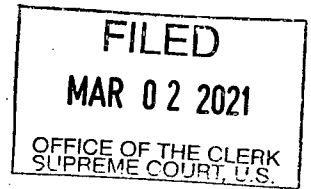


20-7419
No. _____

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

KAMIL JOHNSON — PETITIONER
(Your Name)

vs.

WARDEN, W.E. MACKELBURG — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kamil Johnson
(Your Name)

F.C.I. Gilmer P.O. BOX 6000
(Address)

Gilmer, WV 26351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Whether the lower courts acted arbitrarily in denying the habeas corpus petition (28 U.S.C. §2241), and their respective application of Miller V. Alabama, and Circuit courts that have ordered resentencing, or dismissal of §1959(a), for juveniles of that criminal Statute?

II. Whether an illegal sentence, agreed to because of coercion and affirmative misrepresentations, constitutes a manifest miscarriage of justice?

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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- APPENDIX B United States District Court District of South Carolina Rock Hill Division, order and opinion.
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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 "C" 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☒ is unpublished.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☒ is unpublished.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☐ is unpublished.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 August 28th, 2020.

☐ 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: November 3rd, 2020, and a copy of the order denying rehearing appears at Appendix "E".

☐ 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

5th and 6th Amendments, 15

28 U.S.C. § 2241 , 1, 3, 5

STATEMENT OF THE CASE

The petitioner - Kamil Johnson, was convicted, following a jury trial, of violating 18 U.S.C. § 1959(a)(1) (murder in aid of racketeering). In accordance with the jury verdict, a sentence of life imprisonment without parole was imposed. Although Kamil Johnson was only a juvenile, the statute made no exception for juveniles. Thus, the district court possessed no discretion to impose any sentence other than the statutory mandatory minimum of life imprisonment without parole.

Following exhaustion of Kamil Johnson's appellate rights, and his initial motion to vacate (28 U.S.C. § 2255), the Supreme Court published Miller v. Alabama, 132 S.Ct. 2455 (2012), which held that mandatory life imprisonment without the possibility of release for a defendant who was a juvenile at the time of the offense violates the Eighth Amendment. That decision led to Johnson receiving permission to file a second § 2255 motion. See Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (per curiam). Consequently, Kamil Johnson was resentenced, under 18 U.S.C. § 3553(a), to a term of 42 years imprisonment even though Congress has not authorized a term of years imprisonment for violating § 1959(a)(1). Neither do the Sentencing Guidelines. Montgomery v. Louisiana, 136 S.Ct. 718 (2016),

Was published by the Supreme Court in order to resolve a circuit split about the retroactivity of Miller v. Alabama, *supra*. The Supreme Court ruled it was. This resulted in Kamil Johnson filing a third § 2255 where he challenged the legality of the 42 year sentence, and attorney's ineffective representation. The motion was denied. See United States v. Johnson, 2016 U.S. Dist. LEXIS 93777 (D. Minn.). It was the reasoning of the district court that it had jurisdiction to impose the 42 year sentence simply because the petitioner/defendant did not object to its authority at the time of resentencing.

Next, Kamil Johnson turned to habeas corpus relief under 28 U.S.C. § 2241. Jurisprudence developed in the Fourth Circuit Court of Appeals should have entitled Johnson to relief since it differed from the jurisprudence of the Eighth Circuit Court of Appeals applying Miller v. Alabama, *supra*. However, both the district court, and the Appeals Court, refused to address the merits of Johnson's claims, and dismissed his petition.

REASONS FOR GRANTING THE PETITION

A. To Avoid a Circuits split in the retroactivity Application of Miller v. Alabama, and whether it Requires the Reversal of the Petitioner's Conviction, Because 18 U.S.C. § 1959(a) Does not Permit a District Court to Impose any Sentence Except Life Imprisonment Without Possibility of Release, the Court Should Declare the Statute to be Unconstitutional, Especially if a Defendant is a Juvenile.

Rather than considering the merits of Petitioner's jurisdictional claim, the lower courts summarily rejected it without analysis, and in complete contradiction of precedent in the Fourth Circuit.

