No. _____

In The

Supreme Court of the United States

IN RE GEORGE HOUSTON, JR.,

Petitioner.

On Petition For Writ Of Habeas Corpus
To The United States District Court For
The Middle District Of Florida, Tampa Division

PETITION FOR WRIT OF HABEAS CORPUS

GEORGE HOUSTON, JR.
D.C. # 16032-018
Federal Correctional Camp
P.O. Box 725
Edgefield, SC 29824

QUESTIONS PRESENTED

Although some circuits have used the conspiracy-wide approach, it has been called into question by Alleyne v. United States, 133 S.Ct. 2151 (2013) and subsequent cases from those circuits. Notably, the circuits to adopt the conspiracy-wide approach; did so before Alleyne was decided in 2013, while all circuits, to explicitly address the issue in Alleyne's wake, have adopted or followed the individualized approach. The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published or unpublished cases decided after Alleyne. The circuit's conflicts remain.

The questions presented are:

(1) Whether it is the individualized drug quantity that is a fact that increases the mandatory minimum sentence or whether the amount of drugs attributable to the conspiracy as a whole can be the fact which triggers the mandatory minimum for an individual defendant?

(2) Whether a sentence that violates Apprendi v. New Jersey, 530 US 466 (2000) and Alleyne claims are jurisdictional error, and therefore the error may be raised on collateral review without being subject to procedural default or the non-retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989)?

(3) If not, whether this court should now make Apprendi and Alleyne retroactive limited in scope on collateral review from June 26, 2000, in which the Apprendi decision was announced?

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner George Houston, Jr. respectfully petitions this Court for a Writ of Habeas Corpus.

OPINIONS BELOW

The District Court denied Petitioner's 2255 Motion on February 12, 2014, Case No. 8-12-cv-561; 8:09-cr-379, and is reported and printed in the appendix to this petition, Pet. App.1A.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a), 28 U.S.C. § 2241 and Supreme Court Rule 20.2; see also In Re Sindram, 498 U.S. 177 (1991) (Accordingly, if petitioner wishes to have his petition considered on its merits, he must pay the docketing fee required by this Court's Rule 38(a) and submit a petition in compliance with Rule 33).

This Court has jurisdiction to hear Mr. Houston's Petition for an Extraordinary Writ on its merits because he has paid the filing fee and submitted his petition in compliance with Supreme Court Rule 33.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defenses.

28 U.S.C. § 2241(A):

Writ of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit court within their respective jurisdictions.

28 U.S.C. § 2244(b)(3)(E):

The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT PURSUANT TO RULE 20.4(A) AND 28 U.S.C. § 2242

Pursuant to Rule 20.4(A), Petitioner states that he has not filed this petition in the district court of the district in which [Petitioner] is held, Sup. Ct. R. 20.4(A) (quoting 28 U.S.C. § 2242), because Petitioner has no avenue for doing so. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, 110 stat. 1217 ("AEDPA") permits a prisoner in federal

custody to file for habeas corpus in the district in which he is held only when filing a motion in the district which sentenced him would be inadequate or ineffective 28 U.S.C. § 2255(E). Petitioner may, however, attack the validity of his conviction in a § 2241 petition if he can meet the requirements of § 2255's savings clause; Kinder v. Purdy, 222 F.3d 209, 212 (5th Cir. 2000): § 2255(E). To do so, Petitioner must establish that his claims: (1) Are "based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense," and (2) that the claims were foreclosed by circuit law at the time when the claim[s] should have been raised in the petitioner's trial, appeal or first § 2255 motion, Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). Because petitioner cannot meet the requirements of § 2255 savings clause, he thus has no avenue for making an "application to the district court of the district in which the applicant is held," Sup. Ct. R. 20.4(A) (quoting 28 U.S.C. § 2242).

STATEMENT OF CASE

Mr. George Houston, Jr. is a sixty year old father of twelve adult children, and has a boat company that he started in 2006 and was indicted in October of 2009 by a federal grand jury in Tampa, Florida. He was charged with conspiring to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. § 846. But during the jury trial, the jury was not required to find that each defendant was

individually responsible for entering a conspiracy to willfully conspire together to possess 5 kilograms or more of cocaine beyond a reasonable doubt. (A copy of the Court's instructions to the jury, excerpts pages 14-19 attached as Appendix B). Nor was the Petitioner found guilty beyond a reasonable doubt by the jury verdict; (A copy of the verdict is attached as Appendix C). In addition, although the jury found that the conspiracy involved five or more kilograms, it made no finding that Petitioner should have foreseen that the conspiracy would involve this amount.

