

NO. ~~17-85533~~

17-8563

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. BLANKENSHIP,
PETITIONER

v.

JORGE L. PASTRANA,
WARDEN

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

PETITIONER'S REPLY BRIEF
IN RESPONSE TO THE UNITED STATES'
BRIEF IN OPPOSITION

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SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BLANKENSHIP,
Petitioner,

v.

CASE NUMBER: 17-85533

JORGE L. PASTRANA,
Warden.

**PETITIONER'S REPLY BRIEF IN RESPONSE
TO THE UNITED STATES' BRIEF IN OPPOSITION**

COMES NOW, Petitioner, MICHAEL BLANKENSHIP, pro se, and files this reply to the UNITED STATES' Response, filed in opposition to his Petition for a Writ of Certiorari, and would advise this Honorable Supreme Court as follows:

I. 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. § 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. Petitioner's Title 28 U.S.C. § 2241 Motion was denied by both the

District Court and the Eleventh Circuit, because the District Court stated that it had no Jurisdiction to hear the Petitioner's case, based on Title 28 U.S.C. Section 2255(e)'s "savings clause," based on McCarthan, supra, which did not allow the Petitioner jurisdiction of the COurts to hear and decide the Petitioner's Mathis v. United States, 136 S. Ct. 2243-2248 (2016) claim as a substantial change in the Law, as well as Petitioner being Actually, Factually, and Legally Innocent of his Career Offender / Section 851 status, in regards to Mathis, supra. Petitioner states that Mathis is a substantial change in the Law, by the United States Supreme Court. Petitioner cannot pursue his Mathis claim through a Second or Successive 2255(h)(2) motion because Mathis is not a constitutional change in the law, but a substantial change in the Law. Petitioner also cannot meet the second prong of a Second or Successive § 2255 motion requirement because his claims are not based on newly discovered evidence. The decision in Mathis is not newly discovered evidence, but a substantial change in the Law. Therefore, even a Second or Successive § 2255 motion is ineffective and inadequate to test the legality of the Petitioner's detention. The only avenue available to the Petitioner is a Title 28 U.S.C. § 2241(c)(3) motion through the "savings clause" of a Title 28 U.S.C. § 2255(e) motion because Mathis was not available during the Petitioner's trial, sentencing, nor any of the Petitioner's Appeal stages, nor his first § 2255 collateral attack stages. And Therefore, according to Mathis, Petitioner is serving an unconstitutional sentence in violation of the five prongs in Bryant v. Warden, 738 F.3d 1253 (2013) and Bousely v. United States, 523 U.S.

614-620 (1998). Petitioner's sentence is a total miscarriage of justice, according to Murray v. Currier, 477 U.S. 478 (1986); Davis v. United States, 417 U.S. 333-346 (1994); Shlup v. Delu, 513 U.S. 295-298 (1995); Fiore v. White, 531 U.S. 225-229 (2001); Glover v. United States, 531 U.S. 198-203 (2001); Boumediene v. Bush, 553 U.S. 723 (2008); Hill v. United States, 369 U.S. 424-429 (1962); In re-Davenport, 147 F.3d 605, 609 (7th Cir. 1998); In re-Dorsainvil, 119 F.3d 245, 251 (3rd Cir. 1997); Triestman v. United States, 124 F.3d 361-377 (2nd Cir. 1997); and Engle v. Issac, 456 U.S. 107 (1982). Petitioner is therefore, actually, factually, and legally innocent of his Career Offender status and Section 851 status, based on Mathis, meaning that the United States District Courts and the Eleventh Circuit did have jurisdiction to hear the Petitioner's case. Also, because McCarthen, supra, violates the Petitioner's Fifth Amendment Rights to Due Process to a § 2255(e) "savings clause," which violates Boumediene v. Bush, supra. The Petitioner's Due Process rights to a § 2255(e) have been violated, even though he meets the requirements under Bryant, supra. Approximately eleven other Circuit Courts agree with the Petitioner that he is entitled to the filing of his § 2241(c)(3) motion through the portal avenue of a § 2255(e) motion. United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999); Triestman, supra; In re-Jones, 226 F.3d 328, 334 (4th Cir. 2000); 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, supra; Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir. 2011); and In re-Smith, 285 F.3d 6, 8 (D.C. Cir. 2002).

