

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JIMMY LEE SHARBUCK,

Petitioner,

v.

N. VASQUEZ, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND TO DIRECT THE CLERK OF COURT
TO THEN FILE, PETITION FOR WRIT OF CERTIORARI INVOLVING
HABEAS CORPUS PROCEEDINGS AFTER PREVIOUS REMAND

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MOTION FOR LEAVE TO FILE, AND TO DIRECT THE CLERK OF COURT
TO THEN FILE, PETITION FOR WRIT OF CERTIORARI INVOLVING
HABEAS CORPUS PROCEEDINGS AFTER PREVIOUS REMAND

Jimmy Lee Sharbutt ("Movant") moves the Court pursuant to Supreme Court Rule 21 for an Order extending Movant's time to file his Petition for Writ of Certiorari ("Petition") and to then direct the Clerk of Court to file Movant's Petition involving Habeas Corpus proceedings after previous remand by this Court on June 28, 2016.

Movant's Motion herein is based upon (1) his unauthorized transfer to the Federal Transfer Center in Oklahoma City, Oklahoma, as of April 29, 2019, the same day Movant's Petition for Rehearing was denied by the Fifth Circuit Court of Appeals, in violation of Federal Rules of Appellate Procedures ("FRAP") Rule 23(a) and Supreme Court Rule 36.1 causing separation from Movant's assistance of other inmates, Movant's Mail, and Property; (2) Movant's misapprehension of the Clerk of Court's June 12, 2019 letter responding to Movant's May 30, 2019 letter; (3) Congress authorizing this Court to extend the time period to file a Petition upto 150 days for good cause shown or extraordinary circumstances which Movant's Petition was mailed within 150 days from the measure of the Fifth Circuit's order denying rehearing; and (4) the Clerk of Court may have incorrectly considered Movant's Petition as a "civil" case under Supreme Court Rules where in Harris v. Nelson, 394 U.S. 286, 293-94(1969), this Court found the designation that proceedings under Habeas Corpus were "civil" was "gross" and "inexact," which only leaves a Habeas Corpus proceeding as a "criminal" case under this Court's Rule 13.

FACTS FOR WHICH THIS MOTION IS BASED

1. Movant is back seeking this Court to proceed from its June 28, 2016 Granting of Movant's Petition for Writ of Certiorari, vacating the Fifth Cir-

cuit's order that upheld the district court's dismissal of Movant's Petition for Writ of Habeas Corpus, See Sharbutt v. Vasquez, 600 Fed. Appx. 25(5th Cir. 2015)(unpublished), and remanding back to the Fifth Circuit "in light of Mathis v. United States, 579 U.S. ____ (2016). See Exhibit 1.

2. The Fifth Circuit's most recent order for which Movant seeks to reverse again is dated January 30, 2019. See Exhibit 2.

3. Movant's timely Petition for Rehearing was denied on April 29, 2019. See Exhibit 3.

4. On April 29, 2019, Movant was in transit to his current location at the Federal Transfer Center in Oklahoma City, Oklahoma. See Exhibit 4.

5. Movant arrived at the Federal Transfer Center on April 30, 2019. See Exhibit 4.

6. By letter dated October 2, 2019, Case Manager S. Gibson at the Federal Transfer Center explained when Movant arrived at the Federal Transfer Center and when Movant received his property transferred from Beaumont, Texas. See Exhibit 4.

7. Movant learned of the April 29, 2019 order denying his Petition for Rehearing in the Fifth Circuit on or about May 24, 2019. See Exhibit 5.

8. On May 30, 2019, Movant sent a letter to the Clerk of the Supreme Court of the United States explaining Movant's understanding of the situation and seeking information on how to proceed. See Exhibit 6.

9. The Clerk of the Supreme Court received Movant's May 30, 2019 letter on June 11, 2019. See Exhibit 6.

10. On June 12, 2019, the Office of the Clerk of the Supreme Court sent Movant a letter stating "you must submit the petition within 90 day time limit allowed under Rule 13 of the Rules of this Court." See Exhibit 7.

