

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHAWN T. STRAIN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FOURTH CIRCUIT COURT OF APPEAL COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Shawn T. Strain
Shawn T. Strain

(Your Name)

FCI Butner II PO Box 1500

(Address)

Butner, NC 27509

(City, State, Zip Code)

NA

(Phone Number)

QUESTION(S) PRESENTED

THE "CIRCUIT COURTS OF APPEAL ARE "SPLIT" ON WHETHER THE N.C.G.S § 90-95 AS DEFINED IN N.C.G.S § 90-87 IS " A DIVISIBLE OR INDIVISIBLE STATUE" AND IF THE STATUES ARE OVERBROAD. THEREFORE, THIS COURT IN APPLYING THE MATHIS_V_US 136 S.CT 2243 (2016), SHOULD DETERMINE IF THE PRIOR CAN BE USED FOR ENHANCEMENT AS DEFINED IN 4b1.2(b).

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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OTHER

NA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Dec. 22, 2017.

☒ 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 April 30, 2018 (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**: NA

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

U.S. FIFTH AMENDMENT (DUE PROCESS)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

CAREER OFFENDER "CONTROLLED SUBSTANCE" DEFINITION

U.S.S.G. § 4B1.2(b)

(B) The term "Controlled Substance offense " means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that [prohibits the manufacture, import, export distribution , or dispensing of a controlled substance (or counterfeit substance) [or] the possession of a controlled substance with intent to manufacture, import, export, distribute or dispense].

STATEMENT OF THE CASE

The petitioner was sentenced in the Eastern District of North Carolina for Conspiracy to Possession with Intent to Distribute a Quantity of Cocaine in violation of 21 USC § 841(a)(1) and (b)(1)(c).

The Court determined that the petitioner was a [Career Offender] based upon 2 North Carolina convictions for N.C.G.S 90-95 as defined in § 90-87.(See App'x D-E)

The Court sentenced the petitioner to [180 months] However, without the Career Offender finding, the petitioner's base offense level was 22 and produces a guideline range of 77-96 months.

In 2015, the Fifth Circuit determined that the 90-95 is broader than the federal generic definition, but also determined that the state of North Carolina is "divisible" and that the petitioner's arguments were doomed in light of the 5th Circuits case of *US v Ford* 509 F.3d 714 (5th Cir. 2007) and *US v Teran Salas* 767 F.3d 453,459 (5th Cir. 2014) and held that the petitioner failed to show that there was a "realistic" probability that the State of North Carolina would or has convicted someone under the alternatives of 90-95 and 90-87. Ultimately, the court denied that petitioner. (See *US v Selvan-Cupil* 603 F.App'x 242 (5th Cir. 2015))

However, in 2015, the Fourth Circuit determined that same 90-95 is "not divisible and is not overlybroad" and still denied defendants. (See *Davis v US* 2015 Dist. Lexis 164271 (4th Cir. 2015) and *Caldwell v US* 2015 US Dist. Lexis 31925 (4th Cir. 2015))

Because there was a ongoing conflict surrounding what is or isn't a divisible statue, this Court took up the "vehicle case" of Mathis v US, 136 S.Ct 2243 (2016) and determined that if the statue is broader than the federal generic definition and is also indivisible, then the prior may no longer qualify and the enhancement cannot be applied.

Based upon the Mathis decision, the petitioner filed the timely 2255 within the one year of the Supreme Courts ruling, but the lower courts denied the relief sought and found that the North Carolina statue is not broader than the federal definition, and in making this finding, determined that the N.C.G.S 90-95 is like the W.VA Code § 60A-4-401(a). (See App'x B p. 6 of DOC 45). The problem with this position is that the 4th Circuit has already determined that the 90-95 is indivisible and that the West Virginia is divisible. So they cannot be treated the same. More importantly, the N.C.G.S 90-95 also contains a broader swath of means to commit a violation than the West Virginia statue.

Therefore, based upon the "Circuit Split among the Circuits" & the "Intra-split in the Circuit", the petitioner hereby moves the to Grant the Cert in order to make a final determination and to cure both the "Circuit splits and the Intrasplit".

REASONS FOR GRANTING THE PETITION

The North Carolina defines the N.C.G.S § 90-95 as :

...(a) Except as authorized by this article, it is unlawful for [a 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] aka "simple possession"

However, the 90-95 is "further defined in N.C.G.S § 90-87, which has "several counterparts" that are not defined in the 4b1.2(b) controlled substance offense. (See App'x E 90-95 and 90-87 State definitions attached).

The prior decisions of both the 4th and 5th Circuits have both been overturned by the Courts Mathis v US decision which has clarified when a statute is divisible versus when it is not. In this case, simple logic states that if the prior decisions have been overturned, then the prior should no longer qualify today. (See US v Hinkle 832 F.3d 569 (5th Cir. 2016)...finding that the Texas drug conviction for "delivery " of a controlled substance is overly broad and no longer qualifies for career offender purposes;; US v Tanksley 15-11078 (5th Cir. 2017)...holding that the

prior circuit ruling of US v Ford, 509 F.3d 714 (5th Cir. 2007) is overturned and that the Texas drug conviction for "possession with intent to deliver" no longer qualifies in light of Mathis v US and Hinkle).

Also, the Fourth Circuits attempt to uphold the N.C.G.S 90-95 also is diminished by the US v Glass 3rd Circuit decision, in which the Fourth Circuit has also applied to determine if the statue also qualified. However, the Third Circuit has also just ruled that the prior convictions no longer qualifies, thus leaving the 90-95 on a bare island. (US v Glass 16-2906 (3rd Cir. 2017))

Therefore, because the Fourth Circuit has deemed the statue to qualify, whereas other circuits have found that it no longer does or was divisible, then only this Court may settle the Circuit and Intra Circuit Splits that are depriving defendants of their life and liberty.

Therefore, the petitioner prays that the Court Grants the Writ of Certiorari and either Grants the Oral arguments or Grants, Vacates and Remands for further proceedings and Resentencing in light of Mathis v US.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shawn T. Strain
Shawn T. Strain, 29353-058

Date: April 24, 2018.