

No. _____
To be assigned by the Court

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL A. BLANKENSHIP — 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 11th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael A. Blankenship
(Your Name)

FCC Coleman Medium- P.O. Box 1032
(Address)

Coleman, Florida 33521-1032
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) Whether the Petitioner's **Fifth Amendment** Rights are violated by the Eleventh Circuit when it denied Petitioner due process to his **Title 28 U.S.C. § 2255(e)**'s "savings clause," through the portal avenue of a **Title 28 U.S.C. § 2241(c)(3)** motion.

2) Whether Mathis, Shepard, and Descamps apply to the Petitioner's State priors, for which he was unconstitutionally enhanced, based on invalid State materials.

3) Whether Nelson v. Colorado, U.S. Supreme Court Cite 15-1256 applies to Petitioner's unconstitutional enhancements.

LIST OF PARTIES

- ☒ 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

☒ 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,
☒ is unpublished.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,
☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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

☒ For cases from **federal courts**:

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

☒ 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

United States Constitution

Amendment Five
Eight

United States Sentencing Guidelines

4b1.1
4b1.2

Title 18 United States Code

§ 3661

21 United States Code

§ 841(a)(1)
§ 846
§ 851
§ 857

28 United States Code

§ 2241
§ 2241(c)(3)
§ 2255
§ 2255(e)
§ 2255(h)

STATEMENT OF THE CASE

Petitioner was arrested and charged with **Title 21 U.S.C. § 841(a)(c)** and **§ 846**. Petitioner was convicted of the above stated offenses and enhanced unconstitutionally based on an invalid **§ 851** State prior. He was Careered based on **U.S.S. Guideline § 4b1.1/4b1.2**. Petitioner was sentenced to a life term of imprisonment, based on invalid State priors. Those invalid State priors violated Mathis v. United States, 136 S.Ct. 2243-2268 (2016); Descamps v. United States, 133 S.Ct. 2276-2284 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005); Taylor v. United States, 495 U.S. 575 (1990); Johnson v. United States, 135 S.Ct. 2151 (2015); Begay v. United States, 553 U.S. 1371 S.Ct. (2008); Johnson v. United States, 130 S.Ct. at 1269-1270 (2010); Dimaya v. Sessions, 15-1498; and Nelson v. Colorado, 137 S.Ct. 9249 (2017).

Petitioner has exhausted all of his Appeal rights and now requests a Writ of Certiorari based on his Actual, Factual, and Legal innocence.

STATEMENT OF THE CASE

REASONS FOR GRANTING THE PETITION

The Eleventh and Tenth Circuits refuse to honor the Petitioner's **Fifth Amendment** rights to due process to the "savings clause" of Section 2255(e) of a Section 2241(c)(3) motion. Petitioner requests that the Honorable U.S. Supreme Court accept this writ under their discretion, because there is a split in the circuits. This split is in regards to allowing the Petitioner "Jurisdiction" to enter into the Eleventh and Tenth Circuits, based on the "savings clause." Petitioner requests that this writ be accepted to settle the split.

Petitioner understands that the United States Supreme Court Honorable Justices do not have to accept this case, but the reason this case should be accepted is because Petitioner's Eleventh Circuit Court of Appeals is in conflict with ten (10) other United States Court of Appeals Circuits, in regard to jurisdiction. The Eleventh Circuit is violating Petitioner's **Fifth Amendment** rights, under the United States Constitution to due process to **Title 28 U.S.C. § 2255(e)**'s "savings clause," through the portal avenue of a **Title 28 U.S.C. § 2241(c)(3)** motion.

The Petitioner states the following arguments:

ARGUMENT ONE

Whether the Eleventh Circuit Court of Appeals Holding in McCarthan v. Dir. of Goodwill Indus. Suncoast Inc. Unconstitutionally Forecloses a Petitioners Right to Re-Address Under 28 U.S.C. § 2241

Petitioner filed a motion for relief in the District Court under 28 U.S.C. § 2241 based upon the "Savings Clause" of 28 U.S.C. § 2255. Therein, Petitioner contested his sentencing enhancements pursuant to this Court's prior holding in Mathis v. United States, 136 S. Ct. 2293 (2016). Petitioner asserted that had the Sentencing Court applied proper analysis of the Supreme Court precedent in conjunction with the Mathis decision, he would have (and should have) never been deemed a Career Offender 21 U.S.C. § 851 and, thus, not subject of the enhanced sentence imposed.

