No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AMOS JUNIOR SCOTT,
Petitioner,

V.

HERIBERTO H. TELLEZ / C. SWAIN,
Warden(s) - Respondent(s).

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals
Case No. 18-55312

PETITION FOR WRIT OF CERTIORARI

Amos Junior Scott, pro se
Reg. No. 16665-058
Federal Correctional Complex #1
P.O. Box 3725
Adelanto, CA 92301

QUESTION(S) PRESENTED FOR REVIEW

Mr. Scott is serving a 2000 life sentence pursuant to 21 U.S.C. § 841(a)(1) and U.S.S.G. § 4B1.1, based upon two prior convictions, one of which is a mischaracterized state conviction that he has never been convicted of.

The Question Presented is:

Whether Petitioner is Entitled to Seek Federal Habeas Corpus Relief Under 28 U.S.C. § 2241, From an Erroneous Mandatory Minimum Sentence, That Was Based Upon a Nonexistent Prior Conviction, on the Ground That 28 U.S.C. § 2255 is "Inadequate or Ineffective" to Test The Legality of His Detention?

LIST OF PARTIES

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

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OPINION BELOW

Unpublished opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered September 25, 2018, denying COA. (Appendix A). Order of the United States District Court for the Central District of California - Re: Denying Petitioner's petition under 28 U.S.C. § 2241. (Appendix B).

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided this case and denied COA, was September 25, 2018. A petition for rehearing was not filed.

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

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

U.S.S.G. § 4B1.1(a) states in relevant part:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c). U.S.S.G. § 4B1.2.

STATEMENT OF THE CASE AND RELEVANT FACTS

On or about January 13, 2001, after a jury trial, Petitioner, Mr. Scott ("Scott" or "Mr. Scott"), was convicted of conspiracy to possess with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1).

Because the presentence report ("PSR") erroneously alleged that Scott had two prior convictions - one for possession for sale of a controlled substance under California Health and Safety Code ("CHSC") § 11351, and one for assault with a deadly weapon ("AWDW")[1] - the District Court for the Western District of North Carolina had no choice but to set his mandatory minimum sentence at 30 years, with a statutory maximum of life.

In December of 2015, Mr. Scott finally received a copy of his plea and sentencing transcripts from the Superior Court of California, Case No. 39348, which revealed that he was not convicted of AWDW, the predicate used to increase the mandatory minimum to 30 years under the career offender Guidelines. (See Doc. 1, Exhibit A, at 15-16). For Scott, this meant he is innocent of the career offender sentence because his prior California conviction was not a felony "crime of violence." The lower court's or the Respondent does not dispute this fact. (See Doc. 13 & 17).

Mr Scott filed a petition under 28 U.S.C. § 2241, all within one year of receiving his statue court transcripts, requested a re-sentencing at which time the district court could

1. The latter offense, AWDW was mischaracterized in the PSR as a crime of violence. However, Mr. Scott has never been convicted of AWDW as alleged in the PSR, used by the district court, and upheld in the Fourth Circuit Court of Appeals.

sentence him to a guideline range of 168 to 210 months, irrespective of the statutory maximum under § 841 could possibly carry life imprisonment. (Doc. 1, at 5 and Exhibit D). The Government (Warden) opposed the petition, arguing that the Petition should be dismissed as an unauthorized second or successive motion under § 2255. (Doc. 13 at 15). Specifically, the Warden argued the petition was procedurally barred, and also that even if it was not, Scott could get no relief because he was sentenced within the statutory maximum ("life"), and Ninth Circuit precedent in Marrero v. Ives, 682 F.3d 1190, 1195 (9th Cir. 2012) establishes that "purely legal arguments that a petitioner was wrongly classified as a career offender under the Sentencing Guidelines is not cognizable as a claim of actual innocence under the escape hatch." Id.

