

No. _____

19-5944

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY SCOTT

(Your Name)

PETITIONER

FILED

AUG 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

(Your Name) JERRY SCOTT (PRO SE)

REG. NO. 14990-045

U.S. PENITENTIARY

P.O. BOX 1000

(Address) LEAVENWORTH, KS 66048

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- [1] WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN NOT GRANTING A "CERTIFICATE OF APPEALABILITY" WHEN EVEN AFTER UNITED STATES v. SWOPES, 892 F.3d 961 (8th Cir. 2018), THERE IS STILL DEBATABILITY OVER WHETHER AN OFFENSE LIKE MISSOURI ROBBERY SECOND DEGREE IS NECESSARILY A CRIME OF VIOLENCE?
- [2] WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN MAKING THE ORIGINAL SENTENCE-ENHANCEMENT-RELIANCE UPON ORIGINAL FINDINGS OF FACT REGARDING MR. SCOTT'S PRIOR DOMESTIC ASSAULT CONVICTIONS?

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 _____; 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☒ is unpublished.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 _____; 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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 8, 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: June 14, 2019, 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

SIXTH AMENDMENT CONSTITUTIONAL RIGHTS

STATUTORY PROVISIONS:

28 U.S.C. § 2253

28 U.S.C. § 2255

OTHER:

UNITED STATES SENTENCING GUIDELINES § 4B1.1

STATEMENT OF THE CASE

Mr. Scott was charged with seven counts in the Western District of Missouri, related to three incidents:

- * As to a Car search on March 26, 2012:
 - * Count One, possession with intent to distribute PCP,
 - * Count Two, possession of a firearm by a convicted felon, and
 - * Count Three, possession of a firearm in furtherance of a drug trafficking crime;
- * As to a car search on May 12, 2010:
 - * Count Four, possession with intent to distribute PCP;
 - * Count Five, possession of a firearm by a convicted felon, and
 - * Count Six, possession of a firearm in furtherance of a drug trafficking crime, and
- * As to the search of a house on August 20, 2010:
 - * Count Seven, possession with intent to distribute PCP.

UNITED STATES v. SCOTT, 818 F.3d 424, 426-427 (8th Cir. 2016).

At jury trial, Mr. Scott testified that he was a user of PCP, not a distributor, and that when his cars were searched on March 26, 2012, and on May 12, 2010, he was in possession of those guns and drugs, but that the drugs were for his personal use, not for distribution. As concerned the search of the house on August 20, 2010, Mr. Scott denied ever staying at the house and said that, as to documents in his name found during a search of that house,

he did not know how those documents got there. The government developed that an eyedropper was found with the PCP seized in the March 26, 2012 car search and the August 10, 2010 house search, but no eyedropper was found in the May 12, 2010 search. The government further developed opinion testimony that eyedroppers are used by distributors to meter out quantities for sale.

The jury found Mr. Scott guilty as to Counts One, Two and Three related to the March 26, 2012 car search, and guilty as to Count Seven related to the August 20, 2010 house search; however, as to the May 12, 2010 car search, in keeping with Mr. Scott's testimony about the matter, and no presence of an eyedropper, the jury found Mr. Scott not guilty of the Count Six Charge of possession of PCP under Count Four, and guilty of the Count Five felon in possession of a firearm charge.

The District Court sentenced Mr. Scott, as a career offender, to a total sentence of 360-months; the career offender determination was based upon findings that all three of Scott's prior Missouri state convictions, one for robbery in the second degree and two for domestic assaults, were crimes of violence.

