No. ______________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

Gaeson Lee Murray — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gaeson Lee Murray#38269-037
(Your Name)

Federal Correctional Institution Fairton
(Address)

P.O.Box-420, Fairton, NJ 08320
(City, State, Zip Code)

n/a
(Phone Number)

TABLE OF AUTHORITIES CITED

QUESTION(S) PRESENTED

1. WHETHER THE PETITIONER'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT HIS 21 U.S.C. § 851 ENHANCEMENT THAT WAS UPHELD BY HARRIS NO LONGER APPLIES IN LIGHT OF ALLEYNE V. UNITED STATES, 133 S. Ct. 2151 [2013]?

2. WHETHER THE FOURTH CIRCUIT'S HOLDING IN UNITED STATES V. BURGESS IS ABROGATED BY THE U.S. SUPREME COURT'S DECISION IN MATHIS V. UNITED STATES, 579 U.S.____ [2016]?

3. WHETHER THE SUPREME COURT'S DECISION IN DESCAMPS ALLOWS THE DEFENDANT TO RAISE A MATHIS AND HINKLE ARGUMENT THAT HIS PRIOR CONVICTION USED TO ENHANCE HIS SENTENCE PURSUANT TO 28 U.S.C. § 851, NO LONGER QUALIFIES TO SUPPORT THE ERRONEOUS DESIGNATION?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] 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,
[x] is unpublished.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,
[x] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was ______________.

[ ] 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**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. ___A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Gaeson Lee Murray (appellant), was charged and indicted by a federal grand jury for Conspiracy to Distribute and Possess With Intent to Distribute 50 grams or more of cocaine in violation of 21 U.S.C. §§ 846, and 841(a) & (a)(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. By notice of appeal dated July 22, 2017, he appeals from a final decision denying relief on his 28 U.S.C. § 2241. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1291.

Whether the appellant raises any meritorious issues for appellate review, and if those issues are subject to debate by reasonable jurist of a denial of a constitutional right.

Appellant appeals from the judgment of the United States District Court for the District of New Jersey which denied his 28 U.S.C. § 2241, where he sought to move pursuant to 28 U.S.C. § 2255's savings clause based on the appellant's actual innocence due to (1) a change in the law, and (2) that his enhancements no longer apply in light of the retroactive change in the law by the United States Supreme Court made retroactive on collateral review.

SUMMARY OF THE ARGUMENT

The summary of the argument is the fact that based upon the retroactive change in the law, his prior drug offense used to designate him as qualified to receive a § 851 enhancement no longer qualify as a predicate and therefore the appellant should be resentenced under the applicable sentencing guidelines.

STATEMENT OF THE CASE

The appellant hereby moves pursuant to § 2241 because § 2255 is inadequate or ineffective to test the legality of his detention.

The appellant relies on In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997); Mathis v. United States, 579 U.S.____(2016); Holt v. United States, No. 16-1793 (7th Cir. 2016); Hill v. Masters, 836 F.3d 591 (6th Cir. 2016), which has deemed Mathis retroactive on collateral review.

On March 10, 2004, a Sealed Indictment was filed in the U.S. District Court in the Western District of Virginia, and on March 15, 2004, an arrest warrant was issued based upon the sealed indicment.

That, on May 28, 2004, the Arrest Warrant was returned as Executed on May 5, 2004, as to petitioner.

That, on July 12, 2004, the government filed a Notice of Enhanced Punishment, pursuant to 18 U.S.C. § 851.

That, on August 26, 2004, petitioner's bond was reduced from "$15K to $10K".

That, on September 21, 2004, the petitioner was released on Bond, in lieu of his family putting up property, and the petitioner agreeing to forfeit specific property.

That, on December 22, 2004, a "Superseding Indictment" was filed against petitioner and several co-defendants, and on January 11, 2005, the petitioner was arraigned on the new charges.

That, on February 16, 2005, a "Second Superseding Indictment" was filed against the petitioner and on February 23, 2005, the petitioner was re-arraigned.

That, the petitioner invoked his right to go to trial and on February 24, 2005, the petitioner was found guilty of counts one (1) through four (4), which were, Conspiracy to Distribute and Possess With Intent to Distribute 50 Grams or More of Cocaine Base (count one), and Possession With Intent to Distribute Cocaine Base (counts two, three, and four), in violation of 21 U.S.C. §§ 846, and 841 (a) & (a)(1).

