

No. _____

17-7141

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES R. YOUNG, — PETITIONER
(Your Name)

vs.

WARDEN, FCC COLEMAN-MEDIUM, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

[REPLY BRIEF FOR PETITIONER IN OPPOSITION TO THE GOVERNMENT]

James R. Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case

JAMES R. YOUNG

(Your Name)

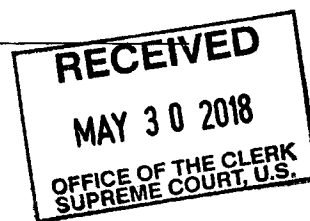
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

[REPLY BRIEF FOR PETITIONER]

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☒ is unpublished.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 _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**: N/A

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☐ is unpublished.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☐ is unpublished.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 13, 2017.

☒ 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**: N/A

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).

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

PETITIONER'S REPLY STATEMENT

In Petitioner's Reply in this matter in accordance to Supreme Court Rule 15, Petitioner would first like to establish the gist of the Government's Brief in Opposition to his Petition for Certiorari. The Government specifically argues: "Although a circuit conflict exists regarding the availability of habeas relief under the saving clause, Petitioner's case is not a suitable vehicle for addressing it. This Court has repeatedly denied review of petitions raising questions about the scope of the saving clause -- including petitions that were filed after the conflict arose -- in which case-specific factors prevented the petitioning prisoner from demonstrating his eligibility for relief. The same result is warranted here."

However, with all due respect to the Government's positioning itself to protect every conviction it has worked to obtain (right or wrong), its Petitioner's "specific factors" in his case and their small class of uniqueness, that actually 'demonstrate' his eligibility entitlement for relief.

Petitioner also asks of this Court that it keep in mind during it's consideration, that Petitioner was 'only' charged and convicted of a 10 year § 922(g) offense for which he has already served 14 years.

This Court as well as the Eleventh Circuit, has already remanded (for resentencing without ACCA enhancement) hundreds of cases involving Florida Burglary being wrongly used for purposes of the ACCA.

If Petitioner were to also be remanded, he, too, would be resentenced without the ACCA enhancement being applied due to intervening changes in law and statute concerning Florida Burglary and it's statutory construction done in James and Esprit.

However, the Government, even with admitted conflicts amongst the circuits, wants it's conviction (or sentence) to stand in this case despite the present substantive intervening law of the land vying against it.

This Court, therefore, (because no other court or judge is available) should thus

intervene in this full matter and resolve this public matter of controversy concerning the use/availability of § 2241 and the saving clause.

In addition, this Court can see the "ACCA 'class' of prisoners under Fla. burglary", as being an unduly split class of identical violators who are separated 'only' by their opportunity to be heard on redress for their entitlement to relief. The defendants who have been heard by any court under de novo review concerning this matter have already obtained their relief. Petitioner is now asking for the same opportunity.

The Government next states: "Even if Section 2255(e)'s saving clause could literally bear the reading that petitioner urges, the clause should not be construed in a manner that would render AEDPA's restrictions on second or successive Section 2255 motions largely self-defeating."

Petitioner agrees in part on this point by the Government, however, this fact of the matter does mean Petitioner's Petition for Certiorari review should also be granted due to admitted conflict warranting a decision by this Court.

Further, the Government factually stated: "The requirement that a second or successive Section 2255 motion must be certified by a court of appeals panel to satisfy AEDPA's strict requirements, 28 U.S.C. 2255(h), does not apply to a petition for habeas corpus that is allowed to proceed under the saving clause. And a petition for habeas corpus is not subject to AEDPA's one-year limitations period, 28 U.S.C. 2255(f), or to the AEDPA procedure for obtaining a certificate of appealability if relief is denied by the district court, 28 U.S.C. 2253(c)(1). An interpretation that would "permit federal prisoners to file habeas petitions based on an intervening change in statutory interpretation," by obviating the need for inmates like Petitioner to comply with AEDPA's requirements, thus "provides those prisoners with a superior remedy." McCarthan, 851 F.3d at 1091.

In response, Petitioner states no "superior remedy" will ever be available by any United States Court when the law is clearly written and applied equally. The Writ of Habeas Corpus was written as Congress has it designed to apply, and a substantive

retroactive intervening change in law by statutory interpretation warrants that a remedy should be made available in that unusual situation.

What is even more troubling in this matter is that the Government is asking the Court to not follow the law's design in this matter concerning habeas corpus as it is publicly written. The Court should deny the Government's request.

The courts of appeals are divided about whether Section 2241 relief is available under the saving clause based on a retroactive decision of statutory construction. Petitioner's case is a good case to resolve that conflict.

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas Petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 398 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in

the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; See also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. id. at 496; See also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) ("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "by definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). That is precisely the circumstance here in Petitioner's case. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. Furthermore, Petitioner can establish actual prejudice because it appears that Petitioner's ACCA enhancement is no longer valid in light of Samuel Johnson and United States v. Esprit, 841 F.3d 1235, 1241 (11th Cir. 2016).