Mr. Scott brought direct appeal to this Court, raising multiple challenges to his convictions and sentences, including the claim that the career offender finding was erroneous because none of his three convictions could properly be found to be crimes of violence. The Court of Appeals for the Eighth Circuit upheld the District Court's determination, though addressing on

the merits of the two convictions for domestic assault ONLY. The Eighth Circuit first noted that Missouri Statute subsection 565.073.1(1) allows for conviction for knowing assaults of sorts which would be crimes of violence, but that subsections 565.073.1(2) and (3) allow for convictions for reckless conduct, clearly not crimes of violence; the Court then employed a modified categorical approach, examined solely the indictment filed against Mr. Scott, and noted that the wording of the indictment was in keeping with the wording in 565.073.1(1); the Court then inferred that Mr. Scott pled and was sentenced for those indicted offenses, and from that point determined that both domestic assault convictions were crimes of violence, and that those two convictions alone satisfied the career offender requirements; the Court did NOT reach the challenge as to the robbery second degree conviction.

Therefore, Mr. Scott timely brought a multifaced 28 U.S.C. § 2255 challenge against his convictions. Mr. Scott renewed challenges against ACCA and U.S.S.G. § 4B1.1 sentence enhancement predicated upon his Missouri State convictions for a robbery in the second degree and for two domestic assaults. Mr. Scott also challenged counsel ineffectiveness:

- * Against direct appeal counsel, in making untrue concessions regarding the supposed applicability of the two Missouri state convictions for domestic assault as predicates for application of enhancements under the Armed Career Criminal Act and U.S.S.G. § 4B1.1.
- * Against trial counsel in failing to seek severance of counts, and
- * Against trial counsel in failing to use expert and

other means to confront police officer testimony which cast possession of eyedroppers as proof of intent to distribute.

On June 5, 2017, the District Court, while denying relief upon most of the issues raised, granted resentencing in light of the panel decision in UNITED STATES v. SWOPES, 850 F.3d 979, 981 (8th Cir. 2017). The District Court decided to wait, until resentencing, to consider Mr. Scott's challenges against labeling of Scott's domestic assault convictions as crimes of violence. The District Court also appointed to assist Mr. Scott with further proceedings in the 2255 case, and in his request for a "Certificate of Appealability." Shortly thereafter, counsel timely filed a motion and suggestions pursuant to F.R.Civ.P 59. Shortly after that, the government sought, and was granted, a stay based upon the decision by the Eighth Circuit Court of Appeals to reconsider, *en banc*, the SWOPES panel decision.

On March 29, 2018, the Court of Appeals decided *en banc*, with Judge Kelly dissenting, that Missouri's Robbery Second Degree statute, in all cases, "requires the use or threatened use of violent force" and therefore any such robbery second degree conviction can be "properly counted" as a predicate for invocation of guidelines sentencing enhancements. See, UNITED STATES v. SWOPES, 886 F.3d 668, 671, 673 (8th Cir. 2018). The District Court entertained further briefing by Mr. Scott and the government, then set aside the original grant of relief, ruled adversely all of Mr. Scott's claims, and denied certificates of appealability.

Thereafter, Mr. Scott through Counsel filed a "Certificate of Appealability" to the Eighth Circuit Court of Appeals, but the Court denied "COA." Therefore, this Petition for Writ of Certiorari follows:

[1] WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN NOT GRANTING A "CERTIFICATE OF APPEALABILITY" WHEN EVEN AFTER UNITED STATES v. SWOPES, 886 F.3d 668 (8th Cir. 2018), THERE IS STILL DEBATABILITY OVER WHETHER AN OFFENSE LIKE MISSOURI ROBBERY SECOND DEGREE IS NECESSARILY A CRIME OF VIOLENCE?

As having mentioned above, the majority in the EN BANC decision in SWOPES, decided that, always and everywhere, Missouri Robbery in the Second Degree was always a crime of violence. *Id.* 886 F.3d at 671-673. In keeping with this decision, the District denied Mr. Scott's challenge against reliance upon Scott's second degree robbery conviction as a predicate for a consequent sentencing enhancement. Even after the EN BANC decision in SWOPES, there are three reasons why the question, about whether Missouri robbery in the second degree is always a crime of violence, remains one upon which "jurists of reason could disagree," and thus is a question eligible for issuance of a certificate of appealability. BUCK v. DAVIS, 137 S.Ct. 759, 773 (2017).

