Daniel John Riley
14528-052
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UNITED STATES DISTRICT COURT
FOR CONNECTICUT

Daniel John Riley
Petitioner/Movant,

Case No. ____________

v.

D.K. Williams, Warden,
Respondent.

MOTION FOR A WRIT OF HABEAS CORPUS, 28 USC § 2241

1. INTRODUCTION

Daniel John Riley, herein after "movant" seeks to invoke 28 USC § 2255's savings clause via 28 USC § 2241(c)(3). This claim is indirectly based on Johnson v US 135 S. Ct 2551 (2015) and its progeny Sessions v Dimaya 200 LED2D 549 (2018), which caused the 1st Circuit's new statutory interpretation of 18 USC § 924(c)(3)(B). See US v Douglas No 18-1129 (1st Cir. Oct. 12, 2018)

2. BACKGROUND

2A. Indictment, Trial and Conviction

Movant was indicted in January 2008 on charges stemming from his alleged support of Edward and Elaine Brown, i.e. preventing their arrests. (A copy of the indictment is attached hereto). The Browns had active warrents for their arrests originating from their convictions related to federal income tax charges. The Browns stayed in their New Hampshire home asserting that they would resist any attempt to arrest them. A nine-month standoff ensued. Movant was arrested in September 2007. The standoff ended in October 2007 when the Browns were arrested.

Movant was charged in the indictment with conspiracy to prevent officers of the U.S. from discharging their duty to arrest the Browns, 18 USC § 372; conspiracy to commit offenses against the U.S., 18 USC § 371, which encompassed dual-objectives, to wit: to interfere with federal officers while in the performance of their duty to arrest the Browns, 18 USC § 111(a) and to assist the Browns in order to prevent their apprehension, trial and punishment, 18 USC § 3; accessory after the fact, 18 USC § 3, and carrying, using and possessing a firearm or destructive device in connection with a crime of violence, 18 USC § 924 (c)(1)(A)(i) or (B)(ii).

During the 12 day trial at the conference on jury instructions movant objected to the court using the categorical approach to determine whether the two charged conspiracies were crimes of violence (COV). Movant asserted the COV determination was a question of fact for the jury to decide, not one of law for a court to decide. With the government's urging, the court

overruled movant's objection stating the law says its a question of law for the court to decide.

After the jury was charged, movant again objected to the court making the COV determination. Again movant was overruled. (These objections contained in the record are attached hereto)

After four days of jury deliberations, movant was found guilty on all charges. Movant was sentenced to 36 years.

2B. Appeals

Movant took a direct appeal. No relief was granted. See US v Eerhard 615 F3d 7 (1st Cir 2010). Movant took a § 2255. No relief was granted. See Riley v US 2013 US Dist LEXIS 28575 (D.N.H. Jan. 28 2013) and the order affirming the magistrates recommendation Riley v US 2013 US Dist LEXIS 28574 (D.N.H. Feb. 25, 2013)

2C. Motion to File a Second § 2255

In May of 2016 movant filed a motion seeking permission to take a second § 2255 motion. Movant based his motion on Johnson, arguing that § 924(c)(3)(B) was unconstitutional. Movant later supplemented his motion citing Dimaya as more authority to support his claim.

On October 3, 2018 oral arguments at the 1st Circuit were held on both Mrs. Brown's motion to take a second § 2255 (No.

16-1293) and Douglas's direct appeal. Movant was permitted to file a brief into Mrs. Brown's action. On October 12, 2008 the 1st Circuit simultaneously decided Douglas and denied Mrs. Brown's motion, citing Douglas as authority. Movant's motion for permission to take a second § 2255 (No. 16-1582) raised the same claim as Mrs. Brown. Imminent denial of movant's motion is pending as of the writing of this motion.

3. ARGUMENT

Movant meets the stringent requirements to employ § 2255's savings clause.

3A. Standard to Invoke § 2255's Savings Clause

28 USC § 2255(e), a.k.a. the savings clause, in pertinent part states that the [§ 2241] motion should not be entertained "unless it also appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention."

A § 2255 is "inadequate or ineffective" where relief is unavailable through such a motion, and failure to allow for collateral review would raise serious constitutional concerns. Triestman v US 124 F3d 361, 377 (2nd 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 previous unavailable statutory interpretation, we would be faced with a thorny constitutional issue." Triestman at 379 citing In re Dorsainvil

119 F3d 245, 248 (2nd Cir 1997).

The savings clause standard boiled down to its bare essence, requires movant to show that § 2255 is inadequate or ineffective by not allowing movant to proceed would raise serious constitutional questions because movant 1) can show actual innocence on the existing record, and 2) could not have effectively raised his claim of innocence at an earlier time. Cephas v Nash 328 F3d 98, 104 (2nd Cir 2003).