11. On August 29, 2019, and within 90 days of the Clerk of Court's June 12, 2019 letter to Movant, Movant caused to be sent to the Clerk of the Supreme Court his Petition for Writ of Certiorari and other papers. See Exhibit 8.

12. On September 10, 2019, the Clerk of the Supreme Court received Movant's Petition and other papers. See Exhibit 8.

13. On September 19, 2019, the Office of the Clerk of the Supreme Court sent Movant another letter informing Movant that his August 29, 2019 Petition and other papers were out of time. See Exhibit 8.

14. In the September 19, 2019 letter, the Clerk of the Supreme Court informed Movant that the date to measure the time to file his Petition was from April 29, 2019, which was almost a month before Movant became aware that his Petition for Rehearing had been denied. Compare Exhibit 3, dated April 29, 2019, with the envelope received by Movant dated on May 24, 2019. See Exhibit 5.

15. The Federal Bureau of Prisons was under obligation to forward all Movant's mail for a minimum period of 30 days under 28 CFR §§ 540.25(e) and (f). See Exhibit 9.

16. Under FRAP Rule 23(a) and Supreme Court Rule 36.1, Movant's custodian was prohibited from tranferring Movant without seeking and obtaining an order to allow the transfer of Movant. See Exhibit 10 (both Rules).

17. Moving Movant caused Movant to be separated from those most familiar with his case prejudicing Movant where Movant had acted diligent in having his Petition and other papers prepared though waiting on the outcome of the Petition for Rehearing to finalize the Petition. See Exhibit 11 (Declaration of Jimmy Lee Sharbutt in Support of this Motion).

18. Movant misapprehended that his 90 days began on April 29, 2019, and not on June 12, 2019. See Exhibit 11, p. 2.

PREVIOUS HISTORY OF CASE

Movant was indicted in 2002 for an alleged violation of 18 U.S.C. § 922(g) with the penalties derived under 18 U.S.C. § 924(e). A jury convicted Movant and he was sentenced to 262 months after the District Court found the facts in support of resetting the sentencing floor from zero to 15 years and the statutory ceiling from 10 years to life under § 924(e). Movant's Ineffective Assistance of Counsel ("IAC") claim was evident in the sentencing.

The Sentencing Judge found Movant had three prior convictions for a serious offense qualifying under § 924(e) when in truth only two prior convictions so qualified. There is no fourth offense to be considered for § 924(e) qualifications. One of the three used by the District Court was for a conviction in the State of Oklahoma in 1980 for Second Degree Burglary in violation of 11 Okla. Stat. Title 21, § 1435. Movant timely appealed. The Tenth Circuit affirmed on January 5, 2005 where Movant had Criminal Justice Act ("CJA") appointed Counsel.

Movant timely filed a criminal motion under 28 U.S.C. § 2255 claiming his District Court Counsel was Ineffective under the Sixth Amendment standards for failing to object to the Pre-Sentence Report ("PSR") challenging the use of Movant's 1980 Second Degree Burglary conviction as a predicate offense under § 924(e). Movant was without CJA Counsel. The United States Attorney's Office opposed Movant's IAC claims. The District Court denied Movant's IAC claims but did so without reaching the conduct of Counsel.

Movant appealed to the United States Court of Appeals for the Tenth Circuit with the help of inmates at FCI Big Spring, Texas, seeking a Certificate of Appealability ("COA") which the Tenth Circuit GRANTED as follows:

"whether, consistent with Shepard, the government presented sufficient

evidence of at least three predicate offenses; and if not,...whether Sharbutt suffered from ineffective assistance of counsel."

See U.S. v. Sharbutt, 289 Fed. Appx. 284, 285(10th Cir. 2008)(unpublished).

The Tenth Circuit affirmed denial under § 2255 concluding "Sharbutt was convicted for burglary by entering a building, a violent felony as described in the ACCA." Id.(citing Taylor v. U.S., 495 U.S. 575, 599(1990)). The Tenth Circuit never reached whether Movant "suffered from ineffective assistance of counsel."

