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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OWEN GARTH HINKSON -PETITIONER

VS.

UNITED STATES OF AMERICA-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
FIFTH CIRCUIT COURT OF APPEALS CASE NO. 21-40174

PETITION FOR WRIT OF CERTIORARI

OWEN GARTH HINKSON

Reg. No. 17785-038

UNITED STATES PENITENTIARY

3901 KLEIN BLVD.

LOMPOC, CALIFORNIA 93436

ORIGINAL

IN THE
SSUPREME COURT OF THE UNITED STATES

OWEN GARTH HINKSON, :
Petitioner-Appellant, :
v. : APPEAL NO. 21-40174
UNITED STATES OF AMERICA, : SUPREME COURT NO.
Respondent-Appellee. :

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Petitioner Owen Garth Hinkson, hereby certifies that the following may have an interest in the outcome of this appeal:

Keith F. Giblin, Hon. J., United States Magistrate Judge;

Marcia A. Crone, Hon. J., United States District Judge;

Ms. Michelle Suzanne Englade, Assistant U.S. Attorney;

Mr. David O'Toole, U.S. District Clerk;

Mr. Bradley Elliot Visosky, Assistant U.S. Attorney;

Mr. Hinkson, Owen Garth, Petitioner-Appellant;

Baverman, Hon. Alen J., United States Magistrate Judge;

Duffey, Jr., Hon. William S., United States District Judge;

DeGenova, John Thomas, Assistant U.S. Attorney;

Kearns, Stephanie A., Executive District, Federal Defender Program, Inc.,;

Ms. Calvert, Victoria M., Attorney At Federal Defender Program, Inc.

IN THE
SUPREME COURT OF THE UNITED STATES

OWEN GARTH HINKSON, :
Petitioner, :
v. : FIFTH CIRCUIT NO. 21-40174
UNITED STATES OF AMERICA, : SUPREME COURT NO.
Respondent. :

**PETITION FOR WRIT OF CERTIORARI
APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

I. INTRODUCTION

NOW COMES, this Petitioner Mr. Owen Garth Hinkson, hereby move this Honorable Court pursuant to 28 U.S.C. § 1651 (a), the United States Constitution 5th Amendment and the 6th Amendment, and in violation of **Sessions v. Dimaya**, 138 S. Ct. 1204 (2018); **Johnson v. United States**, (Johnson II) 135 S. Ct. 2551 (2015).

Petitioner Mr. Owen Garth Hinkson, hereby filing this Petition For Writ Of Certiorari Pro Se. See, **Haines v. Kerner**, 404 U.S. 519, 520 (1972).

II. JURISDICTION

This Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1254, 28 U.S.C. § 2106 and Supreme Court Rule 13.

QUESTION(S) PRESENTED

1. **Whether** the district court can sentence Mr. Owen Garth Hinkson, to a statute of 8 U.S.C. § 1326(b)(2), 20 years imprisonment when his 1987 Massachusetts conviction, which served as the base aggravated felony for enhancement, has been vacated, the Massachusetts Assault And Battery is now vacated?
2. **That** the 1987 Massachusetts conviction can no longer stand as a qualifying aggravated felony under the Supreme Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018)?
3. **Whether** the Fifth Amendment to the United States Constitution allowed the United States District Court and the United States Court of Appeals for the Fifth Circuit to uphold a person to be sentenced under the wrong statute?
4. **Whether** the district court have jurisdiction to uphold Mr. Owen Garth Hinkson's Assault and Battery enhancement after the conviction is now vacated, and does 28 U.S.C. § 1651(a) allow Mr. Owen Garth Hinkson, the right to have the court vacate the illegal enhancement pursuant to 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b), because without § 16(b) 8 U.S.C. § 1101(a)(43)(F) is void, and Mr Owen Garth Hinkson, 8 U.S.C. § 1326(b)(2) enhancement is also void?
5. **Whether** Mr. Owen Garth Hinkson's appellate waiver should enforced his illegal § 1101(a)(43)(F) and § 1326(b)(2) enhancement conviction?

6. "Hinkson does, however, make two relevant challenges to the effectiveness of the appellate waiver and corresponding plea." The first is that he received ineffective assistance of counsel that "directly affected the validity of the waiver or the plea itself." ".... The second is that the district court violated Rule 11 by erroneously informing him during his plea hearing that his statutory maximum sentence would be 20 years (when it should have been 10 years based on his assertion that his 1987 conviction did not qualify as an aggravated felony for § 1326(b)(2).""?