First, as firm as the decision in SWOPES decision may have been, there still arose an equally firm dissent. Courts from outside the Eighth Circuit have found that the differing of reasonable judicial thought, as demonstrated in a dissent, should be reason enough for the matter to warrant a COA on the subject. See, JONES v. BASINGER, 635 F.3d 1030, 1039-1040 (7th Cir. 2013); TANKLEFF v. SENKOWSKI, 135 F.3d 235, 242 (2nd Cir. 1998). This

PEPPER v. UNITED STATES, 562 U.S. 476, 506-507 (2011); WILLIAMS v. CITY OF DOTHAN, ALABAMA, 818 F.2d 755, 758 (11th Cir. 1987).

For all three of these reasons, the decision on direct appeal is not entitled to law of the case treatment.

Mr. Scott produced the judgment entry by the Missouri Court to demonstrate that his pleas of guilty and sentencings were for "Dom Aslt-2nd Deg," with no specification as to which Statutory subsection was admitted or found. Mr. Scott has argued that, whatever specifics there were in the indictment, those did not find their way into this record of the plea and sentencing engaged by the Missouri Court, and thus there was not sufficient proof to justify a finding that these offenses were crimes of violence. A similar argument carried the day for the defendant in UNITED STATES v. MARTINEZ, 756 F.3d 1092, 1096-1098 (8th Cir. 2014). The MARTINEZ decision shows at least debatability of this matter.

Moreover, when no specifics appear in a judgment regarding a matter of import, there is a fatal ambiguity. UNITED STATES v. BARNETT, 870 F.2d 953, 954-955 (3rd Cir. 1989); STAPLES v. COMMONWEALTH, 454 S.W.3d 803, 824 (Ky.banc 2014). When Courts have entertained a presumption to clear up an ambiguity, that presumption has been in favor of the conviction being seen to be for the least onerous form of the offense. PEOPLE v. SANCHEZ, 2011 WL 4063161, *16 (Cal. Ct. App. 2011). More commonly, the Courts have found that such an ambiguity cannot be resolved without a complete redetermination of the case,

UNITED STATES v. BARNETT, supra; STAPLES v. COMMONWEALTH, supra.

Thus, it cannot be assumed that the ambiguous, generalized judgment of guilt on "Dom Aslt-2nd Deg" was a conviction for the most onerous form of the offense, as charged in the indictment; there was nothing in the judgment permitting that assumption. Thus, upon direct appeal, the panel of this Court got the law and the facts wrong in conflating the facts of a charge to be the facts of a conviction, and Mr. Scott's appellate counsel was ineffective in allowing that conflation to occur uncontested.

Under the facts and the law, as set forth above, the District Court should have taken up this matter and found that the convictions for "Dom Aslt-2nd Deg" could not be said to be for violent felonies, and therefore those actual convictions against Mr. Scott could NOT be used as predicates for ACCA and U.S.S.G. § 4B1.1 enhancements against Mr. Scott.

It must be noted as well, in passing, that the direct appeal panel ERRED when they considered the two domestic assault convictions as separate offenses. To the contrary, because the two incidents were charged in the same charging document, because the sentences were imposed on the same day, and because there was no intervening arrest between the two incidents, U.S.S.G. § 4A1.2(a)(2) mandated that these matters be treated as a single sentence for purposes of U.S.S.G. § 4A1.1(b). The government has conceded the point (Doc. 19, p.11, fn.3).

Hence, for all the above mentioned reasons, this Honorable

Court should GRANT Certiorari, Vacate the Eighth Circuit's Order of Dismissal, and Remand to allow Mr. Scott to argue the issue herein.

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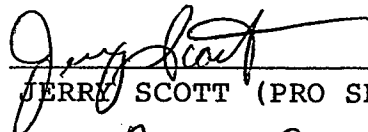
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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


JERRY SCOTT (PRO SE)

Date: AUG. 29, 2017