No. 18-7212

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony Ray Dailey — PETITIONER
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeal
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Ray Dailey
(Your Name)

P.O. Box 26020
(Address)

Beaumont, Tx 77720
(City, State, Zip Code)

(409) - 727 - 8172
(Phone Number)

QUESTIONS PRESENTED

(1) WHETHER OR NOT THE U.S. DISTRICT AND APPELLATE COURTS VIOLATED CASTRO V. UNITED STATES, 124 S.CT., BY REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY ON THE QUESTION OF WHETHER APPELLANT'S 28 U.S.C. §2255 MOTION WAS HIS FIRST OR SECOND?

(2) WHETHER OR NOT THE U.S. DISTRICT AND APPELLATE COURTS VIOLATED CASTRO V. UNITED STATES, 124 S.CT., BY FAILING TO GIVE NOTICE AND WARNING TO APPELLANT BEFORE RE-CHARACTERIZING HIS 28 U.S.C. MOTION AS SECOND AND SUCCESSIVE?

(3) WHETHER OR NOT THE U.S. DISTRICT AND APPELLATE COURTS VIOLATED PANETTI V. QUARTERMAN, 127 S.CT., BY LABELING APPELLANT'S 28 U.S.C. MOTION AS SECOND AND SUCCESSIVE WHEN HIS CLAIM DID NOT EXIST AT THE TIME HE FILED HIS FIRST OR PREVIOUS §2255?

(4) WHETHER OR NOT UNITED STATES V. MATHIS, 136 S.CT., APPLIES RETROACTIVELY ON COLLATERAL REVIEW?

LIST OF PARTIES

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

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

(1) US. MAGISTRATE: JOHN LOVE

(2) US DISTRICT JUDGE: RON CLARK

(3) ASST. US ATTORNEY ALLEN HURST

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8-23-2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) 18 USCS §§ 2113(e)

(2) 28 USCS §§ 2255

(3) 28 USCS §§ 2253

(4) TEXAS HEALTH & SAFETY CODE ANN. 481.119, (e)

(5) 22 USCS §1254 (1)

(6) 28 USCS §§ 2253 (c)

(7) CONSTITUTION AMEND (5)

(8) CONSTITUTION AMEND. (14)

STATEMENT OF THE CASE

In June of 2016, the United States Supreme Court decided United States v. Mathis, 136 S.Ct. 2243, 2251, 195 L.Ed. 2d (2016), which clarified that a statute is indivisible--and thus not amendable to the modified categorical analysis--if it lists alternative means rather than alternative elements. Pursuant to Mathis, the Fifth Circuit Court of Appeals held that Mathis applies to the categorical analysis under the Guidelines, not just the ACCA. Based on this Mathis analysis, the Fifth Circuit Court of Appeals decided two (2) cases which invalidated Texas Health & Safety Code Ann. 481.112 for Career Offender enhancement: United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016), and United States v. Tanskley, 848 F.3d 347 (5th Cir. 2017). In the latter case of Tanskley, the Fifth Circuit held that possession of cocaine with intent to distribute can no longer be a qualifying predicate for the Career Offender enhancement. This ruling qualified Appellant for relief based on 2 disqualifying prior predicates of possession of cocaine with intent to distribute convictions.

In February of 2017, the Petitioner filed for relief to the U.S. District Court for the Eastern District of Texas, Tyler Division, which denied relief in March of 2017, holding that "it lacked jurisdiction." The Court re-characterized Petitioner's motion for §2255 relief without giving him Castro v. Quarterman, 551 U.S. 930, 127 S.Ct., holds that second-in-time petitions based on events that do not occur until a first

petition is concluded would not be second and successive. Mathis and Tanskley was not available to Petitioner in 2007 when he filed his first §2255 petition. Further, this Court in Castro v. United States, 540 U.S. 375, 157 L.Ed. 124 S.Ct., holds that "unless the Court informs the litigant of its intent to re-characterize warns the litigant that the re-characterization will subject subsequent §2255 motions to the law's second or successive restriction, and provide the litigant with an opportunity withdraw, or to amend the filing. Where these things are not done, a re-characterized motion will not count as a §2255 motion for purposes of applying §2255's 'Second or Successive' provision." The Courts also hold that "a subsequent petition challenging the administration of a sentence is clearly not a second or successive petition within the meaning of §2244."

The Petitioner appealed and was denied in July of 2018. The Appellate Court holding that it lacked jurisdiction to entertain a successive §2255--a request that was not made.

REASONS FOR GRANTING THE PETITION

(1) Whether or not the U.S. District and Appellate Court violated Castro v. United States, 124 S.Ct., by refusing to issue a Certificate of Appealability on the question of whether Appellant's 28 U.S.C. §2255 motion was his first or second?

In this issue, Petitioner will show that the U.S. District and Appellate court erred by failing to issue a Certificate of Appealability on the question of whether Petitioner's Second Numerical §2255 was his first or second:

ARGUMENT

In Castro v. United States, 124 S.Ct., the United States Supreme Court held that since Castro no-where asked the Eleventh Circuit to grant, and it nowhere denied authorization by the Court of Appeals to file a Second or Successive Application for 28 U.S.C. §2255, Castro's petition could not meet the requirements for "second and successive" petition of a statutorily relevant "denial" of an authorization request not made.

The District Court certified for appeal the question whether Castro's §2255 motion was his first such motion or his second. This Court holds that this is a very different question than appealing a denial of authorization to file second or successive §2255 applications, which is not appealable.

In the case at bar, the Petitioner never made any request to file a second or successive 2255, therefore the U.S. District Court and Appellate Court erred by re-characterizing Petitioner's

motion as attempt by Petitioner to file a second and successive §2255, and further erred by denying it for lack of jurisdiction.

