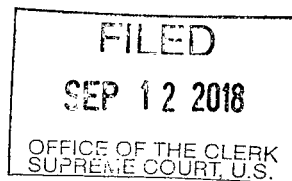


No. 18-7735

IN THE
SUPREME COURT OF THE UNITED STATES



Michael Davis — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Michael H. Davis

Michael Davis

(Your Name)

FCI Butner II, PO Box 1500

(Address)

Butner, NC 27509

(City, State, Zip Code)

NA

(Phone Number)

QUESTION(S) PRESENTED

Question One:

WHETHER THE S. C. CODE ANN 44-53-370 IS OVERLYBROAD AND INDIVISBLE
AND NO LONGER QUALIFIES IN LIGHT OF BOTH MATHIS V US AND DESCAMPS?

Question Two:

WHETHER THE FOURTH CIRCUIT COURT MAY ANNOUNCE THE MATHIS & DESCAMPS
RULINGS AS RETROACTIVE FOR THE FOURTH CIRCUIT AS THE SIXTH AND
ELEVENTH CIRCUITS HAVE ANNOUNCED THEM RETROACTIVE FOR THEIR CIRCUITS?

LIST OF PARTIES

- [x] 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 18-6123 (4th Cir. June 25, 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☒ is unpublished.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 B to the petition and is

☒ reported at 5:17-HC-02047 (EDNCWD Jan. 6, 2018); 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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 June 25, 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: _____, 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

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

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.

2007-- U.S.S.G 4b1.2(b) OF THE GUIDELINES MANUAL VERSION

..The term "controlled substance means", an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or possession of a controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

COMPARED TO:

S.C. CODE ANN. 44-53-370

It is unlawful for any person: (1) to manufacture, distribute, dispense, "**deliver, purchase, aid, abet, attempt, or conspire**" to manufacture, distribute, dispense, deliver, or **purchase**, or possess

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED CON'T

with intent to manufacture, dispense, deliver, or purchase a controlled substance or a controlled substance analogue or (2) do the same with a counterfeit substance (See App'x G for Actual language and cases)

STATEMENT OF THE CASE

In 2007, the petitioner plead guilty to possession with intent to distribute 50 grams or more of cocaine base, which carried a 10 year statutory minimum at the time, but today carries a 5 yr mandatory minimum.(US v Davis, 7:07-cr-00086-D-1 (EDNC). In Feb of 2008, the court sentenced the petitioner to 300 months based upon the PSR finding that the petitioner was a career offender due to the 2 prior convictions from South Carolina and Maryland. However, the petitioner's Maryland conviction was Vacated and the petitioner moved to have the Career offender enhancement removed, but instead of correcting the sentence, the Court denied the relief, although at the time of the initial federal sentencing, the ...Maryland... conviction had not become final and the petitioners case was vacated on the Direct appeal and on top of that the petitioners sentences were suspended and no time was served on either conviction. (See DOC 28, in App'x D & E). However, even though the Maryland priors were Vacated, the Court "substituted" the Vacated priors with the North Carolina prior under NCGS 90-95. However, the 4th Circuit has just ruled that the the government lost its right to substitute in US v Hodge 17-6054 (4th Cir. Aug. 22,2018..the Government relied upon the original priors & doesn't get a double bite at the apple and has lost its right to substitute now, because one no longer qualifies..therefore we order the defendant to be resentenced without the increased punishment).

After the denials, this Court ruled on a flurry of criminal defendant friendly cases such as Carachuri-Rosendo, which Vacated the 4th Circuits US v Simmons ruling "twice", then the Court ruled on Descamps v US and then Mathis v US, along with Molina-Martinez and Rosales-Mireles v US, in which, when applied to this case and many others like Davis, it does show that the petitioner's sentence violates the Glover v US decision and 5th & 6th Amendments by adding the additional 100 plus months and failing to remove them as of this filing.

However, the petitioner filed a direct appeal, because he did object to the career offender finding, then filed a 2255 once the priors were vacated, then filed a successive 2255 requesting permission to file a successive 2255 in light of Mathis, then filed a 2241 which was denied because the Court misconcieved its power to announce the Mathis ruling as retroactive for the Circuit just as the 6th and 11th Circuit have finally conceded in regard to the Descamps and Mathis retroactive natures in their respective Circuits. Because of this misconception, the petitioner was denied and then the petitioner Appealed and was denied as well. However, after the Appeal, the 4th Circuit also overturned its longstanding precedent and opened the 2241 relief to those who were given the increased penalty but the priors no longer qualify today. The petitioner is seeking for the court to finish the question raised by this Court in Rosales-Mireles v US oral arguments that was raised by the Honorable Justice Alito..which is found on the last

page of the oral arguments of Mireles and states:

Alito.."Would you draw a distinction between guidelines errors and other sentencing errors?"

Davidson: Yes

Alito..and what would be the ground for that?

Davidson..It would depend on the "direct effect" the particular sentencing error would have on the outcome and whether or not the error frustrated the purposes served by the rule in question

Alito..**Suppose there was a question about whether a defendant was properly treated as a recidivist..whether.. a heavier sentence imposed based on prior criminal conduct**

Davidson..If it were erroneous and that's what the--if it were erroneous and the direct--the record demonstrated that the district court "was influenced in --in choosing the sentence because of that error, then I think that would reflect an error that improperly influences the discretion of the district court and could be serious enough to meet all 4 prongs.

