

NO.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

Motion to Proceed In Forma Pauperis

Petitioner, MARCO D. DUNCAN, asks this Court for leave to proceed in forma pauperis. The Eleventh Circuit Court of Appeals previously appointed the undersigned counsel to represent Petitioner.



Valarie Linnen, Esq.*
PO Box 330339
Atlantic Beach, FL 32233
PO Box 200
Chippewa Lake, MI 49320
888.608.8814 Tel
Attorney for Petitioner
*Counsel of Record, Member of the Supreme
Court Bar

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15665-AA

MARCO D. DUNCAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Marco D. Duncan has moved for appointment of counsel in his challenge of the dismissal of his *pro se* motion to vacate, set aside, or correct sentence, 28 U.S.C. § 2255, as successive, and denial of his subsequent motion to alter or amend the judgment, Fed. R. Civ. P. 59(e). In his motion, he contends that the anticipated issues on appeal are: (1) whether new facts exist that were not available when he filed his first § 2255 motion and now would justify relief; (2) whether the district court was required to grant relief, even though his prior state conviction was reduced to a misdemeanor rather than vacated; (3) whether U.S. Supreme Court precedent authorizes him to file a second § 2255 motion; (4) whether his claim entitles him to Sixth Amendment protection because it is not a challenge to a sentencing enhancement; (5) whether the lower court violated the Magistrate's Act by conducting a *de novo* review on facts that were not heard by the magistrate judge nor a part of the record, but were later determined *sua sponte*

by the district court; (6) whether the district court allowed improper facts to support its decision to deny relief; (7) whether the district court was obligated to reopen the proceedings and allow him an opportunity to respond to the analysis personally conducted by the district court; and (8) whether the district court committed error by denying his Rule 59(e) motion. He also asserts that his appeal concerns the interpretation and ramification of Proposition 47, which was approved by California voters to reduce specified prior felony drug convictions to misdemeanors. He argues that his prison's law library is inadequate because it fails to provide authorities and reference materials for these issues. He asserts that counsel would assist him in preparing his complex brief and presenting relevant California statutes, court decisions, or executive orders here.

Shortly after Duncan moved for appointment of counsel, he filed his *pro se* appellant's brief. His brief raises many of the issues that he mentioned in his motion for appointment of counsel and provides relevant facts, legal authorities, and arguments.

Duncan is a federal prisoner serving a life sentence after a jury convicted him in 2003 of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. Duncan received an enhanced sentence under 21 U.S.C. § 851 because he had a prior state felony drug conviction, increasing his statutory imprisonment range from 10 years to life, to 20 years to life. He appealed, and we affirmed his conviction and sentence. In 2006, he filed an initial 28 U.S.C. § 2255 motion to vacate his sentence, which the district court denied in 2007. We denied a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP").

In 2015, Duncan filed another § 2255 motion. He argued that his prior state felony conviction for possession of a controlled substance had been converted in 2014 from a felony to a misdemeanor, and, therefore, he no longer qualified for an enhanced sentence under § 851. A

magistrate judge issued a report and recommendation (“R&R”), recommending that Duncan’s § 2255 motion be dismissed. The magistrate judge found that Duncan’s motion was an unauthorized second or successive § 2255 motion, which the court did not have jurisdiction to consider, because his prior § 2255 motion had been denied on the merits, and he had not obtained authorization here before filing the second § 2255 motion.

Duncan objected, relying on the Supreme Court’s decision in *Johnson v. United States*, 544 U.S. 295, 302 (2005) (holding that the vacatur of a prior state conviction was a new fact that renewed the one-year federal statute of limitations under § 2255(f)(4)), and our decision in *Stewart v. United States*, 646 F.3d 856, 863-865 (11th Cir. 2011) (determining that a numerically second § 2255 motion was not successive because it was filed after the movant obtained the vacatur of a prior state court conviction used to enhance his federal sentence, and that “fact” was not available at the time when the movant filed his first § 2255 motion). He argued that he could not have raised his claim in his first § 2255 motion, and, therefore, his second § 2255 motion was not successive.

Over Duncan’s objections, the district court adopted the R&R and dismissed the § 2255 motion as successive. The court also noted that Duncan’s sentence enhancement had increased his minimum sentence, rather than the maximum, and the court had sentenced him to the maximum of life imprisonment. The court concluded that *Johnson* and *Stewart* did not apply, as Duncan’s prior conviction was not vacated, but was merely reduced from a felony to a misdemeanor. The court reasoned that, because Duncan’s sentence did not exceed the statutory maximum and could be re-imposed even without the challenged enhancement, and because Duncan did not raise a claim of actual innocence, no habeas relief was warranted. It also denied Duncan a COA and leave to proceed on appeal IFP.

