

No. 18-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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JOHN THOMPSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For Writ of Certiorari  
To The United States Court of Appeals  
For The Second Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- I. Whether the United States Court of Appeals for the Second Circuit erred in denying Thompson's Motion for Certificate of Appealability because Petitioner has shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

**PARTIES TO THE PROCEEDINGS**

Petitioner, John Thompson (“Thompson”), was a criminal defendant in the United States District Court for the Southern District of New York, Foley Square Division in USDC Criminal No. 1:13-cr-00378-AJN-1; as Movant in USDC Civil No. 1:16-cv-03468-AJN-KNF; and as Movant-Appellant in the United States Court of Appeals for the Second Circuit (“Second Circuit”) in USCA No. 18-0212. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Second Circuit.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully submits this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## **OPINION BELOW**

The Judgment of the United States Court of Appeals for the Second Circuit dated June 27, 2018 is attached in the Appendix at 1a.

## **STATEMENT OF JURISDICTION**

Petitioner timely appealed from a final Judgment in a Civil Case of this conviction and sentence to the United States Court of Appeals for the Second Circuit. On June 27, 2018, the Court of Appeals for the Second Circuit issued an Order denying Thompson's Motion for Certificate of Appealability. This Court has jurisdiction pursuant to Title 28 U. S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **Fifth Amendment of the United States Constitution**

The Fifth Amendment of the U.S. Constitution provides, "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 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.”

### **Sixth Amendment of the United States Constitution**

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

### **STATEMENT OF THE CASE**

#### **A. The Proceedings Below**

On May 21, 2013, a federal grand jury sitting in the United States District Court for the Southern District of New York, Foley Square Division returned a three (3) Count Indictment charging Thompson and four (4) co-defendants. See Doc. 13.<sup>1</sup> Count 1 charged Thompson with Conspiracy to Distribute and Possess with Intent to Distribute Five Kilograms of More of Cocaine and One Kilogram or More of Heroin, in violation of 21 U.S.C. §§

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“Doc.” refers to the Docket Report in the United States District Court for the Southern District of New York, Foley Square Division, in Criminal Case No. 1:13-cr-00378-AJN-1, which is immediately followed by the Docket Entry Number. “CvDoc.” refers to the Docket Report in the United States District Court for the Southern District of New York, Foley Square Division, in Civil Case No. 1:16-cv-03468-AJN-KNF, which is immediately followed by the Docket Entry Number. “ROA.” refers to the record on appeal in No. 18-0212, which is immediately followed by the document number.

846, 841(a)(1) and (b)(1)(A). *Id.* Count 2 charged Thompson with Conspiracy to Commit Robbery, in violation of 18 U.S.C. §§ 1951 and 2. *Id.* Count 3 charged Thompson with Use and Carrying a Firearm in Furtherance of a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2. *Id.* Thompson was also charged in a Forfeiture Allegation, pursuant to 21 U.S.C. § 853, 18 U.S.C. § 981(a)(1)(C), and 28 U.S.C. § 2461. *Id.*

On January 21, 2014, a Change of Plea Hearing was held and Thompson entered a guilty plea as to Counts 1 and 2 of the Indictment. At the conclusion of the hearing, the Court referred this case to the U. S. Probation Office for preparation of a PSR.

On May 28, 2014, Thompson was sentenced to a total term of 188 months' imprisonment, 4 years of Supervised Release, no Fine or Restitution, and a Mandatory Special Assessment Fee of \$200. See Doc. 80.

On June 11, 2014, Thompson timely filed a Notice of Appeal. See Doc. 85.

On July 2, 2015, the United States Court of Appeals for the Second Circuit ("Second Circuit") issued an Order affirming Thompson's sentence. See Doc. 121.

On May 9, 2016, Thompson filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and Memorandum of Law in Support Thereof ("§ 2255 Motion"). See Doc. 126.

On January 8, 2018, the Court issued an Opinion and Order denying Thompson's § 2255 Motion. See Doc. 135; CvDoc. 36.

On January 22, 2018, Thompson timely filed a Notice of Appeal re: denial of his § 2255 Motion. See CvDoc. 37.

On March 6, 2018, Thompson filed a Motion for Certificate of Appealability (“COA”), which was dismissed on June 27, 2018. See ROA. 17, 28.

**B. Factual Background**

1. Offense Conduct

From at least on or about March 16, 2013, up to and including on or about April 22, 2013, in the Southern District of New York and elsewhere, John Thompson, Louis Camper, Leroy Camper, William Tucker, and Donald Gunter, (“the defendants”), intentionally and knowingly did combine, conspire, confederate, and agree together and with each other to violate the narcotics laws of the United States. The controlled substances involved in the offense were (i) five kilograms and more of mixtures and substances containing a detectable amount of cocaine and (ii) one kilogram and more of mixtures and substances containing a detectable amount of heroin.

From at least on or about March 16, 2013, up to and including on or about April 22 2013, in the Southern District of New York and elsewhere, the defendants, unlawfully and knowingly did combine, conspire, confederate, and agreed to commit an armed robbery of individuals they believed to be engaged in narcotics trafficking.