In Johnson and Esprit, under the ACCA, a felon who is convicted of illegally possessing a firearm and has at least three prior convictions for a "violent felony" or "serious drug offense" receives a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as any crime punishable by a term of imprisonment exceeding one year that: (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. Id. § 924(e)(2)(B).

The first prong of this definition is sometimes referred to as the "elements clause", while the second prong contains the "enumerated crimes clause" and what is commonly called the "residual clause". United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). In Johnson v. United States, the Supreme Court held that the ACCA's residual clause is unconstitutionally vague, but did not call into question the ACCA's elements clause or the enumerated crimes clause. See Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551, 2557-58, 2563, 192 L. Ed. 2d 569 (2015).

Subsequently, this Court held that a Florida burglary conviction under Florida Statute §§ 810.02(1)(b)(1) and 810.011(2) no longer constitutes a violent felony under the ACCA. United States v. Esprit, 841 F.3d 1235, 1241 (11th Cir. 2016). More specifically, in Esprit, the court held that a Florida burglary conviction under Florida Statute §§ 810.02(1)(b)(1) and 810.011(2) cannot serve as an ACCA predicate offense under the enumerated offense clause and "indisputably does not implicate the elements clause." Id at 1237, 1240-41.

Thus, after Johnson and Esprit, Petitioner's particular Florida burglary convictions do not count for the purposes of the ACCA because he is not subject to the ACCA's enhanced penalties and is not an armed career criminal as defined under U.S.S.G. § 4B1.4(a).

In ACCA cases, Johnson was a new substantive rule as applied to the ACCA and it was "made" retroactive by this Supreme Court to ACCA cases on collateral review. As a standard Public law, federal law makes it a crime for a convicted felon to possess a firearm. See 18 U.S.C. § 922(g)(1). The default statutory maximum sentence for this offense is 10 years' imprisonment, with no mandatory minimum. See 18 U.S.C. § 924(a)(2). If, however, an offender's criminal history includes at least three prior convictions for a "serious drug offense" or a "violent felony", then the ACCA mandates a minimum sentence of at least 15 years and permits a maximum sentence of life. See 18 U.S.C. § 924(e); Custis v. United States, 511 U.S. 485, 487, 114 S. Ct. 1732, 1734 (1994).

However, an incorrect application of the ACCA alters the otherwise-

applicable statutory sentencing range: it triggers a 15-year mandatory minimum sentence that exceeds the otherwise-applicable 10-year statutory maximum. Accordingly, a new legal rule (such as Johnson [2015]) establishing that the ACCA was misapplied is substantive because, under the applicable version of that provision, it produces "a punishment that the law cannot impose." Schriro, 542 U.S. at 352, 124 S. Ct. at 2523. Simply stated, an Article III court has no power to lawfully impose a 15-year sentence if Congress has provided that the statutory maximum term of imprisonment is 10 years.

Wherefore in every such case where the ACCA is misapplied, regardless of whether the error was of statutory or constitutional dimension, the statutory sentencing range for the crime has been altered in a way that renders the sentence imposed (at least 15 years) in excess of the otherwise-applicable unenhanced 10-year statutory maximum for the crime. Petitioners like Young in this instant case, who were sentenced before Johnson have erroneously received the increased penalties under Section 924(e) and are now serving prison terms above the otherwise applicable statutory maximum of 10 years - a punishment that the law cannot impose upon them. These defendants are now entitled to redress under habeas corpus.

Petitioner's request for Certiorari review should, therefore, be granted. As an alternative form of relief, this Court can remand Petitioner back to the Court of the court of appeals for a de novo Johnson claim review pursuant to 28 U.S.C. § 2106.

The Government in it's brief in opposition doesn't refute the above claims, but did wrongly attempt to shift the focus of Petitioner's core claim in reference to Johnson in this case, to err as one focusing on Mathis. Yes, this Court's Mathis decision is inextricably intertwined with almost any still pending habeas Johnson claim, but it is not the foundational focus in any true Johnson claim. The Mathis decision is solely progeny from Johnson (2015).

The Government also erred in arguing Petitioner had an unobstructed opportunity to raise his non-applicable Florida burglary claim. It didn't however claim that Petitioner's argument that his 262 month sentence exceeding his statutory maximum penalty of 10 years was not a fact of error needing correction.

Petitioner Claims That His 262 Month Sentence Exceeded His Statutory Maximum Penalty of 10 Years For His § 922(g) Crime

Without the ACCA enhancement in the instant case, possession of a firearm by a convicted felon is a Class C felony with a statutory maximum of 10 years' imprisonment. See 18 U.S.C. § 924(a)(2); See also U.S.S.G. § 5G1.1(a). Wherefore, as with cases of proven actual innocence, finality interests must yield in cases of current sentences proven to be above the statutory maximum penalty authorized by Congress.

