

No. 17-7974

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH WILLIAMS, PETITIONER

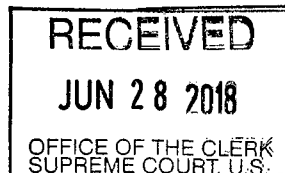
v.

TAMYRA JARVIS, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF TO THE GOVERNMENT'S
BRIEF IN OPPOSITION

JOSEPH WILLIAMS, PRO SE



IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH WILLIAMS,
Petitioner,

v.

TAMYRA JARVIS, WARDEN,
Respondent.

PETITIONER'S REPLY BRIEF

COMES NOW the Petitioner, Joseph Williams, PRO SE, with this reply to the government's reply in opposition. Petitioner is a layman of the law, and unskilled in the law, and therefore respectfully requests that this reply to the Solicitor General's brief be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972).

Petitioner states the following in this reply:

- I. Mathis v. United States, 136 S. Ct. 2243-2248 (2016), from Petitioner's perspective, is a substantial change in the law as to how Petitioner's priors should be considered in respect to using those priors to assign the Petitioner an enhancement under the Armed Career Criminal Act.

Not one of the Petitioner's five state priors are eligible for ACCA status. Because petitioner's state prior from the State of Florida for resisting arrest in violation of section 843.01 in 1995 was not subjected to a Shepard documentation analysis, that prior is invalid. No Shepard v. United States, 544 U.S. 13, 26 (2005) modified nor categorical approach was conducted or Descamps v. United States, 133 S. Ct. 2276-2283 (2013) in regards to the state prior being divisible or indivisible, nor was there a Taylor v. United States, 495 U.S. 575 (1990) categorical approach conducted. Nor was there a Mathis v. United States, 136 S. Ct. 2243-2246 (2016) element approach conducted concerning the ways, means, and

conduct of this state prior. This state prior also violates Johnson v. United States, 130 S. Ct. at 1269-70 (2010) and Begay v. United States, 128 S. Ct. 1581 (2008) and Dimaya v. Sessions, 138 S. Ct. 1204 (2018). Petitioner was therefore enhanced based on an unconstitutional basis in regards to this state prior for ACCA status, nor was there a Moncrieffe v. Holder, Jr., 133 S. Ct. 1674 - 1684 (2013) least culpable offense analysis conducted.

Therefore, Petitioner was only responsible for the least culpable offense to be used against him which in this case, did not transpire. Descamps, Johnson, and Johnson v. United States, 135 S. Ct. 2551-2557 (2015) also applies to petitioner's status as not being eligible for ACCA status. Dimaya, Johnson, and Johnson v. Sessions, 130 S. Ct. at 1269-70 (2010); and Descamps are all retroactively applicable to Petitioner not being declared an Armed Career offender under the ACCA for resisting arrest with violence in this case. It was never proven nor verified to be true based on all of the above stated reasons.

Petitioner's state prior for resisting arrest with violence in regards to a 1997 State of Florida Section 843.01 violation, for the very same reasons stated above, in regards to a 1996 violation of the same State Statute, again does not satisfy the ACCA and that it is in violation and inadequate for an ACCA predicate because of Johnson, 135 S. Ct. 2551-2557 (2016); Johnson, 130 S. Ct. at 1269 - 70 (2010); Begay, 128 S. Ct. 1581 (2008); and Moncrieffe. The least culpable offense based on this state prior with no Shepard, Descamps, Mathis or Taylor categorical approach ever being conducted is invalid.

Petitioner's 1999 state prior for 893.13(1)(d) and his 1994 conviction for possession of cocaine with intent to sell, purchase, or deliver, in violation of a Florida Statute §893.13(1)(a) 1991 drug offense, were not serious drug offenses. Furthermore, they were never declared to be divisible or indivisible and they violate Mathis's element approach to a jury determination beyond a reasonable doubt

because of their means, ways and conduct, which is not legally eligible to be used against the petitioner for qualification for ACCA status.

Furthermore, there was no Shepard documentation approach, no Descamps divisible nor indivisible element approach conducted in this case and there was no modified categorical approach conducted. Thereby leaving the least culpable offense only to be used against the petitioner.

Petitioner's last state prior for possession of a firearm concerning violation of Florida Statute §790.01(2) violates Johnson v. United States, 135 S. Ct. 2551 (2015); Dimaya v. Sessions, 138 S. Ct. 1204 (2018); Johnson v. United States, 130 S. Ct. at 1269-70 (2010); and Archer v. United States, 570 F.3d 1347 (11th Cir. 2008)./ This gun possession is not a violent offense nor it is eligible for ACCA status period.