Movant next proceeded in the Eastern District of Texas, pro-se and with the help of inmates at FCI Beaumont, Texas, seeking relief through the procedure of the Writ of Habeas Corpus under 28 U.S.C. § 2241. Movant was now able to show he was being detained in excess of the statutory maximum of Ten Years without his 1980 Second Degree Burglary Conviction being used to trigger the penalties of 15 years to life under § 924(e). This District Court denied Movant access to the Writ of Habeas Corpus to correct the obvious unlawful detention. See Sharbutt v. Vasquez, 2014 U.S. Dist. Lexis 114174 (E.D. Texas)(Case No. 13-CV-1514).

After this District Court dismissed Movant's Petition for Writ of Habeas corpus, Movant appealed to the United States Court of Appeals for the Fifth Circuit where that Court affirmed the District Court's dismissal under the Fifth Circuit's holding in Reyes-Requena v. U.S., 243 F.3d 893, 904(5th Cir. 2001). See Sharbutt v. Vasquez, 600 Fed. Appx. 25(5th Cir. 2015)(No. 14-40925)(unpublished).

Movant then filed a Petition for Writ of Certiorari with the Supreme Court where on June 28, 2016, the Supreme Court unanimously vacated the Fifth Circuit's decision and remanded to that Court "in light of Mathis v.

United States, 579 U.S. ____ (2016)." See Sharbutt v. Vasquez, 136 S.Ct. 2538, 2016 U.S. Lexis 4298(6.28.16)(No. 15-5587).

The Fifth Circuit, after briefing, remanded this Court's remand to the District Court. See Sharbutt v. Vasquez, 669 Fed. Appx. 707(5th Cir. 2016) (unpublished). On remand, after letter briefs that conceded Movant was currently being detained in the United States of America unlawfully, the District Court accepted a Magistrate's Report recommending dismissal again based on the Fifth Circuit's decision in Reyes-Requena. See Sharbutt v. Vasquez, U.S. Dist. Lexis 151203 and 153492(E.D. Texas, 2017).

Movant then appealed again to the Fifth Circuit, relying upon inmates at FCI Beaumont, Texas, where that Court, again, affirmed the District Court's dismissal. See Sharbutt v. Vasquez, 749 Fed. Appx. 307(5th Cir. 2019)(unpublished)(No. 17-41106). Movant Petitioned for Rehearing and on April 29, 2019, the Fifth Circuit denied that rehearing request. See Exhibit 3.

JURISDICTIONAL STATEMENT

The Fifth Circuit's Order denying rehearing is dated April 29, 2019. Movant's letter to the Supreme Court regarding that order is dated May 30, 2019, and was received on June 11, 2019. See Exhibit 6 and 7. The Clerk of Court's response letter is dated June 12, 2019. See Exhibit 7. Movant's Petition and papers were sent by U.S. Mail dated August 29, 2019. See Exhibit 8. The Clerk of Court's letter returning Movant's Petition and other papers is dated September 19, 2019, showing a received date of September 10, 2019. See Exhibit 8. This Court has authority to authorize the filing of Movant's Petition and other papers for the reasons that follow.

LEGAL ARGUMENT IN FAVOR OF THIS COURT GRANTING LEAVE
TO FILE MOVANT'S PETITION AND DIRECT THE CLERK OF COURT
TO THEN FILE MOVANT'S PETITION

1. This Court may find Movant's unauthorized transfer to the Federal Transfer Center, in violation of FRAP Rule 23(a) and Supreme Court Rule 36.1, is the proximate cause of the late filing of Movant's Petition with the Clerk of this Court.

Movant contends this Court may find it good cause, and even extraordinary circumstances, to warrant authorizing Movant's Petition and other papers as of August 29, 2019, or no later than September 10, 2019, to be considered filed with the Supreme Court and timely where one of the reasons for the late submission of Movant's Petition and other papers is that Movant was transferred to the Federal Transfer Center, from FCI Beaumont, in violation of FRAP 23(a) and Supreme Court Rule 36.1.