That, on August 4, 2005, the trial court sentenced the petitioner to a term of imprisonment of 240 as to count 1, and 240 months as to counts 2, 3, & 4. The trial court also imposed a special assessment of $400.00, and a fine of $1,000.00. The petitioner was also given a term of supervised release of ten (10) years.

That, the petitioner filed a notice of appeal on August 12, 2005, and on February 21, 2007, the petitioner's appeal was affirmed by the Fourth Circuit.

That, on February 21, 2008, the petitioner filed a motion to vacate, set-aside, or correct the sentence pursuant to 28 U.S.C. § 2255.

That, on September 10, 2008, a Order "granting in part, and denying in part, the government's motion to dismis, in which the petitioner was granted the opportunity of an evidentiary hearing on some of his claims. On January 14, 2009, an evidentiary hearing was held via "video conferencing" while the petitioner was being held at FCI-Butner.

That, on April 30, 2009, the petitioner's § 2255 motion was denied. The petitioner's C.O.A./appeal was denied subsequently thereafter. The petitioner remains in custody.

1. WHETHER THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT HIS 21 U.S.C. § 851 ENHANCEMENT THAT WAS UPHELD BY HARRIS NO LONGER APPLIES IN LIGHT OF ALLEYNE V. UNITED STATES, 133 S. CT. 2151 (2013)?

The suggested answer is affirmative. That in support, the defendant relies on Alleyne v. United States, 133 S. Ct. 2151 (2013), which held; "Because mandatory minimum sentences increase the penalty for a [c]rime, [a]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury. Accordingly, Harris is overruled." Id.

That, in further support the defendant relies on United States v. Persaud, No. 12-8068, 2014 U.S. App. Lexis 24877 (4th Cir. 2014), which vacated and remanded in light of the U.S. Supreme Court's vacatur of the Fourth Circuit's Judgment, which was premised upon "the position asserted by the Solicitor General in its brief for the United States."

That, at issue is the fact that Mr. Persaud asserted that he was entitled to relief based on two intervening decisions by the United States Supreme Court. In that, Mr. Persaud argued that the district court committed error by enhancing his sentence pursuant to 21 U.S.C. § 851, because the one prior felony conviction on which the enhancement was based was not proven to a jury beyond a reasonable doubt, and the enhancement increased his statutory penalty from twenty years to life imprisonment." Id. at United States v. Persaud, 87 Fed. Appx. 869 (4th Cir. 2004).

That, in the aforementioned case the Fourth Circuit initially denied Mr. Persaud's claim which was premised upon Apprendi, in light of Harris, and Almendarez-Torres.

That, Mr. Persaud continued to present this argument over the years since and when Alleyne v. United States, was decided Mr. Persaud, initiated the same claim seeking relief under the Supreme Court's decision in Alleyne pursuant to 28 U.S.C. § 2255 and alternatively, under 28 U.S.C. § 2241 and 28 U.S.C. § 1651. The district court dismissed the § 2255 claim as successive and denied relief on the alternative claims. Id.

That, Mr. Persaud, then filed an appeal which was also affirmed by the Fourth Circuit. Mr. Persaud, then filed for a Writ of Certiorari with the United States Supreme Court seeking relief in light of his Alleyne and Miller claims combined.

That, in light of the two intervening changes in the law, which were based upon his previously filed § 851/Alleyne claim, as well as his Miller claim that was deemed retroactive in the Fourth Circuit, the Solicitor General of the United States filed a brief on Mr. Persaud's behalf conceding the issues that Mr. Persaud had raised all these years. This led the United States Supreme Court to vacate the Fourth Circuit's previous judgment denying his claims.

That, when the Fourth Circuit assumed jurisdiction over the High Court's remand, "the parties...filed...joint motion[s] to remand, requesting that [the case be] remand[ed] [back] to the district court so that the district court may consider the Government's arguments in favor of relief in the first instance." Id. at United States v. Persaud, No. 12-8068 (4th Cir. 2014).

That, in the case at bar, the defendant vehemently argued to his attorney that he was improperly being enhanced under 28 U.S.C. § 851, in light of Alleyne, which overruled Harris.

That, the defendant avers that as with Persaud, he was also erroneously enhanced under 28 U.S.C. § 851, which impermissibly doubled his mandatory minimum from 10-to-20 years.

That, in light of Alleyne, because his mandatory minimum increased the penalty for his crime past his mandatory minimum, it is a fact which the Supreme Court has stated very clear terms, that is an "element", that must be placed into an indictment, submitted to a jury, and proved beyond a reasonable doubt.