Therefore, petitioner is not an ACCA career offender nor is he eligible to be based on all of the above states reasons. Johnson, 135 S. Ct. 2556-2558 (2015); Johnson 130 S. Ct. 1269-70 (2010); Dimaya and Descamps are all retroactively applicable. If the court wishes to use any of these cases other than Mathis, being a substantial change in law.

Petitioner is therefore actually, factually, and legally innocent of his Armed Career Offender status.

Petitioner also states that Moncrieffe is also a substantial change in the law in regards to petitioner's 28 U.S.C. §2255(e) through the portal avenue of a 28 U.S.C. 2241(c)(3) avenue. These supreme court cases are substantially applicable to petitioner not being declared a career offender.

Petitioner is therefore actually innocent of his ACCA status. See Bousley, 526 U.S. 614-620 (1988); Davis v. United States, 417 U.S. 333-346 (1974); Byrant v. Warden, 738 F.3d 1253 (11th Circuit 2013).

III. The Eleventh Circuit's Determination that it and the District Court Lacked Jurisdiction is Improper in light of the Split Amongst the Circuit Courts of Appeals

Petitioner had filed his motion for relief in the district court under 28 U.S.C. § 2241 based upon the "savings clause" of 28 U.S.C. sub-section § 2255. Rather than addressing the substantive issues Petitioner had raised, the district court and subsequently the Eleventh Circuit, dismissed his motion as improper predicated upon the Eleventh Circuit's 2017 decision in McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 841 F.3d 1076 (11th Cir. 2017). As a result, and without further explanation or consideration of the substantive arguments Petitioner raised, his § 2241 motion was dismissed. In its Response Brief in opposition to the request for a writ of certiorari, the government has adopted and argued that the McCarthan decision is "good law." Petitioner contends it is not.

The McCarthan decision, which was a relatively recent determination, reversed the court of § 2241 juris prudence within the circuit. In fact, prior to McCarthan, the Eleventh Circuit had been among the overwhelming majority of circuit courts of appeals that recognised (and still do) that the ability of persons in federal custody to invoke 28 U.S.C. § 2255(e)'s "savings clause" to seek relief under §2241 where an intervening and retroactively applicable decision of this Court rendered their continuing custody illegal. Nine circuits still adhere to that position. See, U.S. v. Barrett, 178 F.3d 34 (1st Circuit 1999); Triestman v. U.S., 124 F.3d 361 (2d Cir. 1997); In Re: Dorsainvil, 119 F.3d 245 (3d Cir. 1997); In Re: Jones, 226 F.3d 328 (4th Cir. 2000); Reyes-Requena v. U.S., 243 F.3d 893 (5th Cir. 2001); Martin v. Perez, 319 F.3d 799 (6th Cir. 2003); In Re: Davenport, 147 F.3d 605 (7th Cir. 1998); Alaimalo v. U.S., 645 F.3d 1042 (9th Cir. 2011); In Re: Smith, 285 F.3d 6 (D.C. Cir. 2002).

The decisions of these courts rests largely on the reasoning set out by the Seventh Circuit in Davenport. See, Samak v. Warden, 766 F.3d 1271, 1294 (11th Cir. 2014) (W. Pryor, J., concurring) (noting that "[t]he majority of our

sister circuits have adopted variations of the Seventh Circuit rule from In Re: Davenport"). In interpreting the phrase "inadequate or ineffective" in Sec. 2255(e), the Seventh Circuit looked to the "essential function of Habeas Corpus." Davenport, at 609. It described that function as "giv[ing] a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." Id. (emphasis added.)

Further, the Davenport court noted that a person who challenged erroneous circuit precedent in a direct appeal or initial § 2255 motion never had a reasonable opportunity that habeas corpus demands because

[t]he trial judge, bound by our *** cases, would not listen to him; stare decisis would make us unwilling (in all likelihood) to listen to him; and the Supreme Court does not view itself as being in the business of correcting errors.

Id., at 611.

Moreover, Sec. 2255 would not provide such an opportunity after an intervening and retroactively applicable decision of this Court that postdated an initial Sec. 2255 motion because of the bar on second and successive motions. See, 28 U.S.C. § 2255(h). As such, the Seventh Circuit reasoned (and the vast majority of other circuits have concurred) that, where a person in federal custody "had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion", the Sec. 2255(e) "Savings clause" is triggered and an application for habeas corpus relief under § 2241 is available. Davenport, at 6611.