Rather than addressing the substantive issues set forth in Petitioner's motion, the District Court, instead, issued a two-page order dismissing his motion predicated solely upon the Eleventh Circuit 2017 decision in McCarthan v. Dir. of Goodwill Indus. Suncoast Inc., 851 F.3d (11th Cir. 2017) (En banc).

Specifically the trial Court stated that;

"recently sitting en banc the Eleventh Circuit overruled prior precedent and held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except on very narrow grounds not present in this case."

See App "A". As a result and without further analysis or explanation, the District Court dsmissed the motion. Upon Appeal from that dismissal, the Eleventh Circuit failed to address the substantive arguments as well.

The McCarthan decision, which was a relatively recent determination (as stated by the District Court) reversed the course 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 recognized (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 e.g. United States v. Barrett, 178 F3d 34 (1st Cir. 1999) cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F3d 361 (2nd Cir. 1997); In Re: Dorsainvil, 119 F3d 245 (3rd Cir. 1997); In Re: Jones, 226 F3d 328 (4th Cir. 2000); Reyes Requena v. United States, 243 F3d 893 (5th Cir. 2001); Martin v. Perez, 319 F3d 799 (6th Cir. 2003); In Re: Davenport, 147 F3d 605 (7th Cir. 1998); Alaimalo v. United States, 645 F3d 1042 (9th Cir. 2011); In Re: Smith, 285 F3d 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 F3d 1271, 1294 (11th Cir. 2014) (W. Pryor J. Concurring) (Noting that "the 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. el 2255(e), the Seventh Circuit looked to the "essential function" as "giving a prisoner a reasonable opportunity to obtain 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 section 2255 motion never had a reasonable opportunity that habeas corpus demands because "the 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, § 2255 would not preclude such an opportunity after an intervening and retroactively applicable decision of this Court that postdated an initial § 2255 motion because of the bar on Second or 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 § 2255(e) Savings Clause is triggered and an application for habeas corpus relief under § 2241 is available. Davenport at 611.

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

his Sentencing, Direct Appeal, the First Section 2255 Motion. See Briefs of the United States Dority v. Roy, No. 10-8286 (11th Cir. May 16, 2011), Sorrell v. Bledsoe, No. 11-7416 (11th Cir. Jan. 17, 2012), McKelney 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. 4, 2013), Blanchard v. Castillo, No. 12-7894 (11th Cir. Mar. 26, 2013), Price v. Thomas, No. 12-10719 (11th Cir. Aug. 12, 2013), Abernathy v. Cozz-Rhodes, No. 13-7723 (Mar 7, 2014), Williams v. Hastings No. 13-1221 (11th Cir. Jul. 30, 2014). See also Brief of the United States in Tyler v. Cain, No. 005961 (11th Cir. Mar. 2, 2001), stating that "because 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 those 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 Donty 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 United States v. Suratt, No. 14-6857 (4th Cir. Feb. 2, 2016), the government posited that "Prost's analysis is refuted by Section 2255(e)'s text, when read as a whole.

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 not be able to take advantage of decisions of this Court and will remain incarcerated for conduct that all agree is no longer criminal (or for a term of imprisonment that all agree exceeds the maximum term authorized by law) while other prisoners in 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.

ARGUMENT TWO

Whether Mathis v. United States, 136 S.Ct. 2243 (2016) Applies to Petitioners Career Offender Status and Title 21 U.S.C. § 857.

