

IN THE SUPREME COURT
OF THE UNITED STATES

CASE NO. _____

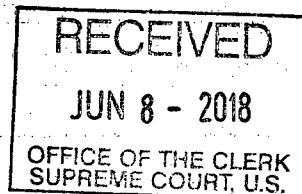
MICHAEL DELANCY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR ISSUANCE OF A
WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

By:
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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals holding in McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017), which is in conflict with opinions of nine other circuit courts of appeals as to the availability of relief under 28 U.S.C. § 2241 for federal inmates, unconstitutionally forecloses habeas corpus access in the courts.
2. Whether, under this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016), Petitioner was unconstitutionally enhanced at sentencing based upon prior Florida-state convictions which Petitioner challenged via 28 U.S.C. § 2241.

LIST OF PARTIES

All parties to this action are named and listed in the caption of this case on the title page.

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28 U.S.C. § 2241

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28 U.S.C. § 2255

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JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided this matter was March 1, 2018. No petition for rehearing was timely filed.

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is, to the best of Petitioner's knowledge, unpublished.

The opinion of the United States District Court for the Middle District of Florida appears at Appendix B to the petition and is, to the best of Petitioner's knowledge, unpublished.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. V

U.S. Constitution, Amend. VI

U.S. Constitution, Amend. VIII

28 U.S.C. § 2241

28 U.S.C. § 2255

STATEMENT OF THE CASE

Following conviction and sentencing, during which Petitioner's sentence was enhanced as a career offender based upon prior convictions in Florida, this Court issued its opinion in Mathis v. U.S., 136 S.Ct. 2243 (2016). Given the procedural posture of the case at bar, Petitioner filed a motion with the district court under 28 U.S.C. § 2241 seeking relief from the imposed sentence, contending that the Florida offenses could not qualify as requisite predicate offenses for the enhancement imposed upon him. The Sec. 2241 motion was invoked under 28 U.S.C. § 2255(e), also known as the "savings clause."

Upon reviewing the motion, the district court denied the relief sought. In the opinion, it surmised that it did not have jurisdiction to entertain Petitioner's motion because Eleventh Circuit precedent foreclosed Petitioner's § 2241 motion, specifically McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc. 851 F.3d 1076 (11th Cir. 2017)(en banc). Petitioner then sought review in the Eleventh Circuit.

On March 1, 2018, the Eleventh Circuit issued its opinion. While the Eleventh Circuit ultimately affirmed the district court's analysis and opinion, the appellate court utilized three of the four pages in the opinion to bolster and justify its prior decision in McCarthan given that Petitioner's appeal focused upon the error in the McCarthan posi-

tion. Moreover, given that holding, The Eleventh Circuit did not at all address Petitioner's argument as to the application of Mathis in relation to the prior Florida convictions and whether his sentence was imposed unconstitutionally.

Petitioner now seeks a writ of certiorari from the Honorable Supreme Court of the United States to review the decision of the Eleventh Circuit and resolve the conflict McCarthan has caused amongst the court of appeals for the various circuit courts.

REASONS FOR GRANTING THE PETITION

COMES NOW, Petitioner, MICHAEL DELANCY, pro se, and respectfully requests this Honorable U.S. Supreme Court issue a writ of certiorari to review the decision of the lower courts. Petitioner is a layman of the law, unskilled in the law, and requests this Petition be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972).

ARGUMENT ONE

The Holding by the Eleventh Circuit in McCarthan Unconstitutionally Forecloses a Petitioner's Right to Redress Under 28 U.S.C. Section 2241

Petitioner filed a motion for relief in the district court under 28 U.S.C. § 2241. The motion was brought pursuant to the "savings clause" of 28 U.S.C. § 2255, and contested his sentencing enhancement(s) premised upon this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016). Petitioner asserted that, had the sentencing court applied prior analysis of this Court's precedent in conjunction with Mathis, he would have (and should have) never been deemed a career offender and, thus, not subject to the enhanced sentence imposed by the district court.