It is noteworthy that, speaking through the Office of the Solicitor General, the government has repeatedly taken the position in the Eleventh Circuit that the majority rule is the correct one. Since 2011, the government has filed at least eleven briefs "argu[ing] that the savings clause provides relief where Section 2255 prevents a federal prisoner from presenting a claim that, under an intervening, retroactively applicable decision ... his sentence is above the statutory maximum and circuit law foreclosed his legal claim at the time of his sentencing, direct

appeal, and first Section 2255 motion." See, Briefs of the United States in Dority v. Roy, No. 10-8286 (11th Cir. May 16, 2011); Sorrell v. Bledsoe, No. 11-7316 (11th Cir. Jan. 17, 2012); McKelvey v. Rivera, No. 12-5699 (11th Cir. Dec. 17, 2012); Thornton v. Ives, No. 12-6608 (11th Cir. Feb. 1, 2013); McCorvey v. Young, No 12-7559 (11th Cir. Feb. 21, 2013). See also, Brief of the United States in Tyler v. Cain, No 00-5961 (11th Cir. Mar. 2, 2001) (stating that "[b]ecause of the availability of the 'savings clause', there is no concern that federal prisoners who have a claim based on a new decision of" the Supreme Court "cutting back on the sweep of a criminal statute *** will lack a remedy").

Additionally, in or ther Briefs, the government specifically disagreed with the Tenth circuit's holding in Prost v. Anderson, 636 F.3d 578 (2011), upon which the Eleventh Circuit ultimately decided McCarthan. For example, in Dority the government said the Tenth Circuit's "overly restrictive interpretation of Section 2255(e) ... departs from the other circuits to have addressed the issue." As well in U.S. v. Suratt, No. 14-6851 (4th Cir. Feb. 2, 2016), the government posied that "Prost's analysis is refuted by Section 2255(e)'s text, when read as a whole."

In its Resposne Brief, however, the government has now taken a position inapposite to that set forth in the cases cited above and others. It is disingenious to accept this "about-face" as anything other than a political maneuver to prevent federal prisoners from acess to the courts. Otherwise, the government would have supported the Prost position and never argued against the Eleventh Circuit's adoption of its reasoning.

Under the current paradigm involving a significant split amongst the circuit courts of appeals, if McCarthan is allowed to stand, many federal prisoners in the Eleventh Circuit will be foreclosed from any advantage decisions that this Court may afford and will remain incarcerated for conduct that all agree is no longer criminal (or for a term of imprisonment that all agree is no longer proper in

excess of the maximum authorized by law) while other prisoners in the majority of other circuits will be afforded that right and opportunity. It is incumbent upon this Honorable Supreme Court to address this circuit split and Petitioner hopes and prays that this Court will issue a writ of certiorari to the Eleventh Circuit for just that purpose.

III. Petitioner's Sec. 2241 Motion Should have been decided on the Merits and Application of this Court's precedents

As observed from Petitioner's Appx. A and B to his initial Petition, neither the district court nor the appellate court addressed any argument Petitioner poised based upon this Court's holding in Mathis v. U.S., 136 S. Ct. 2243 (2016). Yet, the Solicitor General's Office addressed a significant portion of its Response Brief to the substantive arguments and, as such, Petitioner is obliged to reply herein, even though the overarching premise in the lower courts' orders was the lack of jurisdiction, previously discussed above. That the government would focus its arguments on this issue can only be interpreted as an attempt to mislead and misdirect the Court from the specific orders addressed in Appx. A and B.

Petitioner contends his § 2241 motion was proper predicated on this Court's prior holdings which, as will be discussed, were substantial changes in the law applicable to motion under Sec. 2241(c)(3) and that Petitioner had met all five prongs of Byrant v. Warden, 738 D.3d 1253 (2013). The cases Petitioner relied upon are substantial changes in the law by this Honorable Supreme Court in regards to the filing of a first Section 2241(c)(3) motion. See, Glover v. U.S., 531 U.S. 198 (2001); Boumediene v. Bush, 557 U.S. 723 (2001); Shepard v. U.S., 544 U.S. 13 (2005); Descamps v. U.S., 133 S. Ct. 1176 (2013); Moncrieffe v. Holder, 133 S. Ct. 1678 (2011); Beckles v. U.S., 137 S. Ct. 886 (2017); U.S. v. Booker, 543 U.S. 220 (2005); Johnson v. U.S., 135 S. Ct. 2151 (2015); Alleyne v. U.S., 133 S. Ct. 1338 (2013); Nelson v. Colorado, 137 S. Ct. 1259 (2017); Mathis. Petitioner could not

file a second or successive § 2255 (h)(2) motion because Petitioner did not have newly discovered evidence and there was no constitutional change in the law by this Court, only a substantial change in the law as to the cases cited. As such, a second or successive § 2255 motion would have been inadequate and ineffective to test the illegality of Petitioner's improper incarceration, thereby leaving him as his only remedy relief under § 2241. None of these rulings were available to Petitioner during the pendency of his case, during sentencing, trial, conviction, or appeal, and definitely not during his initial § 2255 motion in 2007.