## 2. Plea Proceeding

On January 21, 2014, a Change of Plea Hearing was held before Judge Alison J. Nathan. Thompson entered a guilty plea as to the lesser included offense of Count 1 and Count 2 of the Indictment. In exchange for Thompson's guilty plea, the government agreed to recommend a 3-level reduction for acceptance of responsibility. At the conclusion of the hearing, the Court referred this case to the U. S. Probation Office for preparation of a Presentence Report ("PSR").

## 3. Presentence Report Calculations and Recommendations

The PSR writer employed the November 2013 edition of Federal Sentencing Guidelines. It recommended a Base Offense Level of 32. However, Thompson was deemed to be career offender, therefore, his offense level was increased to 34 and his Criminal History Category was increased from III to VI. Thompson received a 3-level reduction for his acceptance of responsibility, that yielded a Total Offense Level of 31, in Criminal History Category VI, which resulted in an advisory Guideline range on Count 1 of 188 to 235 months' imprisonment.

## 4. Sentencing Proceeding

On May 28, 2014, a Sentencing Hearing was held before Judge Alison J. Nathan. See Doc. 83. The Court adopted the factual recitations set forth in the PSR, with paragraphs 68 and 70 struck from the report. *Id.* at 7. Thompson was sentenced to a total term of 188 months' imprisonment on Counts 1 and 2, to run concurrently; 4 years of Supervised Release on Counts 1 and 2, to run concurrently; and payment of a Mandatory Special Assessment Fee of \$200. See Doc. 80. Count 3 was

dismissed on the motion of the United States. *Id.* A timely Notice of Appeal was filed on June 11, 2014. See Doc. 85.

5. Appellate Proceeding

On Appeal, Lawrence Gerzog, Thompson's counsel, moved for permission to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), and the government moved to dismiss the appeal as barred by the waiver of appellate rights contained in Thompson's Plea Agreement, or, in the alternative, for summary affirmance. Thompson filed a *pro se* response, arguing that his guilty plea was invalid.

On July 2, 2015, the Second Circuit affirmed Thompson's sentence and ordered that: (1) the *Anders* motion was granted; (2) the government's motion to dismiss was granted with respect to Thompson's appeal of his terms of imprisonment and supervised release; and (3) the government's motion for summary affirmance was granted with respect to Thompson's appeal of his conviction and the special assessment component of his sentence. In so ruling, the Second Circuit concluded, *inter alia*, that the issue raised in Thompson's *pro se* response is meritless.

6. Postconviction Proceeding

On May 9, 2016, Thompson filed a § 2255 Motion, arguing the following: (1) actual innocence of 18 U.S.C. § 1951 and 21 U.S.C. § 846; (2) guilty plea was not knowingly, intelligently, or willfully voluntarily entered; and (3) manufactured jurisdiction by DEA Agents (i.e., inducement and entrapment to commit a crime that did not affect interstate commerce). See CvDoc. 1.

In the Court's Memorandum Opinion and Order dated January 3, 2018, and the Order dated January 5, 2018, "the Report and Recommendation is adopted in its entirety, and Thompson's petition for a writ of habeas corpus is denied. No evidentiary hearing is necessary because the files and records of the case conclusively show that he is not entitled to relief. 28 U.S.C. § 2255(b). The Court has also denied Thompson's first, second, and third motions for leave to amend, and his motion for the appointment of *pro bono* counsel. In addition, the Court has declined to issue a certificate of appealability. Petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. See *Love v. McCray*, 413 F.3d 192, 195 (2d Cir. 2005). The Court also finds pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from the order would not be taken in good faith. See *Coppedge v. United States*, 369 U.S. 438, 445 (1962); accordingly, the case is closed." See CvDoc. 36.

## ARGUMENT

As a preliminary matter, Thompson respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. See *Tracy v. Freshwater*, 623 F.3d 90 (2<sup>nd</sup> Cir. 2010); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

**The Second Circuit Erred in Denying Thompson's Motion for Certificate of Appealability Because Petitioner Has Shown That "Jurists of Reason Would Find it Debatable Whether the District Court Was Correct in its Procedural Ruling" Denying Leave to Amend Thompson's 28 U.S.C. § 2255 Motion.**

Thompson contends that the Second Circuit erred in denying his Motion for COA without conducting a hearing and/or without giving a meaningful explanation for its decision. By Order dated June 27, 2018, the Second Circuit denied Thompson's COA, stating as follows:

Appellant, *pro se*, moves for "Reinstatement of Appeal," a certificate of appealability, and for leave to proceed in forma pauperis. Upon due consideration, it is hereby ordered that the motion is denied and the appeal is dismissed because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" denying leave to amend the Appellant's 28 U.S.C. § 2255 motion. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

See ROA. 28.

