

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT WILKERSON,
PETITIONER,

- VS. -

SUPERINTENDENT FAYETTE SCI; ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY PHILADELPHIA,
RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

QUESTION PRESENTED

In this habeas corpus case, the Third Circuit held that an amendment based on *Apprendi v. New Jersey* was untimely, because it did not relate back to a double jeopardy claim raised in the timely habeas petition. The *Apprendi* claim was not based on any new facts; the jury instructions, verdict and sentence are the only operative facts underlying it, and they were pled as part of the double jeopardy claim. The Third Circuit reasoned that the amendment did not satisfy the relation back standard articulated in *Mayle v. Felix*, because it was based on the same conviction and sentence, and because it asserted different problems.

The question presented is this:

Did the Third Circuit Court of Appeals contravene this Court's relation-back precedent when it held that an amendment based on *Apprendi v. New Jersey* does not relate back to a timely double jeopardy claim, because two claims based upon the same verdict and sentence are not based on a "common core of operative facts," when the verdict and sentence are the only operative facts underlying an *Apprendi* claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vincent Wilkerson respectfully asks that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221 (3d Cir. 2017), is appended as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania, *Wilkerson v. Coleman*, No. 12-2190, 2015 WL 500168 (E.D. Pa. Feb. 4, 2015), is appended as Appendix B. The state appellate court opinion, *Commonwealth v. Wilkerson*, No. 1521 EDA 2002 (Pa. Super. Ct. Sept. 10, 2003), is appended as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(a). The Third Circuit issued its opinion on September 8, 2017. App. A1. On November 28, 2017, this Court extended the time for filing a petition for a writ of certiorari to January 5, 2018. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and the Fourteenth Amendments to the United States Constitution. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense." The due process clause of the Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Vincent Wilkerson filed a pro se petition for habeas corpus challenging his Pennsylvania convictions and sentences for attempted murder and aggravated assault based on a shooting outside a nightclub. He was sentenced to consecutive maximum terms of imprisonment: 10-20 years for aggravated assault, 20-40 years for attempted murder, and 2 ½-5 years for possession of the instrument of a crime. App. A5.

In Pennsylvania, aggravated assault is a lesser-included offense of attempted murder; it does not required proof of any additional element beyond those required by the greater offense. App. A9. The jury was not asked to base the aggravated assault conviction on any act separate from the attempted murder conviction; the parties below agreed that if one criminal act, the shooting, served as the basis for both the attempted murder and the aggravated assault convictions, he was punished twice for the same offense in violation of the Double Jeopardy clause. App. A9. The jury was instructed that the elements of attempted murder are: (1) an act,

the shooting of the victim; (2) with the intent to commit the crime of murder; (3) and that act constituted a substantial step toward the commission of murder. The maximum sentence for attempted murder *simpliciter* is twenty years; the statute permits a forty-year sentence only “where serious bodily injury results”:

Attempt, Solicitation, and Conspiracy to Commit Murder. Notwithstanding section 1103(1) (relating to a sentence of imprisonment for felony), a person who has been convicted of attempt, solicitation or conspiracy to commit murder where serious bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years. Where serious bodily injury does not result, the person may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 20 years.

18 Pa. C.S. § 1102 (C) (1997). The jury was not asked to find serious bodily injury as an element of attempted murder. App. A12.

The district court granted relief in part, holding that the separate convictions and sentences for attempted murder and aggravated assault violate double jeopardy, because the jury was not asked to find a separate act as a basis for the aggravated assault. App. B12. The Commonwealth appealed the partial grant of relief, and Mr. Wilkerson cross-appealed the denial of relief on his claim that his maximum sentence for attempted murder violates due process under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the jury was not asked to find “serious bodily injury,” a required element for that sentence.

The Third Circuit vacated the district court’s decision on the double jeopardy issue, and separately held that the *Apprendi* issue was untimely, because it was raised in an amendment that did not relate back to the timely habeas petition. App. A12-13. The Third Circuit reasoned that the double jeopardy and *Apprendi* claims “were separated [from each other] in time and type” and do not satisfy the relation back standard set forth in *Mayle v. Felix*, 545 U.S. 644 (2005). App. A13-14. The Third Circuit rejected Mr. Wilkerson’s argument that the *Apprendi*

amendment shared a “common core of operative facts” with the timely double jeopardy claim, because the facts underlying the *Apprendi* claim were pled as part of the double jeopardy claim: the jury instructions for attempted murder, the verdict, and the sentence. Instead, the Third Circuit held that this Court in *Mayle* explicitly rejected the argument that “relation back can be satisfied simply because the amendment and petition pertain to the same conviction or sentence,” and that the “problems asserted with the [attempted murder] jury charge are entirely unrelated.” App. A14.

