

No. 0611429

**ORIGINAL**

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IN THE  
SUPREME COURT OF THE UNITED STATES

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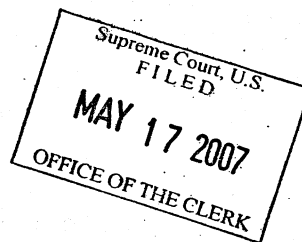
KEITH LAVON BURGESS,

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent.



ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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P E T I T I O N  
FOR A WRIT OF CERTIORARI

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Petitioner:

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Post Office Box 699  
Estill, South Carolina 29918

On the Brief:

MICHAEL R. RAY, Law Clerk  
Legal Assistant-Paralegal  
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**QUESTION(S) PRESENTED**

1. Whether the term "felony drug offense" as used in federal statute requiring imposition of enhanced mandatory minimum 20 years' imprisonment when drug offender has "prior conviction for a felony drug offense" must be read in pari materia with federal statutes defining both "felony" and "felony drug offense", so as to require imposition of minimum 20-year sentence only if prior drug conviction is both punishable by more than one year in prison and characterized as a felony by controlling law.

2. When the court finds that a criminal statute is ambiguous, must it then turn to rule of lenity to resolve ambiguity?

LIST OF PARTIES

1. Petitioner/Appellant: KEITH LAVON BURGESS, pro se,  
Register Number 93479-071, Federal Correctional Institution,  
Post Office Box 699, Estill, South Carolina 29918-0699.
2. Respondent/Appellee: UNITED STATES OF AMERICA, Arthur B.  
Parham, Esq. Office of the U.S. Attorney, Post Office Box 1567,  
Florence, South Carolina 29503-1567.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix "A" to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided this case was March 12, 2007. No petition for rehearing was filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 102(13,44), 401(b)(1)(A), as amended.

2. 21 U.S.C.A. §§ 802(13,44), 841(b)(1)(A).

3. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, tit. IX, § 90105, 108 Stat. 1796, 1987-88.

### STATEMENT OF THE CASE

The Petitioner is one of two Defendants named in a two count indictment filed in the District of South Carolina on January 8, 2003. The charges allege that in or about October of 2002 and continuing thereafter, up to and including the date of the indictment, in the District of South Carolina and elsewhere, the Defendants Keith Lavon Burgess, a.k.a "Black" and Ronald Carl Soares did knowingly and willfully combine and conspire and agree and have a tacit understanding with each other and various other persons, both known and unknown to the Grand Jury, to unlawfully possess with intent to distribute and distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of and 21 U.S.C. § 846. Count two is a substantive count that on or about December 17, 2002, in the District of South Carolina, the Defendants, Keith Lavon Burgess, a.k.a. "Black" and Ronald Carl Soares, knowingly, intentionally, and unlawfully did possess with intent to distribute and did distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a schedule II controlled substance and did aid and abet each other in the commission of the aforesaid offense, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

On February 2, 2003, an Information was filed by the Assistant United States Attorney, pursuant to 21 U.S.C. § 841 to increase the Petitioner's mandatory minimum from 10 years to 20 years. On March 22, 2003, the Petitioner appeared in the United States District Court in Florence, South Carolina and entered a plea of guilty to count one of the indictment before the Honorable Terry L.



Wooten, United States District Court Judge. The Pre-Trial Services Report, dated May 10, 2003, was prepared. On April 20, 2004, Assistant United States Attorney A. Bradley Parham advised the Probation Office that an Information had been filed with the District Court pursuant to 21 U.S.C. § 851 to enhance the Petitioner's statutory mandatory minimum to 20 years. On April 20, 2004, the Presentence Investigation Report was revised by the Probation Officer. On May 5, 2004, the Petitioner objected to ¶¶'s 74 and 75 of the Revised Presentence Investigation Report in which the mandatory minimum term of imprisonment was increased to 20 years pursuant to 21 U.S.C. § 851. Thereafter, on May 12, 2004, the Petitioner filed an additional objection to the 21 U.S.C. § 851 enhancement. On June 10, 2004, the Probation Officer issued a revised addendum to the Presentence Investigation Report responding to the Petitioner's objections.

At sentencing, the Court overruled Petitioner's objection to the application of 21 U.S.C. § 851 which increased the mandatory minimum to 20 years.

The Petitioner received a downward departure at sentencing due to substantial assistance pursuant to United States Sentencing Guidelines § 5K1.1. The Petitioner was sentenced, pursuant to the United States Sentencing Guidelines, to a sentence of 156 months to run consecutive to his supervised release violation.

