

NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

UNITED STATES OF AMERICA,
Respondent,

v.

TITO LAMONT ANDERSON,
Petitioner.

**On Petition for Writ of Certiorari
To the Court of Appeals
For the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Tito Lamont Anderson # 25860-056
FCI-II/POB 1500
Butner, NC 27509

Pro se

QUESTIONS PRESENTED

I.

Whether there exists any circumstance wherein a defendant can attack his Guidelines sentence in a petition pursuant to Title 28 U.S.C. Section 2241; and, does either Descamps v United States, 133 S. Ct. 2276 (2013), [Mathis v United States, 136 S. Ct. 2243 (2016)] or United States v Miller, 735 F.3d 141 (4th Cir. 2013) and United States v Simmons¹, 649 F.3d 237 (4th Cir. 2011) from the Fourth Circuit, provides the circumstance in the instant matter?

¹ Simmons was decided by *en banc* Fourth Circuit on August 11, 2011.

LIST OF PARTIES

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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 for the Fourth Circuit appears at **Appendix A** to the petition and is

[X] is unpublished.

The opinion of the United States District Court for the Eastern District Court of North Carolina, Raleigh Division appears at

Appendix B to the petition and is

[X] is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 8, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 2241(a) of Title 28 of the United States Code provides in relevant part:

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. Section 2241 (c) of Title 28 of the United States Code provides in relevant part: The writ of habeas corpus shall not extend to a prisoner unless— (1)

He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

Section 2255 (e) of Title 28 of the United States Code provides as follows:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Section 2255 (h) of Title 28 of the United States Code provides as follows:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain— (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 21 U.S.C. Section 851 (a) (1) provides:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

STATEMENT OF THE CASE

On December 15, 2008, Petitioner was indicted as the lone defendant in a seven-count Indictment. **DKT¹ # 1.** Count One charged a conspiracy to distribute and possess

¹ DKT is docket entry # for criminal action number for 4:08-cr-00075-D. ADKT # is the docket entry # for appeal number 15-7742.

with intent to distribute 50 grams or more of cocaine base (crack) and quantities of heroin and marijuana, in violation of 21 U.S.C. Sections 846, 841 (a) (1) and (b) (1) (A), (C), and (D). Count Two charged possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. Sections 841 (a) (1) and (b) (1) (B). Counts 3 and 5 charged distribution of less than 50 kilograms of marijuana, in violation of 21 U.S.C. Sections 841 (a) (1) and (b) (1) (D). Counts 4, 6, and 7 charged distribution of less than 5 grams of cocaine base (crack), in violation of 21 U.S.C. Sections 841 (a) (1) and (b) (1) (C). **Id.**

On February 23, 2009, Petitioner pled guilty to Count One of the indictment with a plea agreement. **DKT # 23.** On July 24, 2009, the Government filed a motion for downward departure pursuant to USSG Section 5K1.1. **DKT # 28.** Before sentencing on August 18, 2009, it was determined that Petitioner had a total offense level of 34, a criminal history category of VI, and a sentencing range of 262-327 months² as a career offender. The Court granted the Government's motion for downward departure, and Appellant was sentenced to a term of imprisonment of 198 months, five years of supervised release, and ordered to pay a \$100 assessment. **DKT # 30.** The Judgment was filed on August 18, 2009. **Id. at 31.**

After not filing an appeal of his conviction or his sentence, Petitioner, acting *pro se*, filed a motion for review of his case in light of Simmons³ on November 18, 2011. **DKT # 33.** Then, on August 14, 2012, Petitioner, now represented by appointed counsel, filed a Title 28 U.S.C. Section 2255 motion to vacate, set aside, or correct sentence, and that alternatively, that the motion be considered as a *writ of error coram nobis*. **DKT #**

² Appellant was determined to be a career offender with an offense level of 37, which was lowered three levels for acceptance of responsibility to level 34 with a criminal history category of VI.