Rather than address the substantive issues, the district court opined that it lacked jurisdiction to entertain Petitioner's § 2241 motion, citing the Eleventh Circuit precedent in McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017)(en banc). Specifically, sitting en banc, the Eleventh Circuit overruled prior precedent and

held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except on very narrow grounds. Id.; see also Appendix A, at p. 3. As a result, and without further analysis or explanation, the district court dismissed the motion.

Upon appeal, the Eleventh Circuit set forth in three of the four pages of its opinion (as Appendix A) why it believed the McCarthan reasoning was just. As a result, it, too, never addressed the legal merits of Petitioner's contention regarding Mathis' application to the case at bar. Most telling, however, was the Eleventh Circuit's silence in its opinion regarding why its decision in McCarthan should stand in light of the conflict it causes amongst its sister circuits as explained in Petitioner's appeal.

The McCarthan decision, which was a relatively recent determination, reversed the course of § 2241 juris prudence within the Eleventh Circuit. In fact, prior to McCarthan, the Eleventh Circuit had been among the overwhelming majority of circuit courts of appeals that recognized (and still do) that the ability of persons in federal custody to invoke 28 U.S.C. § 2255(e)'s "savings clause" to seek relief under Sec. 2241, where an intervening and retroactively applicable decision of this Court rendered their continuing custody illegal. Nine circuits still adhere to that position. See, e.g., U.S. v. Barrett, 178 F.3d 34 (1st Cir. 1997), cert.

denied, 528 U.S. 1176 (2000); Triestman v. U.S., 124 F.3d 361 (2d Cir. 1997); In Re: Dorsainvil, 119 F.3d 245 (3d Cir. 1997); In Re: Jones, 226 F.3d 328 (4th Cir. 2000); Reyes-Requena v. U.S., 243 F.3d 893 (5th Cir. 2001); Martin v. Perez, 319 F.3d 799 (6th Cir. 2003); In Re: Davenport, 147 F.3d 605 (7th Cir. 1998); Alaimalo v. U.S., 645 F.3d 1042 (9th Cir. 2011); In Re: Smith, 285 F.3d 6 (D.C. Cir. 2002).

The decisions of these courts rests largely on the reasoning set forth by the Seventh Circuit in Davenport. See Samek v. Warden, 766 F.3d 1271 (11th Cir. 2014), wherein Judge W. Pryor, in concurring, stated that

the majority of our sister circuits have adopted variations of the Seventh Circuit rule from In Re: Davenport.

In interpreting the phrase "inadequate or ineffective" in Sec. 2255(e), the Seventh Circuit looked to the "essential function" as "giving a prisoner a reliable judicial determination of the fundamental legality of his conviction and sentence." Id.

Further, the Davenport Court noted that a person who challenged erroneous circuit precedent in a direct appeal or initial Sec. 2255 motion never had a "reasonable opportunity" that habeas corpus demands because

the trial judge, bound by our * * * cases, would not listen to him; stare decisis would make us unwilling (in all likelihood) to listen to him; and the Supreme Court does not view itself as being in the business of correcting errors.

Id., at 611.

Moreover, Sec. 2255 would not provide such an opportunity after an intervening and retroactively applicable decision of this Court that postdated an initial § 2255 motion because of the bar on second or successive § 2255 motions. See, 28 U.S.C. Sec. 2255(h). As such, the Seventh Circuit reasoned (and the vast majority of other circuits have concurred) that, where a person in federal custody "had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion," the "savings clause" of § 2255(e) is triggered and an application for habeas corpus relief under Sec. 2241 is available. Id.