Duncan filed a Fed. R. Civ. P. 59(e) motion for reconsideration. He argued that the district court was required to restrict its *de novo* review only to portions of the R&R to which he had filed objections and was not permitted to consider analysis not contained in the R&R. He also reiterated that his § 2255 motion was not successive. The court denied the motion without further explanation. Duncan filed a timely notice of appeal as to the court's dismissal of his § 2255 motion and denial of his Rule 59(e) motion.

Duncan sought a COA, construed from his notice of appeal, and IFP status here. Duncan's construed motion for a COA from both the dismissal of his § 2255 motion and the denial of his Rule 59(e) motion was denied as unnecessary. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004). Also, his motion for leave to proceed on appeal IFP was granted. Duncan was a pauper and the appeal of the dismissal of his § 2255 motion was not frivolous. The record showed that Duncan previously filed a § 2255 motion in 2006 that was considered on its merits. However, the claim in Duncan's second § 2255 motion was based on the conversion of his underlying state court conviction to a misdemeanor in 2014, which was a fact that did not arise or exist until after the conclusion of his initial § 2255 proceeding. *See Stewart*, 646 F.3d at 863-65. Although Duncan's claim may not warrant § 2255 relief, he asserted a non-frivolous argument that the district court erred in dismissing his § 2255 motion as successive.

There is no constitutional right to counsel in federal habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, we may appoint counsel to a person seeking collateral relief under § 2255, who is financially eligible, only if we determine that the interests of justice so require. *See* 18 U.S.C. § 3006A(a)(2)(B); *see also Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983) (explaining that counsel must be appointed "only when the interests of justice or due process so require"). "Appointment of counsel in civil cases is . . . a

privilege justified only by exceptional circumstances, such as the presence of facts and legal issues so novel or complex as to require the assistance of a trained practitioner.” *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) (quotation omitted). The key is whether the *pro se* party needs help presenting the essential merits of his position to the court. *Id.* We have further indicated that factors to consider, at least at the district court level, when determining whether exceptional circumstances exist, include: (1) the type and complexity of the case, (2) whether the indigent is capable of adequately presenting his case, (3) whether the indigent is in a position to adequately investigate the case, and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination. *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990).

Duncan’s motion for appointment of counsel is GRANTED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

No.

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PETITION FOR WRIT OF CERTIORARI

Valarie Linnen, Esq.*
P.O. Box 330339
Atlantic Beach, FL 32233
P.O. Box 200
Chippewa Lake, MI 49320
888.608.8814 Tel
Attorney for Petitioner
*Counsel of Record,
Member of the Supreme Court Bar

QUESTION PRESENTED

- I. Under 28 U.S.C. 2255(f)(4), does federal law permit resentencing where the petitioner is originally sentenced as a career offender, but the predicate state felony conviction is later legislatively and judicially re-designated to a misdemeanor conviction “for all purposes”?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eleventh Circuit Court of Appeals include the United States of America and Petitioner Marco D. Duncan. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MARCO D. DUNCAN, respectfully petitions this Court for a writ of certiorari to review the *Opinion* rendered by the Eleventh Circuit Court of Appeals on November 27, 2017. See Appendix K.

OPINIONS BELOW

The *Opinion* rendered by the Eleventh Circuit Court of Appeal is attached as Appendix K.

JURISDICTION

The order of the Eleventh Circuit Court of Appeal became final on November 27, 2017. (App.K) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1) (2018).

Specifically, Petitioner invokes this Court’s jurisdiction under Rule 10(c), because Eleventh Circuit decided a question of federal law which has not been—and should be—settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“A prisoner in custody under sentence of a court established by Act of Congress claiming... that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a).

“A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of— the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2255(f)(4).

STATEMENT OF THE CASE

In the proceeding below, Petitioner, MARCO D. DUNCAN, appealed to the Eleventh Circuit Court of Appeal and argued that the district court erred by finding that his habeas corpus motion was procedurally barred as successive. Substantively, Mr. Duncan argued that he is entitled to resentencing, because the state felony predicate conviction used to sentence him as a career offender was judicially and legislatively “redesignated a misdemeanor for all purposes”. See App.H-K.