³ United States v Simmons, 649 F.3d 237 (4th Cir. 2011)

36. In the motion for review and the Section 2255 motion, Petitioner alleged that, in light of United States v Simmons⁴, 649 F.3d 237 (4th Cir. 2011), he was no longer a career offender. The Government filed motions in opposition to the motion filed by Petitioner, pro se, and the motions filed by his counsel under Section 2255 and the *writ of error coram nobis*. **DKT #'s 38-41**. The sentencing court dismissed the *pro se* motion and the lawyer's filed Section 2255 motion on July 1, 2013. Anderson v United States, No. **4:12-cv-00178-D**. The District Court also denied the petition for a writ of error coram nobis in the same Order. Id. See also **DKT # 43**. The Fourth Circuit dismissed the certificate of appealability on January 26, 2015. See United States v Anderson, No. **13-7169 (4th Cir. Jan. 26, 2015)**. The District Court and the Fourth Circuit denied relief, because both found that the Section 2255 motion was time-barred.

Petitioner filed the instant action, *pro se*, on April 6, 2015, and alleged that 1) the presentence report is a correctable error under Federal Rule of Criminal Procedure 36; and 2) he can establish that Section 2255 is inadequate or ineffective to test the legality of his detention in light of the Supreme Court's decisions in Descamps v United States, 133 S. Ct. 2276 (2013), and the Fourth Circuit's opinions in United States v Miller, 735 F.3d 141 (4th Cir. 2013) and Simmons. **CDKT 1⁵ # 1**. In an Order filed on October 15, 2015, the District Court for the Eastern District of North Carolina, Western Division, dismissed the Section 2241 petition without prejudice. **CDKT-1 # 4**. Anderson v Andrews, No. **5:15-hc-02016-FL (NCED Oct. 15, 2015)**. See also **Appendix B**. A timely notice of appeal was filed on October 30, 2015.

⁴ Simmons was decided by *en banc* Court on August 11, 2011.

⁵ CDKT is the docket entry for civil action number 5:15-hc-02061-FL.

In his COA and appeal to the Fourth Circuit, Petitioner advanced only one issue -- “[w]hether the district court abused its discretion by ruling that a Title 28 U.S.C. Section 2241 petition cannot be used to attack an illegal enhanced sentence under the Guidelines?”. On January 8, 2018, the Fourth Circuit, in an unpublished opinion, concluded that the district court properly dismissed without prejudice Petitioner’s Section 2241 petition and affirmed for the reasons stated by the district court. **See Appendix A.** The Fourth Circuit denied relief also; because, its jurisprudence has held that the reach of the saving clause did not extend to those petitioners challenging only their sentence. **Id.**

STATEMENT OF FACTS

This case presents a widely recognized conflict on an exceptionally important and recurring question involving the review of federal criminal judgments/sentences. When this Court issues a decision that narrows the reach of a federal criminal statute, there will be persons in custody who stand convicted of conduct that is no longer criminal or who remain in custody beyond the maximum term authorized by law. Those convicted of crimes that are no longer criminal, in most circuits, have an avenue for filing for relief by showing “actual innocence” of the offense. But, those with sentences that were improperly determined under the Guidelines, even though, a procedural error has occurred, have no avenue to attack the erroneous obtained sentence. Some defendants will be able to challenge their unlawful sentence on direct appeal or in an initial motion to vacate or set aside the sentence under 28 U.S.C. Section 2255. But for others, situated as Petitioner, who have exhausted their direct appeal and initial Section 2255 motion before this Court issued its decision rendering their sentence a procedural error, there will be no further avenue for relief under Section 2255, given its familiar bar on second or

successive motions - even though the Court's decision has been applied retroactively in some circuits. This case presents the question whether the saving clause in Section 2255 (e) permits such persons to pursue habeas relief with an attack on their sentence under Section 2241 (and, if so, what threshold showing they must make).

Several courts of appeals, which include the Tenth, the Eleventh, and the Fourth Circuits, have held that Section 2255 (e) does not permit habeas relief based on a retroactively applicable statutory-interpretation decision; even though, the new interpretation renders the defendant's detention invalid. See Prost v Anderson, 636 F.3d 578, 589 (10th Cir. 2011); McCarthan v Director of Goodwill Industrial-Suncoast, Inc., No. 12-14989 (11th Cir. Mar. 14, 2017) (en banc); and, United States v Surratt, 797 F.3d 240, 248 (4th Cir. 2015) (would not extend the reach of the saving clause [in Section 2241] to include petition that challenge only the sentencing enhancement).

