

Supreme Court, U.S.
FILED

MAY 15 2018

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

CASE NO. _____

LARRY HAILEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

By:
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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals Erred in Denying Petitioner's Appeal from Denial of His Motion Under 28 U.S.C. § 2255 Wherein Petitioner's Contested That His Prior Convictions In Virginia Did Not Qualify as "Crimes of Violence" for "Career Offender" Enhancement Purposes.

LIST OF PARTIES

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

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OPINIONS BELOW

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

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Court of Appeals for the Fourth Circuit appears at Appendix A to this petition and is, to Petitioner's knowledge, unpublished.

The order of the United States District Court for the Eastern District of Virginia appears at Appendix B to this petition and is, to Petitioner's knowledge, also unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided my case was March 13, 2018. No petition for rehearing was timely filed in my case.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. V

U.S. Constitution, Amend. VI

U.S. Constitution, Amend. VIII

28 U.S.C. § 2253(c)(2)

21 U.S.C. §§ 841(a)(1) and (b)(1)(C)

U.S.S. Guidelines § 4B1.1

U.S.S. Guidelines § 4B1.2(a)

STATEMENT OF THE CASE

On June 21, 2011, Petitioner entered a plea of guilty to possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). On October 24, 2011, Petitioner was sentenced to a term of 155 months imprisonment after the district court found Petitioner to be a career offender. This determination was predicated upon prior convictions in Virginia for

- (1) use of a firearm during a commission of felony;
- (2) shooting at a motor vehicle; and,
- (3) maiming.

The district court determined that all three were "crimes of violence."

Petitioner sought relief from the unconstitutionally imposed sentence premised upon the district court's error in determining he was a "career offender." The district court, however, denied his motion and the Fourth Circuit Court of Appeals denied him an appeal.

Petitioner now brings the instant petition seeking the Honorable U.S. Supreme Court to issue a writ of certiorari to review this matter from the Fourth Circuit and address the unconstitutionally imposed "career offender" designation because the district court failed to comport its actions with this Court's precedent cases, including Sessions v. Dimaya,

No. 15-1498 (Apr. 12, 2018); Nelson v. Colorado, 137 S.Ct. 1249 (2017); Mathis v. U.S., 136 S.Ct. 2243 (2016); Descamps v. U.S., 133 S.Ct. 2276 (2013); and Shepard v. U.S., 544 U.S. 13 (2005).

REASON FOR GRANTING THE PETITION
LEGAL ARGUMENT

Petitioner, LARRY HAILEY, pro se, now seeks this Honorable U.S. Supreme Court to issue a writ of certiorari to the Court of Appeals of the Fourth Circuit. Petitioner is a layman of the law, unskilled in the law, and requests his Petition be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972). Petitioner understands that this Court has discretion as to whether it will accept his request for issuance of such a writ. However, Petitioner prays that this Court will grant his petition because he was unconstitutionally enhanced at sentencing as a "career offender" in violation of Supreme Court precedents established by Sessions v. Dimaya, No. 15-1498 (Apr. 12, 2018), Nelson v. Colorado, 137 S.Ct. 1249 (2017), Mathis v. U.S., 136 S.Ct. 2243 (2016), Descamps v. U.S., 133 S.Ct. 2276 (2013), and Shepard v. U.S., 544 U.S. 13 (2005). Specifically, the U.S.S Guideline applicable to use of prior state convictions is unconstitutional based upon Class v. U.S., 137 S.Ct. 1065 (2017) and Lee v. U.S., 137 S.Ct. 1958 (2017). Should the Supreme Court grant this petition and issue the writ of certiorari, it will verify and judicially prove that those affected by the unconstitutional career offender guidelines will be entitled to remand of their unconstitutional sentences.

ARGUMENT ONE

The Fourth Circuit Court of Appeals Erred
In Denying Petitioner's Appeal from Denial of
His Motion Under 28 U.S.C. § 2255

The Fourth Circuit erred when it denied appellate review of the district court's denial of Petitioner's motion under 28 U.S.C. § 2255, despite Petitioner's showing that jurists of reason would stipulate that Petitioner's Fifth, Sixth, and Eighth Amendment Rights were violated by the unconstitutional sentence imposed after determination of his "career offender" status, and that Petitioner made a substantial showing of the denial of these constitutional rights.

Petitioner asserts that the predicate offenses in Virginia are not, and should never have been, deemed "crimes of violence" to establish career offender status.

