

No. 18-6677

IN THE  
SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

Supreme Court, U.S.  
FILED

OCT 29 2018

OFFICE OF THE CLERK

CLARENCE MARSHALL — 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

CLARENCE DARNELL MARSHALL #20533-017  
(Your Name)

FEDERAL CORRECTIONAL INSTITUTION  
(Address)

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

(Phone Number)

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## QUESTION(S) PRESENTED

1. Whether the Eleventh Circuit applied a heightened standard to the Defendant's request for Certificate of Appealability in violation of the Supreme Court's decision in Buck v. Davis, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017) ?

2. Whether the Eleventh Circuit in conjunction with the district court violated Petitioner's Due Process under the Fifth Amendment by treating the career .. offender Guideline under § 4B1.1 post-Booker as ——— mandatory ?

3. Whether the rule of lenity should apply to post-Booker Sentencing Guidelines that are hopelessly vague ?

## 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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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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 July 30, 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

### The Fifth Amendment to the United States Constitution

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

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 offence 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.

## STATEMENT OF THE CASE

In 2010, Petitioner filed an amended motion under 28 U.S.C. § 2255, asserting Counsel was ineffective for advising him to proceed to trial instead of .... pleading guilty and accepting responsibility. In his memorandum of law, Petitioner certified that he then expressed a desire to plead guilty. Counsel advised Petitioner that he would be facing a mandatory life sentence irrespective aof a plea or trial by jury.

The United States had not served Petitioner with any notice of their intent to seek a mandatory life sentence at that stage of the proceeding therefore, Petitioner was not exposed to the enhancment. A jury convicted Petitioner and he was sentenced to 360 .. months. The magistrate judge entered a R & R to deny Petitioner's § 2255 on May 21, 2013. In the R & R, the Magistrate indicated that petitioner's BOL was 40, CHC VI, and that Petitioner was categorized as a career offender under the sentencing Guidelines due to his prior controlled substance offenses. Counsel filed an affidavit - asserting that if petitioner had acted on a plea of guilt, it would essentially "tip" the



tip the United States, that the required notice seeking a mandatory life sentence had not been given. The Magistrate found Petitioner could not show that his counsel's strategic decision amounted to ..... ineffective assistance of counsel. Furthermore, the magistrate found Petitioner's demonstration of the required prejudice as "speculative" and relied solely on Petitioner's obstruction of justice enhancement when rendering his decision. The magistrate concluded that petitioner's BOL would not change, even if he received an acceptance of responsibility, due to his career offender status. Petitioner did not receive any R. & R from the Clerk of Court, and moved for an extension of time to file his objections. This was after receiving the court's denial of his § 2255, sua sponte. The district court denied Petitioner's motion for an extension. Petitioner filed a Rule 60(b) ... motion thereafter, in 2017 seeking to reopen his § 2255. The Eleventh Circuit denied Petitioner's request for Certificate of Appealability holding Petitioner must make a showing of "extraordinary circumstances" in order to justify reopening the final judgement.

Petitioner takes certiorari on the question presented herein.

## REASONS FOR GRANTING THE PETITION

I. Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure permits a court, on a motion filed after a deadline passed, to extend the time for a party to accomplish an act. The rule requires both good cause and excusable neglect. Petitioner satisfied both of those prongs. See Century Indemnity Co. v. Begley Co., 323 F.R.D. 237, 241-42 (E.D. Ky. 2018). Here Petitioner has established good cause. He did not receive the Court's orders because the Clerk of Court did not process the papers. Petitioner was .. then and is still incarcerated at the largest prison complex in the United States, possibly the World with over 8,000, prisoners. As a result, he was unaware of the deadline. Petitioner established excusable neglect the delay was not unreasonable and only caused a .. minor use of the courts time and resources. The length of delay did not pose a substantial danger of .... prejudice to the United States. In addition, Petitioner appears to have filed the 60(b) request in "good faith", and the delay was, at least in part, out of the control of Petitioner.

Accordingly, the Court should have rejected the magistrates R & R. Petitioner has provided a ..... plausible reason for his failure to comply with the briefing schedule. The Eleventh Circuit applied a heightened standard for Petitioner when disposing of his request for Certificate of Appealability (COA).

Because Petitioner **only** seeks a COA at this stage, his burden is lighter. Petitioner must ..... demonstrate that his claims of constitutional violations were such that jurist of reason could debate the district court's disposition of the issues. See Miller-El v. Cockrell, 537 U.S. 322 (2003)(quoting Slack, 529 U.S. 473 (2000)). If a district court - denies a habeas petition on procedural grounds, we grant a COA "when a prisoner shows, at least, that jurist of reason would find it debatable whether the district court was correct in its procedural ruling." Segundo v. Davis, 831 F.3d 345, 350 (5th Cir. 2016). We are charged with reviewing the case only through this prism and thus must make only one general ... assessment of the merits; Id; see also Buck v. Davis, 137 S. Ct. 759, 773; 196 L. Ed 2d 1 (2017)(doubts about granting a COA should be resolved in favor of

GRANT. Escamilla v. Stephens, 749 F.3d 380, 387 (5th Cir. 2014).