It is also noteworthy that, speaking through the Office of the Solicitor General, the government has repeatedly taken the position in court that the majority rule is the correct one. Since 2011, the government has filed at least eleven (11) briefs in the Eleventh Circuit alone "agree[ing] that the savings clause provides relief where Section 2255 prevents a Federal prisoner from presenting a claim that, under an intervening, retroactively applicable statutory-construction decision ... his sentence is above the statutory maximum and circuit law foreclosed his legal claim at the time of his sentence, direct appeal, and the first section 2255 motion." See briefs of the United States filed in Dority v. U.S., No. 10-8286 (11th Cir. May 16, 2011); Sorrell v. Bledsoe, No. 10-7416 (11th

Cir. Ja. 17, 2012); McKelvey v. Rivera, No. 12-5699 (11th Cir. Dec. 17, 2012); Thornton v. Ives, No. 12-6608 (11th Cir. Feb. 9, 2013); McCorvey v. Young, No. 12-7559 (11th Cir. Feb. 4, 2013); Jones v. Castillo, No. 12-6925 (11th Cir. Feb. 21, 2013); Blanchord v. Castillo, No. 12-7894 (11th Cir. Mar. 26, 2013); Prince v. Thomas, No. 12-10719 (11th Cir. Aug. 12, 2013); Abernathy v. Cozz-Rhodes, No. 13-7723 (11th Cir. Mar. 7, 2014); Williams v. Hastings, No. 13-1221 (11th Cir. Jul. 30, 2014); Taylor v. Cain, No. 00-5961 (11th Cir. Mar. 2, 2001) (stating that because of the availability of the "savings clause," there is no concern that federal prisoners who have a claim based on a new decision of the Supreme Court cutting back on the sweep of a criminal statute will lack a remedy).

Additionally, in those briefs, the government expressly disagreed with the Tenth Circuit's holding in Prost v. Anderson, 636 F.3d 578 (2011), upon which the Eleventh Circuit ultimately decided McCarthan, and is the only other circuit to prohibit an inmate's avenue of redress under the "savings clause." For example, in Dority, the government said the Tenth Circuit's "overly restrictive interpretation of Section 2255(e) ... departs from the other circuits to have addressed this issue." As well, in U.S. v. Suratt, No. 14-6851 (4th Cir. Feb. 2, 2016), the government posited that "Prost's analysis is refuted by Section 2255(e)'s text, when read as a whole."

It is clear that, under the present paradigm, a signi-

ficant split exists amongst the several circuit courts of appeals, with the Tenth and Eleventh Circuits in the minority and severely restricting a federal inmate's habeas corpus access. If McCarthan is permitted to stand, many federal prisoners in the Eleventh Circuit will not be able to take advantage of decisions of this Court and will remain incarcerated for conduct that all agree is no longer criminal (or for a term of imprisonment that all agree exceeds the maximum term authorized by law) while other prisoners in other circuits will be afforded that right and opportunity. In fact, a prisoner in the Eleventh Circuit may be foreclosed from relief under Sec. 2241 today but, upon being transferred to a prison facility in a more favorable circuit, have his conviction and/or sentenced redressed there. Given that both Secs. 2241 and 2255 have national implication and their use by prisoners in federal custody must be uniform across the nation, it is incumbent upon this Honorable Supreme Court to address this circuit split, and issue a writ of certiorari to the Eleventh Circuit to do so.

ARGUMENT TWO
Petitioner's Career Offender Status is
Unconstitutional In Light of Mathis

In the case at bar, Petitioner had been deemed a career offender and subject to sentencing enhancements under 21 U.S.C. Sec. 851, predicated upon prior Florida convictions. Given this Court's holding in Mathis, in conjunction with other

errors committed by the sentencing court, Petitioner avers the Florida convictions could not have been deemed (and cannot now be deemed) "controlled substance offenses" that trigger the sentencing enhancement(s).

Under 21 U.S.C. § 851 and U.S.S. Guidelines §§ 4b1.1/4b1.2, the definition of a controlled substance offense is an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits specific activity, namely the manufacture, import, export, distribution, or dispensing of a controlled substance or counterfeit controlled substance; or the possession of a controlled (or counterfeit controlled) substance with intent to manufacture, import, export, distribute or dispense. Neither purchase nor simple possession are included in this definition.