That, prior to Alleyne, this argument was upheld in light of Harris. Some court's even had the audacity to rely on Almenderez-Torres, suggesting that it applies to cases above mandatory minimum sentences. However, Alleyne, is slightly different in its rationale because Alleyne does not hold any fact [other than a prior conviction] that increases the mandatory minimum.

That, this difference in Apprendi's language leaves two holdings intact. One is Apprendi, which states that, "[d]ue process held, in case involving New Jersey 'hate crime' statute, to require that any fact that increased penalty for state crime beyond prescribed statutory maximum-other than fact of prior conviction-had to be submitted to jury and proven beyond a reasonable doubt." Id. This case delt with the ceiling or statutory maximum. The other holding was Almendarez-Torres, which was left intact enhanced penalties for all offenses that did not exceed the statutory maximum, when the High Court ruled, "provision of 8 USCS § 1326(b)(2) authorizing increased sentence for deported alien's illegal return if deportation was subsequent to aggravated felony conviction held to be penalty provision, so that aggravated felony need not be charged in indictment." Id.

That, in Alleyne, the Supreme Court, while not employing the words, "other than [the] fact of [a] prior conviction", reiterated that, "Apprendi concluded that any facts that increase the pre-scribed range of penalties to which a criminal defendant is exposed are elements of the crime." Id.

That, the High Court further held; "In Apprendi, the U.S. Supreme Court held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While Harris, declined to extend this principle to facts increasing mandatory minimum sentences, Apprendi's definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt. The core crime and the fact triggering the mandatory minimum sentence together constitute a new aggravated crime, each element of which must be submitted to the jury." Id.

That, because Harris, was inconsistent with Apprendi, in this regard, it was overruled by Alleyne. Because the § 851 enhancement is "a fact that increases the sentencing floor, [and] thus, forms an essential ingredient of the offense." It then must be placed into the indictment, submitted to a jury, and proved beyond a reasonable doubt. Id. at Alleyne. Had the defendant's attorney argued these facts under Persaud, and Alleyne, there is a reasonable probability that the outcome of this case would be different.

WHETHER THE FOURTH CIRCUIT'S HOLDING IN UNITED STATES V. BURGESS IS ABROGATED BY THE U.S. SUPREME COURT'S DECISION IN MATHIS V. UNITED STATES, 579 U.S. ___ (2016)?

The suggested answer is affirmative. In support, the petitioner relies on Mathis v. United States, 579 U.S.____(2016), and, United States v. Hinkle, 832 F.3d 569, 570 (5th Cir. 2016), for the proposition that movant's crime of conviction was broader than the elements of a controlled substance offense under [the] U.S. Sentencing Guidelines manual § 4B1.2(b), and could not serve as a [enhancement] predicate," Id.

That, at issue is the fact that Virginia Code Ann. § 18.2-250 is divisible because the statute sweeps more broadly than the generic definition of a controlled substance offense, in that, the statute (§ 18.2-250) lists multiple crimes, or more elements of the offense in the alternative, and thus is "broader" than the generic (federal) definition of a serious drug offense.

That, the statute (§ 18.2-250), is divisible into separate crimes, none of which satisfies the generic version of the crime and this type of situation the modified categorial approach may not be employed.

That, under the categorical approach, a predicate may not be used for enhancement purposes, even if the petitioner committed the offense in its generic form. See Mathis supra. at 136 S. Ct. at 2283.

That, according to Mathis, "the comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or "indivisible") set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match." Id.

That, in the case of Virginia Code Ann. § 18.2-250, the High Court stated: "Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder."

That, once the court (or State) determines that a statute is divisible into "generic" or "non-generic" crimes, it may then apply the so-called "modified categorical approach". However, if, (as in the case at bar), the court determines that a non-generic statute is divisible into separate crimes, none of which satisfies the generic version of the crime, then the court may not apply the modified categorical approach and my not look at the documents in a particular case. Descamps, 133 S. Ct. at 2283.

That, the Fifth Circuit ruled in Hinkle that, a prior conviction...was not a controlled substance offense and could not serve as a predicate for career offender sentencing under U.S.S.G. § 4B1.2(b)." This is because the "delivery element of the Mr. Hinkle's crime of conviction was broader than the elements of a controlled substance offense under the Sentencing Guidelines manual § 4B1.2, and could not serve as a career offender predicate." Id. at Hinkle supra.