The use of a firearm during the commission of a felony, which in Petitioner's case was shooting at a motor vehicle, cannot be deemed a crime of violence when the holdings of Dimaya and Johnson v. U.S., 135 S.Ct. 2551 (2015), are applied. Discharging a firearm into a vehicle (or even an occupied structure) under Virginia Code 18.2-51 cannot be deemed a crime of violence. The crime of "maiming" does not require the use of physical force because one can "cause bodily injury" by means other than the use of physical force.

A vehicle is not a person that one can commit violence against and no one was injured in the process; it is not a

"crime of violence." Discharging a firearm into a vehicle or an occupied structure in violation of Virginia Code 18.2-51 is not a crime of violence since the vehicle is not a "person" upon application of this Court's holdings in Dimaya and Johnson. In fact, it is not a crime of violence upon application of this Court's holding in Mathis either because, according to Mathis, ways, means, and conduct are not elements of the offense, such as was used in Petitioner's case at bar with regards to his State of Virginia prior convictions. No element approach was presented to a jury for any factual determination beyond a reasonable doubt. No divisible or indivisible analyses were undertaken in this case according to Descamps. No appropriate and/or adequate documents were introduced by the government at sentencing as required under Shepard to verify if, in fact, the state prior convictions were or were not valid for use to underlie a career offender status determination.

The sentencing court only relied upon the Presentence Investigation Report, an improper Shepard document. In actuality, the Presentence Report only contained a general description of Petitioner's prior convictions; this is the reason this Court ruled it is an improper document under Shepard. Petitioner never waived his rights, allowing only a Presentence Report to be used against him. The general description within

the Presentence Report does not, and cannot, afford the sentencing court the opportunity to meaningfully understand the exact nature of an individual's prior convictions and use thereof results in an unconstitutionally enhanced and imposed sentence. Thus was the situation in Petitioner's case at bar. Failure by the district court was compounded by the fact Petitioner actually pled to a lesser offense than the one with which he had initially been charged and was reflected in the Presentence Report. This was never brought to the district court's attention by the government upon who lays the burden of proving each and every prior conviction when seeking a career offender enhancement. Moreover, Petitioner's own counsel failed to bring this issue to the sentencing court's attention, thus providing ineffective representation which prejudiced Petitioner with an increased sentence.

Petitioner's Fifth Amendment Rights to be sentenced only upon valid and accurate information contained in the underlying conviction documents rather than inaccurate information presented by a probation officer in a compiled Presentence Report were violated. Counsel's inaction (merged with the government's failure to adhere to its requirements) violated Petitioner's Sixth Amendment Rights to effective counsel.

Further, absent Shepard documents and any meaningful

analysis by the district court of the statutes underlying the prior state convictions, Petitioner was entitled to be considered as having committed the least culpable act. Moncrieffe v. Holder, 133 S.Ct. 1678 (2013). The lower court unconstitutionally used ways, means, and conduct to enhance Petitioner's sentence, not the elements of the prior offenses as according to Mathis. No categorical or modified categorical approach was conducted and, thus, Moncrieffe applies.

Counsel was ineffective for not objecting to Petitioner's Presentence Investigation Report upon Petitioner's request to do so. Counsel's refusal to object prejudiced Petitioner by allowing the district court to impose --unchallenged-- an enhanced 155 month sentence. But for counsel's ineffective representation and performance which fell below the standard of proper representation by defense counsel, the proceedings would have been so much different. Strickland v. Washington, 466 U.S. 668 (1984); Cronic v. U.S., 466 U.S. 648 (1984). But for counsel's prejudice, Petitioner would not be serving a 155-month sentence. Cuyler v. Sullivan, 446 U.S. 350 (1980), Florida v. Nixon, 543 U.S. 175 (2004).

Additionally, mere possession of a firearm is not deemed a "crime of violence" upon application of Dimaya and Johnson. See also, Higdon v. U.S., No. 17-5027 (6th Cir.). An offense is a "crime of violence" if it has, as an element, the use,

attempted use, or threatened use of physical force against the person of another. A bullet can miss everyone in a vehicle or building and no physical force can be applied to the person of another. According to Dimaya and Johnson, the offense, thus, fails to satisfy the "force clause." Since the trial court failed to reference or consider the necessary Shepard documents and failed to undertake analyses as outlined by Mathis, the sentencing court had no way to ascertain exactly to what Petitioner had pled in the state prior convictions, thereby resulting in an unconstitutionally enhanced sentence by designating him a "career offender." The court never found that there had been any elements that involved the "attempted" or "threatened" use of physical force against another, or the actual application of physical force against another. Virginia Code 18.2-51 fails to satisfy the "force clause" of 18 U.S.C. § 16(b) as applied to the proper analysis of Petitioner's instant case. Without the predicate offense(s), Petitioner would never have been deemed a "career offender" and it was incumbent upon the district court to conduct the proper review and/or analyses to reach the correct decision. It was incumbent upon the government to introduce the proper documentation if it sought to hold Petitioner as a "career offender." It was incumbent upon defense counsel to object and challenge the sentencing court

when it committed these errors. It was incumbent upon the Fourth Circuit to, at the very least, review Petitioner's Sec. 2255 denial given that constitutional rights were involved and demonstrated.