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 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, U.S. v. Barrett, 178 F.3d 34 (1st Cir. 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 Cir-

cuit 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 unwillings (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 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 Sec. 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 the Eleventh Circuit that the majority rule is the correct one. Since 2011, the government has filed at least eleven briefs "agree[ing] that the savings clause provides relief where Section 2255 prevents a federal prisoner from presenting a claim that, under an intervening, retroactively applicable decisions ... 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. 11-7416 (11th Cir. Ja. 17, 2012); McKelvey v. Rivera, No. 12-5699 (11th Cir. Dec. 17, 2012); Thornton v. Ives, No. 12-6608 (11th Cir. Fe. 1, 2013); McCorvey v. Young, No. 12-7559 (11th Cir. Feb. 4, 2013); Jones v. Castillo, No. 12-6925 (11th Cir. Feb. 21, 2013). See also, Brief of the United States in Tylerv. 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 other 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 posited that "Prost's analysis is refuted by Section 2255(e)'s text, when read as a whole."

In its Response Brief, however, the government has now taken a position inapposite to that set forth in the cases cited above and others. It is disingenuous to accept this "about-face" as anything other than a political maneuver to prevent federal prisoners from access 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 from 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.

II. Petitioner's § 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 posited 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 obligated 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 this 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 Bryant v. Warden, 738 F.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. 2276 (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 ²⁰⁰⁰1990.

By disallowing Petitioner's § 2241 motion on question-

able "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 "saavings clause" of § 2255(e) and relief under § 2241, and the merits of the case should have been addressed.

III. McCarthan Violates the Suspension Clause

The McCarthan decision violates the Suspension Clause of

the U.S. Constitution, Art. I, Sec. 9, Clause 2, in regards to its effect on 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, Shepard, Descamps, Booker, Mathis. Specifically, Petitioner contended Fla. Stat. § 893.13(1) as relates to his prior convictions more than 19 years ago could not establish that they were serious drug offenses for enhancement under either 21 U.S.C. § 851 or U.S.S. Guidelines Section 4B1.2. 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 life sentence -- premised upon the trial court's decision 19 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 U.S.S. Guideline Section 4B1.1/4B1.2 or 21 U.S.C. § 851(a) 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 19 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. This is an unconstitutional act which mandates review and reversal by this Court.

IV. Petitioner's Sentence is Unconstitutional and is in Violation of this Courts Decisions in Booker and Nelson

Petitioner contends his sentence is unconstitutional under this Court's holding in Booker because he was sentenced under mandatory, not advisory, guidelines more than 19 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 that Booker did not exist at the time of Petitioner's sentencing to give him grounds to challenge it.

Petitioner also contends that his sentence is unconstitutional under this Court's holding in Nelson v. Colorado. This Court held that a state could not retain restitution paid to it via a conviction when that conviction was subsequently vacated on appeal because the defendants were deemed "presumed innocent" of that conduct. Colorado had countered that Nelson had not proved actual innocence and, thus, it could retain the funds. The Court disagreed asserting that the presumption of innocence- the cornerstone of American Jurisprudence -must be afforded weight. As a result, a person not convicted of certain conduct cannot be punished by the United States for that conduct.

By extension, the use of "relevant conduct" at sentencing is anathema to the concept of presumption of innocence. Absent a conviction, if the United States cannot take a dollar of one's property, how much more so can it not take a day of one's liberty. To allow the United States to penalize an individual for uncharged unconvicted conduct, by allowing it to assert such "charge" as a mere sentencing factor in conjunction with some other charge, allowed the United States to make an "end run" around Petitioner's constitutional protections.

In this instant case, after listing the Petitioner's exhaustive procedural history, and factual basis for the court's denials, the United States failed to acknowledge Petitioner was sentenced on evidence that was suppressed and obtained from an unlawful search and seizure. Doc. #61 & 62. For this reply, specifically the drugs that formed the basis of the Government's case in chief. Petitioner was then sentenced to LIFE without parole, on what was either considered acquitted, dismissed, or uncharged conduct, in violation of Nelson. Under Nelson, the Court must presume Petitioner innocent of conduct that was not determined beyond a reasonable doubt, and it is wholly improper and unconstitutional to penalize Petitioner with additional prison time for conduct of which he is presumed innocent.

