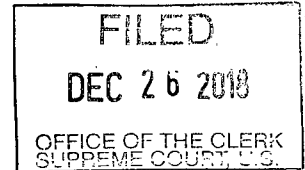


No. 18-7240

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Charles J. King, jr — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Charles J. King, jr
(Your Name)

FCI Butner II, PO Box 1500
(Address)

Butner, NC 27509
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

IN ROSALES MIRELES V US, JUSTICE ALITO ASKED DURING THE ORAL ARGUMENTS..."SUPPOSE THERE WAS A QUESTION ABOUT WHETHER A DEFENDANT WAS PROPERLY TREATED AS A RECIDIVIST?"..(last page of Oral Argument of 16-9493)

THE PETITIONER IS REQUESTING FOR THE COURT TO ADDRESS THIS NOVEL AND IMPORTANT QUESTION ,IN ORDER TO GET THE THOUSANDS LIKE THE PETITIONER OUT OF THE PRISON AND SAVE THE TAX DOLLARS..BY RESTORING THE LIFE AND LIBERTY OF THESE LINGERING IN PRISONS.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

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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 A to the petition and is

☒ reported at 17-7585 (4th Cir. 2018); 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☒ is unpublished.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 C to the petition and is

☒ reported at 17-cv-81292-JPJ-RSB; 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☒ is unpublished.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☐ is unpublished.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 May 16, 2018.

☐ 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: Aug 6, 2018, and a copy of the order denying rehearing appears at Appendix B.

☒ 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

U.S. CONSTITUTION, FIFTH AMENDMENT , DUE PROCESS CLAUSE AND LIFE AND LIBERTY/EQUAL PROTECTION CLAUSES

No person shall be held to answer for a capital ,or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject "for the same offense to be twice put in jeopardy of life or limb"; nor shall be compelled in any criminal case to be a witness against himself, nor be "deprived of life, liberty" or property, without Due Process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, SIXTH AMENDMENT. CLAUSE EFFECTIVE ASSISTANCE OF COUNSEL CLAUSE

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial 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 the witness against him; to have in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

I. Indictment and Trial Findings

On Sept. 24, 2008, the Federal Grand Jury in the W.D. of Virginia, Abingdon Division), indicted the petitioner (King hereafter) for Conspiracy to Distribute "50 grams or More" of Cocaine Base (Crack). (Dist. Ct. ECF No. 2)¹

After 4 days of trial, on May 29, 2009, the jury found King guilty of the "lesser included offense of 5 grams or more but less than 50 grams" of Cocaine Base. (Dist. Ct. ECF No. 104). At the time of indictment the original charge carried 10 yrs to life, but the jury found King guilty of the lesser amount of 5 grams or more, which carried a statutory minimum of 5 yrs.

II. Sentencing

At the time of the indictment, the government filed a 21 USC 851 filing, in which included 4 drug convictions from the State of North Carolina, in which the 1993 conviction did not receive any assigned points and was a juvenile offense and was a suspended sentence of 3yrs. The other 3 convictions were 1998 North Carolina marijuana convictions, all resulting in sentences of "less than one year" of imprisonment. (See Carachuri-Rosendo v Holder 560 US 563 (Sp. Ct 2010) and US v Hodge 17-6054 (4th Cir. 2018)..the priors must be assigned points to be used to enhance the sentence)

Ftn 1: All references to Dist & Appeals Cts ECF No(s) filed in the District & App Cts are designed Dist or 4th Cir ECF No & relevant page numbers.

Court by stated that King's receiving a 20 mth sentence for the North Carolina charge and where it exceeded 12 mths he was not entitled to relief under Simmon's analysis. (4th Cir. ECF 147 at 2, App'x H). Saliba failed to address the "abandoning of King on the Appeal stage and then he requested to be relieved as counsel pointing to King's issue as more in the nature of Habeas Corpus proceedings".

On March 20, 2012. the government responded to King's Motion to Recall the Mandate and "conceded that Post-Simmons, three of the four prior offenses used no longer qualify as felonies and because of this, it appears King was incorrectly chararterized as a Career Offender for guideline purposes", but also suggested King's possible colorable claim of ineffective assistance of counsel on appeal be resolved by the 28 USC 2255. (4th Cir. ECF 152 at 3, 6, App'x I.).

