

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ANTHONY BROWN

(Your Name) — PETITIONER

vs.

UNITED STATES OF AMERICA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

JAMES ANTHONY BROWN, Reg. No. 19659-078

(Your Name)

Federal Medical Center
P.O. Box 15330

(Address)

Fort Worth, Texas 76119

(City, State, Zip Code)

(817) 534-8400

(Phone Number)

QUESTION(S) PRESENTED

- I. WHETHER A UNITED STATES CITIZEN SHALL BE HELD IN PRISON FOR AN ENHANCED SENTENCE THAT IS CONSTITUTIONALLY WRONG, AND WHETHER THERE SHALL BE A GROSS DISPARITY BETWEEN WOMEN AND MEN OFFENDERS SUBJECTED TO THE IDENTICAL SAME SENTENCING ENHANCEMENTS THAT HAS BEEN SUBSTANTIALLY PROVEN SHOULD NEVER HAVE BEEN APPLIED IN THE INITIAL SENTENCING?**

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☒ is unpublished.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 2019 U.S. Dist. LEXIS 17186
2019 U.S. Dist. LEXIS 18381; 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☐ is unpublished.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☐ is unpublished.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☐ is unpublished.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 September 11, 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: _____, 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

The Fifth and Sixth Amendment to the United States Constitution as well as the Fourteenth Amendment as it applies to due process and equal protections of the law.

21 U.S.C. § 841(a)(1) and 28 U.S.C. § 2255 ; 21 U.S.C. § 846

STATEMENT OF THE CASE

Brown is in custody pursuant to a conviction for the offense of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and § 841(b)(1)(A). On May 3, 2013, after a plea of -guilty, he was sentenced to a term of 262 months of imprisonment. The judgment was entered on May 9, 2013. Brown did not appeal the conviction, in which he received ineffective assistance of counsel.

Brown challenged the sentence imposed by filing his initial and only post-conviction petition pursuant to 28 U.S.C. § 2255 on June 16, 2016. Brown raised multiple issues ranging from the denial of due process, equal protection, and that the sentence enhancement pursuant to U.S.S.G. § 4B1.1 and § 4B1.2 was erroneously applied to enhance his sentence to career offender, and it was obtained through ineffective assistance of counsel. Brown argued that he was entitled to relief based upon the fact the State of Texas controlled substance prior convictions should never have been used to enhance his sentence, because the state statute was "indivisible" and "overly broad."

Brown argued that United States v. Ford, 509 F.3d 714 (5th Cir. 2007) which was a split decision by a panel before the United States Court of Appeals, For The Fifth Circuit was "bad" law and a complete denial of Mr. Brown's due process and equal protection rights. The Fifth Circuit in recent cases of United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016) and United States v. Tanksley, 848 F.3d 347 (5th Cir.) supplemented by 854 F.3d 284 (5th Cir. 2017). Brown argued that this Honorable Court held that "indivisible" statutes must not be used to enhance a federal offenders sentence, when applying a prior conviction since 1990 in the Taylor v. United States, 495 U.S. 575 (1990). In a recent decision of this Honorable Court in Mathis v. United States, 579 U.S. ___, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) re-inforcing the Taylor, supra, decision in applying prior convictions. In that a State statute that is "indivisible" can not be used to enhance a federal offender, specifically as a career offender under § 4B1.1 and § 4B1.2.

Brown raised the issue that he should never have been sentenced as a career offender, as the Texas controlled substance priors were "indivisible" and can not be used; however, he was denied effective assistance of counsel by not objecting to the erroneous enhancement and due process and equal protection violations. See, Strickland v. Washington, 466 U.S. 668 (1984).

There is a circuit split between district court's in the Fifth and Eighth Circuits, as well as a gender split between men and women with identically the same sentencing enhancement and argument; which the women obtained no objections from the Government and is released from prison, and the man (Mr. Brown) was denied due process, equal protection, and a violation of his civil rights, by the denial of his § 2255 petition and appeal.

REASON FOR GRANTING THE PETITION

IS THE PETITIONER A CAREER OFFENDER BASED UPON FEDERAL LAW
CRITERIA AND STATUTORIFICATION APPLICATION?