The concern with an erroneous sentence above the statutory maximum is that the sentencing court "exceeded [the punishment] authorized by the legislature." Jones v. Thomas, 491 U.S. 376, 383, 109 S. Ct. 2522, 2526 (1989); See also United States v. DiFrancesco, 449 U.S. 117, 139, 101 S. Ct. 426, 438 (1980) ("A defendant may not receive a greater sentence than the legislature has authorized."); United States v. Bushert, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993) ("It 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."). **Thus, there are serious, constitutional, separation-of-powers concerns that attach to sentences above the statutory maximum penalty authorized by Congress.**

Petitioner Young, has now exceeded the statutory permissible 10 year maximum in this case and is entitled to emergency release; [when a prisoner convicted of a § 922(g) crime serves more than the applicable 10-year maximum in § 924(a) due to an erroneous § 924(e) sentence, he is being detained without authorization by any statute.]. See Jones v. Thomas, 491 U.S. 376, 383, 109 S. Ct. 2522, 2526 (1989); Gilbert II, 640 F.3d at 1295, 1306-07, 1312, 1319 n.20, 1323. **"The concern with an erroneous sentence above the statutory maximum is that the sentencing court "exceeded [the punishment] authorized by the legislature."**

The Eleventh Circuit has consistently recognized that an "illegal sentence" on any count of conviction will always amount to reversible plain error on direct appeal, and warrant habeas relief as well. Mays v. United States, 817 F.3d 728, 737 n.12 (11th Cir. 2016) (erroneously sentencing a defendant to a 15-year minimum sentence under § 924(e), where he does not have three qualifying predicates, results in a "illegal sentence" which warrants

habeas relief; noting that imposing such a sentence will also be reversible plain error, since sentencing a defendant above the applicable statutory maximum **will always affect the defendant's "substantial rights and seriously affect the fairness, integrity, or public reputation of the judicial proceedings.)**. [See dissent and concurring in judgment by 11th Cir. Judges].

Therefore, Petitioner's present [ACCA] enhancement sentence of 262 months on the § 922(g) (1) count in this case, is illegal and the sentencing court now lacks jurisdiction to maintain that it should remain imposed. See United States v. Nealy, 979 F.2d 1522, 1524 (11th Cir. 1992)(defendant's sentence above the statutory maximum was a "manifest injustice" and appealable despite defendant's failure to object below); Bryant v. Warden, 738 F.3d 1253, 1283 (11th Cir. 2014)(same).

Petitioner, In Support, Claims That The Savings Clause In § 2255(e) Permitted Him To Bring His § 2241 Petition Challenging His Illegal Sentence

The language of § 2255(e) states that the savings clause applies regardless of whether a federal prisoner "has failed to apply" for § 2255 relief or whether the sentencing court "has denied him" § 2255 relief. See 28 U.S.C. § 2255(e).

Therefore, Petitioner Young's failure to raise his particular § 924(e) claim in his first § 2255 motion does not preclude him from proceeding under the savings clause in § 2255(e) pursuant to his 262 month sentence exceeding his statutory maximum penalty of 10 years for his § 922(g) crime.

In Gilbert II, 640 F.3d at 1303-04, the Eleventh Circuit Court Of Appeals explained that a "statutory maximum sentence" is a "punishment ceiling beyond which no defendant convicted for committing that particular crime may be sentenced regardless of the circumstances of the crime, regardless of the defendant's history, and regardless of the sentencing guidelines." Id. at 1306. Further, "To the extent of any inconsistency [between the guideline range and the statute], the guidelines would have to bend to statutorily prescribed limits, not the other way around." Id. at 1307.

Thus, with Petitioner having been convicted of a § 922(g) crime and serving more than the applicable 10-year maximum in § 924(a) due to an erroneous § 924(e) sentence, he is being detained without authorization by any statute. See Jones v. Thomas, 491 U.S. 376, 383, 109 S. Ct. 2522, 2526 (1989); Gilbert II, 640 F.3d at 1295, 1306-07, 1312, 1319 n.20, 1323.

Further, the savings clause in § 2255(e) permits Petitioner to bring his § 2241 petition challenging his illegal sentence, under the savings clause.

Petitioner Young's case, like Bryant v. FCC Coleman-Medium, 738 F.3d 1253, 1274 (11th Cir. 2013), thus squarely presents the issue left open in the Eleventh Circuit's en banc decision in Gilbert: "whether § 2241 is available where the asserted error in sentencing resulted in a term of incarceration above the statutory maximum that would have applied but for the error." Gilbert v. United States, 640 F.3d 1293, 1306-07, 1319 n.20 (11th Cir. 2011)(en banc). In other words, this case is about a man who, because of a mistake made by a judge at the time he was sentenced, is now in prison beyond the time allowed by the statute setting his punishment.

