

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Mario Zuniga — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit Court Of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mario Zuniga #43066-424

(Your Name)
Federal Correctional Institution
P.O. Box 1000

(Address)

White Deer, PA. 17887

(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I. Did The Seventh Circuit Court of Appeals error in holding that attempted murder in Illinois is categorically a violent crime under 18 U.S.C. §924(e), without considering *Mathis v. United States*, 136 S.Ct. 2243 (2016)?
- II. Did the Seventh Circuit error in granting MICHAEL HILL authorization under 28 U.S.C. §§2244(b), 2255(h) to file a second or successive 2255 motion in the district court where HILL'S claim was based on a "statutory interpretation" that cannot be brought in a second or successive 2255 motion ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Dawkins v. United States, 829 F.3d 549, 551 (7th Cir 2016)....	9
Herrera-Gome v. United States, 755 F.3d 142 (2d Cir 2014)...	7
Hill v. United States, 877 F.3d 717 (7th Cir 2017).....	8
Hill v. United States, No. 16-3239 (7th Cir 2016).....	5
Holt v. United States, 843 F.3d 720 (7th Cir 2016).....	9-10
Johnson v. United States, 135 S.Ct. 2551 (2015).....	4
Mathis v. United States, 136 S.Ct. 2243 (2016).....	passim
Sustache-Rivera v. United States, 221 F.3d at 16 (1st Cir 2000).....	7
Taylor v. United States, 495 U.S. 601.....	10
United States v. Winestock, 340 F.3d 200 (4th Cir 2003)....	7
United States v. Zuniga, appeal No. 131557 (7th Cir 2013) ..	4
Zuniga v. United States, 135 S.Ct. 1018 (2015).....	4
STATUTES AND RULES	
28 U.S.C. 2243(b).....	5
28 U.S.C. 2255.....	passim
28 U.S.C. 2255(h).....	5
21 U.S.C. 844(a).....	4
18 U.S.C. 924(e).....	passim
18 U.S.C. 924(e)(2)(B)(i).....	passim
18 U.S.C. 922(g).....	4
Illinois Attempted Murder 720 ILCS 5/8-4(a).....	passim

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	Seventh Circuit Order denying petition for rehearing and rehearing en banc. Dated 6.13/2018.
APPENDIX B	Petition For Rehearing And Rehearing En Banc.
APPENDIX C	Seventh Circuit Order affirming judgment of the district court denying 2255 relief.
APPENDIX D	Motion For Certificate Of Appealability And Incorporated Memorandum Of Law.
APPENDIX E	Circuit Court Order Granting Certificate OF Appealability.
APPENDIX F	Appellant Mario Zuniga's Pro Se Motion To Amend Counsel's Statement Of Position In Response To This Court's Decision In Hill v. United States.
APPENDIX G	District court's Order denying 2255 relief and denying a certificate of appealability.
APPENDIX H	Seventh Circuit's Order denying the appeal in Michael Hill v. United States, No. 16-3596, Holding that Both Murder and attempted murder in Illinois are categorically violent felonies under §924(e).

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

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix C to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix G to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 30, 2018.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 13, 2018, and a copy of the order denying rehearing appears at Appendix A.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment: No person shall.....be deprived of life liberty, or property, without due process.

Title 28 U.S.C. §2255

Title 18 U.S.C. §924(e)(2)(B)(i)

Illinois Attempted Murder 720 ILCS 5/8-4(a)

Illinois First Degree Murder 720 ILCS 5/9-1

STATEMENT OF THE CASE

On March 7, 2013, The Petitioner Mario Zuniga was sentenced to 188 months imprisonment following his conviction on one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§922(g) and 924(e)(1) Armed Career Criminal Act (ACCA), and one count of possession of a controlled substance in violation of 21 U.S.C. § 844(a), in Case No. 11-CR-156, Northern District of Illinois, Eastern Division. In sentencing Zuniga as an Armed Career Criminal the court determined that Zuniga's prior conviction for Illinois Attempted Murder, 720 ILCS 5/8-4(a) qualified as a predicate offense under §924(e)(1) (ACCA).

Zuniga appealed his sentence and the Seventh Circuit Court of Appeals affirmed (United States v. Zuniga, Appeal No. 13-1557). Zuniga petitioned the Supreme Court for a writ of certiorari. The petition was denied on January 12, 2015. (Zuniga v. United States, 135 S.Ct. 1018 (2015)).