Just as Virginia Code 18.2-51 does not qualify because it does not contain an element of the use, threatened use, or attempted use of force against another person, so too does Virginia Code Sec. 18.2-154 (shooting at a motor vehicle) fail to rise to the level of a crime of violence because it also has no such element. Petitioner's designation as a "career offender" utilizing this prior conviction as a predicate offense, again, flies in the face of Petitioner's constitutional rights. Counsel's failure to address this before the sentencing court offered only ineffective representation. See, Strickland, Class, Lee, and Hill v. Lockhart, 474 U.S. 42 (1985).

Petitioner's state prior for a controlled substance offense being used as a career offender predicate, further, was unconstitutional as the district court conducted no analysis as required by Mathis. Just as with the other charges, there was no analysis as to the ways, means, and/or conduct. No jury determination was made beyond a reasonable doubt as to the necessary elements. No Shepard documentation was introduced by the government: no transcripts, no plea

document, nothing -- other than the Presentence Report. No categorical approach, modified categorical approach, no divisible or indivisible elements approach -- nothing. Petitioner never consented or agreed to have the Presentence Report used against him as evidence at sentencing, and the government failed to offer any other such "evidence." Thus, the prior state conviction was unconstitutionally applied to deem Petitioner a "career offender." See, Shepard, Descamps, and taylor v. U.S., 495 U.S. 575 (1990).

But for counsel's ineffective representation which fell far below the objective standard of counsel guaranteed to Petitioner by the Sixth Amendment, the proceedings in this matter would have been significantly different. Strickland, Cronic, Nixon, Cuyler, Petitioner's plea was involuntary, unknowing, and unintelligent. Class. The result of counsel's failures is that Petitioner is serving an unconstitutional sentence premised upon the court's erroneous application of his state priors without regard for the direction and instruction from this Court's precedent cases. The three Virginia State priors were unconstitutionally applied and greatly enhanced Petitioner's sentence as a "career offender," a designation he never deserved.

Jurists of reason could quite easily agree with Petitioner's contentions and the Fourth Circuit Court of Appeals

erred when it failed to permit review of the denial of Petitioner's § 2255 motion. Petitioner made a substantial showing of violation of his constitutional rights under the Fifth and Sixth Amendments. It is, and continues to be, cruel and unusual punishment to subject Petitioner to the unconstitutionally imposed sentence as a "career offender." Petitioner contends that this issue deserves further encouragement and issuance of a writ of certiorari would permit such a review. See, Slack v. McDaniels, 529 U.S. 474, Miller-El v. Cockrel, 537 U.S. 322 (2003), Buck v. Davis, 137 S.Ct. 759 (2017).

Petitioner respectfully requests this Honorable U.S. Supreme Court issue a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals in this matter, reverse that opinion, and remand this matter for resentencing without the "career offender" designation.

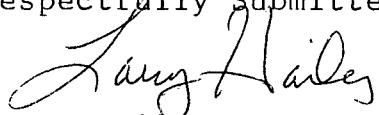
CONCLUSION

The guarantee of access to the courts coupled with effective representation by counsel are enshrined within the Bill of Rights as amended to the U.S. Constitution. The Bill of Rights was added to ensure that individual rights and liberties were not invaded by the then-established federal government because the Founders recognized that the government would always seek to exceed what it

had been granted if not held in check. When an individual is charged with a criminal act, it is imperative that he be afforded effective representation for very few laymen understand the nuances of the federal legal system. When counsel's representation is so inadequate as to allow the government to enhance a sentence without even challenging the bases for that enhancement, a flaw is exposed in the criminal justice system and it is imperative that the courts are vigilant to remedy such deficiencies. When the courts fail, the individual is left without recourse other than the U.S. Supreme Court as established under the U.S. Constitution. Petitioner prays that this Honorable Court sees fit to issue a writ of certiorari to rectify the myriad of errors committed in this case, not the least of which was counsel's complete and utter failure to defend his client at sentencing from the overreach of the government via the prosecution.

DATED: 5-10-18

Respectfully Submitted,



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