Petitioner was sentenced improperly, because he was sentenced as a career offender and he is not a career offender. See Gall v United States, 128 S. Ct. 586, 597 (2007); and United States v Pauley, 511 F.3d 468, 473 (4th Cir. 2007). One of the steps to be taken by district courts in considering, deciding, and handing down a sentence is properly calculating the Guidelines range for the offense. It would be a procedural error if the district court failed to properly calculate the Guidelines range. Gall, 128 S. Ct. at 597. As this Court explained in Rita, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. See Rita v United States, 127 S. Ct. 2456 (2007). The Court stated that “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly,

after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the Section 3553 (a) factors to determine whether they support the sentence requested by a party. In so doing, the district court may not presume that the Guidelines range is reasonable. See Rita, 127 S. Ct. 2456. The district court must make an individualized assessment based on the facts presented. If the district court decides that an outside-Guidelines sentence is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” Gall, 128 S. Ct. at 597. A major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, the district court must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. Rita, 127 S. Ct. at 2466.

In 2009, It was determined that Petitioner was a career offender and as a career offender, he faced a sentence of 262-327 months. Petitioner was a career offender based on convictions appearing in paragraphs 20, 21, 25, 27, 28, and 29 of his Presentence Investigative Report (PSR). For the convictions referenced in paragraphs 20 and 21, Petitioner pled guilty to two North Carolina offenses of *possession with intent to sell or deliver cocaine* (hereinafter *PWISD*) and was sentenced to a consolidated sentence of 10-12 months. For the North Carolina conviction in paragraph 25, Petitioner pled guilty to the offense of *PWISD Schedule II* and was sentenced to 10 to 12 months. For the convictions referenced in paragraphs 28 and 29, Petitioner pled guilty to the offenses of *PWISD Schedule II* and was sentenced to 10 to 12 months on each offense. Petitioner had a career offender sentencing range of 262-327 months based on a total offense level

of 34⁶, and a criminal history category of VI. But, due to USSG Section 5K1.1 motion filed by the Government, the district court sentenced Petitioner to 198 months on Count One. Without the career offender designation, Petitioner had a total offense level of 31⁷, a CHC of VI, and a sentencing range of 188-235 months.

Due to a waiver in the plea agreement, Petitioner did not file a direct appeal and he did not file a post-conviction motion pursuant to 28 U.S.C. Section 2255 until the Fourth Circuit made a ruling in United States v Simmons, 649 F.3d 237 (4th Cir. 2011) that invalidated five of the six predicates that were used to designate him as a career offender. Petitioner filed a motion for review of his case in light of Simmons on November 18, 2011. **DKT # 33.** Simmons was decided by an *en banc* Court on August 11, 2011. After an attorney was appointed to represent Petitioner and after appointed counsel filed a *writ of error coram nobis* and a motion to vacate pursuant to Section 2255 on August 14, 2012, **dkd # 36**, the Government filed a Response and urged the district court to dismiss the Section 2255 motion as time-barred. **DKT #'s 38-41.** Petitioner filed a Reply to the Response, and the sentencing court dismissed the *pro se* inquiry and the lawyer's filed Section 2255 motion on July 1, 2013. Anderson v United States, No. 4:12-cv-00178-D. See also **DKT # 43.** The Fourth Circuit dismissed the appeal on January 26, 2015. See United States v Anderson, No. 13-7169 (4th Cir. Jan. 26, 2015). The District Court and the Fourth Circuit denied relief, because both found that the Section 2255 motion was time-barred.

Next, Petitioner filed the instant action, *pro se*, on April 6, 2015, and alleged that 1) the presentence report is a correctable error under Federal Rule of Criminal Procedure

⁶ Career offender offense level of 37 reduced three levels for acceptance of responsibility.

⁷ Without the career offender's designation, Appellant's total offense level was 34 and would have been reduced by three levels for acceptance of responsibility.