On or about February 25, 2018, Scott filed a timely notice of appeal and concurrent application for certificate of appealability ("COA") in the United States District Court for the Central District of California. The district court denied the request for COA, and forwarded the notice of appeal to the Ninth Circuit. On or about March 9, 2018, Mr. Scott filed a timely request for COA and opening brief. In his brief the primary issues raised were:

> 1. Whether reasonable jurist would agree that Mr. Scott is entitled to seek federal habeas corpus relief under 28 U.S.C. § 2241 on the ground that 28 U.S.C. § 2255 is "inadequate or ineffective" to allow him to raise a claim that he is actually innocent because he does not have a prior conviction for AWDW, the predicate used to erroneously enhance his mandatory minimum sentence to 30 years imprisonment under the career offender Guidelines?

2. Whether jurist of reason could agree that AWDW and assault by any means of force are/were different offenses and or means under Cal. Penal Code § 245(a)(1)? and

3. Whether jurist of reason would agree that Mr. Scott does not have a prior conviction for AWDW, and this error violated Due Process?

On or about September 25, 2018, the Ninth Circuit denied Scott's request for COA. (See Appendix A). This request for writ of certiorari now follows.

I. REASON(S) FOR GRANTING THE WRIT

A. The Ninth Circuit's erroneous decision in this case is in error in several respects, and conflicts with decisions of the Supreme Court, other Circuits, and the statutory language in § 2255(e). See S.Ct. R. 19(a)(c). Specifically, § 2255(e) provides a means for petitioner's to apply for a traditional writ of habeas corpus pursuant to § 2241. It states:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant 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 him 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) (emphasis supplied). In other words, a defendant may file a petition for writ of habeas corpus under § 2241 if § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e) (Supp. Vol. 2011).

This Court has not addressed the circumstances under which a Section 2255 motion is "inadequate or ineffective to test the legality of [a prisoner's] detention," making resort to § 2241 appropriate. The courts of appeals, however, have generally agreed upon a number of governing principles. They recognized that § 2255 is not "inadequate or ineffective" simply because relief has been denied under that provision, because "[a] contrary rule would effectively nullify the gatekeeping provisions" restricting second or successive applications for collateral relief. In re Jones, 226 F.3d 328, 333 (4th Cir. 2000); see also, e.g., Pack v. Yusuff, 218 F.3d 448, 452 (5th

Cir. 2000); In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998); Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997); and In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). But they have concluded that § 2255 may be inadequate or ineffective in limited circumstances, including those involving certain fundamental statutory-interpretation errors.

At the outset, it is well established that § 2255 "was intended to afford federal prisoners a remedy in scope to federal habeas corpus [under 2241]." Davis v. United States, 417 U.S. 333, 343 (1974). Indeed, "the sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." Id. at 344 (internal quotation marks omitted) (emphasis supplied).

The savings clause's text, however, permits resort to § 2241 when § 2255 is inadequate or ineffective to challenge the prisoner's "detention," 28 U.S.C. § 2255(e), indicates that savings-clause relief is not limited to collateral attacks on a conviction. While the word "detention" includes challenges to a conviction, it is not limited to such claims, and the term can naturally be understood to encompass challenges to a sentence as well. See Black's Law Dictionary 449 (6th ed. 1990) (defining "detain" to include "keep in custody"); see also id. at 514 (9th ed. 2009) (defining "detention" as "[t]he act or fact of holding a person in custody"). A challenge to a conviction attacks the legal basis for a prisoner's "detention," and challenges to a sentence attacks the lawful extent of the "detention." Therefore, detention necessarily implies imprisonment as well.

Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment [is freedom] from government custody, detention, or other forms of physical restraint.") (emphasis added).

Other subsections of § 2255 expressly impose a conviction-only limitation, which indicates that Congress did not intend the savings clause to be limited to conviction-based claims. For instance, the courts of appeals may authorize the filing of a second-or-successive § 2255 motion when the prisoner relies on persuasive new evidence showing that the factfinder would not have found him guilty "of the offense." 28 U.S.C. § 2255(h)(1) (Supp. V. 2011). See, e.g., In re Hill, 715 F.3d 284, 297-98 (11th Cir. 2013) (holding that Section 2255(h) does not permit a successive § 2255 motion based on new evidence relating to the propriety of the prisoner's sentence, and citing cases). It stands to reason that contrary to the Ninth Circuit in Marrero, and the lower courts decision in this case, if Congress intended to restrict the savings clause to claims challenging only "the offense" or "the conviction," Congress would have used the words "offense" or "conviction" in the savings clause, as it did in § 2255(h)(1). See, Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). (alterations and internal quotation marks omitted).