Previously, Appellee, UNITED STATES OF AMERICA, charged Mr. Duncan with one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine powder and fifty grams or more of cocaine base. (App.A p.1) Mr. Duncan was initially subject to a sentencing range of 10-years to life imprisonment, but the government gave notice of its intent to seek an enhanced penalty on the basis that he had previously been convicted of felony possession of cocaine base in California state court. (App.B p.1-5) This enhancement increased Appellant’s range of punishment to 20-years to life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) (2002). (App.B)

Following a jury trial, Mr. Duncan was convicted as charged. (App.C p.1-2) Relying on the enhancement provided by the California felony conviction, the district court sentenced him to life imprisonment. (App.D) This Court affirmed the judgment and sentence on direct appeal. See United States v. Duncan, 381 F.3d 1070 (11th Cir.

2004).

Mr. Duncan petitioned for federal habeas corpus relief in 2006. The district court denied the petition without issuing a certificate of appealability.

In November 2014, California voters approved Proposition 47, which reduced certain drug possession felonies to misdemeanors. (App.E) Proposition 47 also created a process for people serving sentences related to those offenses to petition for resentencing. (App.E) Immediately thereafter, the California court rendered an order reducing Mr. Duncan's conviction from a felony to a misdemeanor as follows:

The conviction is hereby redesignated a misdemeanor for all purposes, except that such redesignation shall not permit Petitioner to own, possess, or have in his custody or control any firearm...

(App.E p.6) Upon receipt of the order of the California court, Mr. Duncan promptly petitioned the district court to vacate his sentence on the basis that the state felony conviction used to enhance his sentence had been reduced from a felony to a misdemeanor. (App.E)

In its *Order*, the district court found that the redesignation of Appellant's prior conviction from a felony to a misdemeanor did not constitute a vacatur of the prior conviction used for enhancement. (App.F) The district court added, "And because the life sentence I originally imposed does not exceed the statutory maximum even in the absence of the challenged enhancement – and the same exact sentence could be reimposed without it – he cannot show a 'fundamental defect which inherently results

in a complete miscarriage of justice.” (App.F p.4)

The Eleventh Circuit affirmed and held: “Given our binding precedent in Spencer, we are obligated to affirm. Duncan’s sentence of life imprisonment ‘was and is lawful,’ both before and after California reclassified his offense – the statutory maximum at all times remained life imprisonment. Additionally, Duncan has shown neither ‘actual innocence of his crime’ nor ‘the vacatur of a prior conviction.’” (App.K p.3; citing Spencer v. United States, 773 F.3d 1132, 1144 (11th Cir. 2014) (en banc))

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE WRIT

- I. Under 28 U.S.C. 2255(f)(4), does federal law permit resentencing where the petitioner is originally sentenced as a career offender, but the predicate state felony conviction is later legislatively and judicially re-designated to a misdemeanor conviction “for all purposes”?

The question presented in this petition is whether Appellant, MARCO DUNCAN, may use a 28 U.S.C. § 2255(f)(4) motion to challenge a sentence that was based on a recidivist enhancement, when the predicate state felony conviction was later “redesignated” by legislative and judicial order to a misdemeanor conviction. See Cal. Penal Code § 1170.18(k) (“Proposition 47”).

In the proceeding below, Mr. Duncan petitioned the district court to vacate, set aside, or correct his sentence after the predicate state felony conviction used to enhance his sentence as a career offender was legislatively and judicially “redesignated” to a misdemeanor conviction. (App.E) Procedurally, he argued that the redesignation of the sole predicate conviction from a felony to a misdemeanor “for all purposes” was a new “fact” forming the basis of the challenge that was not previously available or known to him. See 28 U.S.C. § 2255(f)(4) (2017); see also Johnson v. United States, 544 U.S. 295, 303 (2005).¹ Because the redesignation of his predicate conviction from felony to misdemeanor constituted a new fact and started a fresh one-year statute of limitations, his motion to correct sentence was not

¹ Mr. Duncan timely sought relief in the California state court following Proposition 47, then promptly filed his Section 2255(f)(4) motion.

procedurally barred as successive.

Substantively, Mr. Duncan argued that he was entitled to relief because the career offender enhancement under 28 U.S.C. § 841(b)(1)(A) was “imposed in violation of...the laws of the United States”. See 28 U.S.C. § 2255(a). Because the California court and legislature ordered that his conviction be “redesignated a misdemeanor **for all purposes**” (emphasis added), Mr. Duncan argued that he is not, nor has he ever been, a recidivist offender. See United States v. Norwood, 2016 U.S. Dist. LEXIS 9230 *7 (C.D. Cal. 2016) (holding that “once the felony is indeed reclassified as a misdemeanor, it becomes a misdemeanor even for backward looking laws...”); see also People v. Park, 200 P.3d 1263, 1270 (Cal. 2013) (holding that once a conviction has been reduced to a misdemeanor, the conviction can no longer be used as a prior felony to enhance a sentence). Stated differently, Mr. Duncan argued that Proposition 47 operates to vacate his felony conviction in favor of a misdemeanor conviction, viewing the felony conviction as if it never happened.