**V. Petitioner's Controlled Substance Act State Priors,
Under Florida Statute Section 893.13(1), Violates
Petitioner's Mathis Requirements**

Petitioner's Florida State priors violates the Mathis requirements because of the ways, means, and conduct of how

Petitioner was sentenced for his Three state priors. According to Florida State Statute § 893.13(1)(a), under which Petitioner was charged, criminalizes conduct for which is not included within the U.S.S. Guidelines § 4B1.1/4B1.2 Career Offender Guidelines, nor the U.S.S. Guidelines definition of a Controlled Substance. Note that the Florida State Controlled Substance Act of § 893.13(1) in Petitioner's state of Florida priors, that were not obtained, are not elemnts but various means of committing an offense and does not set forth in these disjunctive separate offenses. Delivery, sale, and trafficking in Florida State Section 893.13(1) is not a controlled substance offense within the meaning of U.S.S. Guinelines § 4B1.1/ § 4B1.2, nor in Title 21 U.S.C. § 851(a)(1), nor in 21 U.S.C. §802(44).

There were no Shepard v. United States, 544 U.S. 13, 26 (2005), documentation to verify these Florida State priors, to warrant Career Offender status, nor for a Section 851 enhancement. There was no categorical approach, no modified categorical approach, no Descamps v. United States, 133 S.Ct. 2275-2283 (2013), divisible or indivisible element approach, and no Mathis ways, means, and conduct of the element approach done in this case. The Petitioner did not agree to the Career Offender status predicates or the Section 851 enhancement, which is why he proceeded to trial in this case.

Florida's State Statute Section 893.13(1), was too broad at the time Petitioner was charged as a Career Offender and given the Section 851(a)(1) enhancement. Petitioner's priors can not be used as predicates for enhancement. Because Petitioner was sentenced over 19 years ago, his Florida State priors for § 893.13 of the Florida

State statutes were broader than the requirements of the U.S.S. Guidelines Section 4B1.2 requirements, to qualify as predicates for the Career Offender enhancement and § 851(a)(1) of those listed generic offenses based on an elements-only inquiry. If the elements of the State of Florida Controlled Substance Act state priors under Petitioner's Section § 893.13(1) of the state criminal offense are broader than the generic offense listed under U.S.S. Guidelines § 4B1.1/ §4B1.2, such as in the Petitioner's prior sentences, then the sentence cannot be enhanced with those priors, even if the actual conduct in question fits the generic offense as listed under the Career Offender Guidelines.

As for Petitioner's Section 851(a)(1), a "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any Law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulatn substances, which include possession of the narcotic drugs. A "controlled substance offense" is defined as an offense under federal or State Law, punishable by imprisonment for a term exceeding one year, that prohibits the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. All Controlled Substance offenses are felony drug offenses, but not all felony drug offenses are Controlled Substance offenses. If a state prior durg offense has been found to be broader than the federal definition for a Controlled Substance offense, then there is a chance that the felony durg offenses used to enhance a sentence under § 851 is broader than the federal definition too.

In United States v. Hinkle, 832 F.3d 569 (2016), the Fifth Circuit found that the Texas drug statute, § 481.112(a) was broader than the federal definition for a controlled substance offense. And so it is, also, with the Florida State Statute of § 893.13(1), delivery and trafficking and sale is too broad. Therefore, Petitioner should have recieved the least culpable offense. Moncrieffe v. Holder, 133 S. Ct. 1678-1684 (2011), for which is not a Controlled Substance offense under § 892.12(1). There were also no Shepard documentation, no categorical approach, no modified categorical approach, no Descamps divisible or indivisible approach, and no Mathis ways, means, and conduct of lthe elements approach. And even if there was no objection to the facts contained in the Petitioner's Pre-Sentence Report, it has no constitutional significance. Instead what matters is that the Petitioner did not invoke nor waive his constitutional right to a jury find these facts beyond a reasonalbe doubt during the earlier criminal proceedings.