That, the decision in Mathis clarified when and how the modified categorical approach can be used to determine, when a statute defines more than one offense, of which a defendant was convicted." Id. The Mathis decision reiterated that the inquiry must be solely "an elements based inquiry", and not a facts based on. Put simply, Virginia Code Ann. § 18.2-250 uses broader language then that of what constitutes a serious drug offense, and these mismatch of elements "saves" the petitioner from the enhancement period.

3. WHETHER THE SUPREME COURT'S DECISION IN DESCAMPS ALLOWS THE DEFENDANT TO RAISE A MATHIS AND HINKLE ARGUMENT THAT HIS PRIOR CONVICTION USED TO ENHANCE HIS SENTENCE PURSUANT TO 28 U.S.C. § 851, NO LONGER QUALIFIES TO SUPPORT THE ERRONEOUS DESIGNATION?

The suggested answer is affirmative. In support, the defendant relies on United States v. Hinkle, 2016 U.S. App. Lexis 14810 (5th Cir. 2016), and Mathis v. United States, 579 U.S.____ (2016), which held; "the delivery element of Tex. Health & Safety Code Ann. § 481.112(a) criminalizes a greater swath of conduct than the elements of the relevant U.S. Sentencing Guidelines offense. This mismatch of elements means that a defendant's conviction under § 481.112(a) is not a controlled substance offense under the guidelines." "That prior conviction cannot serve as a predicate offense under the Career Offender Guideline provision." Id.

That, at issue is the fact that the predicate used to enhance the defendant under 21 U.S.C. § 851, was a prior first time drug possession case that occurred at the Dallas Fort-Worth Airport in October of 2001. While at the airport, the defendant was arrested for simple possession of several prescription pills.

That, because this was the defendant's first drug offense, the State of Texas offered a deal that included minimal jail time. However, when the documents (the plea deal) were drawn-up, the State changed the description of the charge as an intent to deliver eventhough there was only a small amount of contraband for no "remuneration". See United States v. Martinez-Lugo, No. 13-40924 (5th Cir. 2014), which stated that, "this is the third time in seven years that we have considered whether the government has properly characterized a low-level drug offense as 'illicit trafficking is a controlled substance', and thus an 'aggravated felony.' Id.

That, the Fifth Circuit, in Martinez-Lugo, further ruled that, "once again we hold that the government's approach defies 'the common-sense conception' of these terms." The Court then cites Carachuri-Rosendo v. Holder, 177 LEd. 2d 68 (2010), which held; that, "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been convicted ...of a felony punishable as such under the Controlled Substances Act.

That, either as a misdemeanor or as a felony, pursuant to the aforementioned cases, the defendant's prior no longer can be used to designate him as a recidivist under 21 U.S.C. § 851.

That, the government must concede that the Texas Statute that he was found guilty of contains a broader range of drugs, and types of which can increase the prescribed range of penalties, and as a result, the State statutes include several alternative elements and is therefore divisible.

That, because this broader range of drugs do not completely overlap the federal controlled substance schedules the defendant's prior can not be used as a predicate § 851 enhancement.

That, according to Hinkle, and Mathis, this "mismatch of elements" "saves" the defendant from any further enhancement on top of the mandatory minimum which is an enhancement in and of itself. Furthermore, Supreme Court precedent makes plain that a simple possession offense is not a "controlled substance offense." Salinas v. United States, 547 U.S. 188 [2006][per curium][reversing the Fifth Circuit for "err[ing] in treating petitioner's conviction for simple possession as a 'controlled substance offense'"].

REASONS FOR GRANTING THE PETITION

The petitioner avers that he has a constitutional right to be treated with the same opportunity as Mr. Persaud. That the government intentially conceeded Mr. Persaud's claim under § 2241, and now Mr. Persuad is at home because of the government's concession.

That, under the equal protection clause of the United States Constitution, the petitioner would like the same relief as Mr. Persaud whose claim was identical to petitioner's claim, and therefore is similarly situated.

That, no matter how a person, government, or court spins it, because Alleyne says that you cannot increase one's punishment above the mandatory minimum unless the charge is placed into the indictment, and proved beyond a reasonable doubt.

That, in the case at bar the answer is clear. Where there is a legal right, there is also a legal remedy

That, the legal remedy in this case is to remand this case for resentencing without the § 851 enhancement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gaeson Lee Murray, Pro-se

Date: March 28TH 2018