7. **Whether** (1) 18 U.S.C. § 16(b); (2) 8 U.S.C. § 1326(b)(2); (3) 8 U.S.C. § 1101(a)(43)(F); and Mass. Gen. Law, ch. 265, § 13D, is Mr. Hinkson actually innocent of these statute? Because this Supreme Court Rule that 18 U.S.C. § 16(b), and 16(b) apply to 8 U.S.C. § 1101(a)(43)(F) and works hand in hand and 18 U.S.C. § 16(b) is Rule unconstitutionally vague?

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:

United States v. Hinkson, District Court No.1:18-cv-64

United States v. Hinkson, Fifth Circuit No 21-40174

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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 Hinkson v. United States, No. 21-40174, 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 Hinkson v. United States, 1:18-CV-64, 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 March 8, 2022

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 22, 2022, and a copy of the order denying rehearing appears at Appendix "A".

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). **Mr. Owen Garth Hinkson cited 28 U.S.C. § 1254(1) that gave this Court its jurisdiction in this case.**

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 Amendment Due Process

6th Amendment Ineffective Assistance of counsel

8 U.S.C. § 1101(a)(43)(F)

8 U.S.C. § 1326(a) and (b)(2)

18 U.S.C. § 16(b)

28 U.S.C. § 1651(a)

28 U.S.C. § 1254

Supreme Court Rule 13

Massachusetts Statute

Mass. Gen. Laws ch. 265, § 13D

Mass. Gen. Laws ch. 278, § 29D

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STATEMENT OF THE CASE

I. Course of Proceedings

Mr. Hinkson was charged in a four count superseding criminal indictment that was returned on April 7, 1999 by a grand jury in the Eastern District of Texas. On June 14, 1999, pursuant to a plea agreement, petitioner pleaded guilty to illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a). The district court sentenced Hinkson to 110 months' imprisonment pursuant to 8 U.S.C. § 1326(b)(2), followed by three years of supervised release and a \$ 100.00 special assessment and a fine of \$10,000.00. Mr. Hinkson completed that sentence in 2006. On or about February 8, 2018, Hinkson filed this petition pursuant to 28 U.S.C. § 1651(a). On or about February 22, 2021, the district court denied and dismissed Hinkson's Petition (Doc. ## 61 and 62). Mr. Hinkson timely filed a notice of appeals. (Doc. # 63) with Petitioner seeks permission to proceed in forma pauperis on appeal. (Doc. # 65). Hinkson is currently serving a term of imprisonment at USP Atlanta Correctional Institution.

REASONS FOR GRANTING THE PETITION

1. The district court denied Mr. Hinkson 28 U.S.C. § 1651 (a) Petition by stated that Mr. Hinkson's 28 U.S.C. § 1651(a) Petition did not apply to Hinkson; "The writ of coram nobis is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the criminal conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief."
2. This Supreme Court Rule whiled Mr. Hinkson's 28 U.S.C. § 1651(a) Petition was penting before the district court, the Supreme Court Rule that 18 U.S.C. § 16(b) was unconstitutionally vague and Mr. Hinkson was indicted pursuant to 8 U.S.C. § 1101(a)(43)(F), and without 18 U.S.C. § 16(b), the statute of 8 U.S.C. § 1101(a)(43)(F) is void and is not a statute for an enhancement penalty.
3. Mr. Hinkson, was indicted pursuant to the 8 U.S.C. § 1326(a) and was sentenced pursuant to § 1326(b)(2), and § 1326(b)(2) invoked the statute § 1101(a)(43)(F), after this Court's Ruling in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), Mr. Hinkson, became actually innocent of the enhancement statute § 1101(a)(43)(F), and also when the Commonwealth of Massachusetts vacated Mr. Hinkson's Assault and Battery conviction pursuant to Mass. Gen. Laws ch. 278, § 29D, again

Mr. Hinkson became actually innocent of the conviction that would allowed the district court to enhanced Mr. Hinkson's sentence. Thus, Mr. Hinkson is **actually innocent** of the statutes of 8 U.S.C. § 1101(a)(43)(F); 8 U.S.C. § 1326(b)(2); 18 U.S.C. § 16(b); and Massachusetts General Law Ch. 265, § 13D. This Court spoke clearly in **Johnson v. United States**, (Johnson II) 135 S. Ct. 2551 (215), **Sessions v. Dimaya**, 138 S. Ct. 1204 (2018), and therefore the district court cannot sentenced Mr. Hinkson to a 20 enhancement penalty without Congress authorities to do so, and the statute that Congress had gave the district court which is 8 U.S.C. § 1101(a)(43)(F), and 18 U.S.C. § 16(b), Rule unconstitutionally vague.

