

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSE WITHERSPOON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS

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

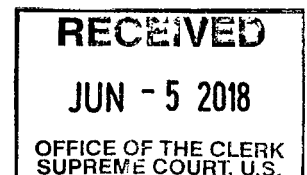
PETITION FOR WRIT OF CERTIORARI

JESSE WITHERSPOON #55951-004
(Your Name)

PO. BOX. 1032
(Address)

COLEMAN, FLORIDA 33521 - 1032
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

1. Whether in light of McCarthan v. Director, Goodwill Industries-Suncoast, Inc. * the issue of whether Congress exceeded its Exceptions Clause Power when drafting the .. AEDPA of 1996, needs to be revisited in this Court ?

2. Whether the question of whether the restrictions placed on second or successive 28 U.S.C. § 2255 motions pursuant to the Antiterrorisim and Effective Death Penalty Act of 1996 is unconstitutional or not, is a question that must first be addressed in the district court ?

* 851 F.3d 1076 (11th Cir. 2017)(en banc).

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:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A - ELEVENTH CIRCUIT DENIAL MAY 09, 2018

APPENDIX B -

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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☒ is unpublished.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 _____ 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☐ is unpublished.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 May 9, 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

STATEMENT OF THE CASE

In 2009, a grand jury in the Southern District of Florida returned an indictment charging Witherspoon with unlawful - possession of a firearm and ammunition, having previously been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), respectively. Witherspoon waived his right to a trial by jury, after a bench trial based on stipulated factual proffer, the district court sentenced Witherspoon to 180 months imprisonment, to be followed by five years of supervised release.

Witherspoon appealed. The Eleventh Circuit affirmed. See United States v. Witherspoon, 405 F. App'x 369 (11th Cir. 2010). The United States requested that the Eleventh Circuit dismiss Petitioner Witherspoon's petition for pre-AEDPA 28 U.S.C. § 2255 - authorization arguing that it was filed without requisite authorization as a successive § 2255. Petitioner was stranded procedurally, after the Eleventh Circuit's decision in McCarthan v. Goodwill Industries-Suncoast, Inc., created a statutorily unconstitutional restriction on the filing of a second successive § 2255. The Eleventh Circuit granted the Government's motion for summary affirmance stating "there is no substantial question as to the outcome of the case." See OP/ORDER pg3¶2. APP A.

REASONS FOR GRANTING THE PETITION

As stated above, Petitioner is now stranded procedurally in light of the Eleventh Circuit's decision in McCarthan v. Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017). The United States in their response to Petitioner's request for leave to file **pre-AEDPA** 28 U.S.C. § 2255, ... stated "this bar on second or successive motions is jurisdictional." citing Burton v. Stewart, 549 U.S. 147, 152-57 (2007)(per curiam). The Government in turn argued that for the same reasons, the district court is without authority to issue a certificate of appealability with respect to any claims in an unauthorized successive motion." (citing Williams, 510 F.3d at 1295. Petitioner argues in turn, that summary affirmance is not appropriate because the question of whether the restrictions placed on second or successive **Title 28 U.S.C. § 2255 motions** pursuant to the **Antiterrorism and Effective Death Penalty Act ("AEDPA")** of 1996 is unconstitutional or not, is a question that must first be addressed in the district .. court.* In re: Clayton, 829 F.3d 1254, 1266-67 (11th Cir. 2016) (Martin, J., concurring)(noting that the issue of whether .. Congress Exceeded its Exceptions Clause Power when drafting the AEDPA of 1996 may need to be revisited), citing Felker v.

*The Seventh Circuit Court of Appeals recently ordered the U.S. District Court to make the ruling in the "first instance" of whether the AEDPA is unconstitutional in light of McCarthan. See Cunningham v. United States, No 17-2651 APP **B**.

Turpin, 518 U.S. 651, 667, 116 S.Ct. 2333, 2342, 135 L.Ed.2d 827 (1996)(Souter, J., concurring)("[t]he question of whether the Statute [i.e., AEDPA of 1996] exceeded Congress' Exceptions Clause power" might need to be revisited. "If the courts of appeals adopted divergent interpretations of the gatekeeper standard provided within 28 U.S.C. § 2244(b)").⁽²⁾

As argued before this court, the decision in McCarthan v. Director, Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th cir. 2017)(en banc), has now interpreted the AEDPA in a manner that exceeds Congress' Exemption Clause power and therefore must be revisited for a constitutional violation. See also Abernathy v. Wanders, 713 F.3d 538, 557 (10th cir. 2013)(noting the need to interpret the AEDPA to avoid "serious constitutional questions" surrounding the Statute, but refusing to decide the issue).

In Abernathy, the court noted that "[i]t is far from clear, in the AEDPA context, of how a Statutory remedy may serve as an adequate substitute for the writ of habeas corpus, where a prisoner has not been provided a meaningful opportunity to demonstrate that he is being held pursuant to a erroneous application or interpretation of relevant law." Abernathy, 713 F.3d at 555, citing Boumediene v. Bush, 553 U.S. 723, 746 (2008)("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ"); id ("[T]he court has said that

⁽²⁾ Justices Stevens and Breyer also joined the concurring opinion of Justice Souter.