On April 4, 2012, in a unpublished opinion, the 4th Circuit's 3 judge panel denied King's Motion to Recall mandate. (4th Cir. ECF 154)

V. Untimely Petition for Writ of Certiorari

On June 6, 2012, King petitioned for a Writ of Certiorari posing the question of the Simmons issue, which was docketed but was deemed as untimely. Therefore, the Sp. Ct declined the petition to be heard on Oct. 1, 2012. (King v US 133 S.Ct 220 (2012))

VI. King's 1st 2255 Motion

On August 16, 2012, the petitioner filed in the Western District of VA, Abingdon, in which his core issues were:

1. Career Offender Guideline Error
2. Former Counsel (Saliba's) failure to raise the Simmons issue while on Appeal
3. Former Counsel (Saliba's) failure to timely petition or even petition for Panel Rehearing/Rehearing En Banc before the 4th Cir., as well as failing to petition for a Writ of Certiorari and thus "abandoning his duties as Appellant Counsel and denying King a viable avenue for relief". (See ECF 190 p. 44-52, App'x J)

On Feb. 19, 2013, the government "again responded and clarified that King's 3 1998 convictions "no longer qualify for the career offender finding in light of Simmons and Carachuri-Rosendo". The government also clearly stated that "former counsel (Saliba's) failure to seek all avenues of review during appeal and the counselors failure to take the necessary steps to allow King to proceed pro se denied King effective assistance of counsel and then the government suggested that the District Court make a factual finding as to the denial of effective assistance of counsel". (See ECF 212 p. 29-30, App'x K)

On May 13, 2014, the District Court "dismissed King's 2255 & held that the parties "agree" that King is no longer a career offender, "but that is not enough to prove King suffered any prejudice and any injustice to warrant relief".

The District Court also made factual findings and held that former counselor Saliba "failed to fulfill his obligation to King under the Criminal Justice Act (CJA) and advised King to "use" Saliba's affidavit and this Courts May 13,2014 order to support a renewed Motion to Recall Mandate.(See ECF 233 at 15,46 & 47, App'x L)

VII. King's Renewed Motion to Recall Mandate

On June 7,2014, the petitioner followed the District Court's advice and Court Order and filed his renewed Motion to Recall the Mandate and attached copies of the Court Order and Saliba's affidavit along with a Motion for appointment of Counsel. The 4th Circuit Granted the Motion and "reissued its judgment and also appointed a new appeal counsel by the name of Paul G. Beers (Beers). King requested that Beers raised the ineffective assistance of Saliba's in the reinstated appeal as a "extraordinary reason for relief but Beers refused" and filed the petition without it.(See ECF 175 , App'x M)

On Feb. 27,2015, the government responded again and again "conceded that had King's Simmons issue been raised in the opening brief that a remand would have been secured and that it the appeal court were to grant the rehearing, King should be remanded for resentencing and that failing to correct the error renders the error not meaningless". (ECF 183, 13-16, App'x N; see also Molina and Mireles)

However, on March 20, 2015, the 4th Circuit of Appeal again denied King's petition for rehearing and resentencing, even after the numerous government and court concessions. (See ECF 184, App'x 0)

IX. King's Renewed Section 2255 for Relief

On June 20, 2016, King filed his 2nd 2255 in the W.D.VA and again raised the IAC of counsels, failure to the Court to apply *Miller v US* 735 F.3d 141 (4th Cir. 2013) as well as its failure to apply this Courts *Molina-Martinez v US* 136 S.Ct 1338 (2016) as well as its failure to apply the *Montgomery v Louisiana* 577 US 136 (Sp. Ct 2016) rulings, and then also the facts were created and showed a continuous prejudice and disregard for the petitioner's life and liberty as well as a disregard of this Courts and its own Circuit rulings that required the correction of the sentence. (See ECF 260, App'x P)

Unfortunately, the government moved to dismiss King's 2255, & King timely responded to the government's assertion and about face position. (See ECF 278 and 282, App'x P and Q)

On Sept. 27, 2017, the District Court denied the 2255 relief and even determined that the subsequent appeal counsel (Beers) was not ineffective and then stated where "no evidence" in the record conclusively demonstrated that the counsel was ineffective for his "failure to present the ineffective assistance claim against the 1st appeal counsel (Saliba) while on the reinstated

XI. King's Motion for Certificate of Appealability

On Dec. 29, 2017, the petitioner timely filed his Petition for a COA and requesting to be heard on the Appeal issues and also asserted the Buck v Davis, 15-8049 (Sp. Ct 2017) ruling, which stated that the COA panel may not perform a merits analysis.

