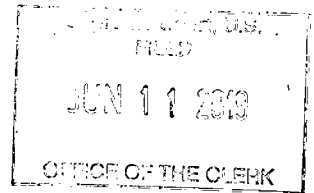


18-9705 ORIGINAL

No. \_\_\_\_\_



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Leonard Moore-Pro Se — PETITIONER  
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Sixth Circuit.  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Leonard Moore Reg. No. 40884-039

(Your Name)

Federal Correctional Institution  
P.O.Box 1000

\_\_\_\_\_  
(Address)

Milan, Michigan. 48160

(City, State, Zip Code)

Prisoner no phone allowed.

(Phone Number)

## QUESTION(S) PRESENTED

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- I. Should the Sixth Circuit Court of Appeals have issued a Certificate of Appealability in the instant case to resolve an open question in the Sixth Circuit of "whether or not 18 U.S.C. §1959(a)(3) qualifies as a crime of violence for the purpose of §924(c)(3)(A) element clause?...6-7
- II. Based on this Court's holdings in *Massaro v. United States*, 538 U.S. 500, 155 L.Ed.2d 714, 123 S.Ct. 1690 (2003), did the Sixth Circuit error in determining that petitioner waived his ineffective assistance of counsel claims because he did not raise them on direct appeal? .....8-9
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## 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 B 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☒ is unpublished.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 C 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 February 6, 2019.

☐ 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: April 8, 2019, and a copy of the order denying rehearing appears at Appendix A.

☐ 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: No person shall be.....deprived of life, liberty, or property, without due process of law;

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right.....to have the Assistance of Counsel for his defense.

Title 28 U.S.C. §2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## STATEMENT OF THE CASE

Petitioner Leonard Moore was indicted by a federal Grand Jury in the Eastern District of Michigan in a multi-count indictment. In 2010, a jury convicted Moore of conducting or participating in the affairs of an interstate enterprise through a pattern of racketeering in violation of 18 U.S.C. §§1962(d) and 1963(a) (Count One) conspiring to participate in the affairs of an interstate enterprise through a pattern of racketeering in violation of §§1962(d) and 1963(a), (Count Two), assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. §1959(a) (3), (Count Nine), conspiring to transport stolen property in interstate commerce in violation of 18 U.S.C. §371 and 2312; (Count Fifteen), conspiring to possess with intent to distribute and distribution of a controlled substance, in violation of 21 U.S.C. §846, (Count Nineteen), and using a firearm during and in relation to a crime of violence, in 18 U.S.C. §924(c) (Count 33).

The district court sentenced Moore to a total term of 228 months of imprisonment. The Sixth Circuit vacated Moore's sentence on Counts 19 and 33 and remanded for resentencing but affirmed all convictions sentences on other counts. See *United States v. Donovan*, 539 F. App'x 648, 661-62 (6th Cir. 2013). After resentencing hearing the district court sentenced Moore to a total term of 204 months of imprisonment. The Sixth Circuit affirmed the new sentence. See *United States v. Moore*, 634 F.App'x 483, 485, 489 (6th Cir. 2015).

On February 6, 2017, Moore filed a §2255 motion to vacate

raising six grounds for relief: (1) trial counsel was ineffective by failing to argue before trial that Counts 1 and 19 of the second superseding indictment were defective; (2) Count 33 should be vacated because assault with a dangerous weapon in violation of Michigan Compiled Laws §750.82, does not qualify as a crime of violence for the purpose of 18 U.S.C. §924(c); (3) counsel performed ineffectively by failing to request an evidentiary hearing on Count 33; (4) sentence on Count 33 is illegal; (5) trial counsel performed deficiently by failing to move for a JUDGMENT OF ACQUITTAL ON Count 1 at close of government's evidence; and (6) trial counsel was ineffective for failing to argue before trial that Counts 1 and 19 were duplicitous. The district court denied relief on the merits of Moore's claims and declined to issue a Certificate of Appealability (COA) and denied leave to proceed in forma pauperis on appeal. (See Appendix D, district court Order denying 2255 relief).

On October 23, 2018, Moore filed an Application For A Certificate Of Appealability to the Sixth Circuit, (Appendix C). On February 6, 2019, the Sixth Circuit denied Moore's request for a COA. On March 4, 2019, Moore filed a petition for panel rehearing and rehearing en banc. On April 8, 2019, the Sixth Circuit entered an Order denying Moore's request for panel rehearing.

Moore now petitions the Supreme Court for review of the Sixth Circuits denial of his request for a COA.