36; and 2) he can establish that Section 2255 is inadequate or ineffective to test the legality of his detention in light of the Supreme Court's decisions in Persaud v United States, 134 S.Ct. 1023 (2014) and Descamps v United States, 133 S. Ct. 2276 (2013), and this Court's opinions in United States v Miller, 735 F.3d 141 (4th Cir. 2013) and Simmons. **CDKT**⁸. In an Order filed on October 15, 2015, the District Court for the Eastern District of North Carolina, Western Division, dismissed the Section 2241 petition without prejudice. **CDKT # 4. Anderson v Andrews, No. 5:15-hc-02016-FL (NCED Oct. 15, 2015).** **CDKT # 4.** A timely notice of appeal was filed on October 30, 2015. **CDKT # 6.** In an unpublished Opinion issued on January 8, 2018, the Fourth Circuit affirmed the appeal/certificate of appealability⁹. **CDKT # 13. See Also Appendix A.**

REASON FOR GRANTING THE WRIT

This case presents an established and widely acknowledged conflict in the circuit on an especially important and recurring question involving the availability of federal habeas review to attack a Guidelines sentence. Habeas review has been allowed in some circuits to attack both the conviction and sentence, but the Fourth Circuit is not one of the circuits to allow an attack on a Guidelines sentence pursuant to habeas review. In the decision below, the Fourth Circuit denied relief in the instant matter; because, the Fourth Circuit "has not extended the reach of the savings clause to petitions challenging only the sentences". United States v Poole, 531 F.3d 263, 267 n. 7 (4th Cir. 2008). With the Fourth Circuit's decisions in the instant matter, Poole, and Surratt, there can be no attacks on a Guidelines sentence in a habeas petition.

⁸ CDKT is the docket entry for civil action number 5:15-hc-02061-FL and the instant action.

⁹ The case was held in abeyance pending a decision in United States v Smith, No. 13-6177.

Most courts require a person in custody to show (1) that controlling circuit precedent at the time of his initial Section 2255 motion squarely foreclosed his claim that his conviction or sentence was inconsistent with the law Congress enacted; (2) that an intervening decision of the Supreme Court overturned that circuit precedent, thereby narrowing the reach of the relevant federal statute; and (3) that the Supreme Court's decision was retroactively applicable on collateral review. See United States v Barrett, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v United States, 124 F.3d 361, 363 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 248, 251 (3d Cir. 1997); Reyes-Requena v United States, 243 F.3d 893, 904 (5th Cir. 2001); Martin v Perez, 319 F.3d 799, 805 (6th Cir. 2003); In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998); Alaimalo v United States, 645 F.3d 1042, 1047 (9th Cir. 2011); In re Smith, 285 F.3d 6, 8 (D.C. Cir. 2002).

All of the courts of appeals in the majority have applied the foregoing test to challenges to unlawful convictions, and a number of those courts have also applied the test to challenges to unlawful sentences. See Hill v Masters, 836 F.3d 591, 597-599 (6th Cir. 2016); Brown v Caraway, 719 F.3d 583, 588 (7th Cir. 2013); cf. Trenkler v United States, 536 F.3d 85, 99 (1st Cir. 2008) (suggesting it would apply the test to unlawful sentences), cert. denied, 555 U.S. 1193 (2009). To the extent there is a subsidiary conflict on the applicability of the saving clause in the sentencing context, this case is a suitable vehicle in which to resolve that conflict.

ARGUMENTS

QUESTION ONE: Whether there exists any circumstance wherein a defendant can attack his Guidelines sentence in a petition pursuant to Title 28 U.S.C. Section 2241;

and, does either Descamps v United States, 133 S. Ct. 2276 (2013), [Mathis v United States, 136 S. Ct. 2243 (2016)]¹⁰ or United States v Miller, 735 F.3d 141 (4th Cir. 2013) and United States v Simmons, 649 F.3d 237 (4th Cir. 2011) from the Fourth Circuit, provides the circumstance in the instant matter?

