19-5964

NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

OCTOBER TERM, 2019

IN RE: DWIGHT CARTER SR,
Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. 2241

DWIGHT CARTER SR. #86120-004
UNITED STATES PENITENTIARY COLEMAN-2
P.O. BOX 1034
COLEMAN, FLORIDA
33521

QUESTIONS PRESENTED FOR REVIEW

1.) Because Petitioner's 18 U.S.C. 924(c) conviction identified conspiracy to commit Hobbs Act Robbery, 18 U.S.C. 1951, as a predicate to support his 924(c) conviction, did Petitioner meet his burden under 28 U.S.C. 2244(B)(3)(C) and 2255(h)(2), of establishing entitlement to file a second or successive 2255 in the District Court in light of United States v. Davis, 139 S.Ct. 2319 (2019), which announced a "new rule of constitutional law" made retroactive to cases on collateral review?

2.) Whether the "prima facie" standard under 28 U.S.C. 2244(B)(3)(C) require(s) a court of appeals to engage in a "strict merits analysis", when deciding whether to grant or deny a "pro se" prisoner's application for leave to file a second or successive 2255, that relies on a "new rule of constitutional law", 2255(h)(2), such as United States v. Davis, 139 S.Ct. 2319(2019)?

3.) Did the Eleventh Circuit invert the statutory order of operations under 2244(B)(3)(C) and 2255(h)(2) by deciding the "merits" of the Petitioner's **Davis**, 139 S.Ct. 2319(2019) based claim, before denying leave to file a second or successive 2255 in the District Court?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

NO: _____

In Re: Dwight Carter, Sr.
Petitioner

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Dwight Carter Sr. respectfully petition's the Supreme Court of the United States, or a Justice thereof, for a writ of habeas corpus to review the judgement of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-12456 in that Court on July 26, 2019, In Re: Dwight Carter Sr., which denied his application for leave to file a second or successive 28 U.S.C. 2255, in light of United States v. Davis, 139 S.Ct.2319(2019).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in Appendix (A) to this petition and was not published.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 2241 and Rule 20.4(a) of the Supreme Court of the United States.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following Constitutional provisions, treaties, statutes, rules, ordinances, and regulations:

U.S. CONST. AMEND. V

(N)or shall any person be..... deprived of life, liberty or property without due process of law as outlined in United States v. Davis, 139 S.Ct. 2319(2019).

U.S. CONST., ART. 1, SEC. 9, CLA. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when cases of Rebellion or Invasion of the public safety may require it.

STATEMENT OF THE CASE

Indictment and Post Conviction Proceeding:

Relevant here, On April 20, 2010, Petitioner Dwight Carter and his Co-defendant's Emmanuel Maxime, Erskaneshia Ritchie, and Nikka Thomas were all charged in a superseding indictment with; conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951, (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), (Count 2); and carrying a firearm during a crime of violence, as set forth in Counts 1 and 2 of the superseding indictment, in violation of 18 U.S.C. 924(c), (Count 3). Count 3 also charged Petitioner and his Co-defendent's with causing death of a person in a way that constitutes murder through the use of a firearm in the course of violating 924(c), in violation of 18 U.S.C. 924(j)(1).

Because Petitioner's 924(c) conviction referenced conspiracy to commit Hobbs Act robbery as a predicate crime of violence, Petitioner sought leave under 28 U.S.C. 2244 to file a second or successive 28 U.S.C. 2255, in light of this Court's recent holding in United States v. Davis, 139 S.Ct. 2319(2019).

In **Davis**, this Court extended its holdings in Johnson and Dimaya to 924(c) and held that 924(c)(3)(B)'s residual clause, like the residual clauses in ACCA and 16(b), is unconstitutionally vague. Davis, 588 U.S. at _____, 139 S.Ct. at 2336. In doing so, this Court held that 924(c)'s residual clause failed the fair notice test and that it violated due process of law, in violation of the

Fifth Amendment to the United States Constitution.

Like **Davis**, Petitioner was charged with and convicted of both, conspiracy to commit Hobbs Act robbery in Count 1; and possessing a firearm during the Hobbs Act conspiracy in violation of 924(c) in Count 3. In short, the 924(c) charge in Count 3 undisputedly relied on the Hobbs Act conspiracy charge in Count 1 of the indictment.