3B. Saving Clause Standard Is Satisfied

3B1. Actual Innocence

3B1(a). The Judge Not the Jury Decided Questions of Fact

The facts of this case do not support a finding that a crime of violence (COV) occurred. The legal precedent at the time of movant's trial required the court to apply the categorical approach to the § 924(c) predicate offenses in order to determine if they were a COV (in this case the two conspiracy offenses). This analysis required the court to apply the ordinary case analysis to the predicate offenses. Under this analysis the court is suppose to imagine an idealized ordinary case of the crime, or stated differently, the court had to identify the kind of conduct the ordinary case of a crime involves. Dimaya 200 LED2D 549, 558-59 (2018). This analysis was done over movant's objections.

3B1(b). Change in Circuit Precedent Results in Constitutional Error

The 1st Circuit in Douglas interpreted § 924(c)(3)(B) to require a trial court to instruct the jury to make a determination as to whether an offense is a COV based on the jury's finding of fact as to how the defendant's conduct violated the statute. Referring to the COV determination, the 1st Circuit stated "We are at this point unwilling to say that the question can be resolved as a matter of law. We think it properly must go to the jury for determination, if there is a trial." Douglas sl. op. at 34.

Consequently, this means movant's trial suffered a substantial constitutional violation, because the court and not the jury determined facts that lead to movant's guilt and an increased sentence. Under the 5th Amend.'s due process clause and the 6th Amend.'s right to a jury trial entitles criminal defendants to a jury determination of guilt based on every element of a crime. Apprendi v New Jersey 147 LED2D 435, 477 (2000).

An element to a § 924(c)(1) is that a COV predicate offense must exist. The court and not the jury determined this element. Furthermore, under the 5th Amend.'s due process clause any fact (except a prior conviction) that increases the penalty beyond the statutory max must be submitted to the jury. Apprendi at 455. Here, the court and not the jury determined the fact of whether a COV occured, a due process violation.

Consequently, the constitutional infirmities with

movant's trial render his entire conviction in violation of the U.S. Constitution. Movant is currently serving an unconstitutional sentence.

3 B 1 (c). <u>The Record Shows there was No Crime of Violence</u>

Movant's jury (wrongly) was never afforded the opportunity to decide the factual question if a COV occurred. It is plausible that the jury would not of found a COV occurred, or, reasonable jurist could disagree that a COV occurred.

The following is a list of what movant believes the government will put forth to show movant's conduct constituted a COV.

1) Brought firearms to Brown's home;
2) Brought Tannerite to Brown's home. Tannerite is a two-part chemical compound. When mixed it explodes when shot by a rifle. It is used for target practice;
3) Assembled zip guns at the Brown's home. The government refers to these as "booby trap devices." They are a small single shot shotgun made of pipe, designed to be fired by a trip wire;
4) Target practiced with a rifle and Tannerite on the Brown's property.

In a legally similar case the defendant was granted relief. See <u>Khan v US</u> 2018 US Dist LEXIS 129441 (E.D. Virginia 2018). This defendant, Masoud Ahmad Khan, unlike movant, was granted permission to take a second § 2255 to challenge the

validity of § 924(c)(3)(B). The court refused to apply the categorical approach (like it did during the trial) to the COV analysis, avoiding the constitutional infirmity that would invalidate § 924(c)(3)(B). Instead the court held (like the 1st Circuit in <u>Douglas</u>) that a conduct specific approach must be applied to the COV analysis.

After Khan's bench trial the court issued its findings of fact and conclusions of law and found Khan guilty of one count of conspiracy 18 USC § 371, one count of conspiracy to levy war against the U.S. 18 USC § 2384, one count of conspiracy to contribute services to the Taliban 50 USC § 1705, one count of conspiracy to contribute material support to Laskhar-e-Taiba (LET) 18 USC § 2339A, on count of conspiracy to possess and use firearms in connection with a COV 18 USC § 924(o), and three counts of use and possession of firearms in connection with a COV 18 USC § 924(c). Khan was sentenced to life in prison.