Brown argues that in 2013 when he was sentenced, he was not a career offender, as the State of Texas prior controlled substance convictions were based upon a "indivisible" statute. This issue has been affirmed by the United States Court of Appeals, For The Fifth Circuit decisions in United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016) and United States v. Tanksley, 848 F.3d 347 (5th Cir.) supplemented by 854 F.3d 284 (5th Cir. 2017).

Therefore, in 2013 when Mr. Brown was sentenced, he was not a career offender and his due process and equal protection constitutional rights were denied.

THERE IS A CIRCUIT SPLIT.

The United States District Court, For The Western District of Arkansas, 2017 U.S. Dist. LEXIS 110888 (W.D.Ark. July 14, 2017) (Magistrate Judge's Report and Recommendation and adopted by Post-conviction relief granted at United States v. Walker, 2017 U.S. Dist. LEXIS 110892 (W.D.Ark., July 18, 2017), in a 28 U.S.C. § 2255 proceeding Granted Tamu Walker, a women relief for the identical same issues that Mr. Brown sought relief. The district court in the Eighth Circuit applied United States v. Mathis, 136 S.Ct. 2243 (2016), and United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016) in holding that a prior conviction does not qualify as the generic form of a predicate felony if an element of the crime of conviction is broader than the generic offense. Appendix C.

Ms. Walker raised a single issue: Whether one of her previous convictions was erroneously considered by the district court to be a "serious drug offense" for purposes of the application of U.S.S.G. § 4B1.1.

Mr. Brown argues that his Texas controlled substance offenses used to enhance him under § 4B1.1 and § 4B1.2 were "indivisible" and "overly broad" and also relied on Mathis, supra, at 136 S.Ct. 2243 (2016) and Hinkle, supra, at 832 F.3d 569 (5th Cir. 2016), as well as Tanksley, supra, at 848 F.3d 347 (5th Cir.) supplemented by 854 F.3d 284 (5th Cir. 2017). Appendix B and D.

Brown argued that the elements of the Texas controlled substance statute also had as an element the mere possession and mere sell. Appendix D.

Therefore, the Eighth Circuit district court decision in the Western District of Arkansas in the Walker, supra, case applying the Fifth Circuit decision in Hinkle, supra, has caused a circuit split in relation to the application of a 28 U.S.C. § 2255 post-conviction habeas corpus petition on the "indivisible" and "overly broad" state statute prior conviction used to enhance both Ms. Walker and Mr. Brown. However, they both are not treated equally in the § 2255 judicial arena, as Ms. Walker, the woman was granted relief, and Mr. Brown, the man, was denied relief. (Emphasis Supplied).

THE DENIAL OF CIVIL RIGHTS, EQUAL PROTECTION AND DUE PROCESS

Mr. Brown argues that a reason for granting this petition, is that there shall be no discriminatory actions by the

Government in a criminal and civil proceeding before any court in the United States.

It is prima facie and conclusive that Tamu Walker is a women and was confined in the Federal Correctional Institution, Tallahassee, Florida. She was sentenced on July 28, 2009 for conspiracy to distribute cocaine base and with possessing with intent to distribute a substance containing cocaine base, all in violation of 21 U.S.C. §§ 841(a)(1) and 846. Appendix C, at p.1.

It is prima facie and conclusive that James Anthony Brown is a man and is confined in the federal Medical Center, Fort Worth, Texas. He was sentence on May 3, 2013 for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Appendix B, at p.1.

Both, Walker and Brown were designated as career offenders. (App. C, at p.1-2; App. B, at p.2. Walker was sentenced to 200 months and Brown was sentenced to 262 months. Id.

On July 14 and July 18, 2017, both joint motion and agreement, applying Hinkle, 832 F.3d 569 (5th Cir. 2016) and Mathis, 136 S.Ct. 2243 (2016) - the Government and the defense attorney agreed that Ms. Walker was entitled to relief from the application of the indivisible state statutes used to enhance her sentence because the state statute were overly broad. Ms. Walker was resentenced on August 23, 2017 (App.C, at p.4.)