The thrust of Petitioner's argument in his application for leave to file a second or successive 2255 under 2244 was that:(1) Petitioner's 924(c) conviction in Count Three, referenced both Conspiracy to commit Hobbs Act robbery in Count One and Substantive Hobbs Act robbery in Count Two; and (2) that, because the trial court or the jury instructions did not ask the jury to specify which predicate offense it relied upon to convict him of the 924(c) conviction in COunt 3, it is impossible to determine which predicate the jury used. Petitioner aruged that his 924(c) conviction **may** be "unconstitutional" in light of **Davis** and that he made the necessary "prima favice" showing under 28 U.S.C. 2244(B)(3)(C) and 2255(h)(2), which only requires "possible merit" to warrant a fuller exploration by the District Court.

Nevertheless, a three-Judge panel with one dissenting Judge, denied Petitioner permission to file a Second or Successive 2255 in the District Court, stating that Petitioner did not make a "prima facie" showing that his 924(c) conviction is unconstitutional in light of **Davis**. See App. Pg.(A).

Jury Instruction's and Guilty Verdict:

During the Petitioner's criminal trial, the District Court instructed the jurythat, to find the Petitioner guilty of violating 924(c), they had to find (1) "that Petitioner committed the crime of violence which is charged in Count I or II of the indictment," and (2) "That during the commission of that offense, Petitioner knowingly carried or used a firearm in relation to that crime of violence." **See Appendix (B)**

The jury was not instructed to specify which Predicate offense (Count I or II) it relied on to convict Petitioner on Count III. The jury's verdict was as follows:

> We, the jury, in the above-styled case, unanimously find the defendant, Dwight Carter:
> As to Count I, Guilty
> As to Count II, Guilty
> As to Count III, Guilty

As the jury verdict confirms, the jury returned a "general verdict" of guilty as to count's 1, 2, and 3. The verdict did not specifically identify which predicate that the jury used. **See Appendix (C)**

In light of these disputed facts, this 2241 habeas corpus petition now ensue's.

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER HAS MET HIS BURDEN UNDER 28 U.S.C. 2244(B)(3)(C) AND 2255(h)(2) OF ESTABLISHING ENTITLEMENT TO FILE A SECOND OR SUCCESSIVE 2255.

Here, the Petitioner has met his burden under 28 U.S.C. 2244 (B)(3)(C) and 2255(h)(2), of establishing entitlement to file a second or successive 2255 in the District Court in light of this Court's recent decision in United States v. Davis, 139 S.Ct. 2319 (2019).

To be sure, Petitioner's 18 U.S.C. 924(c) convcition in Count 3 of the superseding indictment referenced conspiracy to commit Hobbs Act robbery in Count 1, as a predicate "crime of violence" to support Petitioner's 924(c) conviction. And because conspiracy to commit Hobbs Act robbery only falls under the now defunct residual clause of 924(c) (924(c)(3)(B)), Petitoiner's 924(c) conviction **may** be "unconstitutional in light of **Davis**. Id.

The Eleventh Circuit errored when it concluded that the petitioner did not make a "prima facie' showing under 28 U.S.C. 2244(B)(3)(C), that his claim "relied" on the "new rule of Constitutional Law" announced in **Davis**. The Court came to its erroneous conclusion by making a "merits determination" in the first instance, at the 2244 "authorization stage", which is inconsistent with the statute's plain text. The Statute only requires a "prima facie" showing of "possible merit" to warrant a fuller exploration by the District Court. **Not** a "prima facie" showing that the claim is actually

meritorious.

Here, the Petitioner's proposed claim no doubt "relies on" the "new rule of Constitutional Law" announced in **Davis** and has "possible merit" to warrant a "fuller exploration" by the District Court. Thus, the Petitioner should have been allowed (by the Eleventh Circuit) to file a Second or Successive 2255 in the District Court to challenge his 924(c) conviction as "unconstitutional" under **Davis**. See In re Carter, 19.12456 (11th Cir. July 26, 2019, Martin., J. Dissenting) pg. 9-13.

In In re Matthews, 16-2273 (3rd Cir. Aug 14, 2019), which involved five prisoner's 28 U.S.C. 2244 applications, consolidated into one case, the (Third Circuit) granted all five 2244 applications in one order - without addressing the merits of the claims-- and held that all five applicants had made out a "prima facie" showing that their proposed claims relied on the new rule of Constitutional law announced in **Davis**. See **In re Matthews, Id**. The same results in In re Matthews, Id., should have happened for the Petitioner here.

Because the Eleventh Circuit erroneously failed to give the Petitioner a "full and fair" opportunity to challenge his 924(c) conviction as "unconstitutional" in a second 28 U.S.C. 2255 in the District Court, the Petitioner prays that this court **Transfer** this writ of habeas corpus petition (under 2241(b)) to the District Court for full briefing and determination of whether his 924(c) conviction is unconstitutional under **Davis**. See In re Davis, 557 U.S. 952, 130 S.Ct. 1, 174 L.Ed.2d 614 (2009).