Consequently, the jury was allowed to use the conspiracy-wide approach, rather than the individualized approach. Therefore, the amount of drugs attributable to the three man conspiracy as a whole was the fact which triggered both the mandatory minimum penalty and 21 U.S.C. § 851, 240 month statutory sentence against Mr. Houston. Put differently, the jury was not required to find that each defendant was individually responsible for entering a conspiracy to try to purchase and distribute 5 kilograms of cocaine or that it was reasonably foreseeable to each defendant that 10 kilograms would be distributed within the scope of the conspiracy. In fact, the individualized approach would have subjected Mr. Houston to the 500 grams or more mandatory minimum, which is 5 to 40 years, because once the jury would have divided the 10 kilograms between Petitioner and his two co-conspirators, only 3 kilos and 12 ounces would have been attributable to each defendant. Of course, Mr. Houston would have been subjected to the 120 month statutory

penalty based on his prior conviction, rather than the 240 month statutory sentence he received or 0-20 years because the jury was not instructed to make an individualized drug determination which subjected Petitioner to the default penalty subsection of 841(b)(1)(C).

Mr. Houston's direct appeal was affirmed in March of 2011. Subsequently, the district court denied his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence in February 2014. This petition for an extraordinary writ pursuant to Supreme Court Rule 20.2 follows.

REASONS FOR GRANTING THE WRIT

I. This case presents exceptionally rare circumstances that warrant the exercise of this Court's original habeas jurisdiction.

Pursuant to Rule 20.4(A), Petitioner states that he has not filed this petition in the district court of the district in which (Petitioner) is held, Sup. Ct. R. 20.4(A) (quoting 28 U.S.C. § 2242), because Petitioner has no avenue for doing so. The Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, Title I, 110 Stat. 1217 ("AEDPA") permits a prisoner in federal custody to file for habeas corpus in the district in which he is held only when filing a motion in the district which sentenced him would be inadequate or ineffective 28 U.S.C. § 2255(E). Petitioner may, however, attack the validity of his conviction in a § 2241 petition

if he can meet the requirements of § 2255's savings clause; Kinder v. Purdy, 222 F.3d 209, 212 (5th Cir. 2000): § 2255(E). To do so, Petitioner must establish that his claims: (1) Are "based on a retroactively applicable Supreme Court decisions which establishes that the petitioner may have been convicted of a nonexistent offense," and (2) that the claims were foreclosed by circuit law at the time when the claim(s) should have been raised in the petitioner's trial, appeal or first § 2255 motion, Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). Because petitioner cannot meet the requirements of § 2255 savings clause, he thus has no avenue for making an "application to the district court of the district in which the applicant is held." Sup. Ct. R. 20.4(A) (quoting 28 U.S.C. § 2242).

II. A petition for a Writ of Habeas Corpus aids the Court's Appellate Jurisdiction to Resolve Circuit conflicts and to make Apprendi and Alleyne retroactive.

A petition for a writ of habeas corpus under 28 U.S.C. § 1651(A) must show that the writ will be in aid of the Court's appellate jurisdiction . . . Sup. Ct. Rule 20.1. The traditional use of the writ in aid of appellate jurisdiction both at common law and in federal courts has been to confine the lower courts to a lawful exercise of its prescribed jurisdiction.

In its seminal and historic opinion describing the contours of its judicial review powers and other jurisdictional authority, Marbury v. Madison, 5 U.S. (1

Cranch) 137 (1803), this court recognized that the writ of mandamus is the appropriate tool to protect the court's appellate jurisdiction. Id. at 175 ("to enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the court] to exercise appellate jurisdiction"). The All Writs Act sets forth this court's statutory authority to issue all writs necessary or appropriate in aid of its jurisdiction. 28 U.S.C. § 1651(A) one noted treatise has recognized that under the All Writs Act, a writ may issue on the ground that undue delay is tantamount to failure to exercise jurisdiction. 16 Charles Alan Wright, Arthur Raphael Miller and Edward H. Cooper, Federal Practice and Procedure Jurisdiction 2d § 3933.1, p. 557-58 2d Ed. (1996).

Thus, by granting a writ of habeas corpus as requested by Mr. Houston in this case, this court would be acting in aid of its certiorari jurisdiction. For instance, AEDPA requires that a Petitioner seeking to file a successive petition for a writ of habeas corpus first request authorization in the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A); See also id. § 2255(h) (incorporating the gatekeeping procedures of § 2244). Under § 2244(b)(3)(E), the denial of such authorization shall not be subject of a petition for rehearing or for a writ of certiorari. Thus, there is no way for this court to review the Court of Appeals denial of a second or successive 2255 motion by writ of certiorari.

As this court has recognized, however, § 2244(b)'s gatekeeping mechanism does not deprive this court of its authority to entertain original habeas petitions.

The exercise of that authority provides the appropriate – and the only – avenue for resolving the circuit split described below and for making Apprendi and Alleyne retroactive. Indeed, as described below, this case presents the exceedingly rare circumstance in which there is no realistic possibility that these issues will arrive at this court in any other posture (such as through appeal of an initial § 2255 motion or an inmate being able to pay the filing fee). It is well settled in this court, that the United States Supreme Court is bound to hear a petition for a writ of habeas corpus if petitioner wishes to have his petition considered on its merits, he must pay the docketing fee required by this Court's Rule 38(A) and submit a petition in compliance with Rule 33. See In Re Sindram, 498 U.S. 177 (1991). Sindram is the Supreme Law of the land. There is no question that Mr. Houston's request for a writ of habeas corpus would be an exercise of this court's appellate jurisdiction. See also Ex Parte Bollman, 8 U.S. (4 cranch) 75, 100-01 (1807) (the court's statutory authority to issue a writ of habeas corpus is clearly appellate because it involves the revision of a decision of an inferior court); Ex Parte Hung Hang, 108 U.S. 552, 553 (1883).

