

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

GERALD L. SMITH — 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 EIGHT CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GERALD L. SMITH, (Reg. No. 22973-045)
(Your Name)

UNITED STATES PENITENTIARY
(Address)

P.O. BOX 1000, LEAVENWORTH, KS 66048
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- [1] WHETHER THE DISTRICT COURT AND EIGHTH CIRCUIT ERRED IN DENYING PETITIONER'S TRUE RULE 60(B)(6), WHEN THE DISTRICT COURT **FAILED TO ADDRESS** PETITIONER'S JOHNSON II'S CLAIM, BECAUSE WELCH HAD NOT BEEN RENDERED ON WHETHER JOHNSON II APPLIED RETROACTIVELY

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 1 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☒ is unpublished.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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 Aug. 27, 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

FIFTH AMENDMENT

18 U.S.C. § 924(e)

STATEMENT OF THE CASE

On or around February 10, 2011, Petitioner was charged by Indictment with one count of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). On April 6, 2011, a Superseding Indictment was filed, charging Petitioner in Count One with being a felon in possession of ammunition in violation of §§ 922(g)(1) and 924(e)(1) and in Count Two with distribution of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). Trial commenced on July 10, 2012. Upon completion of the two-day trial, the jury found Petitioner guilty of both counts of the Superseding Indictment.

On December 10, 2012, Petitioner was sentenced to 250-months of imprisonment on Count One and 60-months on Count Two, to run concurrently. Petitioner was also sentenced to supervised release for a term of five years on Count One and three years on Count Two, to run concurrently. Petitioner appealed and the judgment was affirmed. UNITED STATES v. SMITH, 557 Fed. Appx. 606 (8th Cir. 2014). This Honorable Supreme Court denied Petitioner's subsequent petition for writ of certiorari. SMITH v. UNITED STATES, 134 S.Ct. 2713 (2014). Petitioner then filed his Initial Motion pursuant to 28 U.S.C. § 2255, in which he filed 20-separate claims of ineffective assistance of counsel.

On July 30, 2015, Petitioner [also] requested leave to file a [SUPPLEMENT] to his initial § 2255 Motion with an additional claim pursuant to the recent decision (at that time), of JOHNSON v. UNITED STATES, 135 S.Ct. 2551 (2015), JOHNSON had been decided

[AFTER] Petitioner's § 2255 Motion had been filed. Petitioner claimed that under JOHNSON II and DESCAMPS v. UNITED STATES, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), his prior conviction for "SECOND-DEGREE DOMESTIC ASSAULT" was [NO LONGER] a "violent felony" under the ACCA.

Nevertheless, on September 18, 2015, the district court held the following:

"...the JOHNSON decision offers no relief to Movant. Accordingly, the Court will deny the Motion to file Supplement (Doc. 14) [WITHOUT CONSIDERING] the preliminary question of whether JOHNSON applies retroactively to cases that were final when it was decided... Even if JOHNSON applies retroactively, the decision does not affect Movant's case, as the ACCA's residual clause was not a factor in his sentence..."

See, District Court's Order Filed on Sept. 18, 2015 (Doc. 17), pgs. 11-12.

Hence, the district court DID NOT fully address Petitioner's JOHNSON's claim, because at the time, it did not know whether JOHNSON applied retroactively to the ACCA. The court failed to rule on his properly presented § 2255 claims under [both] JOHNSON and DESCAMPS together.

Thus, the district court and the Court of Appeals erred in denying Petitioner's Rule 60(b)(6).

REASONS FOR GRANTING THE PETITION

An "argument that the district court **FAILED** to rule on a § 2255 claim DOES NOT challenge the merits of the district court's resolution of a § 2255 motion, but **ONLY** alleges a **DEFECT IN THE INTEGRITY** of the earlier § 2255 proceedings." See, PEACH v. UNITED STATES, 468 F.3d 1269, 1271 (10th Cir. 2006).

Hence, this Honorable Supreme Court should give this Petition **CLOSE SCRUTINY** and **GRANT Certiorari**, based on the fact that the district court and Court of Appeals **ERRED**, in not Granting Petitioner's Rule 60(b)(6). The district court **DID NOT** address Petitioner's claim under JOHNSON II, because it did not know if JOHNSON II applied retroactive to final convictions.

Thus, this Petition should be **GRANTED**, and this Court should Vacate the district court's ruling and that of the Court of Appeals, and **REMAND** for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Gerald L. Smith

GERALD L. SMITH (PRO SE)

Date: 11/20/18

Reg. No. 22973-045

U.S. PENITENTIARY

P.O. BOX 1000

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