This Court also holds that the question of "whether or not a §2255 motion is a Petitioner's first or second" is a question it has jurisdiction to review. See, Castro, 124 S.Ct.

(2) Whether or not the U.S. District And Appellate Court violated Castro v. United States, 540 U.S. 375, 152 L.Ed. 2d 778, 124 S.Ct., by failing to give notice and warning to Petitioner before re-characterizing his 28 U.S.C. §2255 motion as second and successive?

In this issue, the Petitioner will show that the U.S. District and Appellate Court abused its discretion by failing to give Petitioner notice and warning before re-characterizing his §2255 motion as second and successive:

ARGUMENT

In Castro v. United States, 124 S.Ct., the U.S. Supreme Court holds that a federal court cannot re-characterize a pro se litigant's motion as a first §2255 motion unless it first informs the litigant of its intent to re-characterize, warns the litigant that this re-characterization means that any subsequent §2255 motion will be subject to the restrictions on "Second or Successive" motions, and provides the litigant an opportunity to withdraw the motion, or to amend it, so that it contains all the §2255 claims he believes he has. If these warnings are not given, the motion cannot be considered to have

become a §2255 motion for purposes of applying to later motions the law's "Second or Successive" restrictions.

In the case at bar, the U.S. District and Appellate Courts refused to follow this judicially-created requirement. Even to grant a Certificate of Appealability on the issue, as this Court did in Castro. See, Griffith v. Kentucky, 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed. (1987) (noting the principle that "similarly situated defendants" must be treated the same).

(3) Whether or not the U.S. District and Appellate Courts violated Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed. 2d 662 (2007), by labeling Petitioner's §2255 motion as second and successive when his claim did not exist at the time he filed his first §2255?

In this issue, Petitioner will show that his second numerical §2255 cannot be labeled as second and successive because his claim did not exist at the time he filed his first §2255.

STANDARD OF REVIEW

In Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct., the U.S. Supreme Court held that "prisoners may file second in time petitions based on events that do not occur until a first petition is concluded." See, e.g., Benchoff v. Collerman, 404 F.3d 812, 817 (3rd Cir. 2005) (stating "a subsequent petition that challenges the administration of a sentence is clearly not a second or successive petition within the meaning of §2244 if the claim had not risen or could not have been raised at the time of the prior petition.").

The Petitioner filed his first §2255 in June of 2007. United States v. Mathis, 136 S.Ct., was decided in June of 2016. Pursuant to Mathis, the Fifth Circuit Court of Appeals decided two (2) cases relevant to Petitioner's claim and status as a prisoner: United States v. Tanskley, 2017 APPX LEXIS 913, 2017; United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016). In Tanskley, the Fifth Circuit held that "possession of cocaine with intent to distrubte, pursuant to Texas Health & Safety Code Ann. Statute 481.112 is an indivisible statute that invalidates all possession of cocaine with intent to distribute prior convictions used for Career Offender enhancement." This was decided in January of 2017. Petitioner filed for relief "speedily" in February of 2017. Petitioner has two (2) predicate convictions of possession of cocaine with intent to distribute that can no longer be used for career offender enhancement.

(4) Whether or not United States v. Mathis, 136 S.Ct., applies retroactively on collateral review?

In this issue, Petitioner will show that United States v. Mathis, 136 S.Ct., applies retroactively on collateral review pursuant to U.S. Supreme Court precedent.

All sister circuits of the United States Court of Appeals, as well as the United States Government agree that Mathis is not a new rule of Constitutional Law but a case of statutory interpretation. And because the United States Supreme Court made clear in Mathis that it was not announcing a new rule,

but merely reinforcing an old rule set out more than a quarter century earlier, it applies retroactively. See, Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding that an old rule dictated by prior precedent applies retroactive to cases on collateral review). Also, since Mathis is a substantive rule, all substantive rules presumptively apply retroactively. See, Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed. 599 (2016); Robinson v. United States, 137 S.Ct. 1433, 197 L.Ed. 2d 645 (2017).

CONCLUSION

The barrier the COA requirement erects is important, but not insurmountable. In cases where a habeas petitioner makes a threshold showing that his Constitutional rights were violated, a COA should issue. See also, Powell v. Nevada, 511 U.S. 79, 84, 114 S.Ct. 1280, 1283, 128 L.Ed. (1994) ("Selective application of new rules violates the principle of treating similar situated defendants the same."). Castro was granted a COA to determine whether his §2255 was his first or second. In Panetti, this Court holds that "events that do not occur until after the conclusion of a petitioner's first §2255 cannot be successive." United States v. Mathis, 136 S.Ct., invalidates Petitioner's prior predicate offenses for Career Offender enhancement. Also his instant offense of Bank Robbery 2113(a) which criminalizes a greater swath of conduct than generic robbery. Petitioner should be granted a COA, with instructions to re-sentence Petitioner expiditously to time served, as he has already served over 150 months.

Respectfully submitted,

Date: 11-5-18

Anthony Dailey

A PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED:

A COA should be granted because Petitioner has made "a substantial showing of a denial of Constitutional right" §2253(c)(2). This Court holds that a Petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the Petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. (2000). Jurists of reason would find it debatable that Petitioner's issues did not arise until after his first habeas petition had concluded, and also find it debatable that United States v. Mathis, 136 S.Ct., is a substantive rule that applies retroactively on collateral review. Jurists of reason would also find it debatable whether the Petitioner has the qualifying prior and instant predicates for Career Offender enhancement.

Respectfully submitted,

Date: 11-5-18

Anthony Dailey