King raised the following issues:

1. Any reasonable jurist could disagree with the district court's failure to address the claims raised in King's 2255.
2. The District's error in "refashioning" King's Rule 59(e) to Rule 60(b) and deeming it a successive 2255
3. The District Courts failure to find that the records was "established to raise the IAC on Appeal"

The Appeal Court/COA Panel denied King's request to proceed on the Appeal merits on May 16, 2018 and held that King failed to make a requisite showing but "conceded that the District Court did err in misconstruing King's 59(e) Motion as a 60(b) Motion and then as a 2nd and Succesive. (see App'x A and S)

However, the petitioner filed a Motion for Reconsideration in wake of the Buck v Davis merit analysis being performed on the COA request level. This was denied on Aug. 6, 2018. (See App'x B T)

Therefore, the petitioner then filed a Motion for Extension to this Court , which was Granted until Jan. 3, 2019. Hence, the petitioner timely files the Petition for a Writ of Certiorari and request that the Court Establish for All Parties "how to handle such a case when all avenues have been timely exalted"

REASONS FOR GRANTING THE PETITION

The petitioner's case presents this Court with some unique opportunities to clarify the application of some existing Sp. Ct caselaws, as well as allows the Court to deal with a massive cumulative error of IAC and the proper usage of the 2255 forum and what may and may not be challenged under the 2255 forum.

In *Molina-Martinez v US*, 136 S.Ct 1338,1345 (2016), the government fully conceded that the "sentencing error" affects a defendant's substantial rights. According to *Molina-Martinez*, the guidelines play a critical and central role in sentencing and thus exert a powerful anchoring effect. Therefore, a presumption of prejudice is shown when the Court fails to properly calculate a guideline.

In this case, the government, and District Court together has now conceded numerous times that King is not a career offender post *Simmions v US* 649 F.3d 237 (4th Cir 2011, En Banc)

However, the numerous concessions are as wind and have quickly diminished because, even after the numerous concessions, the parties have failed to remand for resentencing even after the petitioner's substantial rights have been shown to have been violated. (See Applicable Facts Sections and App'x filings).

But, in 2018, this Court made a powerfully and very much needed ruling surrounding "any guideline errors" and how they

must be corrected regardless of when the error was discovered. (Rosales-Mireles v US 138 S.Ct 1897, 1908 (2018)). However, even after the ruling Courts have found ways to limit the Rosales and Molina's rulings, instead of following it. This is because of 3 things. First, the Court did not "clearly show or define the words "ordinary case"- Molina,supra 1345, "extraordinary case"- Mireles. Second, the court did not fully address Justice Alito's last question about "what to do about defendants whose priors no longer qualify for recidivist enhancements". (See Roslaes-Mireles oral argument last page attached in App'x A) Third, the Court has yet to decide "which forum must be used or which should not be used for those whose priors no longer qualify for enhancement purposes. So, this Court is properly tasked with deciding rather 2255 or 2241 is the correct forum to correct the fundamental defects in the sentence for both mandatory guidelines and advisory guideline errors.³

When we study the law, we are not studying a mystery, but a well known profession. We are studying what we shall want. The object of our study of law, is the prediction. The prediction of

Ftn3: My root belief is that the proper role of a judge is to do justice between the parties between him/her. If there is "any rule" of law that impairs the doing of justice, then it is in the province of the judge to do all that he/she can do to avoid that rule, or even to change it, so as to do justice in the instant case before them. He needs not wait for the legislative to intervene because that can never be of any help in the instant case. (Lord Denning, The Family Story 174 (1881)

the incidence of the public force through the instrumentality of the Courts. The means of the study are a body of reports, treaties and statutes as well as guidelines today, exceeding back for over 600 years. In these sibylline leaves are gathered the scattered prophecies of the past line of cases like US v Glover, Towne v Burke and Molina-Martinez v US, Rosales-Mirles v US, & upon the case in which the ax will fall. These are the guiding oracles of the law that will easily guide this Court to see that the 4th Circuit's actions and treatment of King's case is based upon arbitrary and capricious actions that violate his 5th and 6th Amendments constitutional rights.

For the most important and pretty nearly the whole meaning of each of the Sp. Ct rulings and constitutional protections is to make these prophecies of law more precise and to generalize them into a thoroughly connected system. In King's case, even the government has conceded at least 3 times, all separate proceedings, that King's sentence was directly influenced and based upon the original career offender and 851 filings, that are no longer applicable after this Court's rulings of Carachuri-Rosendo and US v Simmons... But the petitioner has yet to have the sentence corrected, even after the numerous concessions.

Well, in Gamble v US, 17-646 (oral arg held Dec 6, 2018), the justices were clearly concerned with the defendants life and liberty being taken and remaining in prison based upon such individual liberty violations that were premised from unconsti-

tutional actions of the Courts and government. (See Gamble, supra oral arg. pages. (p72, lines 21-25... You haven't suggested, that a prosecutor has a right to rely on an unconstitutional rule to put someone in prison.. that wouldn't be a thing, would it?

This question and concern was also raised in the Rosales-Mireles v US, 16-9493, oral arguments on Feb 21, 2018 by Justice Alito on the last page of the oral arguments. (See App'x A) when Judge Alito specifically asked..."Suppose there was a question about whether a defendant was properly treated as a recidivist... where there's a heavier sentence imposed based on prior criminal conduct? The parties responded by stating..."If it were erroneous and that's what the -- if it were erroneous and the District-- and the "record" demonstrated that the District Court "was influenced" in -- choosing its sentence because of that error that improperly influences the discretion of the District Court and could be serious enough to meet all prongs.")

In King's case it would be in the best interest of this Court to announce both Molina and Mireles as also being applicable to those who are on collateral review to ensure that individuals do not linger in prison longer than necessary and based upon errors in the law that have now been shown to be previously incorrect, thus leaving defendant's life and liberty deprived. But King's case is unique, because he raised the issue of the incorrect application of the law on both direct appeal and 2255 stages and the parties conceded that the counsel was ineffective and that

the sentence of 180 months was based upon the career offender erroneous finding, but the parties have yet to correct the miscarriage of justice on either level, which is why this Court must provide direction on how to handle such a unique case as this.

The situation should be simply, vacate the sentence and remand for resentencing or grant immediate release. In this case, the petitioner was found guilty of more than 5 grams but less than 50 grams of crack cocaine in 2009. At the time of sentencing the guidelines called for a statutory range of 5-40 years and a BOL of 24-28, thus producing a minimum and maximum guideline range of 100-175 months as a Category VI offender. The petitioner's career offender finding pushed the petitioner to a new BOL of 34 and produced a new guideline range of 262-327. But then the PSR "also wrongly contributed a total of over 400 plus grams of cocaine, which was a BOL of 32 at the time and also defied the Jury's findings. Next, the PSR also determined the 1993 conviction, which was not assigned any points, would trigger the 851 statutory increase from 5-40 to 10-life. In doing this increase, it also increased the career finding to 360-life. Based upon all of these errors in statutory and guideline findings, the Court imposed the 180 months and clearly was improperly influenced based upon these errors in law that have been proven to be errors by this Court's rulings of *US v Glover*, *Alleyne v US*, *Molina-Martinez v US*, *Carachuri Rosendo* and a history of other Sp. Ct rulings.

The petitioner objected to these issues, unlike Mireles, so his errors are properly preserved and ripe for correction. Also, even the lower Court has denied the petitioner the opportunity to file a 3582 motion for reduction based upon Amendments 750 and 782, because of the career offender finding, which shows how bad the error in law is substantially affecting King's substantial rights. (See App'x C, p. 7, Sec C of Case 1:08-cr-00041 (WDVA 2107))

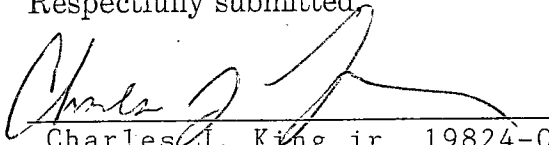
By this Court hearing this case it will allow the Court to provide "directions" on how to handle the correction of sentences & what forum their to... be handled on and how to properly apply Mireles and Molina. It would also abrogate such cases as US v Foote 13-7841 (4th), US v Spencer 10-10676 (11th) and would require justice and fairness to be served instead of leaving defendant's to linger in prison, which is clearly not what the Justices have wanted, nor the framers of the constitution.

Therefore, this Court should grant the Writ of Cert, and set the matter for oral arguments or vacate the 4th Cir. decisions and to order King to be resentenced or granted immediate release. So, just as former Justice Holmes stated in "the mind and faith of Justice Holmes" p. 79 2 paragraph... I once heard a very eminent judge say that "he never let a decision go until he was absolutely sure that it was right". This Court also has the duty to make sure King's sentence, and others like him, is absolutely right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Charles J. King, Jr 19824-057

Date: Dec. 26th 2018