The court found three of the conspiracies were COVs sufficient to act as predicate offenses to support the § 924 counts

In deciding Khan's second § 2255, the court, using the conduct specific approach, concluded that Khan's specific conduct did not constitute crimes of violence. The conduct the court found not to be COVs included:

participating in discussions and meetings, traveling to Pakistan to train in terrorist training camps, where Khan engaged in weapons training and military drills, included as part of this training firing an AK-47 rifle, a 12mm anti-aircraft gun, and a rocket-propelled grenade at targets, supplied an airplane control module, which can be used to fly an airplane with a 10-12 foot wing span along with a compatible wireless video system for aerial surveilance, all this was done with the intent to support violent actions.

The court concluded that Khan's actions based on the record show that Khan did not actually use force or pose a substantial risk that Khan would use force. The court reasoned that the fact Khan never traveled to the front lines or a combat zone (though he traveled to Pakistan), never discharged a firearm in any context other than target practice, or in any respect attempted to use force against the person or property of another, no COV occurred. The court vacated all the § 924 counts and released Khan from prison on August 1, 2018.

Similarly, the record shows movant's actions analyzed under a conduct specific analysis do not constitute a COV. This Court must only look at movant's specific conduct as the Khan court stated: Although Khan's specific conduct may have resulted in a substantial risk of co-conspirators using violence, the residual clause does not sweep so broadly. Instead, the "residual clause makes plain (for all its erstwhile murkiness) that the relevant

inquiry is not whether there is a risk of any person using force in any way tangentially related to the on-going offense, but rather whether there is a substantial risk the defendant doing so." US v Fuertes 805 F3d 485, 499 (4th Cir 2015) cited in Khan at 43 n. 19.

Like Khan, the record shows movant never threatened to harm anyone, never pointed a rifle at anyone, and never attempted to harm or injure anyone or anything. The record shows that no one was injured or came close to being injured by movant's actions, and movant did not cause or attempt to cause damage to the property of another. Movant fired a rifle only in the context of target practice. If the facts of Khan's actions, pondered by a judge not a jury, do not constitute a COV, then indeed movant's much less culpable actions surely cannot constitute a COV. Even without contrasting movant's conduct to Khan's conduct, the record supports that it is plausible that the jury could have found no COV occurred or reasonable jurist could disagree that a COV occurred. Because of this, movant is innocent of the § 924(c) charge.

3 B 2. Claim of Innocence Previously Unavailable

Movant also satisfies the second prong of the savings clause standard.

3 B 2 (a). State of the Law During Trial and Appeals

As highlighted previously, movant unsuccessfully tried to convince the trial court that the COV determination was a

question of fact, not law. The court held the law requires the court to make the COV determination because its a question of law. Every federal trial court in the country was deciding the COV question regarding a § 924(c) predicate. During the trial, movant had no case law to support his position.

1st Circuit precedent at the time precluded movant from claiming that the COV question was one of fact (not law) for the jury to decide. See US v Mangos 134 F3d 460, 463 (1st Cir 1998) (crime of violence is a question of law); US v Bishop 453 F3d 30, 32 (1st Cir 2006) (same); and Lopes v Keisler 505 F3d 58 (1st Cir 2007) (same). The combination of these decisions foreclosed movant's claim. It would have been borderline frivolous to raise such a claim. This was the state of the law up until October 12, 2018.

3 B 2 (b). Change of Law

In denying Mrs. Brown's identical request (and by implication movant's) to take a second § 2255 the 1st Circuit relied upon its holding in Douglas. Douglas changed the law by holding that a jury, no longer a judge, should determine whether a predicate offense is a COV under § 924(c)(3)(B).

With the aforesaid, movant satisfies the savings clause standard.

3 D The Merits

Since movant has met the savings clause standard, then as a matter of law and logic movant has satisfied the harmless error standard. Out of an abundance of caution movant will still address the harmless error analysis.

3 D 1 Harmless-Error Review

In Brecht v Abrahamson 507 US 619 (1993) the Supreme Court outlined the standard for harmless error review on collateral appeal. The court must consider if the error had a substantial and injurious effect or influence in determining the jury's verdict. Idem at 623.

When a question of fact is involved, like here, the burden of persussion on the Brecht issue lies with the government. Shabazz v US 2017 US Dist LEXIS 421 (D. Conn 2017) citing O'Neil v McAninch 513 US 432, 436-37 (1995); Fry v Pliler 551 US 112, 121 n. 3 (2007); and US v Dominguez-Benitez 542 US 74, 82 n. 7 (2004). And also see US v Schneider 665 Fed Appx 668, 673 (10th Cir 2016) (government bears burden of persuassion under Brecht standard); Stumpf v Robinson 772 F3d 739, 752 (6th Cir 2012) (same); and Foxworth v St. Amand 570 F3d 414, 436 (1st Cir 2009) (same).