Thus, "[t]he text of the [savings] clause ... does not limit its scope to testing the legality of the underlying criminal conviction." Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

The Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence. See Nelson v. Campbell, 541 U.S. 637, 643 (2004) ("[T]he 'core' of habeas corpus" has included challenges to "the duration of [the prisoner's] sentence."). Indeed, one purpose of traditional habeas relief was to remedy statutory, as well as constitutional, claims presenting "a fundamental defect which inherently results in a complete miscarriage of justice" and "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is present." Davis, 417 U.S. at 346 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). But if this Court allow the reasoning of Marrero and the lower courts decision to stand for the proposition that a prisoner is foreclosed from seeking collateral relief from a fundamental defective sentence, and "through no fault of his own, has no source of redress," this purpose would remain unfilled.

The Ninth Circuit's decision in Marrero undermines this Court's jurisprudence, when it concludes that the savings clause does not permit Mr. Scott to seek relief under § 2241 purely because he challenges his sentence rather than his offense of conviction. If the lower courts would have correctly focused on the statutory language, and the word "detention" versus "conviction or offense," it would have reached the same conclusions as the Fourth, Sixth, and Seventh Circuit. This is so because sentences that exceed the statutory maximum, or that impose a mandatory minimum under the mandatory guideline regime based on a legal error, should be cognizable under the savings

clause.[2]

This Court must grant this writ and conclude that § 2255(e) provides an avenue for prisoners to test the legality of their sentences pursuant to § 2241, and rule that § 2255(e)'s savings clause is applicable to fundamental sentencing errors, as well as undermined convictions.

Circuit Courts Are Split on Whether a Prisoner Can Satisfy the Gatekeeping Requirements of § 2241 When Challenging a Sentence Instead of a Conviction.

B. Here, in denying Mr. Scott's savings clause request and dismissing his § 2241 Petition, the district court explained:

> The claim that Petitioner's sentence was improperly enhanced is not an "actual innocence" claim for purposes of the § 2255(e) escape hatch. "[A] petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement." Marrero v. Ives, 682 F.3d 1190, 1193 (9th Cir. 2012) (collecting cases from other Circuits). In Marrero, the Ninth Circuit held, "Purely legal argument[s] that a petitioner was wrongly classified as a career offender under the Sentencing Guidelines is not cognizable as a claim of actual innocence under the escape hatch." Id. at 1199.

(See Appendix B at 11-12). The district court further stated "[b]ecause this is not a claim of actual innocence for purposes of the § 2255(e) "escape hatch," Scott cannot bring this Petition under § 2241." (Id. at 44).

A review of circuit court precedent reveals a sharp disagreement over whether a prisoner can assert a cognizable claim of a noncapital sentencing enhancement under § 2241. For

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2. Unlike most provisions of the Guidelines, the career offender enhancement is in fact the product of a specific statutory command. See 28 U.S.C. §994(h). For these "category of defendants," Congress [overroad] the Commission's discretion to determine appropriate sentencing ranges. Cf., e.g., 28 U.S.C. § 994(c), (d) (directing the Commission to establish categories of defendants and determine appropriate penalties).

instance, seven other circuits erroneously agree with the Ninth Circuit's decision in Marrero, that a prisoner generally cannot assert a cognizable claim of a noncapital sentencing enhancement under § 2241. See, Bradford v. Tamez, (In re Bradford), 660 F.3d 226, 230 (5th Cir. 2011) (per curiam) ("[A] claim of actual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction and, thus, not the type of claim that warrants review under § 2241."); Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc) ("[T]he savings clause does not authorize a federal prisoner to bring in a § 2241 petition, a claim which would otherwise be barred by § 2255(h), that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum."); Trenkler v. United States, 536 F.3d 85, 99 (1st Cir. 2008) (noting that "[m]ost courts have required a credible allegation of actual innocence to access the savings clause" and holding that the petitioner failed to make such a showing where he did not claim actual innocence of the crime of conviction or allege that he was sentenced to a greater term of imprisonment than authorized by statute.); Poindexter v. Nash, 333 F.3d 372, 382 (2d Cir. 2003) ("[w]hatever the merits of the contention that the Guidelines were misapplied in the treatment of [the petitioner's] three undisputed prior convictions, his claim that the three crimes should have been treated as one crime is not cognizable as a claim of actual innocence."); and Okereke v. United States, 307 F.3d 117, 120-21 (3d Cir. 2002) (holding that the petitioner could not qualify for the escape hatch where he merely challenged his sentence and