Where a district court sentences beyond its authority, an appeals court must reverse and remand. United States v. Ponce, 51 F.3d 820, 826 (4th Cir. 1995). Notice of a jurisdictional defect can be taken in any court and at anytime. United States v. Tran, 234 F.3d 798 (2nd Cir. 2001); Holloway v. United States, 740 F.2d 1373, 1382 n.11 (6th Cir. 1984); United States v. Bastides, 222 F.3d 779 (10th Cir. 2000); and United States v. Roanow, 9 F.3d 728,

730 (8th Cir. 1993). See also: United States v. Mullen, 843 F.2d 1096 (8th Cir. 1988) (holding that Fed. R. Crim. P. 12(b), permits a lack of jurisdiction to be raised at any time); and Philbrook v. Glodgett, 421 U.S. 707 (1975) (ruling that a district court must dismiss a proceeding anytime jurisdiction is lacking).

Instantly, the lower courts refused to address the merits of the petitioner's claims because he had agreed to be re-sentenced. However, it is basic constitutional law that the parties to a proceeding cannot overcome a jurisdictional defect by a mutual agreement. United States v. Hadden, 475 F.3d 652 (4th Cir. 2007) (ruling that it had jurisdiction to review an amended sentence that the parties had agreed to after the filing of a § 2255 petition even though no certificate of appealability issued); United States v. Machado, 465 F.3d 1301 (11th Cir. 2006) (holding that the absence of jurisdiction can never be waived or forfeited); and United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001)

(absent a factual basis for a guilty plea, no jurisdiction exist to accept it); and United States v. Rosa-Ortiz, 348 F.3d 33 (1st Cir. 2003) (a guilty plea cannot serve as a waiver of the fact that indictment failed to allege an offense).

An indictment provides a district court with jurisdiction. United States v. Longoria, 259 F.3d 363 (5th Cir. 2001). An indictment sets forth the facts and penalty range available to sentence a defendant. Thus, the omission of a drug quantity, plus the reference to 21 U.S.C. § 841(b)(1)(D), by the indictment, served to deprive the court of jurisdiction to sentence defendant under any other subsection of § 841(b). Longoria, supra. See also: Owens v. United States, 236 F. Supp. 2d 122 (D. Mass. 2002); United States v. McMurray, 653 F.3d 367 (6th Cir. 2011) (18 U.S.C. § 3559 required to be charged in indictment before its mandatory minimum of life imprisonment is triggered); and United States v. Julian, 427 F.3d 471 (7th Cir. 2003) (ruling that when a count contains different sentencing ranges, a jury

must decide which applies).

The lower courts acted arbitrarily when denying Kamil Johnson relief from the illegal 42 year sentence, and denied him due process of law. Hicks v. Oklahoma, 447 U.S. 343, 346 (1986) ("The 5th and 14th Amendments protect any liberty interest conferred upon a citizen by the State from arbitrary deprivation by the State."). Since the District court and the court failed to adhere to its own prior ruling in United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016), their decisions meet the thresholds showing of being arbitrary, capricious, whimsical, or manifestly unreasonable. United States v. Herrera, 481 F.3d 1266, 1270 (10th Cir. 2007).

The 4th Circuit's ruling in Under Seal, supra, adopted the reasoning of Bousley v. United States, 523 U.S. 614, 620 (1998), and Schirra v. Summerline, 542 U.S. 348, 352 (2004), i.e., when the Supreme Court decides that a substantive federal statute does not now reach certain conduct, it must be applied retroactively as

it places the defendant in a position where the penalty cannot now be applied and never could have. See also: Rivers v. Roadway Express, 511 U.S. 298, 312-13 (1994)

(A new rule interpreting a statute is always applied retroactively because the Court is essentially saying what the statute has always meant from the day it was enacted). In Under Seal, supra, the 4th Circuit agreed that the penalty structure of §1959(a) is unconstitutional as applied to juveniles like Kamil Johnson.

(Therefore, only Congress can remedy its unconstitutionality, which it has not done. Imposing any sentence other than life imprisonment for violating §1959(a) is unlawful. See Harris v. United States, 536 U.S. 545, 557 (2002); and Williams v. New York, 337 U.S. 241, 247 (1949). 18 U.S.C. § 3582 did not permit the district court to impose the 42 year sentence on Kamil Johnson. It was clear error for the lower courts to deny his habeas petition. Johnson is imprisoned under an illegal sentence and must be released immediately.

This is the conclusion reached by the lower courts in Under Seal, supra: "The district court observed that no authority permitted it to impose a sentence lower than the mandatory minimum provided by the statute." id. at *8.