This Court's Rule 20.4(A) "delineates the standards under which" the Court will grant an original writ of habeas corpus; Felker v. Turpin, 518 U.S. 651, 665 (1996). First, "the petitioner must show . . . that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(A). Second, "the petitioner must show that exceptional circumstances

warrant the exercise of the Court's discretionary powers." Id. (quoting 28 U.S.C. § 2242).

(A) This Case Satisfies Both Requirements.

Petitioner cannot obtain adequate relief in any other form or from any other court. 28 U.S.C. § 2255 is the primary means under which a federal prisoner may collaterally attack the legality of his conviction or sentence, Reyes-Requena v. United States, 243 F.3d 893, 901 (5th Cir. 2001).

However, § 2241 may be utilized by a federal prisoner to challenge the legality of his or her conviction or sentence if he or she can satisfy the mandates of the so-called § 2255's savings clause.

(B) The Savings Clause States:

> An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied his relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. 28 U.S.C. § 2255(E).

Petitioner cannot satisfy the three factors to file a § 2241 petition in connection with § 2255's savings

clause because his claims are not based on a retroactively applicable Supreme Court decision. What is more, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the circumstances under which a prisoner may file a second or successive application for habeas relief. A claim presented in a second or successive application under Section 2254 must be dismissed unless:

III. The claim relies on a new Rule of Constitutional law, that should be made retroactive to cases on collateral review by the Supreme Court.

Thus, there is no way for Petitioner to ask the lower courts to consider his issues, nor is there any way for this Court to review Petitioner's issues by writ of certiorari. Nevertheless, as this Court has recognized, however, § 2244(b)'s gatekeeping mechanism does not deprive this Court of its authority to entertain original habeas petitions, Felker, 518 U.S. at 660-661. The exercise of that authority provides the appropriate – and the only – avenue for resolving the circuit split described below and for making Apprendi and Alleyne retroactive on collateral review without being subject to procedural default or to the non-retroactively analysis of Teague v. Lane, 499 U.S. 288 (1989). Indeed, as described below, this case presents the exceedingly rare circumstance in which there is no realistic possibility that these issues will arrive at this Court in any other posture (such as through appeal of an initial § 2255 motion), and the Court's habeas jurisdiction is

this the only way that the court can make Apprendi and Alleyne retroactive on collateral review, and resolve the split among the circuits regarding whether it is the individualized drug quantity that is a fact that increases the mandatory minimum sentence or whether the amount of drugs attributable to the conspiracy as a whole can be the fact which triggers the mandatory minimum for an individual defendant.

IV. Exceptional Circumstances Warrant the Exercise of This Court's Habeas Jurisdiction

This case presents a rare confluence of circumstances warranting the exercise of this Court's habeas jurisdiction. The court of appeals are openly split on a question unique to the context of addressing whether mandatory minimum sentences for 21 U.S.C. § 846 drug conspiracy offenses are determined by conspiracy-wide or defendant-specific drug quantities. That question is of the utmost importance to thousands of prisoners across the country serving sentences that were determined by conspiracy-wide approach for their offense. Many of whom – like Petitioner – would now be free from custody, but for the district court and jury applying the wide approach in violation of Apprendi and Alleyne. The circuits are split on this issue. The First, Fourth, Fifth and Ninth Circuits have now adopted the individualized approach; see United States v. Haines, 803 F.3d 713, 738-42 (5th Cir. 2015); United States v. Rangel, 781 F.3d 736, 742-43 (4th Cir. 2015) (citing United States v. Collins, 415 F.3d 304 (4th

Cir. 2005)); United States v. Banuelos, 322 F.3d 700, 704-06 (9th Cir. 2003). Prisoners on direct appeal in this circumstance who were convicted have a chance of being resentenced under the individualized drug quantity, and they will be released from custody and sent home to their families early, while prisoners who – like Petitioner – had the misfortune of being convicted in the Third, Sixth, Seventh and Eleventh Circuits will be forced to carry out their unconstitutionally-imposed sentences unless this court makes Alleyne retroactive.

Although some circuits have used the conspiracy-wide approach, it has been called into question by Alleyne and subsequent cases from those circuits. Notably, the circuits to adopt the conspiracy-wide approach, did so before Alleyne was decided in 2013, while all circuits to explicitly address the issue in Alleyne's wake have adopted or followed the individualized approach. The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grail pie with it in subsequent published and unpublished cases decided after Alleyne.