Petitioner's prior convictions for Career Offender enhancement are disqualified. The decision in Mathis clarified when and how the modified categorical approach is applied in the context of the Federal Sentencing. The Mathis decision is controlling regarding the methodology of the modified categorical approach and we must apply its holdings even if they are contrary to prior precedent of the District Courts. Prior to Descamps and Mathis, Sentencing Courts could reference record documents to determine a Defendant's prior conviction, but Mathis instructs that there is a difference between alternative elements of an offense and alternative means of satisfying a single element. Elements must be agreed upon by a Jury. When a Jury is not required to agree on the way of satisfying that requirement is means of committing an offense, not an element of the offense. Facts and means are mere real world things extraneous to the crime's legal requirement, they are circumstances or events having no legal effect or consequences and need neither be found by a Jury nor admitted by a Defendant. Taylor v. United States, 495 U.S. 579 (1990) does not allow conduct to be looked at. Therefore, if conduct, facts, and means cannot be used, then there is no way to determine the elements.

In Petitioner's case in point, there was no Shepard v. United States, 544 U.S. 1326 (2005) documentation provided for Petitioner's prior convictions. Therefore, Descamps and Mathis says that the least acts criminalized must be given. Also the 893.13 and 893.135 Statues are indivisible statues, and under Moncrieffe v. Holder Jr., 130 S. Ct. 1678 (2010), an indivisible statue cannot be used as a predicate for ACCA or CCA enhancemnt. In addition, burglary is no longer a crime of violence under the 4b1.1 / 4b1.2// 851 Career offender guidelines. Burglary is also not an enumerated offense under the 4b1.2, in regards to Mathis, Shepard, Taylor, Descamps, Moncrieffe, and Dimaya v. Sessions, 137 S.Ct. 31 (2016).

Petitioner's prior convictions for Career Offender enhancement and 21 U.S.C. § 851 enhancement are disqualified due to all the above stated reasons. Therefore, Petitioner is no longer a Career Offender nor should he have a 21 U.S.C. § 851 enhancement.

ARGUMENT THREE

Nelson v. Colorado, 137 S.Ct. 1259 (2017)

At Sentencing Federal Judges consider relevant conduct for purposes of calculating the Guidelines, which may include uncharged conduct, otherwise inadmissible as trial evidence and even acquitted conduct. In Nelson v. Colorado, 137 S.Ct. 1259 (2017), the Supreme Court held that once a conviction was erased for any reason the presumption of their innocence was restored. (See Johnson v. Mississippi, 486 U.S. 578, 585 (1988)). After a conviction has been reversed, unless and until the defendant should be retried, he must be presumed innocent of that charge. The reasoning in Nelson clearly reaches farther than just precluding acquitted conduct, it entails that a defendant may not be penalized for dismissed or even uncharged conduct that entails that any facts that could constitute elements of a separate offense from the offense conviction may not be considered for purposes of sentencing. This is so if, as has been emphasized in Nelson. The presumption of innocence is to be given weight. Or put differently, a State or government may not engage in an end-run around the Constitution by characterizing at sentencing acquitted, dismissed, or a separate offense as mere sentencing factors. The principle of Nelson is that only facts arising out of a Final Conviction which may not be construed as elements of acquitted, dismissed, or uncharged crimes may be considered at sentencing. This is not inconsistent with 18 U.S.C. § 3661, which provides that no limitation shall be placed on the information concerning the background,

character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence. This would violate the **Eighth Amendment** of the United States Constitution for cruel and unusual punishment. While Nelson dealt with the Denial of remuneration to the acquitted defendant in monteray terms how much Moreso should it be applicalbe to the deprivation of one's liberty under a sentence of incarceration.

In Petitioner's case in point, Petitioner was convicted of 21 U.S.C. § 841(a)(1) and 846. He was sentenced as a Career Offender with a 21 U.S.C. 851 enhancement. Petitioner was enhanced based on uncharged crimes that has nothing to do with his charges on the indictment and pursuant to uncharged conduct that are actually elements of separate offenses. According to Nelson, these unrelated prior convictions may not be considered at Sentencing, because they had nothing to do with the charges on Petitioner's current indictment. Therefore, they are uncharged conduct form separate offenses. Whenceforth, Petitioner's prior convictions should not be used for any enhancements at Sentencing, because they are uncharged conduct and uncharged crimes not relating to this instant offense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Blankenship

Date: 3/2/2018