No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Terrance Johnson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Terrance Johnson
(Your Name)

Federal Correctional Complex (Low)
P.O. Box 1031
(Address)

Coleman, Florida 33521
(City, State, Zip Code)

Unit C-3
(Phone Number)

QUESTION(S) PRESENTED

In 2013, the district court applied an incorrect legal standard when denying Terrance Johnson's §2255. In 2016, Mr. Johnson sought to reopen the §2255 in order to have the district court apply the correct standard and adjudicate the merits of the unanswered claim. The district court summarily denied the Rule 60(b) motion.

Question 1

Did the district court abuse its discretion by denying the Rule 60(b) motion without discovery or an evidentiary hearing?

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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21 U.S.C. § 851

28 U.S.C. § 2255

Federal Rules of Civil Procedure 60(b)

OTHER

Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, 7th ed., § 35.1 (Matthew-Bender 2017)

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

[X] 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,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 2, 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 _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including August 30, 2018 (date) on _____ (date) in Application No. 18 A 45.

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

21 U.S.C. §851. Proceedings to Establish Prior Convictions

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due dilligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

28 U.S.C. §2255. Federal Custody; Remedies on Motion Attacking Sentence

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered with jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

In 2010, the United States District Court for the Middle District of Florida sentenced Mr. Johnson based on its mistaken belief that the government had identified a 21 U.S.C. § 851 predicate. In 2013, Terrance Johnson sought to vacate his criminal judgment because the district court improperly considered a non-final state conviction as a § 851 predicate. (Appx. "A" at 2). The district court denied the § 2255 motion without adjudicating the jurisdictional claim/1.

In 2016, Mr. Johnson sought to set aside the § 2255 judgment, in order that the district court could adjudicate the merits of the subject-matter jurisdiction claim. (Appx. "A" at 2). In one day, without an evidentiary hearing, the district court summarily denied the Rule 60(b)(6) motion.

In 2017, Mr. Johnson sought a certificate of appealability from the Eleventh Circuit Court of Appeals. The appeals court denied Mr. Johnson a certificate of appealability. This petition followed.

/1 At the time, the Eleventh Circuit considered § 851 a jurisdictional predicate. **Harris v. United States,** 114 F.3d 1202 (11th Cir. 1998). The Eleventh Circuit reversed the position in **United States v. DiFalco,** 837 F.3d 1207 (11th Cir. 2016).

REASONS FOR GRANTING THE WRIT

In 2010, in the original § 2255 proceeding, the district court denied certain ineffective-assistance-of-counsel claims. (Appx. "A" at 2) Embedded in the pro se ineffectiveness claims, however, was a jurisdictional claim. The pro se filing read:

> "The Petitioner was provided ineffective assistance of counsel, where counsel failed to argue that the district court exceeded its jurisdiction in imposing an enhanced sentence under [21 U.S.C.] § 851 based upon a prior conviction that was not yet final".

(Appx. "A" at 1-2).

Self-evident in the text of the ineffectiveness claim is a jurisdictional claim: "the district court exceeded its jurisdiction ... " (Appx. "A" at 2).

We recognize that Mr. Johnson did not articulate a distinct ground for relief. Nevertheless, this Court holds that a federal court has an independent duty to sua sponte address whether its jurisdiction is proper whenever a court becomes aware that it might lack jurisdiction or that the boundaries of its jurisdiction are imprecise. See **Bowles v. Russell,** 551 U.S. 205 (2007); **United States v. Cotton,** 535 U.S. 625 (2002). See also **Mitchell v. Maurer,** 293 U.S. 237, 244 (1934)("an appellate federal court must satisfy itself not only of its own jurisdiction, but also of the lower courts in a cause under review.") The § 2255 court never addressed the jurisdictional-claim/1. Stated differently, the § 2255 court had a duty to address the substantive jurisdictional-claim contained in the pro se filings, even though the uncounseled Mr. Johnson did not present the claim as a distinct ground. When the § 2255 court did not adjudicate the jurisdictional claim, then it abused its discretion in a way that denied Mr. Johnson an opportunity for a fair hearing, an abuse of discretion and a due process error that diminishes the integrity of the habeas proceeding.

/1 We scrupulously avoid the merits in order not to transform these pleadings into an unauthorized second or successive § 2255 motion. But, for context only, Mr. Johnson would establish that the district court incorrectly assessed its § 851-enhanced penalty jurisdiction because one of his prior convictions did not become final until well after sentencing. **United States v. DiFalco,** 837 F.3d 1207, 1220 (2016); **Harris v. United States,** 149 F.3d 1304, 1308 (11th Cir. 1998).

Rule 60(b)

This Court holds that a proper Rule 60(b) challenges a habeas court's procedural ruling, which foreclosed a merits adjudication of an otherwise cognizable claim. **Gonzalez v. Crosby,** 545 U.S. 525, 532 n.4 (2005)(a petitioner does not submit a successive petition "when he merely asserts that a previous ruling which precluded a merits determination was in error ... "). Mr. Johnson's motion alleged that the § 2255 court either mistakenly applied the procedural default Rule 60(b) doctrine to foreclose, or had otherwise overlooked a jurisdictional claim presented in the original § 2255 motion. The district court's original decision not to address the § 2255 claim departs far from the accepted judicial practice of requiring a district court to address every valid habeas claim within an original petition. The district court did not explain the reasons for denying the Rule 60(b) motion or for failing to adjudicate the jurisdictional claim. (Appx. "A" at 1-2).