Moreover, two circuits that initially adopted the conspiracy-wide approach have recently questioned whether that approach is the correct one in a post Alleyne world. For example, the Sixth Circuit appeared to adopt the conspiracy-wide approach in United States v. Robinson, 547 F.3d 632 (6th Cir. 2008), but later panels questioned whether it was consistent with earlier Sixth Circuit cast law; see United States v. Young, 847 F.3d 328, 366-67 (6th Cir. 2017) (finding that the defendant's sentence could be upheld under

either approach, and noting that "there is no need for us to reconcile these [conflicting) cases at this time"); see also United States v. Gibson, No. 15-6122, 2016 U.S. App. Lexis 21141, 2016 WL 6839156 (6th Cir. Nov. 21, 2016), vacated, 854 F.3d 367 (6th Cir. 2017) (en banc). In Gibson, the panel reluctantly applied Robinson, and the full court took the case en banc, ultimately dividing equally, resulting in a reinstatement of the district court's sentence based on the conspiracy-wide approach; United States v. Gibson, 874 F.3d 544 (6th Cir. 2017) (en banc).

Similarly, the Tenth Circuit held in United States v. Stiger, 413 F.3d 1185 (10th Cir. 2005), that "[t]he jury is not required to make individualized findings as to each co-conspirator because the sentencing judge's findings do not, because they cannot, have the affect of increasing an individual defendant's exposure beyond the statutory maximum justified by the jury's guilty verdict." Id. at 1193. But recently, the Tenth Circuit called Stiger into question in United States v. Ellis, 868 F.3d 1155, 1170 n.13 (10th Cir. 2017) ("[A] defendant can be held accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable to him") (quoting United States v. Dewberry, 790 F.3d 1022, 1030 (10th Cir. 2015)). The reason is simple; Alleyne undercut the rationale put forth in Stiger for adopting the conspiracy-wide approach because, after Alleyne, it was no longer the case that a judge could "lawfully" determine a fact that would increase a defendant's mandatory-minimum sentence. Indeed, the question regarding the retroactivity of

Apprendi and Alleyne is also of the utmost importance to thousands of prisoners across the country serving sentences that were determined before Alleyne was decided in 2013, many of whom – like Petitioner – would now be free from custody, but for the lower court's holding that Alleyne is not retroactive, not jurisdictional and is a procedural bar. These issues of immense importance carry a hard deadline for meaningful resolution. Finally, these questions realistically can be moralistically resolved only through the exercise of this Court's original habeas jurisdiction. These exceptional circumstances warrant the exercise of this Court's habeas authority.

V. The circuits are split regarding whether an individualized jury finding as to the quantity of drugs attributable to an individual defendant is required to trigger a mandatory minimum, or if it is sufficient for the jury to find that the conspiracy as a whole resulted in distribution of the mandatory-minimum-triggering quantity.

As previously stated, the District of Columbia, First, Fourth, Fifth and Ninth Circuits have adopted the individualized approach; see United States v. Stoddard, 2018 U.S. App. Lexis 16110 No. 15-3060 Consolidated with 15-3061, 15-3076 (June 15, 2018); United States v. Haines, 803 F.3d 713, 738-42 (5th Cir. 2015); United States v. Rangel, 781 F.3d 736, 742-43 (4th Cir. 2015); United States v. Collins 415 F.3d 304 (4th Cir. 2005); United States v. Pizarro, 772 F.3d 284,

292-94 (1st Cir. 2014); United States v. Banuelos, 322 F.3d 700, 704-06 (9th Cir. 2003).

In United States v. Stoddard, the government had initially proposed individual verdict forms that would have required the jury to determine the quantity of drugs attributable to each defendant. But the district court, while recognizing that "there's a [circuit] split" on the issue, decided to use a verdict form without individualized drug-quantity determinations. The jury found Woodruff and Stoddard guilty of the drug-conspiracy charge and found that the conspiracy, as a whole, involved 100 grams or more of heroin. The District Court explained its reasoning:

> The fact that subjects the defendants to the enhanced statutory maximum of 40 years is that the conspiracy involved 100 grams or more of heroin. That fact was submitted to the jury and found by the jury beyond a reasonable doubt . . . Apprendi and Alleyne did not address whether a jury must find that the amount of drugs that triggers a statutory mandatory minimum penalty in a narcotics conspiracy is attributable to the conduct of a convicted conspirator – or is reasonably foreseeable by him or her as the amount involved in the conspiracy – before that amount's penalties are triggered for that conspirator. The circuits have split on how . . . to properly resolve this question . . . The D.C. Circuit has not resolved this question either. . . . The instructions provided to the jury here and the corresponding verdict form are consistent with the view that the jury need determine

> only the amount of drugs attributable to the entire conspiracy, but not to the individual defendants.

Woodruff and Stoddard raised the issue again at sentencing, arguing that the District Court should decline to impose a five-year mandatory minimum or a forty-year statutory maximum, both of which are applicable when a defendant conspires to distribute 100 grams or more of heroin under 21 U.S.C. §841(b)(1)(B). The Government agreed with this assessment in its sentencing memorandum. The District Court overruled the objections.

