18-5121

No. 17-~~7119~~

In The

Supreme Court of The United States

October Term 2018

Leslie Dominic Musgrove,
Petitioner,

v.

United States of America,
Respondent.

On Petition for A Writ Of Certiorari To The
United States court of Appeals
For The Fourth Circuit

Supplement To Musgrove's Reply

Leslie D. Musgrove
Reg. No. 07743-087
F.C.I. Hazelton
P.O. Box 5000
Bruceton Mills, WV. 26525

I. Musgrove Presents Additional Authority Supporting Certiorari.

A. First This Court Should Remand With Instructions To Grant A Certificate of Appealability

It is beyond any real argument that Leslie Musgrove ("Musgrove") was entitled to a Certificate of Appealability ("COA"). Under this Court's recent decision in Buck v. Davis, 137 S.Ct. 759 (2017), the court[s] below relied on an analysis specifically rejected by this Court. That is, a prisoner whose § 2255 is denied by a court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. A COA may issue "only if the applicant has made a substantial showing of the denial of a constittutional right." Buck, 137 S.Ct. at 773 (citing § 2253(c)(2)). In other words, until Musgrove secures a COA, and a court may not look to the merits of his claim[s]. Buck, 137 S.Ct. at 773 (quoting Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)). In this case. Musgrove was denied a constiuttional right, and the matter is highly debatable.

1. In Rita v. United States, 551 U.S. 338 (2007), this Court held that applying a presumption of reasonableness to within-Guidelines sentences is constitutional on the ground that the Sixth Amendment does not "automatically forbid" a judge from taking account of factual matters not determined by the jury. Id. at 352. Justice Scalia, joined by Justice Thomas, expressed concern that this scheme would lead to "constitutional violations" if a defendant's sentence is "upheld as reasonable only because of the existence of judge-

found facts." Id. at 374 (opinion concurring in part and concurring in judgment). In response, the Court stated that the question was "not presented by this case." Id. at 353. Justice Stevens, joined by Justice Ginsburg, noted that "[s]uch a hypothetical case should be decided if and when it arises." Id. at 366 (concurring opinion).

Seven years later, Justice Scalia, joined by Justices Thomas, and Ginsburg, noted the pressing need for the Court to resolve the question. See Jones v. United States, 135 S.Ct. 8, 9 (2015) (opinion dissenting from denial of certiorari). Justice Scalia observed that, ever since the question was reserved in Rita, the courts of appeals had "uniformly taken our continuing silence" on the question as "suggest[ing] that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." Id. at 9. Justice Scalia urged the Court to grant certiorari in an appropriate case in order to "put an end to the unbroken string of cases disregarding the Sixth Amendment --- or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." Ibid.

Shortly after Justice Scalia's opinion in Jones, then-Judge Gorsuch similarly observed that "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence within the statutorily authorized range "based on facts the judge finds without the aid of a jury or the defendant's consent." United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing Jones). Hence, the matter is debatable, by the country's

highest Court.

Numerous judges --- further supporting requirement for a COA --- in the lower courts have urged a difference approach or specifically importuned this Court to provide guidance, noting the importance of the question and the attendant uncertainty surrounding sentencing practices while the question remains open. See e.g., United States v. White, 551 F.3d 381, 390 (6th Cir. 2008) (en banc)(Merritt, J., dissenting)(taking the position on behalf of six judges that, when judge-found enhancements increase the Guidelines range such that the sentence would be unreasonable absent those facts, "those judge-found facts are necessary for the lawful imposition of the setnence, thus violating the Sixth Amendment right to a jury trial"), cert. denied 556 U.S. 1215 (2009); United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015) (per curiam)(Millett, J., concurring in denial of rehearing en banc) (noting that "only the Supreme Court can resolve the contradictions in the current law"), cert deined, 137 S.Ct. 37 (2017); id. at 927 (Kavanaugh, J., concurring in denial of rehearing en banc)("shar[ing] Judge Millett's overarching concern" and observing that a solution "would likely require" intervention by this Court). Now, with Justice Kavanaugh sitting in this Court it demonstrates the necessity for action, and that Musgrove is and was entitled to a COA. Two of this Court's now Justices call for the highest of scrutiny of Musgrove's arguments. Musgrove does not necessarily disagree that the courts below did not hear the case with the benefit of a COA, but that did not prevent those courts from looking to the merits contrary to this Court's instructions.

A COA inquiry, this Court has emphasized, is "not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurist of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck, 137 S.Ct. at 773 (quoting Miller-El, 537 U.S. at 327)(internal quotation marks omitted). In this particular vein, this court should grant Musgrove a COA, and permit him to present this issue to the court below.

2. Nelson v. Colorado Establishes That Watts Is Gravely Wounded.

Musgrove cited Nelson v. Colorado, 137 S.Ct. 1249 (2017), and that decision establishes that United States v. Watts, 519 U.S 148 (1997), is gravely wounded. That is, since that decision this Court has issued opinions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and up through Alleyne v. united States, 133 S.Ct. 2151 (2013). These decision cut directly against Watts. It would be a different circumstance if the courts below would follow the teachings of Jefferson County v. Acker, 210 F.3d 1317, 1320 (11th Cir. 2001)("[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us --- if it cannot be said that decision 'directly controls' our case --- then, we are free to apply the reasoning in later Supreme Court decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that Court has itself has discredited."). That is precisely what the decision in Nelson did, in that, its observations

that in an acquittal the presumption of innocence re-attaches, by contrast, Watts looks the other way and held that there is no presumption of innocence after an acquittal, and therefore a court is free to rely on acquitted even though a jury has found otherwise.

Conclusion

This Court should either grant certiorari, and GVR, or alternatively, stay the case pending a decision in United States v. Haymond, No. 17-1672, 2018 U.S. LEXIS 6263 (Oct. 26, 2018), cert. granted.

Filed this 12th day of November 2018, under the penalty of perjury.

Leslie D. Musgrove

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