No. 18-5691

IN THE SUPREME COURT OF THE UNITED STATES

DARRYL JEROME BAKER, PETITIONER

v.

R. C. CHEATHAM, WARDEN

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

PETITIONER'S REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION TO HIS PETITION FOR A WRIT OF CERTIORARI

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COMES NOW, Petitioner, Darryl Jerome Baker, pro se, and files this Reply to the United States' Memorandum in Opposition to his Petition for a Writ of Certiorari in the Supreme Court of the United States. Petitioner is a layman of the law, unskilled in the law, and therefore, requests that this Honorable Court construe this Reply liberally. Haines v. Kerner, 404 U.S. 519 (1972).

Petitioner replies to the United States Memorandum in Opposition by stating the following:

The United States alledges that Petitioner's circumstances of his case will not lead to relief under any Circuit's interpretation of the "savings clause," and that Petitioner's Writ should be denied pending the disposition of United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018). This argument by the United States is without merit.

First, in the United States' Memorandum in Opposition, the United States failed to acknowledge the Circuit split, in regards to the jurisdiction to enter the Eleventh Circuit based on the "savings clause" of § 2255(e). The jurisdiction claim presented by Petitioner was the foundation of Petitioner's Writ. In Wheeler, the Fourth Circuit has determined that if a Petitioner has met the requirements under the "savings clause" he or she should be allowed to have their motions heard on the merits. The Eleventh Circuit, on the other hand, has ruled contrary to the Fourth Circuit and the marjority of other Circuit Court of Appeals. The Eleventh Circuit's decision in McCarthan v. Dir. of Goodwill Indus. Suncoast Inc, 851 F.3d (11th Cir. 2017) has forclosed the available avenue for federal prisoners, within the Eleventh Circuit's jurisdiction, to use the "savings clause" in § 2255(e). If the same federal prisoner was located in another Circuit's jurisdiction, the federal prisoner would be able to prevail, if he or she meets the requirement's of the "savings clause." The United States has failed to address the substantive issues set forth in Petitioner's writ, concerning the Eleventh Circuit's refusal to honor prisoners Fifth Amendment rights to due process.

Nine other circuits still adhere to the possision that prisoner's due process will not be forclosed by filing a collateral attack under § 2241. The United States has repeatedly taken the position in court that the majority rule is the correct one. Therefore, it is disingenuous for the United States to now take the position that Petitioner's case is without merit and should be dismissed. There is currently a split decision in the Court of Appeals and the Eleventh Circuit is not in agreement with the other circuits.

Second, because of this circuit split, the Eleventh Circuit states that it has no jurisdiction to hear Petitioner's Mathis v. United States, 136 S.Ct. 2243-2248 (2016) claim. Mathis is a substantial change in the Law and Petitioner is actually, factually, and legally innocent of his Title 21 U.S.C. § 851 enhancement. Petitioner cannot pursue his Mathis claim through a Second or Successive 2255(h)(2) motion because Mathis is not a new constitutional change in the law, it is a substantial change in the law. Petitioner also cannot meet the second prong of a Second or Successive § 2255 motion requirement because his claims are not based on newly discovered evidence. Therefore, even a Second or Successive § 2255 motion is ineffective and inadequate to test the legality of Petitioner's detention. The only avenue available to Petitioner and other federal prisoners is a Title 28 U.S.C. § 2241(c)(3) motion, through the "savings clause" of a § 2255(e) motion, because Mathis was not available during the Petitioner's trial, sentencing, nor any of Petitioner's appeal stages or the first § 2255 collateral attack stages. The Eleventh Circuit's decision in McCarthan violates the Petitioner's Fifth Amendment

right to due process to a § 2255(e), under the "savings clause," and violates Boumediene v. Bush, 553 U.S. 723 (2008). Petitioner also meets the requirements under Bryant v. Warden, 738 F.3d 1253 (2013) and his sentence is a total miscarriage of justice. The Eleventh Circuit's decision in McCathan was in error, which overturned Bryant, because it does not provide Petitioner or any other federal prisoners an avenue to challenge an illegal sentence.

Finally, Petitioner's state priors, under Florida Statute § 893.13(1), were used as prior controlled substance offenses to enhance Petitioner sentence. Under Mathis and Descamps v. United States, 133 S.Ct. 2275-2283 (2013), Petitioner is serving an illegal sentence. In Descamps, this Court discussed the proper approach to determine which statutes are "divisible" into separate offenses for purposes of determining whether a prior conviction was for an offense that satisfies a particular federal definition, establishing that Petitioner's prior Florida drug conviction does not qualify as a "controlled substance offense[ ]," to warrant an enhancement for the Petitioner. In Mathis, this Court established requirements to determine an indivisible statute. When determining the requirements for prior convictions, the court must review the ways, means, and conduct of how the Petitioner was convicted for those state priors. When Petitioner was sentenced, the United States failed to provide any Shepard v. United States, 544 U.S. 13, 16 (2005), documentation to identify the way Petitioner was sentenced for his state convictions. Even if the United States provided Shepard documents, Petitioner's prior state convictions

would not warrant an enhancement under § 851, because the State of Florida § 893.13 is overbroad and ambigous. Petitioner's prior § 893.13 conviction criminalizes conduct for which is not included within the U.S.S. Guidelines nor included in the definition of a "controlled substance." There are various means of committing a State of Florida § 893.13 offense, and the statute does not set forth the disjunctive separate offenses contained within the single statute. There was no categorical approach or modified categorical approach, within the meaning of Descamps or Mathis, using the divisible or indivisible element approach. In United States v. Hinkle, 832 F.3d 569 (2016), the Fifth Circuit found that the Texas drug statute, § 481.112(a) was broader than the federal definition for a controlled substance offense. And so it is, also, with the Florida State Statute of § 893.13(1), delivery, trafficking, and sale is too broad and ambigous. Therefore, Petitioner and other federal prisoners within the Eleventh Circuit, that convicted of a prior § 893.13 offense, should have received the least cuplpable offense.

CONCLUSION

THEREFORE, based on the circuit split in the Eleventh Circuit from the its decision in McCarthan, Petitioner requests that this Honorable Supreme Court overturns the Eleventh Circuit's erroneous decision in McCarthan or, in the alternative, hold Petitioner's case in abeyance pending a decision in determining the circuit split, in regards to the "savings clause" jurisdiction. Petitioner is currently serving an unconstitutional sentence that violates

his due process rights. Petitioner's Sixth Amendment rights are in violation to the elemtns of his prior offenses. Petitioner's Eighth Amendment rights are also being violated, based on the fact that he is serving an unconstitutional sentence, and, as long as he remains incarcerated, unconstitutionally, his rights against cruel and unusual punishment continue to be violated. Petitioner hopes and prays that the Honorable justices grant certiorari in this case for all of the above stated reasons.

Respectfully Submitted,

12-11-2018
Date

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