did not claim factual innocence of the crime of conviction).

But three circuits, including the Solicitor General of the United States, have reached the opposite conclusion. For instance, in Wheeler v. United States, (No. 16-6073) (4th Cir. March 28, 2018), the Fourth Circuit agreed with the Sixth and Seventh Circuit's when they considered whether the defendant is allowed to have his habeas corpus petition heard on the merits by means of the "savings clause" per 28 U.S.C. § 2255(e). The Court held that Wheeler satisfies the requirements of the savings clause on events occurring after the time of his direct appeal and the filing of his first § 2255 motion, that rendered his applicable mandatory minimum unduly increased, resulting in a fundamental defect in his sentence.

Similarly, in Hill v. Masters, 836 F.3d 591 (6th Cir. 2016), the Sixth Circuit too addressed a savings clause request from a pre-Booker, erroneously imposed career offender enhancement which increased the prisoners mandatory Guidelines sentencing range from 235-293 months to 292-365 months. Id. at 593. The Court recognized that Hill's statutory maximum sentence was life imprisonment, so his resulting sentence of 300 months was still within the statutory range. Id. at 596. In granting the petition, the Hill Court explained that "[s]erving a sentence imposed under mandatory guidelines shares similarities with serving a sentence imposed above the statutory maximum. Both sentences are beyond what is called for by law [and] raise a fundamental fairness issue." Id. at 599.

In Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013), the Seventh Circuit held that "a petitioner may utilize the savings clause to challenge the misapplication of the career offender Guideline, at least where, as here, the defendant was sentenced in the pre-Booker era[3], where the sentence was nonetheless below the statutory maximum. Id. at 588 (footnote omitted). The career offender designation changed his mandatory Guidelines range from 262-327 months to 360 months to life, but his sentence of 360 months was still under the statutory maximum of life imprisonment. Id. at 585-86. The Court nonetheless held that this increase amounted to a miscarriage of justice and a fundamental sentencing defect because the period of incarceration exceeded that permitted by law." Id. at 587.

Thus, the Brown Court explained, "to increase, dramatically, the point of departure for his sentence is certainly as serious as the most grievous misinformation that has been the basis for granting habeas relief." (Citing United States v. Tucker, 404 U.S. 443, 447 (1972)).

Finally, the Solicitor General of the United States recognized the same in Persaud v. United States, 134 S.Ct. 1023 (2014). In that case, the Solicitor General joined the petitioner's request for a grant of certiorari from the lower court's denial of his § 2241 petition. See Persuad v. United States, 2013 WL 7088877 (Dec. 20, 2013) (Brief of the United States). The Solicitor General vigorously argued that § 2241 relief was warranted to correct the defendant's mandatory

3. See United States v. Booker, 543 U.S. 220 (2005) (holding that the Guidelines are not mandatory provisions).

erroneous recidivist sentence because "sentences that exceed the statutory maximum, or that impose 'mandatory minimums' based on legal error, are cognizable under the savings clause." Id. at 19-20. (emphasis added).

Consistent with United States v. Rodriquez, 553 U.S. 377, 390 (2008), the Solicitor General, Fourth, Sixth, and Seventh Circuit's jurisprudence, these courts make clear that they are interpreting the savings clause to permit relief for sentences that are below the statutory maximum.

