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Supreme Court, U.S.
FILED
MAY 11 2004
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No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: CLARK KELLEY — PETITIONER
(Your Name)

VS.

WARDEN,
United States Penitentiary
Coleman, Florida — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[✓] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. District Court, M.D. Fla.

U.S. District Court M.D. Penn.

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

X Clark Kelley
(Signature)

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QUESTIONS PRESENTED

1. Where Section 2255 and Section 2244(b)(3)(A) do not allow a Federal prisoner to file a Second or Successive Motion based upon intervening changes in the Substantive Law which reveal the prisoner has been convicted and sentenced for an aggravated offense of which he is Actually Innocent, does the Due Process principle recognized by this Court in Bunkley -vs- Florida, ____ U.S. ____, 155 L.Ed.2d. 1046 (May 27, 2003) require the Federal Courts to provide a Procedure for collateral relief to enable a Federal prisoner to test the Fundamental legality of his detention after the prisoner has exhausted his initial 2255 remedy, and when subsequent changes in the interpretation of the Substantive "elements" of drug offense(s) reveal that the prisoner has a colorable claim that he is Actually Innocent of the conviction and/or penalty which is presently being executed against the prisoner, and, particularly where the prisoner has already been imprisoned beyond the default statutory maximum sentence for which the Jury had found him guilty ?

2. Does Due Process and the principle recognized in Bunkley -vs- Florida require the Federal Courts to retroactively apply a new interpretation of Federal criminal statutes that change "sentencing factors" into "elements" of aggravated

substantive drug offense(s) to cases for collateral relief ?

3. Where a Federal prisoner has presented colorable claims of "Actual Innocence" of not only the conviction, but also "Actual Innocence" of the elements required for the statutory aggravated penalty, is it a miscarriage of justice and denial of Due Process for the Federal Courts to fail or refuse to provide an evidentiary hearing on the prisoner's "Gateway" and "Freestanding" Actual Innocence claims ?

STATEMENT OF THE CASE AND FACTS

1. Petitioner Clark Kelley has attached his "Affidavit of Clark Kelley Regarding Petition For Writ of Habeas Corpus," with exhibits, to this petition; further, Kelley has previously filed a Petition For Writ of Certiorari with this Court that has attached appendices demonstrating the opinions made below regarding his attempts to seek collateral relief from his present imprisonment (Kelley -vs- Romine, S.CT. #02-10072); these records and documents show the following facts, details, and procedural history of the case which have been un-disputed by the Government in prior proceedings:

2. Petitioner Clark Kelley has already been imprisoned well over thirteen (13) years on a forty (40) year sentence based on a Judgment presently being executed by the Respondent, for a single count of conspiracy to import marijuana (see, Judgment attached as App. #2; see also, attached Affidavit of Clark Kelley, at para[s] 2 & 6 attached as App. #4).

3. During Kelley's trial, the Prosecuter and the Judge told the Jury not to determine the amount or quantity of marijuana; Prosecuter Jancha made closing arguments to the Jury that:

> "...the law is ...if it's ten pounds, if it's 10,000 pounds, if it's two million pounds, you're guilty..." (see attached Affidavit of Clark Kelley, para[s] 10 & 11).

4. Kelley hotly contested the amount or quantity of marijuana that should be attributed to him, during his trial, and,

Kelley to be Imprisoned for a term of forty (40) years by the Respondent, where the "jury" verdict only authorized a penalty of a mere five (5) year maximum sentence (see, attached Affidavit of Clark Kelley, para[s] 10-11 & 13-17).

12. During Kelley's trial, direct appeal, and during initial 2255 proceeding, Kelley and his defense counsel, and the Judge(s), did not "understand" the "essential elements" for the crime of which the Respondent is presently executing a forty year sentence of imprisonment upon Clark Kelley. Kelley has averred: "...the cosmic universe of my trial was un-charted and un-known by the Judge, Prosecuter, counsel for defense, and myself" (see, attached Affidavit of Clark Kelley, para. 13).

13. Kelley has already served more time in prison than allowed by the statute for which the Jury had found him guilty. See, Title 21 U.S. Code, Section 960(b)(4).

14. Kelley previously filed an Application for Leave to File a Second or Succesive 2255 Motion, and, previously filed a 2241 petition for habeas corpus in the District of his incarceration (at that time in Pennsylvania), but the Court of Appeals for the 11th. Circuit denied Kelley's Application to file Successive 2255 Motion, and, Kelley was unable to obtain an evidentiary hearing on the merits of his 2241 petition (see, Kelley -vs- Romine, S.CT. #02-10072).