## REASON FOR GRANTING THE PETITION

The question of whether or not 18 U.S.C. §1959(a)(3) qualifies as a crime of violence for purpose of 18 U.S.C. §924(c)(3)(A) is undecided in the Sixth Circuit and is an open question of law that must be decided by the Sixth Circuit Court of Appeals.

Here jurists of reason could debate (or for that matter agree that) Moore's request for a Certificate of Appealability (COA) should have been resolved in a different manner or that the issue Moore presented was adequate to deserve encouragement to proceed further, or that the Sixth Circuit's denial of a COA on the issue presented was debatable or wrong.

### ISSUE NUMBER ONE

Does 18 U.S.C. §1959(a)(3) have as an element the use, attempted use, or threatened use of physical force against the person or property of another and, therefore qualify as a crime of violence for the purpose of 18 U.S.C. §924(c)(3)(A)? and does an open undecided question of circuit law on the issue presented require that a certificate of appealability should issue on the question presented to establish law of the Circuit?

In denying Moore's request for a COA the (unidentified) circuit judge stated,

"Reasonable jurists would agree that §1959(a)(3) has as an element the use, attempted use, or threatened use of physical force against the person or property of another and, therefore qualifies as a crime of violence for the purpose of §924(a)(3)(A)".  
(See Appendix B, page 3).

The Circuit Judge cites no Sixth Circuit authorities or any other Circuit authorities supporting his/her finding's that "§1959(a)(3) qualifies as a crime of violence for the purpose of §924(c)(3)(A) (element clause)". A through search of Sixth Circuit authority reveals the issue of whether or not "§1959(a)(3) qualifies as a crime of violence for purpose of §924(c)(3)(A), is an open question of law that must be decided by the Sixth Circuit Court of Appeals.

Because the question of whether or not "§1959(a)(3) qualifies as a crime of violence for purpose of §924(c)(3)(A), is an open question in the Sixth Circuit Moore is entitled to a certificate of appealability in order to resolve the question and establish circuit law on the issue presented.

Moore submits there was never a more appropriate case for a certificate of appealability because "reasonable jurists could debate (or for that matter agree that) the issue that was presented in Ground Two of Moore's §2255 motion should have been resolved in a different manner or that the issue presented was adequate to deserve encouragement to proceed further.

Moore respectfully requests the Supreme Court remand this case to the Sixth Circuit with instructions to grant a COA On Issue Number One.

## ISSUE NUMBER TWO

When addressing the merits of Moore's Ground's Three and Four, the Sixth Circuit erroneously determined that Moore had "waived appellate review of grounds three and four", citing *Jackson v. United States*, 45 F.App'x 382, 385 (6th Cir. 2002). Ground Three is based on an "ineffective assistance of counsel claim that does not have to be raised on direct appeal". See *Massaro v. United States*, 538 U.S. 500, 155 L.Ed.2d 714, 123 S.Ct. 1690 (2003) "Convicted federal criminal defendant held able to first bring ineffective-assistance-of-counsel claim in collateral proceeding under 28 U.S.C. §2255 regardless of whether defendant could have raised claim on direct appeal". *Id.* The Sixth Circuit erred by finding that Moore had waived his ineffective assistance of counsel claim raised in Ground Three. The Jackson case cited by the Sixth Circuit supports Moore's argument that he did not waive his ineffective assistance of counsel claim raised in Ground Three, because he did not raise the claim on direct appeal. In Jackson the court held,

"We are therefore content to adhere to existing Sixth circuit precedent and hold that the ineffective-assistance claims are subject to existing to review in the district court, having been timely raised in petitioner's §2255 motion. See *Hughes v. United States*, 258 F.3d 453, 457, n.2 (6th Cir. 2001)(holding that petitioner did not procedurally default his ineffective assistance of counsel claim by failing to raise it on direct appeal". *Id.* 45 F. App'x 385 (6th Cir. 2001).

The Sixth Circuit determination that Moore's ineffective assistance of counsel claim raised in Ground Three is waived because Moore failed to raise the ineffective assistance claim on direct appeal is debatable among reasonable jurists and makes the required showing of the substantial showing of the denial of a constitutional right under the 5th and 6th amendments of the constitution.

Moore respectfully requests the Supreme Court remand this case to the Sixth Circuit with instructions to issue a COA on Issue Number Two.