In conclusion, what these cases show is that circuit court's have struggled to interpret the savings clause under § 2241 and § 2255(e). But because eight circuits is at odds with the plain reading of the statute, the definition of "detention" under § 2241, Supreme Court jurisprudence, and the Fourth, Sixth, and Seventh Circuits, this leads to inconsistent and anomalous results. Thus, the Court should grant certiorari to resolve this conflict and clarify whether § 2241 relief is available to petitioner's who challenge their sentences, especially when that sentence is based upon a nonexistent and mischaracterized prior conviction that tripled their mandatory minimum.

THE ERROR IN THIS CASE IS NOT HARMLESS

C. While the district court used a mischaracterized prior conviction that was siphoned from the PSR to enhance Mr. Scott's mandatory minimum sentence from 10 years to 30 years under the career offender Guidelines, this error cannot be considered harmless for several reasons. First, the Fourth Circuit Court of Appeals upheld this erroneous career offender sentence based

upon their belief that Scott was convicted of AWDW. (Appendix C). However, the lower court does not dispute the fact that Scott does not have an AWDW conviction in his criminal record, neither has he ever been convicted of AWDW, the predicate used as a crime of violence. (Appendix B). See also United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994).

In Maybeck, the Defendant pled guilty to a bank robbery and unlawful possession of a firearm in violation of federal law. Before he was sentenced, Maybeck mischaracterized a previous conviction as involving violence. Therefore, the district court sentenced him as a career offender under federal sentencing guidelines.

The Fourth Circuit Court of Appeals ruled that the exception to the cause and prejudice rule applied, as it would be unacceptable automatically to prevent the assertion of actual innocence only because Maybeck did not use available procedural avenues." The Court further stated "defendant was actually innocent of a predicate requirement for classification as a career offender." Id.

Second, Mr. Scott's sentence violates due process and separation of power principles. Specifically, under Hicks v. Oklahoma, 447 U.S. 343 (1980), the Supreme Court held that imposing an erroneous mandatory-minimum sentence "implicates the very substance of the sentencing and thereby the fundamental-fairness concerns protected by habeas corpus." As the Hicks Court also explained that "due process is violated in a criminal case where the sentencing authority is wrongly deprived of the discretion provided to it by statutes." Id. at 343.

Hicks's holding that a sentence within the permissible statutory range does not eliminate due process concerns, because the defendant had a constitutionally protected "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. Id. at 346. That aspect of Hicks, which applies equally to judicially-imposed sentences, dooms the Ninth Circuit's argument in Marrero, and the lower courts decisions that "[t]he claim that Petitioner's sentence was improperly enhanced is not an "actual innocence" claim for purposes of the § 2255(e) escape hatch." The court further relying on Marrero stated "[A[Petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement." (See Appendix B, at 11-12). See also Marrero, at 1199. As the Court held in Hicks, assuming that the same sentence would be imposed absent application of an erroneous mandatory-minimum sentence is "frail conjecture" that demonstrates "an arbitrary disregard of the petitioner's right to liberty." 447 U.S. at 346.

Finally, even if the lower court substituted the assault "by any means of force" conviction in place of the erroneous AWDW, "by any means of force" does not satisfy the force clause's definition of crime of violence for at least two reasons.[4]

4. At the time Scott pled no contest to assault "by any means of force" under CPC 245(a)(1) the statute read in relevant part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (emphasis added).

First, the two "offenses" and or "alternative means" that was listed within California Penal Code ("CPC") § 245(a)(1) at the time of Mr. Scott's state conviction, criminalized both violent and nonviolent conduct. Specifically, "AWDW" was categorically classified as a serious and violent offense under state law. See People v. Delgado, 43 Cal. 4th 1059, 1065, 77 Rptr. 3d 259, 183 P.3d 1226 (2008). However, assault "by any means of force," without the special enhancement, was classified as a nonserious and nonviolent offense. Id.

The differences listed above helps to explain why California courts have reached unanimous conclusions on why "AWDW" can be used as a predicate strike under state law, and why "by any means of force" cannot. See CPC §§§ 667, 667.5, 1170.12(c), and § 1192.7(c). See also, Proposition 8, Approved June 8, 1982. Thus, since § 245's assault "by any means of force" is classified as a nonserious and nonviolent offense, the statute is overbroad. See also United States v. Fuertes, 805 F.3d 485 *2 (4th Cir. 2015) ("After Descamps[5], when a statute defines an offense using a single, indivisible set of elements that allow for both violent and nonviolent means of commission, the offense is not a categorical crime of violence."); United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988) (same).