However, on January 9, 2019 the United States Magistrate Judge entered an order to deny Mr. Brown's Mathis, supra, Hinkle, supra, and Tanksley, supra, motion under § 2255. (App.B, at p.1-4)). The district court adopted the Magistrate Judge's

Report and Recommendation on February 4, 2019. (App.B, p.5-6).

It is evident as argued, *infra* on page 5-1, that it appears to be a circuit split on these issues.

In addition, there appears to be a gender civil rights, equal protection and due process issue that must be remedied by this Honorable Court. The United States Constitution under the Fifth Amendment assures: "Nor be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment assures: "Nor deny any person within its jurisdiction the equal protections of the laws."

In addition, the Civil Rights Act of 1964 held that it is unlawful to discriminate based on race, color, religion, sex, or national origin.

Enacted in 1948, § 2255 federal prisoners, such as Ms. Walker and Mr. Brown to move to vacate, set aside or correct a conviction or sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a) Congress drafted this section "to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts." United States v. Hayman, 342 U.S. 205, 219, 72 S.Ct. 263, 272, 99 L.Ed. 232 (1952).

Habeas corpus proceedings historically have been viewed as civil proceedings. See, e.g., Hilton v. Braunskill, 481 U.S.

770,776, 107 S.Ct. 2113,2119, 95 L.Ed.2d 724 (1987)

Mr. Brown is guaranteed the protections of the Fifth and Fourteenth Amendment, as well as the Civil Rights Act of 1964, even in this habeas corpus context. (Emphasis Supplied). It is clear that while § 2255 is comparable to habeas corpus petition motions are distinct procedural avenues for federal prisoners who seek to challenge only their convictions or sentences. Cf. 28 U.S.C. § 2255; Hayman, 342 U.S. at 222, 72 S.Ct. at 274.

The issue before the Court on the basis for Granting this petition, is that Mr. Brown should not be discriminated against because he is a man, when basically an identical same § 2255 was filed, applying the same laws (Mathis, supra, 136 S.Ct. 2243 (2016), Hinkle, supra, 832 F.3d 569 (5th Cir. 2016) and Tanksley, 848 F.3d 347 (5th Cir.) supplemented by 854 F.3d 284 (5th Cir. 2017)) and because he is a man, that he is not entitled to the same relief as a women (Ms. Walker) in an identical same § 2255 issue. She was convicted and sentenced in 2009 before Mr. Brown in 2013.

Eleven years after § 2255 was enacted, a plurality of this Honorable Court stated, in dicta, that "a motion under § 2255, like a petition for writ of habeas corpus is not a proceedings in the original criminal prosecution but an independent civil suit." Heflin v. United States, 358 U.S. 415,418 n.7, 79 S.Ct. 451,453 n.7, 3 L.Ed.2d 407 (1959) (Emphasis Added) (citation omitted). Lower courts, including the Fifth Circuit similarly concluded that § 2255 is civil in nature. See, e.g., United States v. Dunham Concrete Prods., Inc., 501 F.2d 80,81 (5th Cir. 1974).

Therefore, Mr. Brown's civil and constitutional rights attaches when he filed his § 2255 law suit petition. He further raised equal protections and due process, as well as being treated fairly in his § 2255. In the Brief of the Appellant (James Brown) filed with the Fifth Circuit in Case No. 19-40135 on page 16 he raised the Walker, 2017 U.S. Dist. LEXIS 110885, affd 2017 U.S. Dist. LEXIS 110892 (W.D.Ark. 2017) decision and requested judicial fairness, challenged the integrity of the Court(s), and throughout his brief raised the issue of violations of his constitutional rights to be sentenced correctly, as well as equal to other similarly situated offenders, and not be denied his constitutional rights based upon race, gender or national origin (issues raised at the district court level). Mr. Brown raised plain error, denial of due process, denial of equal protection, and the fact he should never have been enhanced on the "indivisible" and "overly broad" State of Texas controlled substance prior convictions to impose a 262 months sentence, which the sentence should have been at the highest, half of the 262 months.

