



JAMES ERIC MOORE, Petitioner v. UNITED STATES

No. 07-10689

SUPREME COURT OF THE UNITED STATES

129 S. Ct. 4; 172 L. Ed. 2d 1; 2008 U.S. LEXIS 7437; 77 U.S.L.W. 3224; 21 Fla. L. Weekly Fed. S 543

October 14, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

United States v. Moore, 518 F.3d 577, 2008 U.S. App. LEXIS 4803 (8th Cir. Iowa, 2008)

DECISION:

[**1] Resentencing of accused by federal district court held warranted, because court did not think it had discretion to reject crack/powder disparity in United States Sentencing Guidelines (18 U.S.C.S. Appx.) concerning cocaine possession.

SUMMARY:

Procedural posture: Pro se defendant was convicted of possessing cocaine base with intent to distribute, and the case was remanded for reconsideration of the defendant's sentence in view of the disparity between sentences based on the same amount of crack cocaine and powder cocaine. Upon the grant of a writ of certiorari, the defendant appealed the judgment of the U.S. Court of Appeals for the Eighth Circuit which reaffirmed the defendant's sentence.

Overview: Defendant's sentence was reaffirmed at the appellate level without resentencing in the district court based on a finding that the district court was aware of its discretion to impose a lesser sentence based on the sentence disparity and elected not to do so. The U.S. Supreme Court held, however, that resentencing by the district court was warranted since the district court's comments at sentencing indicated that the district court

did not believe that it had discretion to reject the crack/powder disparity. The district court expressly stated that it was Congress rather than the judiciary which looked at the United States Sentencing Guidelines and decided whether they should be put in force, and it was thus clear that the district court believed it was not authorized to impose a lesser sentence.

Outcome: The judgment reaffirming the defendant's sentence was reversed, and the case was remanded for further proceedings.

OPINION

[**2] [*4] **Per Curiam.**

James Eric Moore was convicted of one count of possessing cocaine base with intent to distribute, a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1). Given the quantity of crack cocaine, the presentence report calculated that Moore's sentencing range under the United States Sentencing Guidelines was 151 to 188 months. At sentencing, Moore asked the District Court to impose a below-Guidelines sentence in light of our decision in *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)*, and the Guidelines' disparate treatment of similar amounts of crack and powder cocaine.

The District Court refused, saying:

"With regard to the crack and powder cocaine difference, that is the law. I'm applying the law as it currently stands. If that is going to be changed, that is a congressional matter. Congress is the one who looks at the guidelines and decides whether or not they should be put in--in force. . . . It isn't the judges. It's the lawmakers, and I have taken an oath to apply the law, and that's what I will do in

129 S. Ct. 4, *, 172 L. Ed. 2d 1, **;
2008 U.S. LEXIS 7437, ***; 77 U.S.L.W. 3224

this sentencing." App. C to Pet. for Cert.
55-56.

The District Court sentenced Moore [***2] to 188 months of imprisonment and six years of supervised release.

Moore appealed, and the United States Court of Appeals for the Eighth Circuit affirmed his conviction and sentence. *United States v. Moore*, 470 F.3d 767 (2006). In response to his claim that the District Court should have considered the crack/powder disparity, the Court of Appeals held that "the district court was correct in concluding that 'neither *Booker* nor [18 U.S.C.] § 3553(a) authorizes district courts to reject' the powder cocaine to crack cocaine quantity [***3] ratio mandated by Congress and reflected in the Guidelines." *Id.*, at 770 (quoting *United States v. Spears*, 469 F.3d 1166, 1176 (CA8 2006) (en banc)). Moore filed a petition for certiorari with this Court. Pet. for Cert. in *Moore v. United States*, No. 06-9749.

While Moore's certiorari petition was pending, this Court issued its opinion in *Kimbrough v. United States*, 552 U.S. ___, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007), concluding that a judge "may consider [*5] the disparity between the Guidelines' treatment of crack and powder cocaine offenses" when applying 18 U.S.C. § 3553(a), "even in a mine-run case." *Id.*, at ___, ___, 128 S. Ct. 558, 169 L. Ed. 2d 481. We granted Moore's petition, vacated the judgment, and [***3] remanded the case to the Eighth Circuit for further consideration in light of *Kimbrough*. *Moore v. United States*, 552 U.S. ___, 128 S. Ct. 858, 169 L. Ed. 2d 709 (2008).

On remand, without new briefing, the Eighth Circuit affirmed again. 518 F.3d 577 (2008). This time, the Court of Appeals concluded that "[a]s there was then no circuit authority to the contrary, we presume the district court was aware that *Booker* granted it discretion to vary downward based upon the impact of the crack cocaine guidelines on this defendant, but elected not to exercise that discretion." *Id.*, at 580.

Proceeding *pro se*, Moore again petitioned for certiorari, arguing that the Eighth Circuit's new characterization of the transcript is wrong, and that it is "clear that the district court thought judges had no

discre[t]ion to reject" the Guidelines ratio. Pet. for Cert. 7. The United States agrees that the Eighth Circuit erred, see Brief for United States 9, and so do we.

When the District Court said that "[i]t isn't the judges" but Congress that "looks at the [G]uidelines and decides whether or not they should be put . . . in force," the court showed that it did not think it had the discretion later upheld by *Kimbrough*. App. C to Pet. for Cert. [***4] 56. The Eighth Circuit's first decision recognized this, describing the District Court as "concluding" (correctly under circuit precedent) that it was not "authorize[d] . . . to reject" the crack/powder disparity. *Moore*, 470 F.3d, at 770 (internal quotation marks omitted). In light of the District Court's comments at sentencing, the Court of Appeals should have remanded the case to the District Court for resentencing under *Kimbrough*. We express no views on how the District Court should exercise its discretion at resentencing.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REFERENCES

18 U.S.C.S. Appx., Sentencing Guidelines for the United States Courts

2 Defense of Narcotics Cases §§ 5B.05, 5B.10, 5B.12 (Matthew Bender)

26 Moore's Federal Practice § 635.04 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law § 74; Drugs, Narcotics, and Poisons § 7

L Ed Index, Cocaine; Sentencing Guidelines

Duration of prison sentence as constituting cruel and unusual punishment in violation of *Federal Constitution's Eighth Amendment*--Supreme Court cases. 115 L. Ed. 2d 1169.