In United States v. Sanchez-Fernandez, No. 15-10291 (9th Cir. September 13, 2016)(reversing the district court because Arizona Revised Statute Section 13-3408(A)(2) was not a categorical match with the federal generic definition of "controlled substances offense," because the Arizona Statute criminalizes possession for sale of certain substances that were not federally controlled); United States v. Solomon, No. 16-7350 (4th Cir. August 2, 2017)(found that a North Carolina conviction for possession with intent to sell cocaine no longer qualifed as an ACCA predicate under United States v. Newbold, 791 F.3d 455, 463-64 (4th Cir. 2015) in a request for a COA); and

United States v. Malkern, No. 16-1146 (1st Cir. April 14, 2017) (found Maine drug trafficking statute was broader than the federal definition for controlled substance offense); and so it is with the Florida State Statute § 893.13(1), under the Career Offender status, Shannon v. United States, 631 F.3d 1183-1189 (11th Cir. 2011); United States v. Ocampo-Estrada, No. 15-50471 (9th Cir. August 29, 2017)(held that California Health and Safety Code § 11378 is a divisible statute than is susceptible to the Modified Categorical Approach. The panel held that using the modified categorical approach, the Government failed to demonstrate that the defendant's § 11378 conviction was based on a guilty plea to a controlled-substance element that is included within the "felony drug offense" definition set forth in Title 21 U.S.C. § 802(44). The panel therefore concluded that the defendant's prior conviction does not qualify as a felony drug offense that would enhance his statutory mandatory minimum sentence under Title 21 U.S.C. § 841(b)(1)(A). Ocampo-Estrada, supra, was decided on Direct appeal.)

In Petitioner's Florida State priors under Florida State Statute § 893.13(1), Deliver, Sale, and Trafficking are too broad and ambiguous, and do not compare to the federal U.S.S. Guidelines § 4B1.2 requirements in regards to Title 21 U.S.C. § 802(44). Therefore, Petitioner, according to Mathis and Descamps, supra, is factually, actually, and legally innocent of his Career Offender status, and his Section 851 enhancement.

Petitioner was also sentenced under Mandatory U.S.S. Guidelines,

pre-Booker v. United States, 543 U.S. 220 (2005). The Supreme Court held in Beckles that the Advisory Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause of the Constitution. However, the Petitioner was sentenced under the Mandatory Sentencing Guidelines, therefore, post-Booker, The Supreme Court declared the Mandatory Sentencing Guidelines unconstitutional. Petitioner now challenges his sentence under the Due Process Clause because his sentence was imposed under the Career Offender provisions when the Sentencing Guidelines were mandatory under § 4B1.2.

CONCLUSION

Petitioner is therefore serving an unconstitutional sentence for which he is actually, factually, and lawfully innocent of. A Sentence that violates his Due Process rights to not be incarcerated based on an unconstitutional sentence for the above stated reasons. Petitioner's Sixth Amendment rights are in violation to the elements of the offense to a jury beyond a reasonable doubt based on all of the above stated reasons. Petitioner's Eighth Amendment rights are also violated based on the fact that he is serving an unconstitutional sentence in violation of the laws, statutes, U.S.S. Guidelines, and Constitution.

For the reasons set forth herein and in Petitioner's initial petition for a writ of certiorari, Petitioner assets that the Eleventh Circuit's holding in this matter should be reviewed so as to resolve the conflict amongst the circuit courts of appeals regarding the application of § 2255(e)'s "savings clause" to use in a motion under § 2241, and requests this Honorable Court issue a

a writ of certiorari to the Eleventh Circuit Court of Appeals. As long as the Petitioner remains incarcerated, unconstitutionally, his rights continue to be violated.

Respectfully Submitted,

8/28/2018
Date

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CERTIFICATE OF SERVICE

I, MICHAEL BLANKENSHIP, hereby CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished, via the United States Postal Service, this 28 day of AUGUST, 2018, to:

Solicitor General
Department of Justice, Room 5616
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

"and"

Clerk of the Court
U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Respectfully Submitted,

8/28/2018
Date

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