Similarly, the appellate court did not explain why it allowed the district court to remain silent about its reasons for denying the Rule 60(b) motion. (Appx. "A"). The Eleventh Circuit begged the question and stated that Mr. Johnson raised an ineffective-assistance-of-counsel ground, which did not unambiguously raise a jurisdictional ground, thus it did not matter that neither the § 2255 court did not examine its own jurisdiction or the jurisdiction of the courts that preceded it. (Appx. "A" at 2). But beyond this miss-the-mark reasoning, the appeals court simply failed to identify either the factual premises or legal predicate for denying the Rule 60(b) motion.

The Eleventh Circuit's denial order, like the district court's order before it, departs from a line of this Court's decisions that provide an evidentiary presumption in favor of the pro se petitioner. Which is to say that unless the record conclusively refutes a habeas petitioners allegations these allegations are presumed true. See **Fontaine v. United States,** 411 U.S. 213, 215 (1973); cf.,

e.g. **Buck v. Davis,** 137 S. Ct. 759 (2017)(recognizing that at the C.O.A. stage the petitioner's allegations are presumed true).

District Court Should Have Conducted an Evidentiary Hearing

At the § 2255 court level, positive law (28 U.S.C. § 2255(b)) and this Court's decisions guaranteed Mr. Johnson an evidentiary hearing to test: (1) the subject-matter jurisdiction claim itself; as well as, (2) the attendant ineffective assistance of counsel claim involving counsel misadvice that encompassed the jurisdictional claim. See, e.g., **Machibroda v. United States,** 368 U.S. 487, 494-95 (1962). Since Mr. Johnson's jurisdictional and related ineffectiveness claim "motion [was] conclusively determined either by the motion itself or by the 'files and records' in that court. The factual allegation ... related primarily to purported occurrences outside the courtroom and upon which the record, therefore, cast no real light." **Id.**

The Eleventh Circuit denied a certificate of appealability because "even taking Mr. Johnson's status as a pro se litigant into consideration, there is no reasonable reading of this ground that includes any claim other than ineffective assistance of counsel." (Appx. "A" at 2).

Jurists of reason would find the appeals court analysis debatable. A federal district court must conduct an independent assessment of its (or a predecessor court's) jurisdiction whenever a bona fide question concerning that jurisdiction arises. In the original § 2255 motion the ground states "where counsel failed to argue that the district court exceeded its jurisdiction ... "(Appx. "A" at 2). This embedded notice of jurisdictional error should have alerted the § 2255 court to address the claim despite its inartful and imprecise presentation. The appeals court does not explain why this straightforward statement did not trigger an inquiry into whether the original § 2255 court had jurisdiction.

Generally, this Court vacates and remands when a lower court order granting summary judgment is "opaque and unilluminating as to either the relevant facts or the law." See **Carter v. Stanton,** 405 U.S. 669, 672 (1972). Here there is no explanation why the district court neither reopened the § 2255 motion to sua sponte examine the jurisdictional claim in the original § 2255 proceeding, nor why the district court did not adjudicate the jurisdictional claim in the original § 2255 proceedings. Jurists of reason would find the district court's choices debatable, and would find the Eleventh Circuit's failure to grant a certificate of appealability, simply, wrong.

CONCLUSION

Jurists of reason would debate the correctness of not granting Rule 60(b)(4) or (6) relief since the district court did not answer all the claims in the original § 2255 proceedings. **Slack v. McDaniel,** 529 U.S. 473, 480 (2000). See generally Hertz & Liebman, **Federal Habeas Corpus Practice and Procedure,** 7th ed., § 35.1 (Matthew-Bender 2017). Likewise, jurists of reason would find it wrong that a certificate of appealability did not issue to allow further development of whether the Rule 60 motion should have been granted in order to determine if the original § 2255 court should have liberally construed the pro se petition as presenting a jurisdictional challenge. See **Miller-El v. Cockrell,** 537 U.S. 322, 327 (2003)(identifying the test for C.O.A., "jurists of reason could disagree with the district court's resolution of his constitutional claims or with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further").

Moreover, jurists of reason would find that Mr. Johnson met this Court's test for granting Rule 60(b) relief. At the C.O.A. stage, "[t]he question for the Court of Appeals was not whether Buck [or here, Johnson] had shown the case

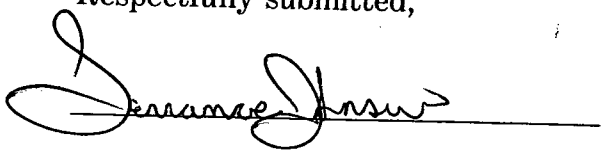
is extraordinary [60(b)-worthy]; it was whether jurists of reason could debate the issue." **Buck,** 137 S. Ct. at 772-73. Reasonable jurists would debate whether the § 2255 court should have recognized the jurisdictional controversy.

This Court should grant the writ, vacate the Eleventh Circuit's opinion, and remand the matter to the Eleventh Circuit with instructions to the Court of Appeals to issue a certificate of appealability on whether a mandatory sentencing guideline may be challenged as unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: _____