By disallowing Petitioner's § 2241 motion on questionable "lack of jurisdiction" grounds, the district court and the Eleventh Circuit precluded Petitioner from even having the opportunity to test the legality of his detention and satisfy the "savings clause" of Sec. 2255. A Petitioner is not required to win his release in order "to test" his claim but a Petitioner must be allowed the opportunity to have a court address the merits of the claim in order for that claim to be "tested" such as was raised in Petitioner's initial § 2241 motion. The opportunity to test or try a claim, however, does not guarantee any relief and does not require any probability of success. It only guarantees access to the procedure. To determine whether the savings clause is satisfied, the court asks only whether the motion to vacate is an adequate procedure to test the petitioner's claim. To answer this question, the court asks whether the prisoner would have been permitted to bring the claim in a motion to vacate. In other words a petitioner has a meaningful opportunity to test his claim whenever Sec. 2255 can provide him a remedy. In Petitioner's case at bar, the only remedy and relief remaining available to him was via the "savings clause" of § 2255(e) and relief under § 2241, and the merits of the case should have been addressed.

IV. McCarthy Violates the Suspension Clause

The McCarthy decision violates the Suspension Clause of the U.S. Constitution, Art. I, Sec. 9, Clause 2, in regards to its effect of the "Savings clause" of Sec 2255(e). The Suspension Clause provides that the privilege of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion when public safety may require it. Sec. 2255(e)'s "savings clause" affords a federal prisoner habeas corpus relief via § 2241 when relief under § 2255 itself is not available, such as in Petitioner's case based upon new law not previously available (as noted above). Under these changes, Petitioner contends his sentence is illegal and unconstitutional due to sentencing guidelines and enhancements which are no longer applicable in light of the trial court's failures to determine if the predicate offenses were divisible or indivisible statutes, failure to conduct a categorical and/or modified categorical analysis of any prior convictions, failure to utilize proper documentation to establish the prior convictions, and failure to have a jury determine beyond a reasonable doubt specific facts upon which enhancement determinations were made. See, Descamps, Shepard, Mathis, supra. and Dimaya v. Sessions, 137 S. Ct. 1204 (2018). Specifically, Petitioner contended Fla. Stat. § 893.13(1) as relates to his prior convictions more than 15 years ago could not establish that they were serious drug offenses for enhancements under § 924(A)(2)(ii) because they were never proven nor verified as serious drug offenses. However, the district court and appellate court, though, foreclosed Petitioner's avenue to have this Court's holdings applied to ascertain whether the sentence he is currently serving is, as he contends, illegal and unconstitutional -- a 360 month sentence -- premised upon the trial court's decision 15 years ago to accept the government's assertions of Petitioner's prior convictions rather than require actual proof, documentation, and analysis of the statutes underlying the proposed priors, priors based upon a questionable statute, (Fla. Stat. § 893.13(1)). Sec. 893.13 sets forth various means of committing these offenses, not separate elements.

Various means do not set forth distinctive separate offenses: delivery, deliver, sale, purchase, and trafficking. It is not a controlled substance offense within the meaning of Section 924(a)(2)(ii) or 21 U.S.C. § 802(44) and, as such, should never have been utilized to enhance Petitioner's sentence. The statute alone is too broad and ambiguous, absent the necessary proof and/or documentation, to allow a court to establish that they are valid predicate offenses.

Yet, despite the government's action in seeking Petitioner's sentence, the trial court's failure to ascertain whether any prior convictions truly met the criteria necessary for enhancement purposes, and Petitioner having remained incarcerated for more than 15 years, the Eleventh Circuit's reliance upon its recent decision in McCarthan has, effectively, barred Petitioner from challenging those actions. McCarthan has, whether explicitly or implicitly, suspended the writ of habeas corpus for those prisoners within the Eleventh Circuit's jurisdiction, an unconstitutional act which mandates review and reversal by this Court.

V. Petitioner's Sentence is Unconstitutional under Dimaya, Johnson, Descamps, and Mathis.

Petitioner contends his sentence is unconstitutional under this Court's holdings in Dimaya, Johnson, Descamps, and Mathis because he was sentenced under a mandatory statute more than 15 years ago. As such, he is serving an illegal sentence. Yet, Petitioner is unable to bring this challenge because of the Eleventh Circuit precluding his argument premised upon its McCarthan holding, despite the fact Dimaya, Johnson, Descamps and Mathis did not exist at the time of Petitioner's sentencing to give him grounds to challenge it.

It should also be noted that Petitioner's Dimaya v. Sessions applies to his 924(c)(1)(A) and "potential risk" for Title 21 U.S.C. § 841(a)(1).