2. THE "PRIMA FACIE" STANDARD UNDER 28 U.S.C. 2244(B)(3)(C) DOES NOT REQUIRE A "MERITS ANALYSIS."

Here, the Eleventh Circuit engaged in an impermissible "merits determination" under 28 U.S.C. 2244, by concluding **in the first instance**, that the jury in Petitioner's case, "**Must have**" relied on the Substantive Hobbs Act robbery charge in Count 2 of the indictment, to find Petitioner guilty of the 924(c) and (j)(1) charge(s) in Count 3. Although the jury instructions and general verdict form refutes the Courts **factual findings**, the court nevertheless refused to allow the Petitioner here, to file a new 28 U.S.C. 2255 in light of **Davis**. **See Appendix (A) and Appendix (C)**.

For starters, the Court is **not** permitted to engage into "**Judicial factfindings**" when it comes to increasing a (defendants) mandatory minimum sentence. See Alleyne v. United States, 570 U.S. 99, 103, 133 S.Ct. 2151, 2155 (2013). Putting **Alleyne** aside, that particular issue should have been left to the District Court to decide **in the first instance**, not a Court of Appeals during the 2244 Authorization stage.

Congress did not give Court(s) of Appeals the authority under 28 U.S.C. 2244 and 2255(h)(2) to decide (in the "first instance") whether a "pro-se" prisoner will win or lose if allowed to proceed with a new 2255. Other Court's of Appeals agree that the "lack of actual merit" is irrelevant at the authorization stage. See In re Hoffner, 870 F.3d 301, 308 (3rd Cir. 2017)(explaining that whether an application "relies on" a new rule cannot be based on "whether the claim has merit, because (the Third Circuit) does not address

the merits at all in our gatekeeping function."

Because the Eleventh Circuit actually decided the "Merits" of the Petitioner's proposed **Davis** based claim at the preliminary review stage under 2244, it went well beyond its role as a mere "gatekeeper." In essence, the Eleventh Circuit decided a 28 U.S.C. 2255 without jurisdiction to do so.

3. THE ELEVENTH CIRCUIT EXCEEDED ITS "GATEKEEPER" ROLE.

As previosly mentioned in this petition, the petitioner filed an application for leave to file a second or successive 2255 under 2244, relying on this Court's recent decision in United States v. Davis, 139 S.Ct. 2319(2019). A decision was rendered on Petitioner's case by a divided three-judge panel denying petitioner's "pro-se" application on July 26, 2019. **See Appendix(A) pg. 1-13.**

One Judge on that panel (Judge Beverly Martin) dissented, expressing her view on why she believed that Petitioner had made out the necessary "prima facie showing" of entitlement to file a second or successive 2255 raising a claim under **Davis**. She explained that the Court went beyond its "gatekeeping" role by engaging into a full blown "merits determination." She also stated that she would allow the Petitioner to proceed in the District Court with a new 2255 because one of the Petitioner's predicate convictions that support his 924(c) is Conspiracy to Commit Hobbs Act robbery. **See Appendix (A) pg. 9-13.**

Here, because at least one judge on that panel agreed that Petitioner had made the requisite "prima facie" showing that his

claim relies on the "new rule" announced in **Davis**, it should follow then, that Petitioner's **Davis** claim has "possible merit" to warrant a fuller exploration by the District Court. In short, Judge Martin's dissent illustrates that Petitioner's **Davis** claim has "possible merit" and that he **may** be serving an "unconstitutional" sentence.

In Buck v. Davis, 137 S.Ct. 759; 197 L.Ed. 2d. 1(2017), a case in the (COA) context, this court held that; "A reviewing Court of appeals should limit its examination (at COA stage) to a threshold inquiry into the underlying merit of the claim and ask only if the District Court's decision was debatable. **Buck** Id.

In the (second or successive context) under 2244 and 2255(h)(2) the Court of Appeals are only tasked with determining whether the prisoner had made a "prima facie" showing that his/her proposed claim "relies on" a "new rule of constitutional law." Not whether the "pro se prisoner's" claim has "actual merit."

Like the (COA context) the (second or successive context) is only a "threshold inquiry" into the underlying merit of the claim, that does not allow a Circuit Court of Appeals to decide the "actual merits" of a claim before granting or denying the Petitioner permission to proceed. Tellingly too, when a Circuit Court grants authorization for a prisoner to file a Second or Successive 2255, the District Court must decide for itself-denovo-whether the motion meets 2255(h)(2) requirements, and must dismiss the authorized 2255 motion if it determines that it does not. This further supports the conclusion that a Court of Appeals exceeds its "gatekeeping"

function whenever it reaches and decides the merits of a proposed claim in the 2244 and 2255(h)(2) context.