FRAP Rule 23(a), and Supreme Court Rule 36.1, prohibit the Warden of FCI Beaumont from directing, or authorizing, the transfer of a Habeas Corpus Petitioner unless an application by the Warden is granted by the District Court, Fifth Circuit, or the Supreme Court. On October 2, 2019, S. Gibson explained in a letter regarding Movant that Movant "has been at our facility since April 30, 2019. He transferred from FCI Beaumont, TX..." See Exhibit 4. The envelope containing the April 29, 2019 Order from the Fifth Circuit denying Movant's Petition for Rehearing, post marked on April 29, 2019, is addressed to Movant at FCI Beaumont Low in Beaumont, TX 77720-6020. See Exhibit 5. At no time did the Warden seek or obtained authorization to transfer Movant anywhere or specifically to the Federal Transfer Center.

Movant is not versed in the law and the rules of the District Court, Fifth Circuit, and Supreme Court, are simply overwhelming for Movant without the assistance of someone able to guide Movant through the labyrinth. When

the Warden had Movant transferred to the Federal Transfer Center Movant was separated from those who were lawfully assisting Movant in the pursuit of Movant's release from Prison under his current unlawful detention. See Exhibit 11, p. 1.

Movant was transferred to the Federal Transfer Center with no more than 160 inmates in a Cadre unit where inmates help run the hold-over units. At FCI Beaumont there were men very capable of assisting Movant in perfecting any filing required by the District Court, Fifth Circuit, and the Supreme Court involving Habeas Corpus proceedings (a/k/a known to the free world as "writ writers"). Additionally, being transferred to the Federal Transfer Center separated Movant from his records and arrived at the Federal Transfer Center on May 28, 2019. See Exhibit 4. And finally, Movant was unaware of the April 29, 2019 Order by the Fifth Circuit until on or after May 24, 2019. See Exhibit 4.

These circumstances, which continued to haunt Movant to this day, were somewhat attempted to be mitigated in Movant's letter to the Court dated May 30, 2019. Had Movant remained at FCI Beaumont, Movant would have easily complied with the time requirements associated with the filing of a Petition for Writ of Certiorari as demonstrated in all the previous filings made by Movant. See Sharbutt, 136 S.Ct. 2538(June 28, 2016, remanding to the Fifth Circuit).

Movant did not have any problems complying with the rules governing the time to file anything until he was transferred in violation of FRAP 23(a) and Supreme Court Rule 36.1. Many Appellate Courts consider granting relief for a violation of FRAP 23(a) after showing the transfer resulted in prejudice to the prosecution of the pending habeas action. Strachan v. Army Clemency & Parole Bd, 151 F.3d 1308, 1312(10th Cir. 1998)(citing Shabazz v. Carroll,

814 F.2d 1321, 1324(9th Cir. 1986), vacated in part on other grounds, 833 F.2d 149(9th Cir. 1987), cert denied, 487 U.S. 1207(1988); Hammer v. Meachum, 691 F.2d 958, 961(10th Cir. 1982), cert denied, 460 U.S. 1042(1983); Goodman v. Keohane, 663 F.2d 1044, 1047-48(11th Cir. 1981).

Movant's position here is not without support. See Johnson v. Avery, 393 U.S. 483, 491(1969)(Douglas, J. concurring) ("The increasing complexities of our governmental apparatus at both the local and the federal levels have made it difficult for a person to process a claim or even to make a complaint.") To Movant, that complexity in 1969 had to be even easier than it is for persons like Movant in 2019.

Movant contends that his transfer to the Federal Transfer Center is the main cause for why Movant's Petition was not filed in a timely manner according to the Clerk of Court's measure. Under these extraordinary circumstances Movant requests relief in the form of the granting of an extension to file his Petition to reach the August 29, 2019, or September 10, 2019 date set by the September 19, 2019 letter to Movant from the Clerk of Court returning Movant's Petition and papers to Movant.