The Khan court did not do a harmless error review under the Brecht standard. Instead – because the court was the jury – the court applied the new 18 USC § 924(c)(3)(B)

standard: did the defendant's actual conduct, by its nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3 D 2 Brecht Standard is Satisfied

Not only was the court's directed verdict on the COV element a substantial and injurious effect or influence on the determination of the jury's verdict, IT WAS THE JURY'S VERDICT, on a crucial element. Without this element being proven the jury could not proceed to consider the § 924(c) count.

This partial directed verdict removed an issue completely from the jury's consideration. This negated the government's burden of proof to persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each element. See US v Golding 482 Fed Appx 633, 635-36 (2nd Cir 2012)(court committed plain error when it removed from the jury the felon conviction element of § 922(g)(1), though defense counsel stipulated to the element, court's failure to submit stipulation to the jury was fatal). The 2nd Circuit explained that removing an element from the jury causes harm to the judicial process and the role of the jury in determining the guilt or innocence of the accused as charged. It violates the very foundation of the jury system. US v Gilliam 994 F2d 97, 100 (2nd Cir 1993). Also see US v Chevere 368 F3d 120 (2nd Cir 2004).

In Golding removing an element from the jury was plain error. By law and logic, if it was plain error then it must also not

be harmless. The harmless error analysis is couched within the third prong of the plain error criteria. See US v George 779 F3d 113, 120 (2nd Cir 2014) citing US v Marcus 560 US 258, 262 (2010). By deduction, if removing an element from the jury's consideration was not harmless in Golding (an element the defendant admitted) then it surely cannot be harmless in this case.

The court's predetermination of the COV question played a significant role on how the trial unfolded. Going in, the parties knew the COV question was predetermined by the court before the trial even began. 1st Circuit precedent at the time held that a conspiracy to commit a COV is a COV. US v Turner 501 F3d 59, 67 (1st Cir 2007). Knowing this, its fair to conclude that the defense's trial strategy would have been significantly different if the COV question had been left open for the jury to decide.

Movant's defense was that the government has not met its burden of proof. Without this COV predetermination, movant could have argued to the jury that the evidence does not support that movant's conduct constituted a COV. Pointing out that the evidence shows the factors as described on page 10. Movant could of called an expert to give his/her opinion that movant's conduct did not qualify as a COV.

In addition, being a joined trial, the jury would of had contrasting conduct to consider. When comparing a fist-fight to a brutal stabbing, the fist-fight doesn't look so bad. Furthermore, movant would have been able to propose a jury instruction

regarding the COV determination, or at least make suggestions to the court's COV instruction.

The loss of these defense implements, acting in concert, would have prevented the jury from finding that movant's conduct constituted a COV. And there would have been positive spillover of movant's COV defence into the other charges. Without the COV, there would have been no § 924(c) conviction and movant would of been home six years ago.

If the jury had been permitted to determine the COV element, there was not such overwhelming evidence that no reasonable jurist would not of found movant's conduct constituted a COV. The record shows that movant's DNA and fingerprints were not on any of the rifles, zip guns, Tannerite or any of the other 600 items taken from the Brown's home that were forensically tested. The several zip guns were found unloaded in a box in the Brown's garage. A government witness testified that the zip guns were meant to be mechanical alarms, using blanks, to let the Browns know when there was a trespasser in their woods. 95% of the Tannerite was found unmixed in its inert state, except for four small containers placed 12-14 feet in the trees about the woodline and one on the eve of an out building. The record shows these Tannerite containers were placed subsequent to movant's last visit to the Browns.

But the weight of the evidence is not even a consideration in the context of this case. In Erolding the defendant stipulated

that he was guilty to an element (what is heavier evidence than that?). And yet, the court concluded the admission of guilt meant nothing, because removing an element from the jury is such a fundamental constitutional error the conviction had to be vacated.

CONCLUSION

The new statutory interpretation of § 924(c)(3)(B) by the 1st Circuit makes movant innocent of a § 924(c) conviction. This claim of innocence was foreclosed by precedent up until this change in the law. Therefore movant satisfies the standard to invoke the savings clause of § 2255.

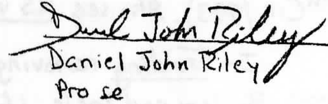
Consequently, the constitutional errors discussed herein, infected the entire trial, requiring a new trial on all four charges, or at a minimum the vacation of the § 924(c) conviction.

RELIEF REQUESTED

1. Movant's entire conviction be vacated, or
2. Movant's § 924(c) conviction be vacated,
3. Any relief this court deems necessary and proper.

JURAT

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 31, 2018.



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