However, the District of Columbia Circuit held "mandatory minimum sentences were imposed for drug-trafficking conspiracy, in violation of 21 U.S.C. §§ 841 (A)(1)(b)(1), and 846, because individualized jury findings as to quantity of drugs attributable to each individual defendant – rather than drugs attributable to conspiracy as a whole – was required to trigger mandatory minimum." The panel didn't stop there, with one voice the panel said "we adopt the individualized approach to drug-quantity determinations that trigger an individual defendant's mandatory minimum sentence. It is a core principle of conspiratorial liability that a co-conspirator may be held liable for acts committed by co-conspirators during the course of the conspiracy only when those acts are in furtherance of the conspiracy and reasonably foresee[able] to the defendant." As authority the panel relied on Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); United States v. McGill, 815 F.3d 846, 917,

421 U.S. App. D.C. 280 (D.C. Cir. 2016). According to the panel, reasonable foreseeability shapes the outer bounds of coconspirator liability, and it applies to drug quantities that trigger enhanced penalties just the same as it applies to other acts committed by co-conspirators. The panel relied on Burrage v. United States, 134, S. Ct. 881, 887 (2014). Yet in United States v. Knight, 342 F.3d 697, 709-12 (7th Cir. 2003), the panel held, we find that the district court's instructions were legally proper and adequately advised the jury about applicable law. Under those instructions and making use of the special verdict form, the jury determined whether each defendant was guilty of participating in the conspiracy and then determined that the conspiracy involved a type and quantity of drugs sufficient to trigger the statutory maximum of life in prison. Once the defendant's participation in the drug conspiracy was proven, the judge at sentencing appropriately determined the drug quantity attributable to that particular defendant and sentenced him accordingly.

Likewise, in United States v. Phillips 349 F.3d 138, 141-43 (3rd Cir. 2003) the court held "we find the analysis of . . . Knight persuasive. In drug conspiracy cases, Apprendi requires the jury to find only the drug type and quantity element as to the conspiracy as a whole and not the drug type and quantity attributable the statutory maximum is, in other words, to be offense-specific, not a defendant-specific, determination. The jury must find, beyond a reasonable doubt, existence of a conspiracy, the defendant's involvement in it, and the requisite drug type and quantity involved in the

conspiracy as a whole. Once the jury makes these findings, it is for the sentencing judge to determine by a preponderance of the evidence the drug quantity attributable to each defendant and sentence him or her accordingly, provided that the sentence does not exceed the applicable statutory maximum."

Unfortunately, Alleyne says it is for the jury to determine beyond a reason able doubt the drug quantity attributable to each defendant is required to trigger a mandatory minimum. In the present case, the jury attributed five kilograms of cocaine to petitioner and his co-defendants involved in the conspiracy as a whole. Thus, absent an individualized determination of drug quantity, the verdict (attributing five kilos to the conspiracy as a whole) exposed Petitioner a statutory 21 U.S.C. § 841(b)(1)(A) mandatory minimum of ten years and a statutory 21 U.S.C. § 851 mandatory minimum of twenty years (240 months).

Indeed, the drug quantity attributed to a particular defendant dictates the § 841(b) penalty subsection that is applicable to such defendant and controls the statutory sentencing range to which the defendant is exposed. But the jury in this case was not asked to determine the threshold quantity of cocaine attributable to each individual defendant on trial, for the purpose of determining applicable penalty subsection of § 841(b). The jury instead determined only the amount of cocaine attributable as a whole. Naturally, in the absence of a jury determination of this threshold quantity, or an admission by Petitioner as the drug quantity attributable to him, his sentence must fall within the

default penalty subsection of § 841(b)(1)(C) – that is 0 to 20 years.

Petitioner raised an Alleyne issue in his motion to amend his § 2255 motion second time. He argued that Alleyne, in which the Supreme Court held that "[A]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury," requires that his sentence be vacated because his prior convictions were not charged in the indictment and proven to a jury beyond a reasonable doubt. But instead of realizing that the jury in this case was not asked to determine the threshold quantity of cocaine attributable to each individual defendant on trial for the purpose of determining the applicable penalty subsection of § 841(b), the court said "Petitioner's argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). Petitioner was right, because in the absence of a jury determination of his threshold drug quantity attributable to him, his sentence should have fell within the default penalty subsection of § 841(b)(1)(C) which is 0 to 20 years, rather than a mandatory minimum statutory range; see United States v. Brooks 524 F.3d, 549, 561 (4th Cir. 2007).

Petitioner contends that a § 2255 motion is simply inadequate or ineffective vehicle for now raising claims based on Apprendi; and Alleyne because those cases were decided on direct appeal and they were not made retroactive for collateral review.