2. Movant clearly misapprehended the June 12, 2019 letter from the Clerk of Court.

By no means does Movant attempt to place blame on the Clerk of the Supreme Court for Movant's misapprehension of the measure of 90 days. Movant sent a letter to the Clerk of Court seeking to understand how to proceed now that the Fifth Circuit had finally addressed the Supreme Court's remand dated June 28, 2019. See Sharbutt, 136 S.Ct. 2538. See Exhibit 6. Movant set out in his May 30, 2019 letter the history of his Habeas Corpus proceedings and the remand by the Supreme Court to the Fifth Circuit. Movant explained that he needed "further instructions in regard to this case" and listed case number

15-5587. See Exhibit 6. Maybe the lower courts should have appointed Movant CJA Counsel as to the complexities entailed in the type of remand issued to the Fifth Circuit. Movant erroneously thought that he had 90 days from June 12, 2019 to file his basic objections to the Fifth Circuit's decision on remand from the Supreme Court's June 28, 2019 Order. It was under those guide posts that Movant submitted his Petition and other papers with the Clerk of the Supreme Court on August 29, 2019 (received September 10, 2019). Movant read these words:

"Should you choose to file a petition for writ of certiorari, you must submit the petition within the 90 day time limit allowed under Rule 13 of the Rules of this Court."

See Exhibit 7.

Movant realizes that the Clerk of Court provided a copy of the Rules of this Court but at the Federal Transfer Center there simply was no one that had the experience of navigating a case from the position of a remand from the Supreme Court. Had the Warden at FCI Beaumont moved the Court for an authorization to transfer Movant to the Federal Transfer Center, Movant would have been able to lodge his objections and explain to the lower Courts why such a move would prevent Movant's proper exercise and prosecution of his Petition. But that never happened. To someone that deals with the Court's Rules all the time the June 12, 2019 letter to Movant most likely would have been an easy read. But not for Movant or those available writ writers at the Federal Transfer Center.

Movant believes that his misapprehension of the June 12, 2019 letter and how to measure the time for Movant to file his Petition and other papers is at some point part of the reason why Movant is in the situation he currently finds himself. This second reason, combined with the first, may justify

this Court granting the relief Movant seeks herein.

3. Movant's Petition and other Papers were within the time period if this Court extends the 90 days to 150 days.

To the extent this Court is of the mind that appeals involving Habeas Corpus Proceedings instigated in the United States District Court on behalf of a Federal Prisoner, is a civil case, 28 U.S.C. § 2101(c) authorizes this Court to extend the time for filing a Petition for Writ of Certiorari from 90 days to 150 days. The Standard is for good cause shown. In addition, this Court's Rules authorize this Court to extend the time period in extraordinary circumstances. See Supreme Court Rule 13.5.

The Clerk of Court's letter dated September 19, 2019 fixes the date to measure from at April 29, 2019. See Exhibit 8. The Clerk of Court's letter also fixes the date of Movant's filing of his Petition at August 29, 2019.

If this Court were to extend the time period from 90 days, to 150 days, Movant's August 29, 2019 date would be well within 150 days standing at 122 days between April 29, 2019 to August 29, 2019.

In addition to the unauthorized transfer of Movant to the Federal Transfer Center, and Movant's misapprehension of the Clerk of Court's June 12, 2019 letter responding to Movant's May 30, 2019 letter, as argued in the first two reasons and argument above and herein, the fact that Movant is being unlawfully detained in excess of the statutory maximum of 10 years also qualifies as extraordinary circumstances justifying extending Movant's time period from 90 days to 150 days for the filing of his Petition and other papers.

(a) Additional reasons and argument for finding extraordinary circumstances.

This Court has held that a defect arises where a Petitioner's "conviction and punishment are for an act the law does not make criminal." Davis v. U.S.,

417 U.S. 333, 346(1974).

Movant never qualified for the punishment he received under 18 U.S.C. § 924(e). The law and the Constitution prohibit Movant's current detention. This Court found a "conviction and punishment...for an act the law does not make criminal" qualifies as an exceptional circumstances "where the need for the remedy afforded by the writ of habeas corpus is apparent." Davis, 417 U.S. at 346(quoting Hill v. U.S., 368 U.S. 424, 428(1962)).