Roberts..Thank you counsel, the case is submitted.(see App'x H)

In this case, the Court was improperly influenced and later substituted the prior, therefore, the question for the Court is whether the South Carolina statute is overlybroad and is broader than the Career Offender application thus requiring resentencing and if the District Court has the power to announce Mathis &

as Retroactive in the 4th Circuit as well? (See App'x A-C)

REASONS FOR GRANTING THE PETITION

This Court has already ruled that the executive branch is expected to speak with one voice if the nation is to be respected and when 2 US attorney offices have conceded to 1 point , all US Attorney offices are bound by that concession.(Munaf v Geren 553 US 674,702 (Sp. Ct 2008) and Depierre v US 131 S.Ct 2225 (2011)).

In the Depierre decision, this Court held that..the US Sp. Court may rule inartful legislative drafting, does not excuse the Court from the responsibility of construing a statute (in this case, both 4b1.2(b) in comparison to SC Code 44-53-370) as faithfully as possible. This Court also went further and stated that ..it is not for the Sp. Ct to "rewrite a statute" so that it covers only what the court thinks is necessary to achieve what it thinks Congress really intended. In this case, did Congress intend to include the "purchasing & financing.", this court answered that in both Descamps and Mathis rulings, and stated that the overly broad statutes no longer categorically qualify. In making this ruling, the Courts around the country, except the 4th Circuit has found that several state and federal drug convictions no longer qualify because they ... included things not found in the federal generic definitions or plain text of the guidelines. (See US v Winstead 12-3036 (DC App. May 25,2018)..the attempted drug convictions no longer qualify and the attempted distribution is not included in the guideline and thus the guidelines and commentary are inconsistent; US v McKibbin 16-1493 (10th Cir. 2017)..the Colorado Rev. Stat. 18-18-

405(1)(a)..defines sale to mean..a barter,an exchange, or a gift, or an offer therefore ... the court erred in classifying the Colorado conviction as a "controlled substance offense"; see also US v Madkins 15-3299 (10th Cir. 2017)..the Kansas prior no longer qualifies as a controlled substance offense in light of Mathis; US v Hinkle 832 F.3d 569 (5th Cir. 2016)..the Texas drug conviction no longer qualifies in light of Mathis; Sandoval v Sessions 13-71784 (9th Cir. 2017)..Org. Rev. Stat. 475.992,which is now 475.752 permits a conviction for delivery based on mere solicitation, but the federal definition does not punish solicitation)

In this case, the Federal guidelines definitions for a controlled substance does not include within the plain text things found in the South Carolina statute such as purchase,deliver, at least these were not apart of the federal definition at the time the petitioner was sentenced...nor is finacing (See App'x G cases)

In the Depierre decision, this Court ruled that..the rule of lenity"requires" ambiguous criminal laws to be interpreted in favor of the defendnats subjected to them. Here,the South Carolina and even the North Carolina 90-95 both have been declared to be broader than the federal statutes, but the 4th Circuit has failed to conform to the Descamps and Mathis duo as the other circuits have done, thus creating the circuit splits. But the split doesn't stop here. The 6th and 11th Circuit have announced that Descamps and Mathis are retroactive.(See West v Barhart E.D.Ky July 18,2018)

In West, the Sixth Circuit Court dealt with the same 2241 vehicle being used to challenge a prior career offender predicate that no longer qualifies today in wake of the Mathis & Descamps rulings. However, for years since the Descamps ruling was issued in 2012, it did take 4-5 yrs of case arguments before the 6th and 11th Circuit finally conceded the retroactivity of Descamps and then 2 yrs later they conceded the Mathis ruling as being retroactive as well, but it eventually happened and thus relief began to be granted. (See West, supra..Mathis is a case of statutory interpretation and is retroactive and it was unavailable when he filed his previous post conviction motions. :.and if the case,as clarified in Mathis been applied at the time of West's sentencing, he would not have been deemed a career offender and thus West 2441 petition is Granted and the sentence is Vacated and the resentencing should take place)

But even with the abundance of caselaw that supports the petitioner's relief, the 4th Circuit has stated that"although petitioner filed the current action in a 2241, he attacks the legality, rather than the execution, of his sentence (see App'x B, Doc 8, p. 2 last parg) and also..Mathis did not establish a new rule of constitutional law. In making this decision, the 4th Circuit adopted the 9th Circuit case of Arazola-Galea v US instead of adopting the Mathis ruling as retroactive for this Circuit inspite of other circuits, just as the 6th and 11th cir have done. Therefore, the Circuit splits are ripe, where the

this Court must now intervene and announce Mathis as retroactive for all circuits of Grant, Vacate and Remand (GVR) back to the 4th Circuit to allow the Court to utilize the Ashley v US 01-1733 (7th Circuit ruling 2001) and declare Mathis as retroactive for its on Circuit , in which it does have the inherent power to do.

This Court has stated that the writ of habeas corpus is a bulwark against convictions that violate fundamental fairness and as the judicial method of lifting undue restraints upon person liberty. In fact, because of this language the 4th Circuit ruled in favor of US v Wheeler, 16-6073 (4th Cir. 2018) and upheld it on the Governments En Banc request because of the national importance and declared that those whose priors no longer qualify due to a intervening change, may use the 2241 to challenge their sentences.

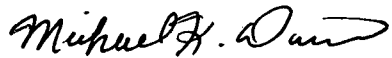
After that, the 4th Circuit also ruled in favor of US v Hodge 17-6054 (4th Cir. 2018) and declared that.."We reject the governments attempt to revive Hodge's enhancement by arguing that the 1992 drug conviction could serve as a substitute predicate and that the government has lost its right to use the conviction to prevent Hodge from obtaining relief"

Therefore, this Court should announce Mathis as being retroactive or in alternative decide the issue of whether the S.C Code Ann 44-53-370 is overly broad and no longer can be used as a Career offender predicate in light of Mathis, Descamps, Mireles, Hodge and Wheeler. in alternative, grant the GVR and remand with instructions to determine the Mathis retroactivity for the 4th Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael K. Davis, 50837-056

Date: Sept. 12th, 2018