To succeed on an ineffective assistance of counsel claim, a defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) the counsel's deficient ... performance prejudice the defendant." United States v. Fields, 761 F.3d 443, 453 (5th Cir. 2014). The Counsel's "strategy" to stand trial in this case, as the "only way to preserve the issue" that the United States had not sought a mandatory life .... sentencing enhancement is not only objectively, well below the standard of reasonableness, rather it is non sensical. The overwhelming evidence ... against Petitioner weighed in favor of taking a - plea, in lieu of trial. Prejudice must be presumed here because Counsel exposed his client to the .... maximum penalty as a matter of law. Petitioner could have entered into an agreement for a lesser ..... sentence considering the nature of the Guidelines were only **advisory**. The district court, as well as the Appellate Court treated the § 4B1.1 career offender Guideline as **mandatory**.

In the background to the Career Offender Guide line, the Sentencing Commission explains that it .. promulgated § 4B1.1 to implement 28 U.S.C. § 994(h). That statutory subsection "**mandates** that the Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.'" The background further explains that while the Guideline definition of career - offender "track[s] in large part the criteria set forth in § 994(h)",\* the Commission has used its statutory amendment authority to "mofi[fy] this definition in several respects to focus more precicely on the class of recidivist offenders for whom a lenghty term of - imprisonment is appropriate and, in the language of § 991(b)(1)(B), to avoid 'unwarranted sentencing .. disparities among defendants with similar records who have been found guilty of similar conduct ....." The Eleventh Circuit has stated .... that "'terrorist [,] [even those] with no prior criminal behavior[,]" are unique among criminals in the likelihood of recidivis, the difficulty of rehabilitation, and the need

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\* § 994(h)(2) states that:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and ... (2) has previously been convicted of two or more prior felonies, each of which is ... (A) a crime of violence ... or ... (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

for incapacitation.'" United States v. Jayyousi, 657 F.3d 1085, 1117 (11th Cir. 2011). In Jayyousi, .. the failure to incarcerate a al-Qa'ida trainee "at or near the maximum term authorized" was deemed "a clear error of judgement." Id. The district court in Petitioner's case in conjunction with the Eleventh Circuit failed to consider that the mandatory nature of the § 4B1.1 guideline unconstitutionally force judges to interpret what were, in effect, an ..... entirely new set of criminal laws. ("Because they are binding on judges, we consistently held that the Guidelines have the force and effect of laws). See United States v. Booker, 543 U.S. at 234. see also Johnson v. United States, overly vague Sentencing .. Guidelines necessarily offend due process. ("[T]he fact that the Guidelines were promulgated by the .. Sentencing Commission, rather than Congress, lacks constitutional suignificance."). Petitioner's career offender sentence was imposed after Booker, and thus because the district court and the Eleventh Circuit treat — the § 4B1.1 career offender guideline as a mandatory provision, this axiomatically offended due process.

II. RULE OF LENITY / IS § 4B1.1 A STATUTE OR IS IT  
A U.S.S.G. § GUIDELINE

For the reasons stated above, Petitioner moves this Honorable Court to grant cert as to whether .. the "career offender" Guideline post-Booker **is** a - law/statute, or an advisory Guideline. If the Court is unable to distinguish whether the § 4B1.1 is a sentencing guideline or a legal statute, then the Court must consider whether the rule of lenity ... should apply here. The Eleventh Circuit's "interpretation of the Sentencing Guidelines is governed by traditional rules of statutory construction." See United States v. Shannon, 631 F.3d 1187, 1189 (11th Cir. 2011). And the rule of lenity is the traditional rule the Court has applied when other guides to .. Guideline construction fail to clarify an ambiguity. See United States v. Inclema, 363 F.3d 1177, 1182 (11th Cir. 2004)(the rule of lenity must be applied if Guideline enhancements are capable of competing, but equally rational constructions, "[u] ntil the sentencing guidelines and accompanying commentaries are made to be more precise."); United States v. Rolande

Gabriel, 938 F.3d 1231, 1237 (11th Cir. 1991). Uncertainty about the applicability of the career offender enhancement, which catapults offenders to "at or near" the statutory maximum, 28 U.S.C. § 994 (h); see U.S.S.G. § 4B1.1, will paralyze the plea-bargaining process, preclude reasonable pre-trial resolutions, and result in unnecessary additional trials. See Johnson, No. 13-7120, Oral Arg. Tran., 2015 WL 2399398 at \*\* 42-43 (April 20, 2015)(Roberts C.J)(recognizing that vagueness prevents defense - counsel from properly advising clients, and thus .. impedes plea bargaining). At sentencing, judges will be forced to engage in "guesswork" to interpret this "shapeless" provision, Johnson, 135 S. Ct. at 2559-60, making a mockery of justice. These pervasive consequences will affect countless defendants in the Eleventh Circuit. In 2011 alone, the Commission's statistics indicate there were 233 Career Offenders sentenced in the Eleventh Circuit, representing more than 10% of all Career Offenders in the United States. U.S. ... Sentencing Commission Booker Report 2012, Part C: - Career Offenders at 50.



Absent any coherent body of law to apply, ... district court judges will resort to "guesswork" - and "intuition," and sentencing in the Eleventh Circuit will depend upon the capricious proclivities of individual judges. Petitioner's writ of .. certiorari should be granted for the reasons stated above.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 10-29-18