Conversely, the Third and Seventh Circuits conspiracy-wide approach has been choked-out by

Alleyne, even though these circuits are still using Apprendi as a respirator. This rare circumstance – a split among the circuits that is specific to Alleyne's conspiracy-individualized approach that a judge could no longer lawfully determine a fact that would increase a defendant's mandatory minimum sentence, which through both §§ 2255 and 2241 statutes may not be considered or appealed to this court in any way other than an original petition because Apprendi and Alleyne are not jurisdictional error, may not be raised on collateral review without being subject to procedural default, and the non-retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989) is precisely the sort in which this Court should exercise its habeas jurisdiction.

VI. Because the Court of Appeals have unanimously held that Apprendi and Alleyne are not retroactive, an original habeas petition is the realistic way to resolve the circuit split on whether an individualized jury finding as to the quantity of drugs attributable to an individual defendant is required to trigger a mandatory minimum, rather than the conspiracy as a whole.

There is virtually no possibility that this court will have the opportunity to resolve the circuit split on the individualized approach or wide approach to trigger the mandatory minimum triggering drug quantity in any collateral posture other than an original petition for inmates like Petitioner, because Apprendi, and Alleyne are not retroactive.

As discussed above, the court will not be able to review the decisions of the Court of Appeals through the ordinary certiorari process because the split among the circuits that is specific to Alleyne's conspiracy-individualized approach, that a judge could no longer lawfully determine a fact that would increase a defendant's mandatory minimum sentence, which through both §§ 2255 and 2241 statutes, may not be considered or appealed to this court in any way other than an original petition because Apprendi and Alleyne are held by lower courts not to be jurisdictional error, may not be raised on collateral review without being subject to procedural default, and the non-retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989). Furthermore, the Eleventh Circuit has even concluded that § 2244(b)(3)(E) divests them of jurisdiction to certify these questions to this Court pursuant to this Court's Rule 19.1 or to issue any interlocutory order that would permit review of the issues by certiorari; see order at 2 n.1. In re Hammons, No. 15-13606 (11th Cir. Aug. 31, 2015). As a matter of fact, in United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001) (the court held the Rule announced in Apprendi does not apply retroactively on collateral review); Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013) holding that the constitutional rule announced in Alleyne was not made retroactively applicable on collateral review, and Alleyne is an extension of Apprendi, which itself is not retroactive. In addition, according to the Simpson panel at 877, unless the Justices themselves decide that Alleyne applies retroactively on collateral review,

we cannot authorize a successive collateral attack based on § 2255(h)(2).

The Simpson panel made it comprehensible that "this Court resolved Alleyne on direct rather than collateral review. It did not declare that its new rule applies retroactively on collateral attack," see Young v. Warden, Fort Dix FCI, 592 Fed. Appx. 69 (3rd Cir. 2015) affirming the dismissal of Young's habeas corpus petition, 28 U.S.C. § 2241 for lack of jurisdiction over Alleyne claim. In United States v. Reyes, 799 F.3d 622, 624 (3rd Cir. 2014) the panel acknowledged that every court of appeals that has considered the subject has concluded that Alleyne is not retroactive on collateral review.

In Jeanty v. Warden, FCI, Miami, 757 F.3d 1283, 1285 (11th Cir. 2014), the court held, to challenge his sentence, Jeanty has to establish that he meets all of the five specific requirements a § 2241 petitioner must satisfy to proceed under § 2255(E) Bryant v. Warden, FCC Coleman-Medium 738 F.3d 1253, 1257 (11th Cir. 2013). According to the panel, Jeanty does not meet Bryant's third requirement because Alleyne does not apply retroactively on collateral review.

The unanimity with respect to initial petitions makes it very unlikely that this court could resolve the present split without exercising its habeas jurisdiction. As an initial matter, it is unlikely that the court would grant certiorari in the context of initial petition where the lower courts are unanimous, given its ordinary practice of granting certiorari only where there is a

conflict among circuits; see Sup. Ct. R. 10(A); see also In re Vial, 115 F.3d 1192, 1196, n.8. (4th Cir. 1997) ("[I]t seems unlikely that the Supreme Court would grant certiorari to declare the applicability of a rule announced on direct review to collateral proceedings when . . . lower federal courts uniformly rule in favor of collateral availability."); Amicus Br. of the United States 9, In Re Smith 526 U.S. 1157 (U.S. May 6, 1999) (No. 98-5804 (observing the same)).

Moreover, even if the Court wanted to grant certiorari in the context of an initial motion in the absence of a split, it will not get the opportunity. The United States agrees that Apprendi and Alleyne are not retroactive and thus the government would never contest a district court declaring that Apprendi and Alleyne are not retroactive, jurisdictional error and may not be raised on collateral review without being subject to procedural default, and the non-retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989) to an initial § 2255 motion, let alone appeal to the circuit court and then seek certiorari on the issue.

Failure to exercise this Court's habeas petition in these circumstances would lead to an anomalous result. Amicus Br. of United States 9-10, In Re Smith, 526 U.S. 1157 (May 6, 1999).