Petitioner filed a direct appeal, citing this issue to the Fourth Circuit Court of Appeals at Richmond. On March 12, 2007, a three judge panel of that court issued a published opinion, authored by Judge Shedd, in which they affirmed the conviction and sentence. This instant petition for writ of certiorari is the result of that decision.

## REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(a) allows review on a writ of certiorari when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. In the case at bar, the Petitioner clearly shows that the Fourth Circuit Court of Appeals has issued just such a decision. The United State Court of Appeals for the DC Circuit issued a completely opposite decision on January 7, 2005 in the matter of U.S. v. West, 393 F.3d 1302. In the instant case, the Fourth Circuit basically found that the statutory language was not ambiguous. Looking at both the language and structure of the VCCLEA, the Petitioner contends that § 841(b)(1)(A) must be construed by reference to both § 802(13) and § 802(44). Petitioner argues that § 841(b)(1)(A) plainly refers only to "felony" drug convictions, so the definitional provision under both § 802(13) and § 802(14) appear to apply. The Petitioner would also remind this Court that, under well-established case law, a court must always strive to interpret statutes to give meaning to all provisions and to achieve coherent and consistent results. Following these principles, the Petitioner argues that the phrase "prior conviction for a felony drug offense" in § 841(b)(1)(A) must be read in pari materia with the definition of "felony" in § 803(13) and the definition of "felony drug offense" in § 802(44). Pursuant to this reading, the 10-year § 841(b)(1)(A) enhancement applies only when a defendant's prior conviction is (1) classified as a felony by applicable state or federal law and (2) punishable by more than a year in prison.

To resolve this circuit conflict, this Court must first decide whether the 1994 amendments manifest an unambiguous intent on the part of Congress to broaden the applicability of the disputed enhancement provision. If you find the statute ambiguous on this point, the Court must turn to the rule of lenity to resolve the dispute. See Whalen v. U.S., 63 L.Ed.2d 715. This is so because, in the criminal context, (your) assessment of the meaning of any particular statute is informed by "two policies that have long been a part of our tradition." United States v. Bass, 404 U.S. 336.

This Court must decide that "fair warning...be given... in language that the common world will understand, of what the law intends to do if a certain line is passed." Id. (quoting McBoyle v. United States, 283 U.S. 25,27 (1931)). "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community" we require that legislatures, not courts, define criminal activity. Bass, 404 U.S. at 348. In short, Congress must be precise in providing fair notice of the specific criminal activity that is prohibited, as well as the punishment that will be imposed if the prohibition is violated. These policies find expression in the rule of lenity. This Court has emphasized that the touchstone of the rule of lenity is statutory ambiguity. Bifulco v. United States, 447 U.S. 381.

The question at hand is not simply whether the language of § 802(44) defines "a prior conviction for a felony drug offense", but rather, whether there is any language in that or any other provision of the Act plainly stating that § 802(44) alone gives meaning to those words as they are used in § 841(b)(1)(A). There is not. To the extent that this argument persuades you that the matter is not entirely free of doubt, the doubt must be resolved in favor of

lenity." Whalen.

In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in the [Petitioners] favor." United States v. Granderson, 511 U.S. 39.

In the case at bar, a ruling in favor of the Petitioner is required, not only to resolve this case, but to provide guidance and clarity to the other Circuits and the public at large. At present, the statute(s) are much less than clear on the subject, which has created the circuit conflict at hand.

After the application of "every thing from which aid can be derived, [you are] still left left with an ambiguous statute." Chapman v. United States, 500 U.S. 453.

In the face of such grievous ambiguity, the more lenient interpretation controls.

#### CONCLUSION

The petition for writ of certiorari should be granted, and counsel should be appointed to represent this Petitioner to present oral argument to this Court.

Respectfully submitted,

Dated: May 20, 2007

By: Keith Burgess  
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No. 06-11429

Supreme Court, U.S.  
FILED

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KEITH LAVON BURGESS; PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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SUPREME COURT

PETITIONER'S RESPONSE TO THE BRIEF IN  
OPPOSITION BY THE UNITED STATES

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On the Brief:

MICHAEL R. RAY, Law Clerk  
Legal Assistant-Paralegal  
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NOW BEFORE THE COURT COMES the Petitioner, pro se, KEITH LAVON BURGESS, to file his response in opposition to the brief of the Respondent UNITED STATES OF AMERICA.