SUPPORTING FACTS: In 2009, when Petitioner was sentenced, his six prior drug convictions were considered “felony” convictions. The Presentence Report (PSR) stated that the Petitioner was a career offender based on convictions appearing in paragraphs 20, 21, 25, 27, 28, and 29. For the convictions referenced in paragraphs 20 and 21, Petitioner pled guilty to two offenses of *possession with intent to sell or deliver cocaine* (hereinafter *PWISD*) and was sentenced to a consolidated sentence of 10-12 months. For the conviction in paragraph 25, Petitioner pled guilty to the offense of *PWISD Schedule II* and was sentenced to 10 to 12 months. For the convictions referenced in paragraphs 28 and 29, Petitioner pled guilty to the offenses of *PWISD Schedule II* and was sentenced to 10 to 12 months on each offense.

Petitioner’s guideline sentence was enhanced, because he was designated as a career offender¹¹. Even though, Petitioner received sentences of 10 – 12 months on five of the six prior drug convictions with 12 months being the maximum sentences he faced, he was designated as a career offender. See United States v Harp, 406 F.3d 242 (4th Cir. 2005) (held that in determining “whether a conviction is for a crime punishable by a prison term exceeding one year [under North Carolina law] we consider the maximum

¹⁰ Mathis v United States, 136 S. Ct. 2243 (2016) has not been decided when Petitioner filed his initial 28:2255 motion and for a certificate of appealability in the Fourth Circuit.

¹¹ A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense; (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history.”). Thus, because all of Petitioner’s prior drug convictions for the worst possible criminal history carried sentences of more than one year in prison in 2009, he was sentenced as a career offender.

Under the Controlled Substance Act (CSA), a separate provision of the CSA defines a “felony drug offense” as a drug-related “offense that is punishable by imprisonment for more than one year under any law ... of a State.” *Id.* Section 802 (44). The Federal Guidelines state that, “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

Then, in 2011, an en banc Fourth Circuit, decided Simmons, in which the Fourth Circuit reversed course and held that an offense qualifies as a “felony drug offense” for purposes of Section 841 (b) (1) and is punishable by more than one year in prison only if the defendant could have received a sentence of more than one year in prison, overturning its earlier decisions in Harp, 406 F.3d 242. See United States v Simmons, 649 F.3d 237, 242 (4th Cir. 2011) (en banc). Relying on the reasoning in Carachuri-Rosendo v Holder, 560 U.S. 563 (2010), the Fourth Circuit rejected the argument that these hypothetical aggravating factors made Simmons’ offense “punishable” by more than one year in prison. Simmons, 649 F.3d at 243-45.

Thus, for purposes of a qualifying predicate conviction under Section 841 (b) (1), a predicate conviction is not “punishable for a term exceeding one year” unless the defendant could have received a sentence of more than one year in prison under the North Carolina Structured Sentencing Act. Under Simmons, only one of Petitioner’s prior drug

convictions could be used as a predicate. Thus, five of the six prior drug convictions cannot be used to enhance Petitioner's sentence under Count One, because the prior drug convictions had maximum sentence of twelve months and are not felony convictions.

Petitioner, acting *pro se*, filed a motion for review of his case in light of Simmons on November 18, 2011. Then, on August 14, 2012, Petitioner, now represented by counsel, filed a Title 28 U.S.C. Section 2255 motion to vacate, set aside, or correct sentence in light of Simmons. In both the pro se letter for review and the appointed counsel's motion to vacate under Section 2255, Petitioner alleged that he was not a career offender; because, five of his six predicates were not felony offenses. Without reaching the merit of the petition, both the District Court and the Fourth Circuit denied relief, because both found that the Section 2255 motion was time-barred.

Then, in United States v Miller, 735 F.3d 141 (4th Cir. 2013), the Fourth Circuit declared that United States v Simmons, 649 F.3d 237 (4th Cir. 2011) was retroactively applicable on collateral review. But, the Fourth Circuit ruling in Miller which made Simmons retroactively applicable on collateral review did not aid Petitioner in filing a post-conviction motion attacking his career offender sentence. United States v Sawyer, No. 13-6556 (4th Cir. Jan. 21, 2014) (agreed that the Defendant would have been eligible for relief with Simmons if it had been the law at the time of his sentencing, but denied relief because the post-conviction motion was filed more than one year after Sawyer's conviction became final).