Here, like in **Buck**, the Eleventh Circuit inverted the statutory order of operations-in 2244 and 2255(h)(2)-by deciding the merits of the Petitioner's underlying **Davis** claim. In doig so, it placed too heavy a burden on the Petitioner that only sought leave to file a second or successive 2255 in the District Court. Thus, the Eleventh Circuit exceeded its role as **only** the "gatekeeper" under 2244. And again, the Eleventh Circuit (by reaching the merits of the Petitioner's claim) decided a 28 U.S.C. 2255 without jurisdiction to do so.

REASON FOR NOT SEEKING THE WRIT IN A LOWER COURT

As previously mentioned, on June 25, 2019, Petitioner sought leave to file a second or successive 2255 under 2244(b)(3)(A) and 2255(h)(2), arguing that his 18 U.S.C. 924(c) and (j)(1) conviction's may be "unconstitutional" in light of **Davis**, 139 S.Ct. 2319(2019), because conspiracy to commit Hobbs Act robbery (one of the Petitioner's predicates) fails to qualify as a crime of violence under 924(c). On July 26, 2019, the Eleventh Circuit denied Petitioner's request, holding the Petitioner's proposed claim did not actually rely on the "new rule" announced in **Davis**. **See Appendix (A)**.

Now, the Petitioner has no other readily available or adequate remedy at law, other than this 2241 petition to this Honorable Court. Indeed, 28 U.S.C. 2244(B)(3)(E) states that: "The grant or denial of an authorization by a Court of Appeals to file a second

or successive application shall not be appealable and shall not be the subject of a petition for a rehearing or for **writ of certiorari**.

A writ of habeas corpus petition pursuant to (2241) gives this court or a justice thereof the authority to review "gatekeeper" orders under 2244 which are otherwise unreviewable. See Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 2340 135 L.Ed 2d 827 (1996). No other Court can review 2244 "gatekeeping" order's other than this Court under its writ of habeas corpus jursidction.

EXCEPTION CIRCUMSTANCES WARRANT RELIEF

The Lower Federal Courts of Appeals are conflicted over the meaning of "prima facie" showing in the "gatekeeping" context (2244(B)(3)(C)). They are also divided over, when does a given claim actually rely on a "new rule" of constitutional law under 2255(h)(2). And notably, this Court has never answered those precise question(s) since the enactment of the AEDPA in 1996. Those are currently open questions that should be answered because of their importance.

Importantly too, thousands of "pro se" prisoner's are applying to their Court of Appeals seeking permission to file a second or successive 2255 in the District Court in light of this Court's **Davis** decision. So, unless this Court intervenes and provides guideance to the Lower Court(s) in the 2244 "gatekeeping" context under the "new rule" provision, there are going to be inconsistent results concerning Appellet Court(s) "gatekeeping" function. Those results would lead to "pro se" prisoner's (like Petitioner

here) serving potentially "unconstitutional" sentences beyond the lawful statutory maximum(s) without a chance to test whether their conviction(s) are illegal.

Finally, the one year statute of limitations in 2255(f)(3) began to run on June 24, 2019, the day that this court decided **Davis**, so prisoner's only have until June 24, 2020 to challenge their 924(c) conviction(s) in light of **Davis**. Thus, public policy is in favor of fairness, as well as the Sixth and Fourteenth Amendment to the United States Constitution.

Based on the aforementioned, **Exceptional Circumstances** warrants this Courts swift intervention.

CONCLUSION

Because the Petitionre has made out the requisite "prima facie" showing under 28 U.S.C. 2244(B)(3)(C) and 2255(h)(2) that his 18 U.S.C. 924(c) conviction **may** be "unconstitutional after United States v. Davis, 139 S.Ct. 2319(2019). The Petitioner **prays** that this Honorable Court **transfer** this Habeas Corpus Petition Under 28 U.S.C. 2241(b) to the District Court that sentenced him, **for full briefing and advisarial testing from the Government**, so that the Court can reach an informed decision on whether the Petitioner's 924(c) and (j)(1) convictions (which relies on Conspiracy to Commit Hobbs Act robbery as a predicate) are "Unconstitutional" in light of **Davis**. See In re Davis, 557 U.S. 952, 130 S.Ct. 1,174 L.Ed 2d614 (2009) (where this Court transfered a Writ of Habeas Corpus petition to the District Court for a hearing and determination.)

Prayed for this 10th day of September, 2019.

Respectfully Submitted,

Dwight Carter Sr.

Dwight Carter Sr., Pro Se