Indeed, Williams, Circuit Judge concurring in Crayton v. United States, 799 F.3d 623 (7th Cir. 2015) held "it cannot be a sufficient justification that Alleyne is not retroactive because it has close analytic ties to Apprendi; (which is not retroactive) because Gideon

meets the Teague standard, but the Supreme Court has not suggested that Johnson v. Zerbst, 304 U.S. 458 (1938) or Powell v. Alabama, 287 U.S. 45 (1932), to which Gideon v. Wainwright, 372 U.S. 355 (1963) has close analytic ties, would also meet the Teague standard. Apprendi does not need to be retroactive in order for Alleyne to be retroactive"; see also Circuit Judge Barkett, concurring in McCoy v. United States, 266 F.3d 1245, 1260 (11th Cir. 2001) holding I believe that McCoy is correct to claim that a sentence that violates Apprendi, is jurisdictional error and therefore the error may be raised on collateral review without being subject to procedural default or to the non-retroactivity analysis of Teague v. Lane 489 U.S. 288 (1989). But in United States v. Olvera, 775 F.3d 726, 731 (11th Cir. 2015) the panel acknowledged Alleyne extended Apprendi; and [e]very circuit court to address whether Apprendi applies . . . retroactively . . . has held that it does not.

If this Court does not exercise its habeas authority where there is a conflict the net result is that each circuit will continue to use both the individualized approach and wide approach, and Apprendi and Alleyne will remain unavailable on collateral review. Of course, there is no reason to believe that Congress intended to create such an unusual system of collateral review. Thus, the exercise of habeas jurisdiction in this unique instance, far from interfering with the accomplishment of Congress' objectives in the AEDPA, would assist in effectuating in a sensible fashion the system of collateral review Congress created.

Accordingly, an original petition is the best and only procedural posture by which the court may decide whether the thousands of prisoners, like Petitioner who may be serving unconstitutional sentences under the conspiracy wide approach drug quantity are entitled to be resentenced. The exercise of this Court's habeas jurisdiction is eminently justified in this rare circumstance.

VII. This issue is of exceptional importance to tens of thousands of conviction and sentences in drug cases alone whose ability to seek relief is prohibited against retroactivity.

There are many thousands of prisoners across the country who were sentenced under the conspiracy-wide approach. From 1983 until now (2018), tens of thousands have been convicted and sentenced to mandatory minimum statutory penalties because the district judge, rather than the jury, made the drug quantity determination in violation of Apprendi and Alleyne. To cite but one example, in Petitioner's criminal case, he and his co-defendant were both found guilty under the conspiracy-wide approach rather than the individualized approach. Furthermore, Petitioner wasn't found guilty of the drug amount beyond a reasonable amount (A copy of the Verdict Transcript of the Jury Trial is attached as Appendix D). Subsequently, the court found the amount of cocaine involved was limited to a ten kilogram transaction. According to the court "that will of course, affect the guidelines

calculation." (A copy of pages 46 and 47 excerpts of the Sentencing Hearing Transcript are attached as Appendix E). Admittedly, the District of Columbia Circuit has recently held a district court thus errs when it applies a mandatory minimum based on a fact that was not found by the jury. In addition to that, the panel adopted the individualized approach to drug-quantity determinations that trigger an individual defendant's mandatory minimum sentence. United States v. Stoddard 2018 U.S. App. Lexis 16110 (D.C. Cir. 2018). In United States v. Collins 415 F.3d 304, 314 (4th Cir. 2005), the panel held "by failing to instruct the jury in a manner consistent with our holding in United States v. Irvin, 2 F.3d 72 (4th Cir. 1993) (that, for the purpose of setting a specific drug quantity under § 841(b), the jury must determine what amount of cocaine base was attributable to Collins using Pinkerton principles), the district court's sentence effectively attributed to Collins, an individual member of the conspiracy, the quantity of cocaine base distributed by the entire conspiracy."

Thus, each prisoner, past and present, who was sentenced based on the conspiracy-wide approach drug determination, is serving at least five to ten additional years in prison – and in many cases more – for violating 21 U.S.C. 841(A)(1), and many of those prisoners – like Petitioner – would today be free from custody but for the government seeking increased sentences rather than justice when it comes to drug quantity determination. In the meantime, prisoners all over the federal system face great uncertainty of how to best preserve their rights: Do they file requests for authorization to

file a successive motion from the court of appeals, with full knowledge that they will be denied and that they will be precluded from seeking rehearing even if this court later rules in their favor without making Alleyne retroactive? Or do they hold off from asserting their right under Alleyne, at the risk that they are viewed as having failed to preserve their rights within the limitation period? Many of these prisoners lack counsel to advise them about this challenge, and absent the court resolving the conflict, they will almost certainly lose the ability to reduce their sentences. Unless this Court acts immediately to intervene and correct the Third, Sixth and Seventh Circuits' erroneous decisions, and make Alleyne retroactive, the prisoners' choices will not matter: the effect of this Court's decision in Alleyne will be substantially blunted and Petitioner and these prisoners will remain in prison based on a shapeless conspiracy-wide approach drug quantity determination that does not comport with Alleyne's mandate. Given the serious consequences of waiting any longer, it is incumbent upon this Court to intervene now. Indeed, this case presents the ideal vehicle to resolve the circuit split. In addition, since Apprendi and Alleyne have not been made retroactive, this Court should make it so now.