In contrast, Florida's controlled substance act is codified under Fla. Stat. §§ 893.13 and 893.135. Both criminalize the sale, manufacture, and delivery of controlled substances, although § 893.135 also criminalizes the act of purchase.

In Petitioner's case, the sentencing court relied solely upon a description of Petitioner's prior convictions, not definitive documentation and/or statutory citation. As a result, there is no way that the sentencing court could ascertain whether Petitioner's prior convictions were obtained under § 893.13 or § 893.135. To make that determination, the government, in seeking the sentencing enhancement, was obligated to introduce

specific documentation as outlined by this Court in Shepard v. U.S., 544 U.S. 13 (2005). It did not, and the sentencing court never reviewed any such proper information. Further, in the absence of Shepard documentation, a conviction under Fla. Stat. § 893.135 is categorically overbroad and does not constitute a "controlled substance offense" under the analogous career offender guideline because the act of purchase is not included in that definition. See, U.S. v. Shannon, 631 F.3d 1187 (11th Cir. 2015).

Further, the sentencing court never undertook either a categorical or modified categorical approach with regards to an analysis of Petitioner's prior convictions. In light of this Court's decision in Mathis, however, delivery, sales, and possession are not controlled substance offenses within the meaning of the guidelines because that conduct is not criminalized within the guidelines' definition of a "controlled substance offense." They are not elements of the crime but, rather, only various means of violating the statute, and do not set forth disjunctive separate offenses. Mathis clarified how and when the modified categorical approach was to be applied in the context of federal sentencing. That decision is controlling regarding the methodology of the modified categorical approach and must be applied even if it is contrary to prior district or circuit precedent. Mathis makes clear that sentencing courts may no longer reference record documents to

determine a prior conviction, and establishes that there is a difference between alternative elements of an offense and alternative means of satisfying a single element. Elements must be agreed upon by a jury, while a jury is not required to agree on the way that a particular requirement of an offense is met; the way of satisfying that requirement is a means of committing an offense, not an element of the offense. Facts and means are mere real world things extraneous to the crime's legal requirements. They are circumstances or events having no legal effect or consequence, and need neither be found by a jury nor admitted by the defendant. Further, conduct itself cannot be looked at. Taylor v. U.S., 495 U.S. 575 (1990). Thus, if conduct, facts, and means cannot be used, and no Shepard documents were introduced, the sentencing court had no way to determine the elements of the predicate offenses. As a result, Moncrieffe v. Holder, 133 S.Ct. 1678 (2011), requires that the court impose sentence based only on the least act criminalized since § 893.13 and § 893.135 are indivisible statutes under the modified categorical approach, thus disqualifying Petitioner's prior Florida convictions as predicate offenses for career offender status and enhancement.

Petitioner contends that the district court and the Eleventh Circuit Court of Appeals opined improperly in not addressing this issue, claiming that it had no jurisdiction to make a decision (as set forth in Argument One herein). Peti-

tioner's sentence was imposed unconstitutionally and, in the same manner, improperly enhanced. Petitioner respectfully requests this Honorable Supreme Court issue a writ of certiorari to review the opinion of the lower courts on this issue.

CONCLUSION

Uniformity and consistency are cornerstones of the U.S. judicial system. When one or two circuit courts of appeals tack on a path diametrically inapposite to that followed by the vast majority of its sister circuits, it is imperative that this Court step in and provide direction and guidance, thus ensuring that the nearly 200,000 federal prisoners in custody throughout the United States are treated in the same manner when it comes to the fundamental right of relief under habeas corpus, a right extending back prior to the founding of this country. Moreover, the uniform application of this Court's holdings and precedent should be adhered to by the lower courts, including the requirements necessary in determining whether an individual is subject to a harsher, enhanced sentence. In Petitioner's case, these issues have national impact and Petitioner prays and requests this Court issue a writ of certiorari to the Eleventh Circuit to review its erroneous determinations in this case.

DATED: 5-25-18

Respectfully Submitted,

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