REASONS FOR GRANTING THE PETITION

- I. A rule that an amendment to a habeas petition may not relate back under *Mayle v. Felix* because claims related to the same conviction or sentence but asserting separate problems do not share a common core of operative facts conflicts with this Court's precedent when applied to a claim raised under *Apprendi v. New Jersey*, because the jury instructions, verdict and sentence are necessarily the operative facts of such a claim.**

It is undisputed that Mr. Wilkerson's maximum sentence for attempted murder violates due process as set forth in *Apprendi v. New Jersey*, because the jury did not find a required element of the maximum sentence. App. A12. It is also undisputed that trial counsel did not raise this issue, and post-conviction counsel failed to raise trial counsel's ineffectiveness for failure to raise it.¹

Mr. Wilkerson filed an amendment seeking to add the *Apprendi* issue to his pro se habeas petition. The facts underlying the *Apprendi* amendment are the same as the facts underlying his timely-pled double jeopardy claim: the jury instructions, the verdict and the sentence. Under this Court's precedent, "so long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Mayle*, 545 U.S. at 664. The Third Circuit, however, held that the *Apprendi* issue does not relate back, because the "problems asserted with the [attempted murder] jury charge are entirely unrelated." App. A14. Per this interpretation of *Mayle v. Felix*, an amendment is not sufficiently based in a common core of operative facts if the "problems asserted" are different. But the Third Circuit did not identify any fact underlying the *Apprendi* amendment that had not been pled as part of the double jeopardy claim; the "problems asserted" are the legal theory, not the facts. The doctrine of relation back

¹ Because the Third Circuit held that this claim was untimely, the opinion did not address Mr. Wilkerson's argument that he showed cause to overcome any procedural default by showing, per *Martinez v. Ryan*, 566 U.S. 1 (2012), that post-conviction counsel was ineffective for failing to raise a colorable claim of trial counsel ineffectiveness.

expressly permits relation back when an amendment asserts a new legal theory based on common facts. *Mayle*, 545 U.S. at 664 & n.7. Because *Apprendi* claims are by definition based upon jury instructions, verdict and sentence, the rule adopted by the Third Circuit contravenes this Court's precedent. It would prevent relation back of any *Apprendi* claim even where, as here, the facts underlying the claim were timely pled.

A. Because the jury did not find a required element, the maximum sentence violates *Apprendi*.

Mr. Wilkerson was sentenced to a forty-year maximum sentence for attempted murder. The jury did not find "serious bodily injury" as an element of attempted murder; that element is required for imposition of that maximum sentence. As the Commonwealth conceded below, the sentence is unconstitutional. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This error violates the Sixth and Fourteenth Amendments, and Pennsylvania law is clear such a sentence cannot stand.

"Serious bodily injury" is a fact that increases the maximum sentence for attempted murder. Under Pennsylvania law, the maximum sentence for attempted murder *simpliciter* is twenty years; the statute permits a forty-year sentence only "where serious bodily injury results":

Attempt, Solicitation, and Conspiracy to Commit Murder.
Notwithstanding section 1103(1) (relating to a sentence of imprisonment for felony), a person who has been convicted of attempt, solicitation or conspiracy to commit murder where serious bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years. Where serious bodily injury does not result, the person may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 20 years.

18 Pa. C.S. § 1102 (C) (1997). Under Pennsylvania law, such an error is not harmless even where there is sufficient evidence for serious bodily injury.

It is undisputed that the jury at Mr. Wilkerson's trial was not asked to find, and did not find, that "serious bodily injury" resulted from the shooting of Nasir Hill. Further, the error is not harmless. Under Pennsylvania law, had counsel raised it at sentencing, or on post-conviction, there is a reasonable probability the sentence would have been vacated. "The Courts of Pennsylvania have consistently respected the authority of a jury to find, or to decline to find, the existence of each element of each criminal offense." *Commonwealth v. Johnson*, 910 A.2d 60, 67-68 (Pa. Super. Ct. 2006) (vacating forty-year sentence for attempted murder on *Apprendi* grounds despite jury verdict for aggravated assault, serious bodily injury as an element). *See also Commonwealth v. Naranjo*, No. 273 EDA 2012, 2013 Pa. Super. Unpub. Lexis 2168, *15 (Pa. Super. Ct. 2013) (unpublished) (relying upon *Johnson* to remand for resentencing where court imposed forty-year sentence for attempted murder without a jury determination of serious bodily injury); *Commonwealth v. Barnes*, No. 947 MDA 2014, 2016 WL 1062842 (Pa. Super. Ct. 2016) (unpublished) (same).

B. The *Mayle v. Felix* relation-back doctrine.

Under the Federal Rules of Civil Procedure, a party may properly amend a pleading to raise a new claim or defense that would otherwise be barred by a statute of limitations if the amendment "arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).² This doctrine is called "relation back."