The Petitioner is proceeding pro se with the assistance of an inmate Law Clerk. Petitioner would ask that the Court treat this response in accordance with Erickson v. Pardus, (2007) 167 L.Ed.2d 1081, as far as this Court "liberally constru[ing]" this reply to a "less stringent standard than [a] formal pleading[] drafted by [a] lawyer."

The Respondent spends the first four pages of their brief in opposition quoting the (undisputed) factual background of this case since its commencement (undisputed, of course, with the exception of the § 851 enhancement issue).

Respondent's argument fails miserably to convince the Court to not grant the writ of certiorari. If one were to be persuaded by the Respondent's position, then in essence, one would have to believe that the Petitioner was unfortunately sentenced within the District of South Carolina. Had Petitioner been sentenced in the District of Columbia, the § 851 enhancement would not have applied to increase the penalty to a minimum twenty years.

The Respondents contend that the Petitioner failed to request a re-hearing en banc of the Fourth Circuit's decision. One would then wonder, why, did the government not request re-hearing in the West case? Petitioner would have loved to had a re-hearing before the Fourth Circuit, but he was a might bit disadvantaged, due to the fact that not only did his ineffective trial counsel also represent him on appeal, he also filed an Anders brief on that same direct appeal, advising his client that there were no arguable issues for him to appeal. Hindsight being 20-20, we are here before

the Supreme Court today, seeking to right this injustice, not only for the Petitioner, but for the fair and equal treatment for all of those criminal defendants who come after him. As to the Respondent's contentions regarding the failure of the Petitioner to ask for re-hearing, Petitioner was under the impression, until nearly the eleventh hour that his attorney would be filing this instant petition. It is apparent that counsel was in over his head, so to speak, as the record of this case clearly indicates there was (at least) one issue which had merit, and that same issue warranted a published opinion from the Fourth Circuit, and this instant advancement to the Honorable Court. Petitioner was expecting his attorney to represent him on this Petition, however, counsel withdrew from his representation.

The Respondent concedes that there is in fact a circuit split regarding the issue advanced in the instant Petition. The problem, they claim, is that it quite simply doesn't effect enough defendants to really matter. Try selling this argument to the poor souls like the Petitioner who are today sitting in federal custody with twenty-year mandatory minimums hanging over their heads. The Respondent further contends that the conflict itself is of a "very recent vintage" and further that this Courts review "could benefit from additional consideration of the question by the lower courts." Honestly now, how many more Defendants in the same predicament as this Petitioner must pass through the system, and be sentenced to an improper twenty year term — before enough are effected? The closing argument (on the brief) of the Respondent is, at best, literally laughable.

In the interest of the preservation of justice, review of this case is certainly warranted at this time. It is crystal clear,

that had this Petitioner been fortunate enough to pass through the District of Columbia, versus the District of South Carolina, the twenty-year enhanced penalty would not have applied. The Respondent justifies this calamity by stating simply that not enough folks are effected for it to really matter, therefore the Petitioner is simply subject to the fallout, due to his being in (literally) the wrong district, at the wrong time. This argument must fail.

It is not necessary to obtain the input of any other lower courts' on the issue. The conflict is quite ripe for determination. Allowing the uncertainty to continue would constitute a manifest injustice, not only to this Petitioner, but to all those who come after him, to which the same circumstances apply. It is noteworthy that the instant case and West arose in a fairly short period of time. How many more and hanging in the valance? A criminal defendant has a right to know the punishment he faces. That same defendant has a right to be able to intelligently know not only the charges that are made against him, but too, the penalties which he may incur. With the current ambiguity, there is certainly no way for a defendant to intelligently make that determination. One could certainly argue that it would all depend as to what district (or circuit) he was in, and that, in itself should not be the determining factor.

The issue before this Court today is prime for review, and the pro se Petitioner respectfully requests that this tribunal grant the Petition for Writ of Certiorari, and that counsel be appointed to represent the Petitioner on any further proceedings before this Court. The statute is ambiguous, and that ambiguity must be resolved utilizing the rule of lenity — in favor of this Petitioner.

**W H E R E F O R E** , the pro se Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and grant



whatever other and further relief that this Court may deem appropriate.

Respectfully submitted,

Dated: August 24, 2007

By: Keith L. Burgess  
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CERTIFICATE OF SERVICE

I, Keith L. Burgess do hereby certify that on this the 28th. day of August, 2007, I did deposit with the Institutional Special Mail, an exact copy of the within-named Response, properly addressed to:

Ms. Elizabeth A. Olson, Esq.  
U.S. DEPARTMENT OF JUSTICE  
Office of Solicitor General  
Washington, DC 20530-0001

By: Keith L. Burgess  
KEITH L. BURGESS