#### GROUND NUMBER THREE

Prior to trial Moore's trial attorney failed to challenge Racketeering Acts 10 (conspiracy to distribute steroids), Act 11 (conspiracy to distribute controlled substance) and Count 19 (conspiracy to possess with intent to distribute) because the three conspiracy charges state that the Defendant did knowingly conspire with another "to commit offenses against the United States". Although the three conspiracies are charged under 21 U.S.C. §841 and §846, the language "commit offenses against the United States" are not "elements" of the drug conspiracy statutes 21 U.S.C. §841 and §846. The language "to commit offenses against the United States" are essential elements of the general conspiracy statute in 18 U.S.C. §371 and cannot be used to charge or prosecute a federal drug offense. See *United States v. Meacham*, 626 F.2d 503 (1980). The charging of separate and distinct conspiracy statutes in the same count

constitutes impermissible duplicitous charging and violates Moore's constitutional 5th and 6th amendment rights to "due process" and "a fair trial". Due to the duplicitous charging it cannot be determined from the jury's general verdict which conspiracy elements the jury found Moore guilty of, was it under an "agreement to violate drug laws" or "to commit offenses against the United States"?

The district court and Government both admit error in the charging of two separate conspiracy elements in the same counts but harmless error and that Moore's trial counsel was not ineffective for failing to challenge the duplicitous charging prior to trial. (See Appendix D, district court order denying 2255 motion, pages 11 and 12, 4. Failure to Challenge Duplicious Charging). Reasonable jurists could debate or agree that the duplicitous charging prejudiced Moore's constitutional right to a fair trial. Moore requests the Supreme Court remand this issue back to the Sixth Circuit with instructions to issue a COA on the issue of duplicitous charging.

#### GROUND NUMBER FOUR

Moore was waiting on "resentencing" based on a remand from the Sixth Circuit (See Donovan, 539 Fed. Appx. at 653) when the Supreme Court decided *Rosemond v. United States*, 134 S.Ct. 1240 (2014). Because Moore's conviction was not finalized when the Rosemond case was decided, Moore was entitled to the holding's in Rosemond.

Moore's trial attorney was ineffective for not challenging

Moore's conviction and sentence prior to resentencing based on Rosemond. The Government presented no evidence of a "practical certainty" that Moore knew that firearms would be used during the illegal conduct. In Rosemond the Court held that the "Government makes its case by proving that the defendant actively participated in the underlying drug trafficking crime or crime of violence with advanced knowledge that a confederate would use or carry a gun during the crime's commission". Rosemond, Id.

Reasonable jurists could debate or for that matter agree that Moore's Rosemond claim should have been resolved in a different manner or given encouragement to proceed further on appeal. Moore requests the Supreme Court remand this issue back to the Sixth Circuit with instructions to issue a COA on his Rosemond issue.

#### GROUND NUMBER FIVE

In addressing Moore's Ground Four of his 2255 motion that raises a sentencing claim under Alleyne v. United States, 133 S.Ct. 2151, the district court and Sixth Circuit erred by finding that Moore Alleyne claim was barred because Moore had already raised the Alleyne sentencing claim on direct appeal after his "first sentencing". But the Alleyne claim raised on direct appeal after Moore's first sentencing is not based on the same type of Alleyne claim raised in his §2255 motion after his "second sentencing". The Alleyne claim raised in Moore's §2255 did not exist at his first sentencing

and the new Alleyne error occurred at his second sentencing, when the district court "relied on judge found facts to exceed the 60-month mandatory minimum and added three years for a sentence in violation of Alleyne."

Moore's resentencing produced a new "judgment" and a new Alleyne error based on "judge found facts" that increased the mandatory minimum. On appeal from Moore's resentencing the Sixth Circuit stated ("It may seem anomalous that a court would be prohibited from using its own factual findings to impose a higher mandatory minimum, but permitted to use its own factual findings to increase the sentence over the mandatory minimum, "but" Alleyne seems to contemplate and accept the possibility"). See Moore, 634 F. App'x at 487-88. (Appendix E). In the instant case reasonable jurists could find it debatable (or for that matter agree) whether or not "a sentencing court could use its own factual findings to increase the sentence over the mandatory minimum". The Sixth Circuit should have granted Moore a certificate of appealability on his Alleyne sentencing claim raised in Ground Four of his §2255 motion.

Moore requests the Supreme Court to remand this case to the Sixth Circuit with instructions to issue a COA on the Alleyne issue raised in Ground Four of his §2255 motion.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Leonard Moore

Date: JUNE 8<sup>th</sup> 2019

## APPENDIX INDEX

- Appendix-A: Sixth Circuit Judgment Order denying request for Panel Rehearing. Dated April 8, 2019.
- Appendix-B: Sixth Circuit Judgment Order denying request for Certificate of Appealability. Dated February 6, 2019.
- Appendix-C: Petitioner's Application For A Certificate of Appealability to Sixth Circuit.
- Appendix-D: District Court Order denying 2255 relief and denial of certificate of appealability.
- Appendix-E: United States v. Moore, 634 F. App'x at 487, (relevant part).