But, Petitioner was unable to attack his illegal imposed career offender sentences.

Next, this Court decided Descamps v United States, 133 S. Ct. 2276 (2013), in which it approved a variant of the categorical approach — labeled the “modified

categorical approach”— when a prior conviction is for violating a so-called “divisible statute.” That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime. Descamps, 133 S. Ct. at 2285.

Using the modified categorical approach to examine the six prior predicates used to designate Petitioner as a career offender, Petitioner found that five of the six predicates were charged under a North Carolina statute that is divisible. Petitioner’s prior drug convictions for *possession with intent to sell or deliver cocaine* and/or a Schedule II controlled substance falls North Carolina statute, Section 90-95, which provides:

- (a) Except as authorized by this Article, it is unlawful for any person:
 - (1) To manufacture, *sell* or *deliver*, or possess with intent to manufacture, *sell* or *deliver*, a controlled substance;
 - (2) To create, *sell* or *deliver*, or possess with intent to *sell* or *deliver*, a counterfeit controlled substance;
 - (3) To possess a controlled substance.

North Carolina Section 90-95 (a) (1). The generic definition for the same crime federally is provided by Title 21 U.S.C. Section 841 which states:

- (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21, U.S.C. Section 841 (a) (1) and (2). The North Carolina's statute, Section 90-95 (a) (1), is thus broader than the federal statute, Section 841; because, Section 90-95 (a) (1) charged "sell" and "deliver" and the federal statute does not charge "sell" or "deliver". North Carolina statute, 90-87 defines "deliver" or "delivery" as "the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." NC Code, Section 90-87 (7). The North Carolina statute does not define "sell". Black's Law Dictionary defines "sell" to mean "to dispose of by sale". Other definitions for "sell" are "give or hand over (something) in exchange for money", "trick or deceive (someone)", and, "persuade someone of the merits of". Additionally, Section 90-95 charged mere possession; mere possession of cocaine or a controlled substance is never a predicate that can be used to designate a defendant as a career offender.

This Court decided Mathis while the instant action was working itself through the courts below, and Mathis provided further support that five of six of the predicates that could be used to designate Petitioner as a career offender cannot be used. In Mathis v United States, 136 S. Ct. 2243 (2016), the Supreme Court held that where a statute provides "various factual means of committing a single element," as opposed to multiple alternative elements, courts may not apply modified categorical approach to determine which of those factual means defendants used. Thus, the Supreme Court held that, because the elements of Iowa's burglary law were broader than those of generic burglary, Mathis's prior convictions could not give rise to ACCA's sentence enhancement. Id. at

2248. Mathis broke new ground by holding that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. Mathis, 136 S. Ct. at 2247 (quoting Taylor v United States, 495 U. S. 575, 602).

But, Petitioner was unable to attack his illegal imposed career offender sentences.

CONCLUSION

In light of Simmons and Descamps, five of the six prior drug convictions used to enhance Petitioner's guideline sentence of 188-235 months to guideline sentence of 262-327 months cannot be used as predicates for enhancement purposes because they are not controlled substance offenses and they are not felony drug offenses. It is undisputable that Petitioner is not a career offender. It is certain that Petitioner would not have been sentenced as a career offender if Simmons and Descamps had been the law when Petitioner was sentenced. Without the career offender designation, Petitioner would have had a total offense level of 31¹², a CHC of VI, and a sentencing range of 188-235 months. Applying the 24.43 % reduction for substantial assistance, and Petitioner would be sentenced to a term of imprisonment of 142 months.

But, Petitioner has no recourse to correct his illegal imposed sentence. Petitioner respectfully requests that the Court grant, vacate, and remand the instant matter to the lower court for a ruling on this issue by finding that a Section 2255 is inadequate or ineffective to assess the merit of the instant action.

Petitioner prays that a writ be issued.

Respectfully submitted this 2 day of March 2018.

¹² Without the career offender's designation, Appellant's total offense level was 34 and would have been reduced by three levels for acceptance of responsibility.

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