If, judicial fairness and to correct a complete miscarriage of justice was the cause of Vacating Ms. Walker's sentence, applying Mathis, supra, and Hinkle, supra. The same judicial fairness and to correct a complete miscarriage of justice must apply to Mr. Brown, or based upon sex and gender, Mr. Brown is being denied his Fifth and Fourteenth Amendment Constitutional Rights that are guaranteed and afforded to him in the civil law suit filed under § 2255. (Emphasis Added). See, Civil Rights Act

of 1964.

The court in Walker, supra, concluded that "[b]ased on the Motion, the Response, and the case law discussed therein, it appears Walker was sentenced, in part based on the PSR which found her to be a career offender pursuant to U.S.S.G. § 4B1.1. The Government concedes this finding was in error. Walker's Motion should be granted and she should be brought back before the court for re-sentencing. App. C, at p.2. As Appendix 2 at p.2, the district court did exactly what the district court in Walker did, reliance on the PSR to determine that he was a career offender based on the "indivisible" and "overly broad" State of Texas controlled substance prior conviction. Yet, unlike and in violation of Mr. Brown's constitutional right (civil rights, should not be prejudiced based upon sex and gender), he was not granted relief. (Emphasis supplied).

As the district court held that Ms. Walker had been in custody since 2010 and had served 82 months. Her new sentencing guidelines without the erroneous career offender enhancement was 70-84 months. App. C, at p.2. Sure enough her statutory maximum sentence exposure was 40 years as noted by the district court. (Emphasis Supplied). 21 U.S.C. § 841(b)(1)(B)(iii) (2010). The district court even emphasized that Walker's current term of imprisonment was within the statutory maximum, but states based upon the 18 U.S.C. § 3553 factors, she may well be entitled to a greatly shortened sentence, including the possibility of release. (App. C, at p.2).

Mr. Brown's 262 months sentence is erroneously based on the

career offender enhancement. As argued at every level of the proceedings (Appendix D), Mr. Brown more than likely would receive a 140 months sentence. Brown has been in custody since 2012, since April 12, 2012. This is 91 months that he has presently served on this unconstitutional sentence. Mr. Brown, upon re-sentencing based upon his exemplary conduct within the Bureau of Prisons and the Pepper v. United States, 562 U.S. 476 (2011) standard; may ' receive a sentence of time served, or at the worst a sentence of 140 months. (Emphasis Added). It is also noted that Mr. Brown's statutory minimum was ten years and his maximum sentence was life. Further, the First Step Act of 2018 eliminated the implication of a life sentence. For sure, if Mr. Brown was sentenced today, he would receive a lesser sentence imposed.

Because, Mr. Brown is a man, first, the government did not concede as they did with Ms. Walker. Second, they continue to allow the complete miscarriage of justice to occur toward Mr. Brown, and not Ms. Walker. Third, because Ms. Walker is a women, they applied the Mathis, supra / Hinkle, supra, to her § 2255 and granted her relief. Further, Mr. Brown raised identically the same argument, and applied Mathis, supra, Hinkle, supra, and Tanksley, supra that he was entitled to the same relief as Ms. Walker. Then, the civil rights violation occurred, and he was denied relief. The due process and equal protection violation occurred and he was denied relief. Ultimately, the Government argued in the contrary for Mr. Brown receiving relief, and in Ms. Walker's case they conceded and did the right thing.

(Emphasis Supplied).

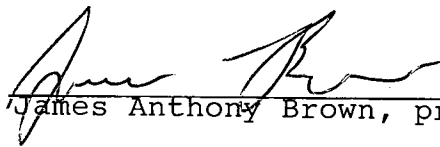
Mr. Brown is being prejudiced by a government that is applying a philosophy based on flexibility of ethical decisions to fit different contexts and circumstances rather than rigid dogma. Further, it is not like the local district court and the local prosecutor was not aware of the Walker, supra decision as it applies to a § 2255 using Mathis, supra, and Hinkle, supra, on the state prior "indivisible" and "overly broad" convictions used to sentence Mr. Brown. Equal protection and due process and the Civil Rights Act of 1964 will not allow this type of prejudice toward Mr. Brown, and this matter is now before the highest judicial decision-making authority in the United States to uphold the Constitution.

These are profound reasons for Granting the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Brown", is written over a horizontal line.

James Anthony Brown, pro se

Date: November 4, 2019