The Eleventh Circuit disagreed and cited circuit precedent requiring two showings for relief: (1) that the sentence imposed was unlawful (in other words, that the same sentence originally imposed could not be reimposed upon resentencing); and (2) actual innocence of the crime or vacatur of the prior conviction. See App.K p.3 (citing Spencer v. United States, 773 F.3d 1132, 1144 (11th Cir. 2014) (en banc)). Stated differently, the Eleventh Circuit did not consider California’s Proposition 47

to constitute a “vacatur” of prior conviction.

However, Mr. Duncan asks this Court to grant a writ of certiorari, because this Court has never required such a showing and allowing to stand the sentence enhanced by a felony conviction that does not exist, when California law views the predicate felony conviction as if it never happened, amounts to a “vacatur or prior conviction” and “a fundamental defect which inherently results in a complete miscarriage of justice.” See United States v. Addonizio, 442 U.S. 178, 186 (1979).

Law

In McNeill v. United States, this Court specifically left undecided the issue of whether federal courts should consider the effect of state action upon recidivist enhancement statutes where “a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.” See 563 U.S. 816, 825 (2011).

However, the Eleventh Circuit sitting en banc answered the question left unanswered in McNeill in the negative. See Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014).² In Spencer, the Eleventh Circuit held that an inmate may only use Section 2255 to collaterally attack a sentencing error resulting in an unlawful

² See also Whiteside v. United States, 748 F.3d 541 (4th Cir. 2014), rev. en banc on procedural grounds 775 F.3d 180 (4th Cir. 2014); Hawkins v. United States, 706 F.3d 820, 823 (7th Cir. 2013), supplemented on denial of reh’g, 724 F.3d 915 (7th Cir. 2013); Sun Bear v. United States, 644 F.3d 700 (8th Cir. 2011) (en banc).

sentence and may not seek relief when the sentence was erroneously imposed, but nonetheless lawful. Id. But the en banc opinion makes no mention of, and thus appears to ignore, the realities of the impact that the recidivist designation places upon the offender, which brands him as “one subject to particularly severe punishment”, see Buford v. United States, 532 U.S. 59, 60 (2001), and also appears ignores the influence that such a label imparts upon the considerable discretion of the district court when fashioning a sentence.

A dissenting opinion in Spencer noted that “nowhere has the Supreme Court held that a finding of unlawfulness is *necessary* to satisfy the complete miscarriage of justice standard.” See 773 F.3d at 1146 (Wilson, J., dissenting). Indeed, Judge Wilson cited this Court’s precedent clearly establishes that:

... that an error resulting in an unlawful sentence--i.e., a sentence that is beyond the scope of a court's legal authority--is *sufficient* to satisfy the complete miscarriage of justice standard. *See Davis*, 417 U.S. at 346-47, 94 S. Ct. at 2305; *Addonizio*, 442 U.S. at 186-87, 99 S. Ct. at 2241 (stating that refusing to vacate the sentence in *Davis* "would surely have been a complete miscarriage of justice, since the conviction and sentence were *no longer lawful*" (emphasis added) (internal quotation marks omitted)).

Id.

Indeed, the plain language of Section 2255 dictates that the statute is a vehicle to correct sentences “imposed in violation of...the laws of the United States.” 28 U.S.C. § 2255(a) (2107). While not limited to constitutional errors alone, a non-constitutional error may serve as a basis for collateral attack when it involves “a

fundamental defect which inherently results in a complete miscarriage of justice.” Addonizio, 442 U.S. at 185. (Internal quotation marks omitted). Further, a postconviction change in the law rendering a defendant’s conduct no longer criminal is cognizable on collateral review because “[t]here can be no doubt that such a circumstance inherently results in a complete miscarriage of justice...” Davis v. United States, 417 U.S. 333, 346 (1979) (internal quotation marks omitted); see also Hill v. United States, 368 U.S. 424, 428 (1962) (holding that collateral relief is permitted where there is a “fundamental defect which inherently results in a complete miscarriage of justice,” “an omission inconsistent with the rudimentary demands of fair procedure,” or “exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent”).

While ordinary errors in guideline application do not amount to a complete miscarriage of justice, this Court permitted an inmate to use Section 2255 to challenge his career offender designation after his state court predicate conviction was vacated. Johnson v. United States, 544 U.S. 295, 311 (2005); see also Stewart v. United States, 646 U.S. 856, 858-59 (11th Cir. 2011). Indeed, “a defendant who successfully attacked his state conviction in state court or on federal habeas review could then apply for reopening of any federal sentence enhanced by the state sentences.” Johnson, 544 U.S. at 303 (internal quotation marks omitted).