On October 19, 2015, Zuniga filed a motion under 18 U.S.C. §2255. Zuniga raised two issues in his 2255 motion (1) that his trial counsel was ineffective for failing to interview and call witnesses who's testimony would have been helpful to the defense, and (2) under Johnson v. United States, 135 S.Ct. 2551 (2015), Zuniga's 1996 Illinois attempted murder does not qualify as a predicate offense under 18 U.S.C. §924(e)(1) Armed Career Criminal Act (ACCA). On August 8, 2016 after full briefing by the parties, the district court denied Zuniga's 2255 motion and denied a certificate of appealability (COA). Zuniga petitioned the Seven

Circuit to grant a certificate of appealability on the issue of whether or not under **Johnson (2015) supra**, Illinois attempted murder qualified as violent crime under the ACCA. On April 25, 2017, the Seventh Circuit granted Zuniga's motion for a certificate of appealability. On July 31, 2017, Zuniga filed his opening brief through appointed counsel Nicole Henning, arguing that his conviction of attempted murder under 720 Ill. Comp. Stat. 5/8-4(a) does not qualify as a violent felony. Zuniga's counsel failed to argue that pursuant to **Mathis v. United States**, 136 S.Ct. 2243 (2016) Zuniga's Illinois attempted murder conviction fails to qualify as a violent felony because the elements of Illinois attempted murder are a mismatch with the elements of §924(e)(1) elements clause. Zuniga filed a pro se motion to amend counsel's statement of position adding a Mathis argument in support of his claim that Illinois attempted murder conviction does not qualify as a violent felony under §924(e)(1) element or force clause.

After Zuniga's appeal was fully briefed the court of appeals ordered that Zuniga's appeal be held in abeyance pending the outcome of the court's decision in **Hill v. United States**, Appeal No. 16-3239. In the Hill case the Court of Appeals had granted Hill authorization to file a second or successive 2255 in the district court under 28 U.S.C. §§2244(b) and 2255(h), based on a "statutory interpretation" of 18 U.S.C. §924(e)(1). In granting Hill a second or successive 2255 the court of appeals erred and exceeded its jurisdictional authority because a statutory interpretation cannot be brought in a second or successive 2255 motion as Congress has restricted second or successive 2255 to

constitutional claims or newly discovered evidence. Zuniga firmly argues that the Hill decision is void because the court of appeals did not have jurisdiction to grant Hill a second or successive 2255 motion to begin with.

On December 13, 2017, the Seventh Circuit rendered its decision in the Hill case holding that "Both murder and attempt murder in Illinois are categorically violent felonies under §924(e)". On April 30, 2018, the Seventh Circuit entered an Order Affirming the district court's decision based on the Hill decision that Illinois attempted murder is categorically a violent felony under §924(e). The also stated "Appellant Zuniga has preserved his argument for possible further review". On May 7, 2018, Zuniga filed a petition for rehearing and rehearing en banc. On June 13, 2018, the Seventh Circuit entered an Order denying Zuniga's request for rehearin and rehearing en banc.

Zuniga now petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Court of appeals lacked jurisdiction to authorize Michael Hill to file a second or successive 2255 based on a "statutory interpretation"; where Congress restricted second or successive 2255 motions to constitutional claims or newly discovered evidence. A statutory interpretation cannot be brought in a second or successive 2255 motion.

As amended by the AEDPA, §2255 bars successive applications unless they contain claims relying on (1) newly discovered evidence; or (2) a new rule of constitutional law. *United States v. Winestock*, 340 F.3d 200 (4th Cir. 2003). We are required to deny authorization to pursue any successive §2255 motion, unless it contains a new claim based on: (1) newly discovered evidence; or (2) a new rule of constitutional law. *Herrera-Gome v. United States*, 755 F.3d 142 (2nd Cir. 2014). Congress has restricted second or successive petitions to constitutional claims. *Sustache-Rivera v. United States*, 221 F.3d at 16 (1st Cir. 2000)(Congress has determined that a second or successive §2255 motion may not contain statutory claims).

Michael Hill's claim relied on a statutory interpretation of 18 U.S.C. §924(e)(2)(B)(i) element clause, and Illinois Attempted Murder Statute, 720 ILCS 5/8-4(a). Under Congresses restrictions on second or successive 2255 motions Hill's statutory claims cannot be brought in a second or successive §2255 motion and the Seventh Circuit Court of Appeals abused its discretion and exceeded its jurisdiction in granting Michael Hill authorization to file a second or successive §2255 motion.

Zuniga has standing to challenge the Seventh Circuits erroneously granting Michael Hill a second or successive 2255 motion because the Michael Hill decision was erroneously decided contrary to the Supreme Courts holdings in *Mathis v. United States*, 136 S.Ct. 2243 (2016). The decision in *Hill v. United States*, 877 F. 3d 717 (7th Cir. 2017) is void for lack of jurisdiction and Zuniga requests the Supreme Court to direct the Seventh Circuit to vacate the Michael Hill decision and remand Zuniga's case for a rehearing on Zuniga's claim that pursuant to the holdings of *Mathis*, his Illinois Attempted Murder conviction does not qualify as a violent felony the element clause of 18 U.S.C. §924(e) (2)(B)(i), because Illinois Attempted Murder Statute does not not have the elements of "use, attempted, or threatend us of physical force against the person of another" as required by §924 (e)(2)(B)(i) to qualify as a violent felony under the *Mathis* "element match inquiry". (See Appendix H, Michael Hill, Opinion, Seventh Circuit Panel admits to procedural errors,page 2).

