement his arguments with *Apprendi* related sentencing issues. The court denied this request by stating that *Apprendi* is not retroactive to cases on collateral review pursuant to their precedent case, In Re Joshua, 224 F.3d 1281 (11th Cir. 2000). On September 18, 2000, Petitioner filed a request to the district court to amend and supplement his previously filed 2255 motion with *Apprendi* related sentencing issues, ***(District Court Dkt.# 404)***, and this request was denied on March 14, 2001. ***(District Court Dkt.# 415)***. Even when Petitioner's 2255 motion was remanded for an evidentiary hearing in 2001, petitioner again requested the court of

appeals to expand its mandate to allow Petitioner to argue *Apprendi*, however, such requests were denied. On November 21, 2001, Petitioner's 2255 motion was denied following the evidentiary hearing, whereby the district court found that Petitioner was not denied effective assistance of counsel, the sole issue on remand.

5. **Second Habeas Corpus Application Proceedings**:

On July 2, 2004, following this court's decision in Blakely v Washington, Petitioner filed an application to the Eleventh Circuit Court of Appeals seeking authorization to file a Second or Successive habeas corpus motion pursuant to 28 U.S.C. 2255 and 2244(b)(3)(A). In his request, Petitioner claimed that, "*the district court violated his Sixth Amendment Right to a jury trial by enhancing his sentence under the Federal Sentencing Guidelines, based on his role as a manager or supervisor, and his obstruction of justice, when the facts supporting those guideline enhancements were not proved to a jury beyond a reasonable doubt.*"

On July 16, 2004, the court denied Petitioner's application stating that, "the Supreme Court has not made Blakely retroactively available on collateral review, In Re Dean, No: 04-13244 manuscript op. at 6-7 (11th Cir. July 9, 2004), and acordiingly, Petitioner's claim failed to satisfy the statutory criteria. 28 U.S.C. 2255." (***See Appendix A – Order Denying Successive Habeas Application***).

REASONS FOR GRANTING WRIT

Following those proceedings, it is clear that Petitioner is left in a dilemma, because although his well preserved constitutional issues is supported by the facts and the law as recently announced in Blakely, he is technically barred from all appeals, and from seeking relief in the lower courts from his illegal and unconstitutional sentence. The pertinent questions that arises under these circumstances are, "where and how can Petitioner find relief?" and, "Should

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 16 2004
THOMAS K. KAHN
CLERK

No. 04-13298-D

IN RE: DALE BROWN,

Petitioner.

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 **DUBINA, BLACK and CARNES, Circuit Judges.**

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255 and 2244(b)(3)(A), Dale Brown has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in 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 court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

In his application, Brown indicates that he wishes to raise the following claim in a second or successive § 2255 motion: that the district court violated his Sixth Amendment right to a jury trial by enhancing his sentence under the federal sentencing guidelines based on his role as a manager or supervisor and his obstruction of justice, when the facts supporting those guideline enhancements were not proved to a jury beyond a reasonable doubt. Brown contends that his claim relies on a new rule of constitutional law, citing the U.S. Supreme Court's recent opinion in Blakely v. Washington, No. 02-1632 (U.S. June 24, 2004).

In Blakely, the Supreme Court reversed an upward departure imposed pursuant to the State of Washington's state sentencing guidelines. The Supreme Court applied the rule in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, slip op. at 5. In reversing the upward departure, the Supreme Court held that the "relevant statutory maximum for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." Id. at 7-9. This Court recently held that the Supreme Court has not made Blakely retroactively available on collateral review. In re Dean, No. 04-13244, manuscript op. at 6-7 (11th Cir. July 9, 2004). Accordingly, Brown's claim fails to satisfy the statutory criteria. 28 U.S.C. § 2255.

Brown has failed to make a prima facie showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255. Accordingly, his application for leave to file a second or successive motion is DENIED.