The 4th Circuit supported the district court's reasoning in Under Seal, supra, and ordered the juveniles release from custody:

Under the plain language of §1959(a)(1), Congress has authorized two penalties - and only two penalties - for the crime of murder in aid of racketeering: "death or life imprisonment."

Further, we note that a district court ordinarily has "no discretion to impose a sentence outside the statutory range

established by Congress
for the offense of conv-
iction." United States v.
Robinson, 404 F.3d 850,
862 (4th Cir. 2005).

id. at *9.

The aforesaid opinion was cited
as the basis for dismissing an indictm-
ent against a juvenile in United States
v. Reyes-Canales, 2019 U.S. Dist. LEXIS
174108 (D. Md.). The § 1959(a) count could
not be lawfully charged because Reyes-
Canales "was a juvenile at the time this
murder took place. An individual may not
be prosecuted in federal court for crimes
committed as a juvenile if the mandatory
maximum penalties for those crimes would
be unconstitutional as applied to a ju-
venile." id. Citing United States v. Under-
Seal, 819 F.3d 715, 728 (4th Cir. 2016).

Due to the jurisprudence developed
in the 4th Circuit following publication of
Miller v. Alabama, 567 U.S. 460, 489 (2012),

the denial of the instant petition was arbitrary and capricious, and denied Kamul Johnson due process of law.

Wolfe v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). The due process violation is depriving Kamul Johnson of his liberty, Khan v. Mukasey, 517 F.3d 513, 518 (7th Cir. 2008).

In other cases, the 4th Circuit has not hesitated in granting relief if the law has changed. See White v. United States, 748 F.3d 541 (4th Cir. 2014); and United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018). At the very least, the "savings clause" of 28 U.S.C. § 2255 applies to actual-innocence claims due to a non-existent offense, White v. Taylor, 636 Fed. Appx. 521, 525 (11th Cir. 2016). Since § 1959(a) is no longer a viable offense for juveniles, Kamul Johnson is actually innocent and the "savings clause" was triggered. Under these facts, the AEDPA is unconstitutional by depriving Kamul

Johnson with a "Judicial Forum for his Constitutional claim." Tristman v. United States, 124 F.3d 361, 378 (2nd Cir. 1997).

Kamil Johnson's 42 year sentence constitutes a "miscarriage of justice" since it is contrary to the statute. It cannot be enforced no more so than an involuntary guilty plea. United States v. Andis, 333 F.3d 886, 891-92 (8th Cir. 2003). Thus, this court should grant the writ for these compelling reasons and order Petitioner's immediate release from prison. Harris v. Nelson, 394 U.S. 286, 291 (1969); Keeney v. Tamayo-Pleyes, 504 U.S. 1, 13 (1992).

B. Petitioner's 42 year sentence is the product of a coerced agreement to the sentence because of misrepresentation of the facts and applicable law.

When "statutory elements carry different punishments, then . . . they must be elements." Mathis v. United States,

(136 S.Ct. 2243, 2256 (2016). Under Apprendi v. New Jersey, 530 U.S. 466, 477 (2000), any fact which affects a sentence must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt. Petitioner Kamil Johnson was denied his rights under the 5th and 6th Amendments because of misrepresentations made by his attorney, prosecutor, and the district court, thereby causing him to agree to a 42 year term of imprisonment.

(Recently, in Lee v. United States, 137 S.Ct. 1958, 1969 (2017), it held that if a defendant faced no harsher penalty by going to trial, then his guilty plea is invalid. Johnson's defense attorney was clearly incompetent by not recognizing that no sentence could be imposed because Miller v. Alabama, supra, rendered his client actually innocent of violating § 1959(a). Defense Counsel's action was "patently unreasonable". Dingle v. Sec. for Dep. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007).

(Defeat was scratched from the hands

of probable victory. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992); and United States v. Winstead, 890 F.3d 1082 (D.C. Cir 2018) (holding on direct appeal, and as a matter of law, that defense counsel was ineffective by not objecting to defendant being sentenced as a career offender).

Kamil Johnson is being deprived of his liberty because of an unlawful conviction and sentence. See Khan v. Mikasa, supra. The lower courts are refusing to correct this miscarriage of justice because Johnson agreed to an illegal sentence. In United States v. Charles Brown 915 F.3d 754 (2018), the court acted to correct an illegal sentence even though it refused to grant a certificate of appealability on the issue. This Court should correct the injustice that conflicts with relevant decisions of this court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: February, 22nd, 2021