This Court has recognized in O'Dell v. Netherland, 512 U.S. 151, 157 (1997), that rules forbid "punishment of certain primary conduct" as well as "prohibiting a certain category of punishment for a class of defendants because of their status or offense."(citing Penry v. Lynaugh, 492 U.S. 302, 330(1989)).

Movant has shown, as an unlawfully detained federal prisoner, that he has diligently pursued relief through one proceeding or another for more than 12 years involving the use of his Second Degree Burglary conviction under Oklahoma's Title 21, § 1435. At every turn Movant has relied upon others to assist navigating the labyrinth of rules, statutes, and procedures and simply misapprehended that his 90 days was measured from April 29, 2019. Movant did not even receive the April 29, 2019 Order from the Fifth Circuit until May 24, 2019. See Exhibits 4 and 5.

Under these circumstances, which indeed are extraordinary, Movant seeks leave from this Court to extend his time to file his Petition and other Papers to the Clerk of the Supreme Court beyond the 90 days and to include any date of measure of either August 29, 2019, or September 10, 2019, both dates being recognized by the Clerk of Court in the September 19, 2019 letter. See Exhibit 8.

4. This Court may find the Clerk of Court incorrectly concluded that Movant's Petition is a "civil" case which this Court has previously said is "gross" and "inexact."

The Clerk of Court's September 19, 2019 letter indicates that this Court is treating Petitions in habeas cases as "civil" cases instead of criminal. See Exhibit 8. However, this Court has stated in Harris v. Nelson, 394 U.S. 286, 293-94(1969) that labeling appeals in habeas cases as "civil" is "gross" and "inexact." In Hilton v. Braunskill, 481 U.S. 770, 776(n.5)(1987), this Court noted it recognized "some circumstances where a civil rule of procedure should not govern habeas proceedings!" (citing Harris, 394 U.S. at 294).

So that this makes sense, Movant will examine how Habeas Corpus Proceedings, and its exactly commensurate substitutes, are treated in the Federal Courts.

Some Federal Courts have held habeas cases are unique and even a hybrid. See Davis v. Fechtel, 150 F.3d 486, 488(5th Cir. 1998)(referring to habeas as labeled "civil" "is gross and inexact" and that such proceedings are unique); See U.S. v. Cruz, 774 F.3d 1278, 1283(10th Cir. 2014)(referring to habeas as a hybrid of civil and criminal); and See Sloan v. Pugh, 351 F.3d 1319, 1323 (10th Cir. 2003)(same)

Supreme Court Rule 13 only recognizes two types of cases. One is "civil" and the only other is "criminal." While the time limits under Supreme Court Rules is not jurisdictional, and may be extended, see Sanabria v. U.S., 437 U.S. 54, 62(n.12)(1978), when Congress fixes time limitations by statute, jurisdiction attaches to those time limitations.

To aid this Court in determining whether it has jurisdiction to extend Movant's 90 days, to 150 days, may require this Court to ascertain how it views the function of Habeas Corpus Proceedings. This Court exercises its

discretion when the ends of justice so require it to do so. Schacht v. U.S., 398 U.S. 58, 64(1970). The "central mission" of 28 U.S.C. § 2241 "should be the substance of 'justice,' not the form of procedures." Murry v. Carrier, 477 U.S. 478, 500(1986).

A habeas claim, this Court has held, "is an asserted federal basis for relief from a...court's judgment of conviction." Gonzalez v. Crosby, 545 U.S. 524, 530(2005). This Court has always found a judgment of conviction is a criminal case.

The Tenth Circuit says they "look at the relief sought, rather than a pleading's title or its form" to determine how to proceed. U.S. v. Baker, 718 F.3d 1204, 1208(10th Cir. 2013)(citing Gonzalez, 545 U.S. at 531-32); See also U.S. v. Robinson, 917 F.3d 856, 863(5th Cir. 2019)(a federal habeas claim should be examined to determine the "asserted federal basis for relief from a ...judgment of conviction").