Argument

In light of the discrepancies between this Court’s existing jurisprudence and the en banc circuit precedent of the Eleventh Circuit, Mr. Duncan asks this Court to settle the important question of whether federal courts should consider the effect of state action upon recidivist enhancement statutes, where “a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.” See McNeill, 563 U.S. at 825.

All that Johnson requires is that Mr. Duncan “successfully attack[] his state conviction in state court” in order to “then apply for reopening of any federal sentence enhanced by the state sentences.” Johnson, 544 U.S. at 303. Mr. Duncan “successfully attacked” his state court felony conviction. To distinguish between a *vacatur* of conviction and a *redesignation* of conviction, as the Eleventh Circuit did in Spencer and in this case, is a specious play on semantics with no basis in law or reality.

Furthermore, denying Mr. Duncan relief on the basis that his sentence is nonetheless lawful ignores the realities of federal sentencing. See Spencer, supra. It is true that Mr. Duncan, without the career offender enhancement, would still face the same statutory maximum sentence of life imprisonment, while his mandatory

minimum sentence would drop from 20 years to 10 years.³ Applying the Eleventh Circuit precedent announced in Spencer ignores the realities of the impact that the recidivist designation places upon the offender, which brands him as “one subject to particularly severe punishment,” see Buford, 532 U.S. at 60, and thus ignores the influence that such a label imparts upon the considerable discretion of the district court when fashioning a sentence.

It is to be noted that the same predicate conduct of possession of cocaine (a misdemeanor under California law) used to enhance Mr. Duncan’s conviction under Section 841(b)(1)(A) would also be a misdemeanor if he were prosecuted federally for the same conduct. See 21 U.S.C. § 844 (2018). This glaring inconsistency in the application of Section 841’s sentencing enhancement solidifies that allowing Mr. Duncan’s enhanced sentence to stand, when he does not have the qualifying prior felony state drug conviction and would not have had the qualifying prior felony drug conviction if prosecuted for the same conduct under federal law, amounts to “a fundamental defect which inherently results in a complete miscarriage of justice.”

³ When viewing this distinction in terms of months, the sentencing range drops down from 240–470 months to 120–470 months. This distinction vastly increases the range of available sentences for the district court to consider when fashioning a sentence. The United States Sentencing Commission defines a life sentence as 470 months, based on the average life expectancy of federal offenders. See United States Sentencing Commission, “Preliminary Quarterly Data Report Through September 30, 2015”, p.8. Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015_4th_Quarterly_Report.pdf

See Addonizio, 442 U.S. at 185.

Basic notions of procedural fairness and fundamental justice, see Hill, 368 U.S. at 428, especially in light of the realities of federal sentencing, require that Mr. Duncan be resentenced without the recidivist sentencing enhancement. Allowing to stand the sentence enhanced by a felony conviction that does not exist, when California law views the predicate felony conviction as if it never happened, amounts to “a fundamental defect which inherently results in a complete miscarriage of justice.” See Addonizio, 442 U.S. at 185.

The finality of a conviction can never outweigh the fact that “fundamental fairness is the central concern of the writ of habeas corpus...” See Strickland v. Washington, 466 U.S. 668, 697 (1984). Given the discrepancies between the ruling below and this Court’s existing jurisprudence, Mr. Duncan calls upon this Court to settle an important question of federal law: whether federal courts should consider the effect of state action upon recidivist enhancement statutes where “a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.” See McNeill, 563 U.S. at 825.

CONCLUSION

Petitioner requests that this Court grant a writ of certiorari and consider this important question of federal law.

A handwritten signature in blue ink that reads "Valarie Linnen". The signature is fluid and cursive, with the first name "Valarie" and last name "Linnen" clearly distinguishable.

Valarie Linnen, Esq.*
P.O. Box 330339
Atlantic Beach, FL 32233
P.O. Box 200
Chippewa Lake, MI 49320
888.608.8814 Tel
Attorney for Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to
SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of
Justice, 950 Pennsylvania Ave. NW, Washington, DC 20530-0001, by U.S. Mail this
12th day of February 2018.



Valarie Linnen, Esq.*
PO Box 330339
Atlantic Beach, FL 32233
PO Box 200
Chippewa Lake, MI 49320
888.608.8814 Tel
Attorney for Petitioner
*Counsel of Record,
Member of the Supreme Court Bar