² This provision was numbered Rule 15(c)(2) at the time *Mayle* was decided in 2005, but is now numbered Rule 15(c)(1)(B) due to a reorganization of the rule.

This Court's precedent holds that Rule 15(c) relation back applies in habeas. "[S]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Mayle v. Felix*, 545 U.S. 644, 664 (2005). Thus, a habeas petitioner may amend a petition with a new claim, asserting a new legal theory, after the statute of limitations has passed, if the amendment is "tied to a common core of operative facts" raised in the timely petition. In other words, relation back is in order "when the new claim is based on the same facts as the original pleading and only changes the legal theory." *Mayle*, 545 U.S. at 664 n. 7 (quoting 3 J. Moore, et al., *Moore's Federal Practice* § 15.19[2], p. 15-82 (3d ed. 2004)).

In *Mayle*, this Court vacated a Ninth Circuit decision holding that any claim related to a habeas petitioner's "trial, conviction, or sentence" relates back to the initial petition. *Mayle*, 545 U.S. at 656-57. That rule was overbroad, because "federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence." *Id.* The two claims at issue in that case were an amendment that the trial court's admission of the defendant's statement violated the Fifth Amendment, and a timely claim that the admission of an informant's statements violated his Sixth Amendment confrontation rights. Although both claims were related to the admission of pretrial statements, the statements "were separated in time and type" and did not arise from the same "conduct, transaction, or occurrence," and therefore the amendment did not relate back. *Id.*

This Court made clear in *Mayle* that the Ninth Circuit's rule, permitting relation back for any claim relating to the same trial, conviction or sentence, "views 'occurrence' at too high a level of generality." *Mayle*, 545 U.S. at 661. At the same time, this Court affirmed that relation back is appropriate when an amendment "arises from the same core facts as the timely filed claims." *Id.* at 658.

C. The Third Circuit’s application of *Mayle v. Felix* in this case conflicts with this Court’s precedent defining common core of operative facts.

Here, the double jeopardy claim and the *Apprendi* amendment are based on a common core of operative facts. Although the legal theories for the two claims differ, they both rely upon straightforward and uncontroverted facts:

- Mr. Wilkerson was convicted and sentenced for both aggravated assault and attempted murder;
- the jury found the following elements of aggravated assault: (1) an act, infliction of serious bodily injury; (2) that is intentional, knowing or reckless under circumstances manifesting extreme indifference to the value of human life. 18 Pa. C.S. § 2702(a)(1);
- the jury found the following elements of attempted murder: (1) an act, a substantial step toward an intentional killing; (2) with specific intent to kill. 18 Pa. C.S. §§ 901(a), 2502(a);
- the jury was not asked to, and did not find, a separate act as a basis for the aggravated assault conviction;
- the court imposed consecutive sentences of 10-20 years for aggravated assault and 20-40 years for attempted murder.

There is no fact underlying the *Apprendi* claim that was not pled as part of the double jeopardy claim.

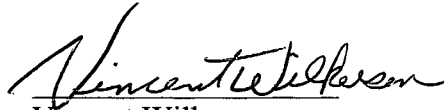
Mr. Wilkerson argued below that the *Apprendi* amendment relates back, because it is based upon the facts pled in support of the timely double jeopardy claim: the jury instructions, the verdict and the sentence. The Third Circuit held that this argument “is just another way of couching the argument explicitly rejected in *Mayle*—that relation back can be satisfied simply because the amendment and petition pertain to the same ‘conviction or sentence.’” *Wilkerson*, 871 F.3d at 237 (quoting *Mayle*, 545 U.S. at 661). Although conceding that the two claims “coincidentally relate to the jury charge and involve the term ‘serious bodily injury,’” the Third Circuit held that “the problems asserted with the jury charge are entirely unrelated.” App. A14.

This holding conflicts with *Mayle*, because the “problems asserted” in a claim are the legal theory, which is distinct from the operative facts. This Court based its decision in *Mayle* on the fact that the two pretrial statements at issue were made by different people “at a different time and place,” not on the fact that the two claims asserted different legal theories about the statements’ admissibility. *Mayle*, 545 U.S. at 660. Mr. Wilkerson’s *Apprendi* amendment was based on facts asserted in his double jeopardy claim regarding the attempted murder jury instruction, verdict and sentence. In fact, the double jeopardy claim cannot be asserted without setting forth the attempted murder jury instruction, verdict, and sentence. The two claims at issue here are related in time and type, and are therefore based on a common core of operative facts.

CONCLUSION

This Court should grant the petition for writ of certiorari in order to impose consistency on the Third Circuit Court of Appeals and its sister circuits in their adjudication of claims in federal habeas proceedings.

Respectfully submitted this 5th day of January, 2018.


Vincent Wilkerson