Facts: Judge Fox ordered the release of the transcripts and related documents after his second Jail-House-Lawyer ("JHL2") requested him to do so. Upon receiving the requested instruments, JHL2 discovered issues in the record that JHL1 was not privy to, because said instruments were not provided to JHL1 prior to filing the original § 2255 pleadings, but the issues were related in content and context. The ineffective assistance of counsel and invalid guilty plea underlying claims, contained in the Rule 15(c) of the Fed. R. of Civ. P. ("Rule 15(c)") amended/supplement pleading, "related back" to the same claims contained in the original pleading.

The only difference between the claims contained in the original and amended/supplement pleadings, is that JHL1 argued the claims without support of the record, while JHL2 argued the claims with support of the record. Judge Fox and Judge Nathan construed Thompson's Rule

15(c) pleading to that of Rule 15(a), without first providing Thompson proper notice and without his consent.

Moreover, Thompson's Rule 15(c) motion was sought "[be]fore" Judge Nathan ruled on the merits of Thompson's § 2255 petition, or entered a final judgment or resolution on the § 2255 matter.

In this case, Judge Fox and Judge Nathan construed Thompson's Rule 15(c) motion for leave of amend/supplement his § 2255 pleadings to subdivision (a) of the Rule, they should have done so uninfluenced as to whether the amendment would or would not relate back. The amendment process allows, if Appellant had pleading limitation, the court should have considered and acted upon the pleading in light of subdivision (c) of the Rule, and therefore sustained or rejected the pleading in accordance with whether or not the claims asserted in the amend/supplement pleading arose out of the same course of transaction, or occurrences set forth or attempted to be set forth, in the original pleading. See *Till v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 65 S.Ct. 471, 89 L.Ed. 2d 465.

Moreover, Thompson filed a total of three separate amended/supplement pleadings before either Judge Fox or Judge Nathan ruled on the underlying merits of his original claims, and entered their final judgment in the matter. Thus, the district court denied or dismissed the amended/supplemental pleadings in violation of *Littlejohn v. Artus*, 271 F.3d 360 (2<sup>nd</sup> Cir. 2001).

In *Littlejohn*, the Second Circuit held that "motion to amend a habeas petition should not be construed as second or successive petition," *Littlejohn*, 271 F.3d at 362, "[w]hen amendment of a habeas petition is sought before the district court's rule on the merits of the petition." *Id.* at 363; see also, *United States v. Pagan*, 2003 U.S. Dist. LEXIS 22334 (2<sup>nd</sup> Cir. 2003)(Citing, *Littlejohn*)).



Rule 15(a) provides that, “a party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served .. otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Fed. R. Civ. P.

Where, as here, Thompson Rule 15(c) motion without first receiving any responsive pleading from the government and before Judge Fox or Judge Nathan ruled on the merits or rendered a final judgment in the matter, Thompson’s amended/supplement pleadings were not filed in bad faith, with undue prejudice to the government or with futility to the amendment.

Both Judges Fox and Nathan denied Thompson procedural due process when they committed per se structure and procedural errors, by denying Thompson access to the court under the above circumstances. Put differently, the case should be vacated and remanded with instruction to allow Thompson access to the district under Rule 15(c), and to give Thompson’s amended/supplement underlying claims meaningful consideration, as well as to give him a meaningful opportunity to be heard.

Without notice or Thompson’s consent, Judge Fox arbitrarily construed his Rule 15(c) amended/supplement complaint to subdivision (a) of the Rule, then decided that he did not satisfy the prerequisites of subdivision (a) and denied the motion. Judge Nathan, in turn, erroneously adopted the decision, in violation of *Castro v. United States*, 540 U.S. 375 (2003).

This is so, because Thompson had filed his amended/supplement complaint before the government responded or furnished him a copy of its responsive pleading to his original complaint, and before either Judge Fox or Judge Nathan issued final judgments in the matter.

See, Rule 15(a); see also, *Andujar v. Rogowski*, 113 F.R.D. 151, 155 (S.D.N.Y. 1986) (“as long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the action against him, he will not be prejudiced by the addition of a new complaint”)(Citing, 6 *Wright & Miller*, 1501 (1<sup>st</sup> Ed. 1971 & Supp. 1986)).

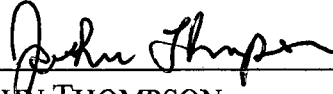
It can be said, therefore, that the government in this case was fully apprised of Thompson’s underlying amended/supplement claims, and was in a unique position to adequately defend itself without prejudice.

In light of *Littlejohn* and *Castro*, the district court and the Second Circuit abused its discretion in this respect. More over, Thompson has shown that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling” denying leave to amend Thompson’s 28 U.S.C. § 2255 motion. Accordingly, Thompson’s sentence and conviction should be vacated and remanded for further proceedings so that the district court can reconsider Thompson’s Rule 15(a) amended/supplemental claims.

## CONCLUSION

For the above and foregoing reasons, Thompson’s conviction and sentence should be vacated and remanded for further proceedings, or, in the alternative, his conviction and sentence should be vacated and remanded for an evidentiary hearing so that he may further prove his constitutional claims, resolve facts in dispute and expand the record.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John Thompson", is written over a horizontal line.

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