'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified"), see also Felker, 518 U.S. at 663-64 ("[W]e assume, for purposes of the decision here, that the Suspension Clause...refers to the writ as it exists today, rather than as it existed in 1789").

Here, there has been no dispute that a recent interpretation of relevant Supreme Court law has established that Appellant was unlawfully sentenced under the Armed Career Criminal Act ("ACCA"), within title 18 U.S.C. § 924(e). That is, because the version of the Statute Appellant had been previously convicted, was not a federal felony offense and therefore not a "serious drug offense" within § 924(e). McNeil v. United States, 131 S.Ct. 2218, 2222 (2011)(for purposes of a violent felony enhancement, we [turn] to the version of the State law the defendant was actually convicted of violating).

Here, the Appellant argued that he was entitled to relief, where the decision in McCarthan interprets Section § 2255(e) in a manner that renders the AEDPA unconstitutional. In doing so, Ground One of Appellant's § 2255 motion stated as follows:

GROUND ONE: The Restrictions placed on Second and Successive § 2255 motions under the AEDPA of 1996 Stands Unconstitutional as drafted in light of McCarthan

Rather than addressing this claim, the court implicitly recharacterized Appellant's claims under the very constitutional provision [i.e., 28 U.S.C. § 2255(h)(2)] the

Appellant attacks as being unconstitutional.⁽³⁾

As a result, the United States request for summary affirmance should be denied, where the issue of whether the AEDPA of 1996 is unconstitutional following McCarthan, remains unresolved. This is so, where prior to McCarthan, a Petitioner could move to vacate his sentence under § 2255(e) where his previous opportunity for relief under § 2255(a) was "inadequate or ineffective to test the legality of his detention." McCarthan, 851 F.3d at 1079. In McCarthan, this long standing principle was overturned, as the court held as follows:

"[W]e join the Tenth Circuit in applying the law as Congress wrote it, see Prost v. Anderson, 636 F.3d 578 (10th cir. 2011) (Gorsuch, J.), and hold that a change in caselaw does not make a motion to vacate a prisoner's sentence inadequate or ineffective to test the legality of his detention, 28 U.S.C. § 2255(e)."

Id. at 1080.

This holding is in direct conflict with the position taken by the United States Solicitor General before the Supreme Court. See United States brief in Persaud v. United States, No. 13-6435, 203 WL 7088877 (U.S. 2013)(conceding that the Savings Clause of § 2241 [i.e., § 2255(e)] may be opened to review erroneously imposed Statutory minimum sentence based on intervening and retroactively applicable Supreme Court decision,

⁽³⁾ The district court's ruling violates precedent of this court. See Clisby v. Jones, 960 F.2d 925, 936 (11th cir. 1992)(holding that the district court must resolve all claims raised in a pro se prisoner's habeas corpus petition, whether relief is to be granted or denied).

that the defendant otherwise had no opportunity to raise).

In McCarthan, the Eleventh Circuit limited the "Savings Clause" of § 2255(e) to allow federal prisoners to seek relief under § 2241 in only limited circumstances. McCarthan, 851 F.3d at 1079-80. According to the court, those limited circumstances included: "(1) when raising claims challenging the execution of the sentence, such as the deprivation of good-time credits or parole determinations; (2) when the sentencing court is unavailable, such as when the sentencing court itself has been dissolved; or (3) when practical considerations, such as multiple sentencing courts, might prevent a petitioner from filing a motion to vacate." McCarthan, 851 F.3d at 1092-93. Because none of those limited circumstances are in conflict with the position of the United States Solicitor General. The restrictions placed on second or successive § 2255 motions by the AEDPA of 1996 must be declared unconstitutional.

Moreover, where there is no other legal avenue to provide fundamental fairness to a prisoner wishing to bring a claim based on a new substantive rule of law. The restrictions placed on Second or Successive § 2255 motions under the AEDPA must be declared unconstitutional, as a matter of law. See e.g., United States v. Lloyd, 188 F.3d 184, 187 n.9 (3rd cir. 1999)("The need to afford a fair opportunity to challenge a conviction following reinterpretation of a criminal Statute has constitutional implications"); In re Dorsainvil, 119 F.3d 245, 248 (7th cir. 1997)("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable Statutory interpretation,

we would be faced with a thorny constitutional issue"); Triestman v. United States, 124 F.3d 361, 363 (2nd cir. 1997)("We conclude that serious constitutional questions would arise if a person who can prove his actual innocence on the existing record-and who could not have effectively raised his claim at an earlier time-had no access to judicial review"). The decision announced in McCarthan, creates such an unconstitutional matter of the AEDPA, where unlawful ACCA sentences are considered akin to actual innocence claims. Bryant v. Warden, 738 F.3d 1235 (11th cir. 2013)(holding that a sentence exceeding the authorized Statutory maximum in § 924(a) is akin to an actual innocence claim).

Here, the decisions in Moncrieffe v. Holder, 569 U.S. 184 (2013); Descamps v. United States, 133 S.Ct. 2276 (2013); Mathis v. United States, 136 S.Ct. 2243 (2013) all demonstrate that new substantive Supreme Court rulings establish that Appellant received an erroneous minimum mandatory 15 year sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jesse Witherspoon

Date: 05/28/18