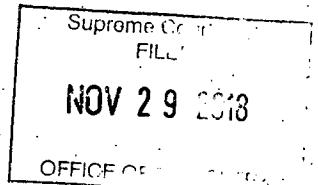


18-7333 ORIGINAL

No. \_\_\_\_\_



IN THE

SUPREME COURT OF THE UNITED STATES

Deshawn Maurice Moffett — PETITIONER

(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals (No. 17-10994)

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Deshawn Maurice Moffett

(Your Name)

P.O. Box 9000

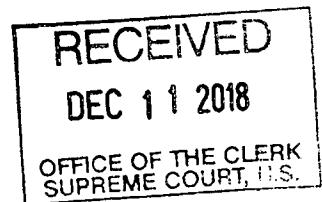
(Address)

Seagoville, TX 75159

(City, State, Zip Code)

(N/A)

(Phone Number)



QUESTION(S) PRESENTED

Did the Fifth Circuit Court of Appeals apply an incorrect standard when denying Petitioner's Request For Certificate OF Appealability (COA), and further compound this error by adjudicating the merits of Petitioner's appeal before granting COA?

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## 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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## OTHER

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 is unpublished.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 B 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 is unpublished.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 August 31<sup>st</sup>, 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).

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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**

## STATEMENT OF THE CASE

On May 13th, 2016, Petitioner was sentenced to 71 months in prison for a violation of 18 USC § 2113(a). The sentencing court calculated an offense level of 23 with a criminal history category III, resulting in a range of 57-71 months. The sentencing court chose the guidelines maximum as the basis for its chosen sentence.

On July 25th, 2016, Petitioner's prior state conviction for Theft of Property was overturned on appeal because the state determined Petitioner was innocent. The State of Texas found the guilty party (not the Petitioner) and convicted him, opening Petitioner's conviction to a Double Jeopardy attack.

On July 17th, 2017, Petitioner filed a motion under 28 USC § 2255 to vacate his sentence because it was based on a guidelines calculation that was no longer valid since his state conviction was overturned on appeal. The District Court denied this motion (and COA) on July 21st, 2017, stating that it would have imposed the same sentence regardless of how the guidelines should have been calculated.

Petitioner filed a notice of appeal with the Fifth Circuit and requested a (COA). The Fifth Circuit issued an order dated August 31st, 2018, denying COA. This denial did not address the COA question of whether reasonable jurist could disagree with the District Court's application of the law, but rather attempted to adjudicate Petitioner's merit's by restating the District Court's position that it would have imposed the same sentence despite the state prior conviction being overturned.

Petitioner now makes a timely Petition For A Writ Of Certiorari to this honorable court.

## REASONS FOR GRANTING THE PETITION

Petitioner makes the case that the Fifth Circuit Court of Appeals failed to apply the proper standard when reviewing his Request For COA.

### STANDARD OF REVIEW

A federal prisoner whose habeas corpus petition is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 USC § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." §2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. Miller-El v. Cockrell, 537 US 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El at 327. "When the court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Miller-El at 336-337.

### THE FIFTH CIRCUIT DID NOT APPLY THE PROPER STANDARD

In denying Petitioner's request for COA, the Fifth Circuit stated, "Moffett cannot make [a substantial showing of the denial of a constitutional right] because the district court stated that it would not change the sentence even if the now-invalidated state conviction were not included in the criminal history score." This statement presumes the validity of the District Court's statement regarding what it would hypothetically do at a resentencing hearing without affording Petitioner the opportunity to actually participate in the hearing. Not only does this presumption deny Petitioner of his due process right, it is contrary to the law established by this Court.

"[A] defendant given a sentence enhanced for a prior conviction is vacated." Johnson v. U.S., 544 US 295, 303, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005). In Molina-Martinez v. U.S., 136 S. Ct. 1338, 1345, 194 L. Ed. 2d 444 (2016), the Court stated that, "Nothing... supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings. This is so even if the ultimate sentence falls within both the correct and incorrect range." And further, the Fifth Circuit, citing Molina-Martinez stated, "The prejudice is even stronger when the correct Guidelines range is below the defendant's sentence..." U.S. v. Marroquin, 884 F.3d 298, 301 (5th Cir. March 2, 2018). The District Court sentenced Petitioner to 71 months, and his corrected Guidelines range was 51-63 months.

#### SUMMARY

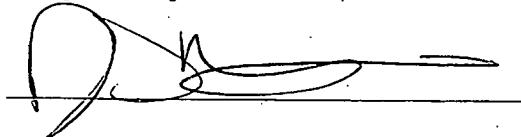
The speculation of the District Court regarding the outcome of a hypothetical sentencing rehearing is moot when the established law provides for the presumption of prejudice in circumstances such as that of Petitioner. This presumption alone is, and should have been, sufficient for the Fifth Circuit to grant a COA to Petitioner. This misapplication is also sufficient for a precise remedy such as a GVR in regards to this Petition For A Writ Of Certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Doe".

Date: 11/29/2018