

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5268

September Term, 2003

02cv02166

Filed On: June 29, 2004 [832972]

Brian A. Davis, et al.,
Appellants

Robert Price, et al.,
Appellees

v.

U.S. Congress,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Edwards, Randolph, and Tatel, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief and response to order to show cause filed by appellants. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's judgment filed August 29, 2003 be affirmed in light of Chatman-Bey v. Thornburgh, 864 F.2d 804, 809 (D.C. Cir. 1988) (en banc) (habeas corpus is the exclusive remedy for a federal prisoner bringing any claim that would have a "probabilistic impact" upon the duration of his custody). That appellants are challenging the constitutionality of Congress's perpetuation of the 100:1 sentencing disparity between crack cocaine and powder cocaine does not place their claims outside the scope of Chatman-Bey. Appellants' argument that their action is properly brought under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), because it is an equal protection claim also lacks merit. See Chatman-Bey, 864 F.2d at 808-809 (Congress intended the more specific federal habeas statute to be utilized by prisoners attacking the validity of their confinement as opposed to the "more generic civil rights remedy embodied in § 1983") (discussing Preiser v. Rodriguez, 411 U.S. 475 (1973)).

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That Congress could remedy the sentencing disparity by raising sentencing levels for powder cocaine rather than lowering those for crack cocaine also does not change the fact that a finding in appellants' favor would have a probabilistic impact on the duration of their custody. See Bourke v. Hawk-Sawyer, 269 F.3d 1072, 1073 (D.C. Cir. 2001) (although the prisoner's success on his claim "would not necessarily result in his being released any earlier, it would raise that possibility and thus have a 'probabilistic impact' upon the duration of his custody"); see also Razzoli v. Fed'l Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000) (for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam