No. 18-7378

IN THE

SUPREME COURT OF THE UNITED STATES

Nathan L. Hill,

Petitioner,

v.

Charles A. Daniels, Warden,

Respondent,

On Petition of a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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NO RESPONSE PROVIDED

The Solicitor General did not respond to the question that Hill presented to this court,

> "Whether the Tenth Circuit has made the essential term, "has failed," which is listed in section 2255(e) null and void."

THE ADDITIONAL QUESTION PROMPTED BY THE SOLICITOR GENERAL

The additional question prompted by the Solicitor General in his response is of National Importance. That is, "Whether Alleyne's essential holding set forth a substantive

> rule when it held; the essential inquiry is whether a fact is an element of the crime. When a finding alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense"
>
> or, whether this Court's [opinion] set forth only a new rule of constitutional law."

OVERVIEW OF THE ISSUES

Mr. Hill filed his habeas corpus petition under 28 U.S.C. 2255(e) and 28 USC 2241(c)(3), in the district court of Colorado. Outlined in his memorandum he explained that because he cannot meet the Tenth Circuit's Prost Metric test explained; he should not be barred by the Preclusive Provision of 2255(e), which states, "shall not be entertained if it appears if the applicant' has failed to apply for relief."

Relying on this Court's Williams v Taylor 529 US 420 (2000) which interpreted a similar habeas text, specifically, the phrase "has failed" that contains a fault clause and cannot be used neutrally. Hill argued that he "has not failed" and therefore, the court should've heard his habeas corpus, under 2255(e) and 28 USC 2241.

The district court did not opine why Hill was allowed to process to habeas corpus. But denied on another issue, that is mentioned below. The court of Appeals did not address Hill's arguments, did not say he was wrong, but instead held that one panel cannot overrule another panel's decision.

Hill had challenged Prost's one size fits all Metric Test. A Test that does not take into consideration the term "has failed" which is used in the Preclusive Provision. Instead, the opinion sole focus is that a prisoner could have presented his argument in his initial 2255, regardless or not if he was impeded by the law of the case doctrine, and that outside circumstances impeded the process.

Moreover, the Tenth Circuit does not recognize, law of the case doctrine. See Abernathy v Wandes 713 f3d 538 (10th Cir 2013). Therefore, prisoners that have not abused the writ of habeas corpus are still being sanctioned. This undermines Davis v United States 417 US 333 (1974) and leaves prisoners with no unobstructed opportunity though no fault of their own.

This is inconsistent with the habeas corpus jurisprudence. In 1948 when the Judicial Committee got together their aim was to curb abuse of the writ, not hinder prisoners such as Hill. Nonetheless the Tenth circuit has categorically barred prisoners by their one size fits all approach "shall not been entertained... when the prisoners has been denied relief".

This reading ignores Congress's use of the disjunctive word (or) that is positioned between," has failed "and" has been denied." This court has cautioned against such interpretation Loughrin v United States 134 S. Ct. 2384, 2390 (2014). "When Congress employs the word "or", the words it connects are to be given separate meanings" See also Scalia and Garners, interpretation of legal text, Disjunctive-canon.

Before, this court, the Solicitor General did not dispute that the Tenth Circuit ignored Congress's preclusive provision, i.e., "has failed" clause. Thereby, making it superfluous which results in the court writing law rather than interpreting them. Hill believes that the separation of powers violation suspended the writ of habeas corpus in violation of Article 1, Section 9, Clause 2. which is of importance when the record reveals that Hill remains presumptively innocent of violating title 21 USC 848(b).

This is a slap in the face of logic and law. Because, Alleyne essential holding Id. 570 US at 113 specifically reads:

> "the core crime and the fact triggering the mandatory minimum
>
> sentence together constitutes a new, aggravated crime"

Not only is the Solicitor General asking this court to overlook the substantive rule set forth by Alleyne itself. He also must think that Harris v United States 536 US 545, 552 (2002) is long forgotten. In Harris this Court held " We must first answer a threshold question of statutory construction." The court then addressed the question **"we conclude that, as a matter of statutory interpretation,** section 924(c)(1)(A) defines a single offense."

Certainly, this was the substantive rule, until Alleyne revisited both Harris's statutory interpretation and its procedural rule. See Alleyne 570 US at 106 explaining that it revisited the "statutory provision and the Sixth Amendment question, the same statutory provision before us today".

The argument that Hill's case is no good for review because Alleyne did not present a substantive rule is incorrect. The Solicitor General wants this Court to accept that Hill's case is no good for review because Alleyne [only] set forth a new rule of Constitutional Law.

An Alleyne claim is commonly known as a claim based on the new rule of Constitutional Law. The Solicitor General has attempted to twist Hill's claims that are based on Alleyne's substantive rule into an Alleyne Claim, both of which have two different standards of review. For the record this Court has before it the district court's opinion. See (Hill's App. 1).

> "He states that his claims do [] not stem from the [decision]
>
> of Alleyne, but rather, "from the logic and reasoning behind
>
> the court's decision" he seizes upon the portion of Alleyne
>
> that explains that "when a finding of fact alters the legally
>
> prescribed punishment so as to aggravate it, the fact
>
> necessarily forms a constituent part of a new offense."

The record displays that the Solicitor General is mistaken. Hill did not rely on the Constitutional rule set forth by Alleyne, also known as an Alleyne [claim]. The District Court's

opinion exonerates Hill of the allegations of the Solicitor General. Returning to the record.

> "Mr. Hill then concludes that 21 USC section 848(b) describes a separate crime than 21 USC section 848(a) (the provision he was charged and convicted under). then he concludes that the due process clause is implicated by his [conviction], as he was convicted under 21 USC section 848(b) despite having only been charged under 848(a)."

This record also disputes that Hill presented an [Alleyne Claim], i.e., a claim based on the new constitutional rule. The District court rejected Hill's position that relied upon this court's Rivers v Roadway Inc, 511 US 298, 312-13 (1994) see District court's order

> "for the proposition that" a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case given rise to that construction" essentially arguing that Alleyne operates as a judicial construction of 21 USC 848(b)."

The rejection of the district court is troublesome because they have assumed powers of Congress. For instance, the district court held

> "under Alleyne, the question of whether a defendant was an organizer or leader is one that "must [now] be submitted to the jury."

In this same breath, the District court inadvertently admitted that 848(b) is not a sentencing factor, agreeing with Hill although it erred when it held that it must [now] be submitted to the jury. This attributed to the violation of separation of powers.

Additionally, this Court must also take into account that it granted review in Harris v United States Id. because of the spilt between circuits, in regards to Apprendi concurring opinion set forth by Justice Thomas in Apprendi v New Jersey 530 US 429 (2000). This Court did not adopt the concurring opinion of Apprendi, but the national importance of the issue has resurfaced because prisoners are still suffering from this Court's mistake in Harris. The Solicitor General is now trying to capitalize from the error that occurred over a decade ago.

It is well established that only congress writes laws. And this court has long ago established that a statute can have but one meaning. Therefore, Alleyne did not make 21 USC 848(b) a distinct crime. Congress made 848(b) a distinct aggravating crime. Since congress made it a crime prior to Hill's arrest, the government had an obligation to take the charges before the Grand Jury, in order to seek an indictment. Hill was entitled to fair notice, and the crime had to be proven beyond a reasonable doubt, not under civil law's preponderance of the evidence standard. The Solicitor General is trying to twist Hill's Position into a solely sentencing matter, but it is not.

According to the record the judgment imposed by the District Court is invalid. The Warden is violating Hill's 8th Amendment right by [executing the sentence]. Furthermore, this Court has held that habeas corpus is flexible and that habeas corpus allows the courts to give the prisoner the relief he is entitled to. See Preiser v Rodriguez 411 US 475 (1973).

Hill's application (2241) presented a challenge to the Warden for violating Hill's Eighth Amendment Rights. The record reveals that Hill remains presumptively innocent of the charge because the District Court lacked authority to impose such sentence.

In closing the section called overview, it must be noted that the authorities cited by the Solicitor General, in regard to retroactivity does not apply to Hill's position. For instance, Poe v LaRiva 834 f3d 770, 773 (7th Cir. 2016), and Gardner v Warden Lewisburg U.S.P. 845 f3d 99, 103 (3rd Cir. 2017). The prisoners presented Alleyne [claims] based on a new rule of Constitutional law.

The Solicitor General has also argued that every court of Appeals are in agreement that Alleyne is not retroactive. He goes on to present a laundry list of authorities. After thorough scrutiny it will reveal that all of the cases cited by the Solicitor General are based on Alleyne's Sixth Amendment procedural rule, not the substantive rule set forth by the Court's holding.

Canon Rules dictate that courts are to answer only the questions that are before them, not the questions that are not. All of the cases present the wrong questions of law, and are dissimilar to Hill's. This court has also held "We must...relate general language...in judicial opinion-as referring in context to circumstances similar to the circumstances 'then' before the court and not referring to quite different circumstances that the court was not then considering. "Illinois v Lidster 540 U.S 419 (2004)."

The court of Appeals were then considering retroactivity based on a new rule of law, not a substantive rule. The Solicitor General in mistaken. Just as the Tenth Circuit interpreted section 2255(e), as a one size fits all, thus, making the "has failed" relied on by Congress superfluous. This resulted in widespread disagreement across the country, i.e., whether prisoners may rely on section 2255(e) to present statutory interpretation arguments.

REASONS FOR GRANTING APPROVAL OF THE WRIT

The Solicitor General relies on authority that doesn't apply to Hill's position. Hill and thousands of other still remain in prison, since Alleyne's substantive rule return crimes back to their proper place of designation. Hill is suffering at the hands of the Warden, who is executing an invalid judgment.

This court should find that Hill's case is good for review, because the Tenth circuit has made Congress's 2255(e) preclusive provision null and void, which results in the suspension of the writ of habeas corpus in violation of Art. 1, Sec 9, Cl. 2, causing the door to slam on prisoners who have been in prison for decades for crimes not charged and convicted for.

Reasons for reviewing Hill's case present the character

of compelling reasons that have not been soundly rebutted

by the Solicitor General.

Hill's case fits within the ambit of this court's rule 10. The record reveals that two court of appeals have said that they have interpreted the savings clause of 2255(e), but in their interpretation, they have bypassed the phrase "has failed" and proceeded to, "has denied him" which is also within the preclusive provision of 2255(e).

This has resulted in the courts categorically barring prisoners by the jurisdictional language cited in the preclusive provision which is "shall not entertained." Then the prisoner finds himself barred by test erected as Prost's Metric Test, which has barred claims based on statutory interpretation. See also McCarthan v Director of Goodwill Indus-Suncoast 851 f3d 1076 (11th Cir. 2017).

Moreover, in Hill's case, the Solicitor General does not dispute that the Tenth circuit has created a one size fits all, and that section 2255(e), cannot be utilized to present statutory arguments, even when the prisoners "has not failed" to present their arguments on direct appeal. And are impeded by the law of the case, on their initial 2255.

Hill presented such argument in both lower courts. But the lower court allowed Hill to proceed via 2255(e) and 2241, without opining. And the Tenth Circuit reversed and it did not address Hill's challenge to the court making the "has failed" phrase used in congress statute null and void. In other words, the court treated the necessary term, as it was mere surplusage and simply discarded it along with Hill's petition. See, Scalia and Garners, interpretation of legal text, section 26 "surplusage canon" see also United States v Menashe 348 US 528, 538-39 (1995) "We cannot adopt a reading of a statute that renders part of the statute superfluous over one that gives effect to its "every clause and word."

The Supreme Court Williams v Taylor Id, defined the phrase "has failed" that is used in habeas test. It is interesting that this court traveled back to 1939 to the Webster's New International Dictionary to interpret a statute, enacted in the AEDPA era. The court also relied upon a Webster Dictionary from 1993.

This is indicative, because in 1948, Congress enacted 28 USC 2255(e), both statutes that contain the "has failed." This is consistent with Scalia and Garner's Id section 7 Fixed meaning-canon. The "has failed" means the same in both era's. Hill also finds support in Scalia and Garner's Id section 25 "presumption of consistent usage" and section 39 related-statutes canon.

Furthermore, Hill finds support in Congress's provision 28 USC 2254(b)(1)(11) "circumstances exist that renders such process ineffective to protect the rights of the applicant." This statute was enacted in 1948 by the same Congress who enacted 2255(e). Both provisions have a fault clause, although worded different, the provisions appear to have the same meaning.

There exists an exception when circumstances exist, outside of the prisoner himself abusing the writ of habeas corpus. Hill believes that the court's mistaken interpretation of the law falls within the ambit. Furthermore, when reading text courts must look to the whole text. See, Scalia and Garner's Id. section 24 Whole-Text Canon. "On ascertaining the plain meaning of the statute, the court must look to the particular statutory language of issue, as well as the language and design of the statute as a whole." Kmart Corp v Cartier, 468 US 281, 291 (1988) (per Kennedy).

Section 2255(e)'s savings clause must also be taken into consideration when reading the preclusive provision. The savings clause reads as follows, "unless it also [appears] that the remedy by motion is inadequate or ineffective...." Here Hill points out that the word, "appears," that congress use calls for flexibility. The word "appears" is defined as something that "seems."

These words cannot be used as "exclusive," or "the only" as the Tenth and Eleventh Circuit has called for in their interpretation of the savings clause. In other words, their interpretation holds the "only" way that a prisoner can use the savings clause is for these reasons. But the congress did not write [their] statute that way.

Furthermore, both court's interpretation has made the word, "appears," superfluous, which has resulted in making the savings clause non-flexible. See United States v Butler 297 US 1, 65 (1936) "These words cannot be meaningless, else they would not have been used."

This Court may search the courts' interpretations, neither opinion relies on the word, "appears." In Hayman v United States 342 US 214 (1952), this court had a chance to visit the savings clause. The prisoner had argued that section 2255 is inadequate or ineffective, because the district court did not allow him to be present at an evidentiary (2255 proceeding).

CONCLUSION

This Court rather than addressing the serious constitutional question held that if the prisoner had been allowed to be present at the hearing then 2255 would have provided an adequate or effective remedy. This Court reversed, and sent it back to the lower court. This is indicative that of the flexibility that the word "appears" bring to the table.

It is also consistent with the related statute section 2254(b)(1)(11). "Circumstances exist that renders such process ineffective." See statutes, Justice Frankfurter explaining "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, some reflections on the reading of statues, 47 column. L. REV. 527, 539 (1947) see also WIlliams v Taylor id.

Moreover, the Tenth Circuit's Prost Test did not read the whole text. It omitted important words out of 2255(e), and then dropped down to the AEDPA's 2255(h). This provision is concerned with new claims, see 2255(h)(1) and (2). However, it is not triggered when old claims are revisited. For example, 2255(e)'s preclusive provision (has failed) allows a prisoner to relitigate claims that are based on statutory interpretation.

These claims are not new, and this is in concert with this Court's Davis v United States, Id. Furthermore, the AEDPA is not undermined because in a sense the convictions never took place. In this case Hill was not charged and convicted therefore, how could finality rest where it ought not to. See Teague v Lane 489 US 288 quoting Mackey 401 US at 693 "there is little societal interest in permitting the criminal process to rest at a point it ought properly never to repose."

In this case, the undisputed record demonstrates that Hill has not been duly convicted of 21 USC 848(b). Surely, Finality cannot rest. However, Hill was not asking the habeas corpus court to vacate the judgment of conviction, even though it is null and void. It is up to the habeas court to fashion the appropriate relief Hill was entitled. See, Peyton v Rowe 391 US 54 (1968). "The federal statute authorizing the United States District Courts to issue writs of habeas corpus on behalf of prisoners who are in custody in violation of the Constitution of the United States (28 USC section 2241(c)(3) does not deny the federal courts power to fashion appropriate relief other than immediate release.

The executive branch can keep their judgment of conviction; however, the Warden cannot execute the invalid judgment. Hill asked for relief from the cruel and unusual punishment. For instance, Hill finds support in Berman v United States 302 US 211 (1937), " a judgment of conviction and sentence in a criminal case, is not affected by the fact that execution of the sentence is suspended...."

The Solicitor General did not respond to the question opened by the Tenth Circuit, which goes directly to jurisdiction of the proceedings, this question remains open.

> "But a panel of this court cannot overrule the judgment of another panel absent.... and intervening Supreme Court decision that is contrary to or invalidates our previous analysis."

This open question and the court rewriting congress's 2255(e) provision calls for this Court to grant review. The Tenth Circuit has suspended the writ of habeas corpus. Moreover, this Court instructed the Solicitor General to respond. But he did not respond to Hill's questions and arguments. Instead, he put forth his own arguments.

His actions must be taken as a concession, because Hill's questions were not addressed in the response. The Solicitor General did not address whether Alleyne essential holding set forth a substantive rule, and that a statute can only have one meaning. Instead, the Solicitor General argued that Alleyne's new rule of constitutional law cannot be applied retroactively.

The Solicitor General's argument is misplaced. He argues a claim that was never presented by Hill. Mr. Hill's claim is raised under a substantive rule. Furthermore, the authority relied upon do not apply to Hill's set of circumstances. Hill's set of circumstances applies to thousands of prisoners who remain illegally in custody of the B.O.P.

It is mind-blowing how the lower courts immediately rule that Alleyne cannot be used in a habeas corpus, as soon as the name Alleyne is cited. The courts do not answer the questions that are before them. The Solicitor General wishes that this Court takes the same approach. In this way the Executive Branch does not have to address, Alleyne's substantive rule.

A rule that returns crimes back to their proper place of designation, as a crime not a sentencing factor. Once Congress wrote crimes, it (848)(b) was always a crime, that had to be charged and proven beyond a reasonable doubt.

This case presents the character of compelling reasons for this Court to grant review.

Sincerely,

Nathan L. Hill

4-12-19