Movant contends that this Court should apply Habeas Corpus Proceedings under its criminal label when the Petition seeks to correct an unlawful sentence, through unlawful detention, which is criminal in nature.

This Court has "consistently rejected interpretation of the habeas corpus statute that would suffocate the writ in stiffling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. 345, 350(1973). The writ of habeas Corpus must have the "capacity to reach all manner of illegal detention" and the "ability to cut through barriers of form and procedural mazes" which "have always been emphasized and jealously guarded by Courts and lawmakers." Harris, 394 U.S. at 291.

"The very nature of the writ demands that it be administered with the

initiative and flexibility essential to insure that miscarriage of justice within its reach are surfaced and corrected." Id.

Movant contends here that what should make Petitions for Writ of Certiorari designated as criminal is that the great writ is to reach "all manner of illegal detention" and, if civil, becomes submerged in such procedural requirements that effectively suspend access to it through one or more events most of which were beyond the control of Movant.

"Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" Engle v. Isaac, 456 U.S. 107, 126(1982). For instance, 28 U.S.C. § 2255 Proceedings, which are to be exactly commensurate with Habeas Corpus Proceedings, see Hill, 368 U.S. at 427, are "the continuation of the same criminal matter..." U.S. v. Cook, 997 F.2d 1312, 1319 (10th Cir. 1993); U.S. v. Bergman, 746 F.3d 1128, 1130(10th Cir. 2014) ("of course, § 2255 proceedings...remain part of the underlying criminal prosecution all the same."); See U.S. v. Johnston, 258 F.3d 361, 365-66(5th Cir. 2001) ("a § 2255 motion is a hybrid, with characteristics indicating of both civil and criminal proceedings" and "the precise nature...remains highly dependent on the proceedings context.")

In Chadez v. U.S., 568 U.S. 342, 185 LED2D 149, 154(n.1)(2013), this Court explained a writ of error coram nobis provides a way to collaterally attack a criminal conviction for a person who is no longer "in custody" and therefore cannot seek habeas corpus. (citing U.S. v. Morgan, 346 U.S. 502, 510-11 (1954)). In Morgan, this Court placed coram nobis proceedings within the criminal category. See also Wall v. Khali, 562 U.S. 545, 179 LED2D 252, 261-62 (2011).

The traditional function of the writ of habeas corpus is to secure rel-

ease from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 484(1973).

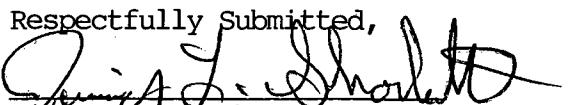
Even in the Prison Litigation Reform Act ("PLRA") context, habeas corpus proceedings are not considered civil cases. McIntosh v. U.S. Parole Comm., 115 F.3d 809, 811(10th Cir. 1997). See also Garza v. Thaler, 585 F.3d 888, 890(5th Cir. 2009)(holding the PLRA and its requirements regarding appeals in civil cases does not apply to habeas corpus proceedings)(citing Hall v. Cain, 216 F.3d 518, 521(5th Cir. 2000)).

Movant contends that his Habeas Corpus Proceedings, in the proper context, seeks relief from his unlawful detention stemming from a criminal judgment and that this Court should designate his Petition as being brought under Supreme Court Rule 13 as a Petition in a criminal case. It is the substance of Movant's relief sought by his Petition that should control this Court's designation of whether what Petitioner seeks is criminal or not.

CONCLUSION

Movant respectfully requests this Court enter an order, based upon the above and herein, granting Movant leave to file his Petition and other Papers extending the 90 days to 150 days, or within the time period of August 29, 2019, or September 10, 2019, and to direct the Clerk of Court to then file Movant's Petition involving Habeas Corpus Proceedings after having previously remanded Movant's case to the Fifth Circuit in 2016.