4. Mr. Hinkson have the right to be convicted under the correct statute and § 1326(b)(2) is not the correct statute, and that violated the United States Constitution Fifth Amendment. In Mr. Hinkson's appeal the government conceded that "True, Dimaya held that Section 16's residual clause is void for vagueness, 134 S. Ct at 1223, so Hinkson's 1987 conviction might not today qualify as an aggravated felony under Section 1101(a)(43)(F)." But the district court and the appeals court sole reason to denied Mr. Hinkson relief is that 28 U.S.C. § 1651(a) and Mr. Hinkson's appeal waiver does not allow Mr. Hinkson the relief he now seeked. In **Allen v. Ives**, 950 F.3d 1184, (9th Cir. 2020)(citing **Bousley v. United States**, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)."

5. The government clearly stated in it's brief that in light of **Sessions v. Dimays**, 138 S. Ct. at 1223 Mr. Hinkson could not as of today convicted and sentence pursuant to § 1101(a)(43)(F), thus, in light of all the evidence, it is more likely than not that no reasonable juror would have convict him. **Bousley**, 523 U.S. at 623 (internal quotation mark omitted). Mr. Hinkson is actually innocent, and the applaes waiver should not stop Mr. Hinkson from relief. In **United States v. Northcutt**, 554 Fed. Appx. (11th Cir. 2014) ("[I]n Bushert, we left open the question of whether a sentence-appeal waiver would be enforced when a defendant wished to appeal a sentence that exceeded the statutory maximum. Bushert, 997 F.2d 1351 n.18 ("nothing that [i]t is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute."). See, **United States v. Taylor** 596 U.S. ____ (2022) ("But as the Fourth Circuit recognized, Congress has not authorized courts to convict and sectence him to a dacade of further imprisonment under § 924(c)(3)(A).").

6. Mr. Hinkson's counsel was ineffective when he object in Hinkson's PSR to the 20 years penalty, and did not object at Mr. Hinkson's sentencing hearing or in Mr. Hinkson's appeal, to the 20 years penalty.

7. Because of this statute 8 U.S.C. § 1326 and 8 U.S.C. § 1101(a)(43)(F), in this case, Mr. Hinkson was sentenced 2 times in the United States District Court for the Northern District of Georgia, pursuant to 8 U.S.C. § 1101(a)(43)(O). Without this enhancement penalties pursuant to 8 U.S.C. § 1326(b)(2) and 8 U.S.C. § 1101(a)(43)(F), in this case Mr. Hinkson would have been sentenced pursuant to 8 U.S.C. § 1326(b)(1), and that would have been a penalty of 10 years and not 20 years. Mr. Hinkson's case is a non aggravated felony immigration case. Mr. Hinkson has no prior conviction as a crime of violence that trigger this enhancement. Thus, the district court relied on § 1101(a)(43)(F), and 8 U.S.C. § 1101(a)(43)(O) denied Mr. Hinkson's 28 U.S.C. § 1651(a) Petition and to up held an enhancement that Mr. Hinkson is totally actually innocent of. See, Concepcion v. United States, 597 U.S. ____ (2022) ("First, he argued that he would no longer be considered a career offender under the amended Guidelines, because one of his prior convictions had been vacated and his remaining convictions would no longer be considered crime of violence that trigger the enhancement. n.1"). In this Court's Ruling Mr. Hinkson is no longer an aggravated felon, and the government conceded to that clearly. Mr. Hinkson's 20 years penalty in this case violated the United States Constitution, and this Court would not allow a

United States Citizen to be sentenced pursuant to a vacated prior conviction and one that this Court Ruled Uncostitutionally vague.

8. Mr. Owen Garth Hinkson, was only indicted pursuant to 8 U.S.C. § 1326(a), and this Court must revisit **Almendarez Torres v. United States**, 523 U.S. 224 226-27 (1998), which held that § 1326(b)(2) "is a penalty provision" that "does not define a separate crime" and that thus "neither the statute nor the constitution require the Government to charge the factor ... in the indictment." Because, Justice **THOMAS**, conceded that he had wrongfully decided that case. Section 1326(b)(2) must in the indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Owen G. Hinkson

Date: August 12, 2022

Date: October 12, 2022

Respectfully Re-Submitted,

Owen G. Hinkson