Even if this Court has not previously made Apprendi and Alleyne retroactive, within the meaning of § 2255(h)(2), the Court should exercise habeas jurisdiction now and make them retroactive. Again, see Amicus Br. of the United States 8, In Re Smith 526 U.S. 1157 U.S. (May 6, 1999) ("the purpose of requiring this

Court to determine the retroactivity of a new rule before it may be invoked in a successive habeas petition is satisfied if the Court makes that determination in the consideration of an original habeas petition itself.")

This case presents an issue of fundamental importance to Petitioner and other prisoners across the country, upon which the circuits are split – allowing some prisoners on direct appeal to be resentenced immediately in light of Alleyne and the individualized approach drug determination, while others continue to serve sentences that were unconstitutional in the first place.

This Court's habeas jurisdiction is the only realistic avenue through which this Court could make Alleyne retroactive and adopt the District of Columbia's reasoning in United States v. Stoddard 2018 U.S. App. Lexis 16110 (D.C. Cir. 2018), that because individualized jury finding as to quantity of drugs attributable to each individual defendant – rather than drugs attributable to conspiracy as a whole – was required to trigger mandatory minimum, for the purpose of successive petitions.

What is more, in Edwards v. United States, 523 U.S. 511, 513-14 (1998) the Supreme Court held that, "as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the court sentences him within the statutory maximum applicable to that conspiracy, the court may determine both the amount and the kind of controlled substances for which the defendant should be held

accountable – and then . . . impose a sentence that varies depending upon amount and kind." While Apprendi decided two years later, did not purport to overrule Edwards, and the two decisions are easily harmonized: in a drug conspiracy case, the jury should determine the existence vel non of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy; see Edwards, 523 U.S. at 514. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination). Unfortunately, Alleyne decided 15 years later purports to overrule Edwards, and the three decisions are easily not harmonized: to protect at accused's Sixth Amendment Rights, Alleyne says any fact (other than a prior conviction that jacks up a compulsory minimum sentence must be found by a jury (or by a judge in a bench trial) beyond a reasonable doubt, if the defendant does not admit the fact; see Alleyne v. United States 570 U.S. 99, 103 (2013).

Petitioner believes the individualized drug quantity is a fact that increases the mandatory minimum sentence, he also believes Alleyne claims are jurisdictional error, and therefore the error may be raised on collateral review without being subject to procedural default or the non-retroactivity analysis of Teague v. Lane 489 U.S. 288 (1989), and that this Court should now make Apprendi and Alleyne retroactive limited in scope on collateral review from June 26, 2000.

Finally, a ruling in the Petitioner's favor will level the playing field for defense attorneys all over the country when it comes to advising their clients to proceed to trial rather than accepting a plea agreement. Furthermore, a defendant would be more inclined to say that drug amount is mine.

CONCLUSION

The Thirteenth, Fourteenth and Fifteenth Amendments were designed mainly for the protection of the newly emancipated blacks, but full effect must, nevertheless, be given to the language employed. The Thirteenth Amendment provides, that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." If honestly received and fairly applied, this provision would have been enough to guard the black race. In some states it was attempted to be evaded by enactments cruel and

oppressive in their nature – as, that blacks were forbidden to appear in the towns, except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the Fourteenth and Fifteenth Amendments were erected. Being duly convicted is not at rest in federal drug cases regarding 841(b) penalty subsection, because the amount of drugs attributable to a drug conspiracy as a whole is in most circuits the fact which triggers the mandatory minimum for an individual defendant are used to further the conditions of excessive punishments of involuntary servitude by the judges and juries to duly convict individuals for the whole conspiracy, rather than the individualized drug quantity in violation of Alleyne: and only this court has the original jurisdiction with an end that can make Alleyne retroactive and resolve the above circuits' widespread conflict. Furthermore, to permit Apprendi to choke out Alleyne and for the conspiracy wide approach drug quantity to trump the individualized drug quantity determination and for Alleyne not to be retroactive on collateral review to accommodate the government, may in itself prejudice the rights of the defendant who was unduly convicted based on the whole conspiracy drug amount because of the trial judge's jury instruction and drug determination. Played to an extreme conclusion, this overlooked game of musical chairs could collapse any

semblance of sound administration and work to the ultimate prejudice of many defendants awaiting trial in criminal court and wanting to raise an Alleyne claim on collateral review because they are left without a seat. Therefore, for all of the above reasons, the petition for an extraordinary writ should be granted.

Respectfully submitted,

GEORGE HOUSTON, JR.
Federal Correctional Camp
P.O. Box 725
Edgefield, SC 29824