Respectfully Submitted,


Jimmy Lee Sharbutt
Reg. # 09112-062
Federal Transfer Center
P.O. Box 898801
Oklahoma City, Oklahoma 73189

E X H I B I T

1

Supreme Court of the United States

No. 15-5587

JIMMY LEE SHARBUTT,

Petitioner

v.

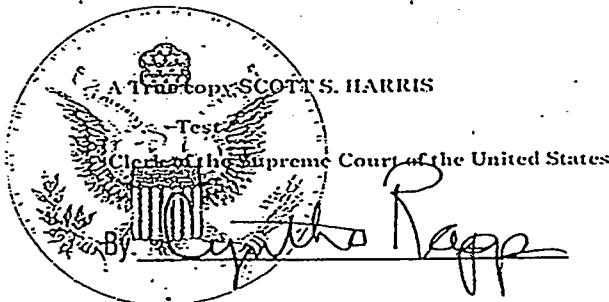
N. VASQUEZ, WARDEN

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Mathis v. United States*, 579 U. S. ___ (2016).

June 28, 2016



E X H I B I T

2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

January 30, 2019

Lyle W. Cayce
Clerk

No. 17-41106
Summary Calendar

JIMMY LEE SHARBUTT,

Petitioner-Appellant

v.

N. VASQUEZ, Warden,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:13-CV-514

Before BARKSDALE, ELROD, and HO, Circuit Judges,

PER CURIAM:*

Jimmy Lee Sharbutt, federal prisoner # 09112-062 and proceeding *pro se*, contests the dismissal of his 28 U.S.C. § 2241 petition. Sharbutt was convicted of being a felon in possession of a firearm and ammunition. The district court concluded he was an armed career criminal and sentenced him, *inter alia*, to 262 months' imprisonment. *See* 18 U.S.C. §§ 922(g)(1), 924(e). Subsequently, his 28 U.S.C. § 2255 motion was denied.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

For his § 2241 motion, Sharbutt contends the court erred in concluding he failed to meet the requirements of the savings clause of § 2255(e), which would permit him to proceed under § 2241 (generally reserved for challenges to the manner in which a sentence is being executed). According to Sharbutt, *Mathis v. United States*, 136 S. Ct. 2243 (2016), prohibits the application of the armed-career-criminal enhancement for convictions of offenses defined more broadly than the generic offense listed in § 924(e)(2)(B)(ii), such as his prior conviction of Oklahoma second-degree burglary. See *United States v. Hamilton*, 889 F.3d 688, 699 (10th Cir. 2018).

The district court's determination of law in dismissing a § 2241 petition is reviewed *de novo*. *Garland v. Roy*, 615 F.3d 391, 396 (5th Cir. 2010). To proceed under § 2241, Sharbutt has to meet the requirements of the savings clause in § 2255(e) by showing his claim was “based on a retroactively applicable Supreme Court decision which establishes that . . . petitioner may have been convicted of a nonexistent offense” and “foreclosed by circuit law at the time when the claim should have been raised in . . . petitioner’s trial, appeal, or first § 2255 motion”. *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

Because *Mathis* implicates the validity of a sentence enhancement, *Mathis* does not establish Sharbutt was convicted of a nonexistent offense. See *Padilla v. United States*, 416 F.3d 424, 425–27 (5th Cir. 2005) (pre-*Mathis* action in which petitioner “[did] not attack his conviction and his claims challenge only the validity of his sentence”). Moreover, *Mathis* does not apply retroactively. See *Mathis*, 136 S. Ct. at 2257; see also *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (denying authorization to file a successive § 2255 motion because petitioner “failed to [show] *Mathis* . . . set forth [a] new rule[] of

constitutional law that [has] been made retroactive to cases on collateral review" (citation omitted)).

AFFIRMED.

E X H I B I T

3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-41106

JIMMY LEE SHARBUTT,

Petitioner - Appellant

v.

N. VASQUEZ, Warden,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before BARKSDALE, ELROD, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale

UNITED STATES CIRCUIT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**