II. Pursuant to the Mathis "element match inquiry" the Seventh Circuit erroneously determined that Zuniga's prior conviction for Illinois Attempted Murder is a violent felony under 18 U.S.C. §924(e)(2)(B)(i)'s element clause.

First and foremost is the fact that the Seventh Circuit erroneously granted Michael Hill authorization to file a second or successive §2255. The Supreme Court's holdings in *Mathis v. United States*, 135 S.Ct. 2243 (2016) does not have retroactive application for a second or successive §2255 motion and Michael Hill could not get the benefit of the Mathis, "element match inquiry" due to the fact that Michael Hill's claim was brought in a second or successive §2255 motion. In reaching the merits of Hill's claim that his Illinois Attempted Murder conviction does not qualify as a violent felony under §924(e)(2)(B)(i) the Seventh Circuit did not conduct the required "element match inquiry" necessary to determine if a prior conviction qualifies as a violent felony under §924(e) ACCA. See *Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016) (Arguments that rest on Mathis do not justify second or successive collateral attacks). Under the Mathis "element match inquiry" Michael Hill would have prevailed if his claim would have been brought in a first §2255 motion because Mathis applies retroactively on collateral review under §2255. See *United States v. Holt*, 843 F.3d 720 (7th Cir. 2016). In Holt, the United States conceded that Mathis has retroactive application on first §2255 motion. citing

Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.ED 2d 599 (2016).

In granting Michael Hill's second or successive §2255 motion the Seventh Circuit did not certify that Hill's claim rested on "newly discovered evidence" or "a new rule of constitutional law", which Hill's claim does not. The Seventh Circuit erroneously granted Hill's second or successive §2255 motion and the Hill decision was made without the benefit of Mathis. As amended by the Antiterrorism Effective Death Penalty Act (AEDPA) 2255(h) bars second or successive applications unless they contain claims relying on

- (1)newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;or
- (2)a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, 28 U.S.C.A. §2255P 8.

Because Zuniga's timely Johnson (2015) claim that his prior conviction under Illinois Attempted Murder, 720 ILCS 5/8-4(a), does not qualify as a violent felony under §924(e) (ACCA), was brought in a first collateral attack motion under §2255, Mathis, 135 S. Ct. 2243 (2016) applies retroactively to Zuniga's claim. Holt, 843 F.3d 720 (7th Cir. 2016). Under Mathis "element match inquiry" Illinois Attempted Murder 720-5-9-1 does not qualify as a violent felony under §924(e)(2)(B)(i) "element clause" or the "enumerated clause" and the "residual clause" has been held to be unconstitutionaly vague and no longer exists.

The Illinois Attempted Murder must be viewed under the

"element clause" of §924(e)(2)(B)(i) to determine if it qualifies as a violent felony under §924(e) (ACCA). The element clause of §924(e) defines a violent crime as any felony that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

The Illinois statute defining murder provides:

First Degree Murder...

- (a) A person who kills an individual without lawful justification commits first degree murder, in performing the act which causes the death.
 - (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another, or
 - (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another.
- (3) he is attempting to commit a forcible felony other than second degree murder....720 ILCS 5/91(a).

A reading of the Illinois Attempted Murder statute reveals the statute does not possess or require the elements of "use, attempted use, or threatened use, of force against the person of another in order to convict for Illinois murder. A side-by-side comparance of the elements of §924(e)(2)(B)(i) element clause, and Illinois Attempted Murder statute shows a "mismatch" of the elements. The two statutes on their face bare witness

that Zuniga's prior Illinois Attempted Murder conviction does not qualify as a violent felony under §924(e) element clause.

In Mathis the Supreme Court held that "ACCA requires a sentencing judge to look only to the "the elements of the [offense], not to the facts of [the] defendant's conduct". citing Taylor, 495 U.S. at 601. The "underlying brute facts or means" by which the defendant committed his crime makes no difference; even if the defendant's conduct, in fact fits within the definition of the generic offense, the mismatch of elements saves him from an ACCA sentence. In Zuniga's case the elements of §924(e)(2)(B)(i) and the elements of Illinois Attempted Murder are a mismatch saves Zuniga from a ACCA sentence.

Zuniga requests the Supreme Court grant his petition for a writ of certiorari and remand his case back to the Seventh Circuit Court of Appeals in light of Mathis v. United States, 136 S.Ct. 2243 (2016).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mario Zuniga
Mario Zuniga

Date: 7-30-2018