Next, § 245's language, "any means of force" is broader than, and does not rise to the heightened level of violent physical force" as mandated by Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed. 2d (2010) (Johnson I).

5. Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed. 2d 438 (2013).

Specifically, the word "any" within the statutes text encompasses a lesser degree of force, and covers a broader swath of force than is required by Johnson I, and makes § 245(a)(1)'s "any means of force" too "wide ranging, indeterminate, and overbroad." As the court explained in People v. Whalen (1954) 124 Cal. App. 2d 713, 720, 269 P.2d 181 ("the kind of force is immaterial...."); People v. Pullins (1950) 95 Cal. App. 2d 902, 904 (the statute [§ 245(a)(1)] does not define the means to be used ... its language "is a general and comprehensive term designed to embrace many and various means of force.") citing People v. Hinsh 194 Cal. 1, 17 [227 P. 156]. See also United States v. Parnell, 818 F.3d 974 (9th Cir. 2016) (statute criminaliz[ing] "any force, however slight ... so long as the victim is aware of it" did not qualify as a crime of violence...); and United States v. Dominguez-Maroyoqui, 784 F.3d 918, 921 (9th Cir. 2014) (statute criminalizing "any force whatsoever []" was not a crime of violence as required by Johnson I).

While the distinction between graduations of force may seem insignificant, the same cannot be said of the differences between "violent physical force" as explained in Johnson I, and the bare minimal amount of force - or lesser degree of force -- required to sustain a conviction under § 245(a)(1), especially when a defendant is convicted under the disjunctive, and did not touch the victim, use a deadly weapon, gun, instrument, or receive a special enhancement.

A good example of this distinction between graduations of force is also expressed within the statute by the word "any."

The word "any" is defined in "The American Heritage College Dictionary, Fourth Edition" as (1) one, some, every, or all without specification." The adverb is defined as "To any degree or extent." Therefore, "any" within § 245 draws on various degrees of force, regardless of how slight, and makes the disjunctive portion of the statute broader than the violent physical force required under Johnson I. This is so because the statutes language can also be read to mean "one means of force, some means of force, every means of force, all means of force without specification, or [t]o any degree or extent of force." And if the Supreme Court interpret the statute, and used the least amount of force, it would be required to use the primary word "one" which could be measured, but is indefinite in position and degree. The secondary word "some," is similar to "one" and is an unspecified or indefinite number or degree which cannot reconcile itself with the Supreme Court's definition of force in Johnson I.

In sum, where the erroneous AWDW conviction was used as a predicate crime of violence under the career offender guideline, increased Mr. Scott's Guideline range from 168-210 months to 360 months to life, and tripled his mandatory minimum from 10 years to 30 years imprisonment, this error was very prejudicial and cannot be considered harmless. See Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed. 2d 604 (2001) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggest that any amount of jail time has Sixth Amendment significance"); United States v. Mackins,

315 F.3d 399, 410 (4th Cir. 2003) ("Applying harmless error and holding that a defendant's substantial rights were affected by error increasing his total imprisonment to life when the Guidelines only mandates a sentence of ninety years."). See also United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996), United States v. Robinson, 460 F.3d 550, 558-59 (4th Cir. 2006) (same); and United States v. Seacott, 15 F.3d 1380, 1384 (7th Cir. 1994) ("we are unaware of anyone who would maintain that even one additional hour of confinement, much less a day, or week of confinement, 'doesn't matter.'").

CONLCUSION

For the foregoing reasons, it is Mr. Scott's prayer that his Petition for Writ or Certiorari be granted to resolve the inconsistencies within the circuits.

RESPECTFULLY SUBMITTED this 19 day of November, 2018.

Amos Junior Scott
Reg. No. 16665-058
FCI Victorville # 1
P.O. Box 3725
Adelanto, CA 92301