However, the question left open in Gilbert, was affirmatively answered in Bryant by the Eleventh Circuit Court of Appeals stating: "Bryant is entitled to a grant of the writ only because his sentence exceeds the statutory maximum penalty and only to that extent." "The § 924 error that opens the portal to a §2241 claim and the nature of the § 2241 relief are inextricably intertwined in this case of statutory sentencing error."

Petitioner's case involves this exact same set of facts and, therefore, warrants his requested habeas relief.

Petitioner Young's § 924(e) Claim

To show his prior § 2255 motion was "inadequate or ineffective to test the legality of his detention," Petitioner states that (1) throughout his sentencing, direct appeal, and first § 2255 proceeding, the Eleventh Circuit's binding precedent in Davis, 881 F.2d 973, (1989), and United States v. Hill, 863 F.2d 1575, 1581 (11th Cir. 1989), foreclosed any [residual clause/enumerated offense clause] previous argument on the Florida burglary issue that triggered § 924(e) and had squarely foreclosed Petitioner's § 924(e) claim that he was erroneously sentenced above the 10-year statutory maximum penalty in § 924(a), [In Adams, following these cases, it was held "the Florida burglary statute encompassed both generic and non-generic burglary." See United States v. Adams, 91 F.3d 114, 115 (11th Cir. 1996).]; (2) subsequent to his first § 2255 proceeding, the Supreme Court's decisions in Mathis & Descamps [inextricably intertwined with that of Johnson], as extended by the 11th Circuit Court in Esprit, to Petitioner's distinct prior convictions of Florida burglary,

overturned the Eleventh Circuit precedent in Davis, Hill, and Adams that had collectively squarely foreclosed Petitioner's § 924(e) claim; (3) the new rule announced in Mathis & Descamps via Mays [inextricably intertwined with that of Johnson] applies retroactively on collateral review; (4) as a result of Mathis & Descamps's new rule being retroactively applied in collateral review cases [as established in Mays], Petitioner's current sentence exceeds the 10-year statutory maximum authorized by Congress in § 924(a); and (5) the saving clause in § 2255(e) reaches Petitioner's pure § 924(e) [due to Mathis, Descamps, & Esprit][inextricably intertwined with Johnson] - Begay error claim, of illegal detention above the statutory maximum penalty in § 924(a)(2). A Begay error type of claim is now also a Johnson error claim.

The Government Does Not Object To Petitioner's Claim That He Was Sentenced beyond his 10 Year Statutory Maximum

The Government in this case declined to posit whether Petitioner's Florida burglary convictions remain ACCA "crimes of violence" under current binding precedent. Nor did the Government object to Petitioner's conclusion that Florida burglary is no longer (or never was) an ACCA "crime of violence" pursuant to retroactive Johnson.

More importantly, the Government doesn't refute that this Court has jurisdiction to hear or remand this case. See [Rule 15.4][28 U.S.C. § 2106].

Therefore, because none of Petitioner's Florida burglary convictions are/remain ACCA "crimes of violence", Petitioner no longer has sufficient predicates to qualify as an armed career criminal and is, thus, unconstitutionally sentenced beyond his 10 year statutory maximum.

The Government Failed To Address Petitioner's Question Concerning Bond

Lastly, the Government failed to address Petitioner's question concerning if the Warden has a right to continue to detain Petitioner without the application of a statute; and Petitioner's request for bond or recognizance release; as were outlined in Petitioner's motion request for certiorari.

Petitioner filed his "Motion For "Bond" or "Emergency Release" Pending Habeas Review", in the district court on April 6, 2017. The district court without specific reference to the motion for bond, dismissed Petitioner's motion (See Attachment "C"), along with his § 2241 petition for lack of jurisdiction. See Attachment "B".

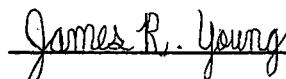
Petitioner, then sought leave to proceed in forma pauperis ("IFP") in the Eleventh Circuit Court of Appeals while again attempting to address his request for bond and or recognizance relief along with his other grounds outlined in his § 2241 motion then before that court. His request in that court (also without specific reference), was denied review along with the motion's entirety. See Attachment "A".

Petitioner, therefore, now again requests review of this matter following the Government's failure to even address this question, or that concerning the Warden's lack of authority to continue further detention.

In closing, Petitioner respectfully asks that this Court intervene and use it's authority to address the matters of public concern in this case, and to solve the circuit split concerning the use of habeas corpus. As an alternative, this Court can also choose to reverse and remand Petitioner's case back to the Eleventh Circuit Court of Appeals for a de novo review of his habeas corpus issues. See 28 U.S.C. § 2106.

Respectfully submitted,

Date: May 24, 2018



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