No. _____

03-0107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

Supreme Court, U.S.
FILED
FEB 27 2004
OFFICE OF THE CLERK

In re GERALD BURKS — PETITIONER
(Your Name)

MAR 4 - 2004

VS.

JERRY L. STERNES — RESPONDENT(S)
(Custodian)

PETITION FOR WRIT OF HABEAS CORPUS – PERSON IN STATE CUSTODY

(PURSUANT TO 28 U.S.C. § 2254)

PETITION FOR WRIT OF HABEAS CORPUS

Gerald Burks #N-10182
(Your Name) P.O. Box 1200
2600 North Brinton Avenue
(Address)
Dixon, Illinois 61021-7200
(City, State, Zip Code)
(815) 288-5561
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the decision announced by This Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) should be applied retroactively to cases pending on collateral review?

2. Whether the decisions by Illinois courts to deny relief to Petitioner on the claim that his extended term sentence is unconstitutional in light of Apprendi constitutes a violation of the Supremacy Clause, the Equal Protection Clause and the Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments?

3. Whether the relevant Illinois statutes used for extending Petitioner's sentence beyond the prescribed maximum range were unconstitutional in that they were procedurally deficient and contained ambiguous language in violation of the Due Process Clauses and the Void for Vagueness Doctrine?

4. Whether Petitioner's continued confinement on the extended term portion of his sentence is unconstitutional and constitutes an "exceptional circumstance" so as to warrant relief via the Great Writ—ordering his immediate release based upon the above and foregoing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues raised in the instant petition involve the extended term sentencing statutes of the State of Illinois. The federal Constitution is implicated where the application of those statutes raises serious due process concerns with respect to the Fifth, Sixth and Fourteenth Amendments.

Although the right to have the essential elements of an offense stated in an indictment, presented to a jury and then proved beyond a reasonable doubt is well recognized, it is not specifically stated in the Constitution. Even so, Petitioner makes the claim that it is nevertheless a right "retained by the people" pursuant to the Ninth Amendment. It is, however, acknowledged that such rights emanate more directly from the requirement that criminal accusations be alleged in an indictment (a Fifth Amendment provision), and, from the provision in the Sixth Amendment which affords an accused the right to be informed of the "nature and cause of the accusation."

The latter of the two provisions is further implicated in the constitutional challenge by Petitioner attacking the relevant Illinois statutes on the basis of their ambiguous language—which he contends has resulted in their arbitrary application, and the lack of fair warning with respect to the Void for Vagueness Doctrine.

Also involved is the Supremacy Clause (i.e., Article VI, cl. 2) where certain decisions by the Illinois courts have drawn into question the claimed infringement of the foregoing constitutional

provisions and other relevant and well-established rules of law. Relatedly, such decisions tend to question the validity of various decisions by This Court on the issue of whether or not the constitutional rules of law announced in Apprendi should be applied retroactively to cases pending on collateral review.

STATEMENT OF THE CASE

The instant case involves the 1978 homicide of a person suspected of having burglarized Petitioner's residence. The evidence adduced at trial suggested that drugs were involved and that the victim may have been both a pusher and an addict.

Petitioner was tried jointly by a jury along with codefendant, Eddie Harris, in the Circuit Court of Cook County, Illinois. One of the key defense witnesses could not be located for trial, but Petitioner still contested his actual involvement in the incident.

In 1980, the jury returned guilty verdicts and the trial judge sentenced Petitioner and codefendant Harris to 50 and 80-year extended terms, respectively. The particular factor/element used for invoking the extended term provisions was not stated in the indictment; nor was it presented to the jury; and no finding of guilt thereon was ever made by the jury. At the time, the maximum statutory penalty for such a murder in Illinois was 40-years.

On direct appeal, appellate counsel presented evidence showing that the prosecution had offered certain inducements to their key witnesses in exchange for their testimony. The appellate court, however, rejected all the claims raised in the joint appeal and affirmed the convictions and sentences. The constitutional challenge to the extended term sentences was inadvertentently omitted from the petition for leave to appeal to the Illinois Supreme Court.

It is that term (which Petitioner began serving in 2000) that is the focus of the instant application for federal habeas relief.

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH APPLICANT IS CURRENTLY HELD

The instant application is being submitted to This Court as an original action rather than in the U.S. District Court for the Northern District of Illinois because:

(1) the Court of Appeals for the Seventh Circuit has expressly stated that it will not grant such an application pursuant to its gate-keeping function (i.e., 28 U.S.C. §2244(b)(3)(A)) until This Court declares that its decision in Apprendi applies retroactively to cases pending on collateral review. See Talbott v. Indiana, 226 F.3d 866 at 869 (7th Cir. 2000).

(2) Petitioner has previously filed an application for federal habeas corpus relief in the district court; however, the Apprendi-related claims which he now seeks to raise were not presented at that time. See Petition.

(3) the Apprendi-related claims were not presented in his previous habeas application due to appellate counsel's failure to present them to the State's highest court on direct appeal—after they had been rejected by the appellate court. See Supporting Record.

(4) for Petitioner to again present said claims to the lower State tribunals would have been futile by virtue of the principle of res judicata. Thus, he presented

them to the only State court to never have a chance to pass upon them (i.e., the Illinois Supreme Court) in a state habeas petition as an original action prior to applying to This Court for relief.

(5) Petitioner is proceeding from the premise that "[t]he doctrine of 'res judicata' is inapplicable in habeas corpus proceedings[.]" Fay v. Noia, 372 U.S. 391 at 423 (1963).

(6) by virtue of the foregoing, "adequate relief cannot be obtained in any other form, or from any other court." S. Ct. Rule 20(1).