

18-7462

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

ORIGINAL

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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ANTHONY JOHNSON — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

WILLIAM ANTHONY JOHNSON # 05230-033

(Your Name)

U.S. penitentiary  
P.O. Box 33

(Address)

Terre Haute, Indiana 47808

(City, State, Zip Code)

N/A

(Phone Number)

**QUESTION(S) PRESENTED**

WHETHER THE APPEALS COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO RECALL MANDATE BASED ON ELEVATING THE PRINCIPLE OF FINALITY TO BE THE GUIDING FACTOR RATHER THAN CORRECTING A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

## 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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## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 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: August 31, 2018, 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**

DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

## STATEMENT OF THE CASE

Following a jury trial, William A. Johnson was sentenced on January 23, 2004. During the pendency of his direct appeal, this court published Blakely v. Washington, 542 US 296 (2004), and United States v. Booker, 543 US 220 (2005). Subsequently, the Sixth Circuit Court of Appeals commenced remanding for re-sentencing any defendant whose appeal had not become finalized when Booker, *supra*, was published. However, the Sixth Circuit failed to comply with this precedent when it affirmed William Johnson's convictions and sentences on November 30, 2005. United States v. Johnson, 430 F.3d 383 (6th Cir.2005) as amended 440 F.3d 832 (2006), cert. denied, 549 US 829 (10-02-06).

Following affirmance of his convictions and sentences, William Johnson filed at least two "pro se" motions seeking re-sentencing under an "advisory" Guidelines system, as directed by Booker, *supra*, and Sixth Circuit jurisprudence. It was necessary for the "pro se" motions to be filed since appellate counsel refused to do so even though he had expressed to William Johnson a promise to seek a remand for re-sentencing after Booker was published. The Sixth Circuit never explained a reason for remanding for re-sentencing a

co-defendant's sentence, i.e., Christopher Stone. Neither did the Sixth Circuit issue a ruling on the "pro se" motions filed by William Johnson. Although the motions were timely filed, they remain unaddressed.

The instant "Motion to Recall" the mandate was filed seeking an Order from the Sixth Circuit to remand the matter to the district court for re-sentencing under an "advisory" Guidelines, pursuant to Booker, supra, and ensuring opinions of the Sixth Circuit. The statutes under which William Johnson was convicted have no mandatory minimum sentence. The district court imposed the sentences because it was compelled to do so under the then mandatory Guidelines. There was no discussion of the factors set-forth in 18 U.S.C. § 3553(a). Neither did the district court rule on "Objections" filed by William Johnson to the findings in the "Pre-Sentence Report". Consequently, the sentencing proceeding was very abbreviated, and of no substance. Remanding for resentencing will permit the district court to impose a non-guideline sentence by considering the factors set-forth in 18 U.S.C. § 3553(a).

The Sixth Circuit refused Johnson's motion to recall its mandate due to "the lengthy passage of time between the

entry of the final judgment and the filing of the motion to recall the mandate". Order, denying petition for reconsideration (August 31, 2018). Omitted from the analysis was the fact that William Johnson has continuously contested his convictions and sentences through various post-conviction challenges, i.e., Rule 33(b) motion for a new trial; petition to vacate under 28 U.S.C. § 2255; Rule 60(b) motions attacking the validity of the district court's denial of the § 2255 petition since it failed to rule on the merits of the claims; the necessity of an appeal to the Sixth Circuit because the district court refused to recognize the validity of the "prison mailbox rule" established in Houston v. Lack, 487 U.S. 266 (1988); a request for permission to file a "Second or Successive" § 2255 motion to vacate; and a habeas petition under 28 USC § 2241. Therefore, petitioner William Johnson has not slept on his rights, nor overlooked a procedural mechanism for challenging the Sixth Amendment violation which occurred in his sentencing proceeding. The Sixth Circuit has placed "finality" on a pedestal rather than addressing the "miscarriage of justice" that resulted from not remanding for re-sentencing to cure the Sixth Amendment violation.

## REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS IS DENYING WILLIAM ANTHONY JOHNSON DUE PROCESS OF LAW BY REFUSING TO RECALL ITS MANDATE BECAUSE IT PLACES A HIGHER EMPHASIS ON FINALITY RATHER THAN THE MISCARRIAGE OF JUSTICE THAT OCCURRED.

The denial of William Johnson's "Motion to Recall the Mandate" was in clear contradiction of Supreme Court jurisprudence, and Sixth Circuit precedent. The Sixth Circuit placed undue emphasis on "finality", rather than engaging in an analysis of whether a "manifest miscarriage of justice" occurred. Consequently, the denial was so arbitrary and capricious so as to constitute a violation of the petitioner's entitlement to due process under the Fifth Amendment. Williams v. Martinez, 586 F.3d 995 (D.C.Cir.2009).

While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a latter appeal in the appellate court, unless [] the decision was clearly erroneous and would work manifest injustice.

White v. Murtha, 377 F.2d 428, 431-32 (5th Cir.1967).

The Government did not contend that it would be prejudiced, and the appeals court did not assert that recalling the mandate would be harmful to the administration of jus-

tice and/or cause the courts to be overworked. Even though the Sixth Circuit, a few years previous (in 2014), accepted a defendant's request for re-sentencing under United States v. Booker, 543 US 220 (2005), it refused to accord William Johnson the same relief. See Sullivan v. United States, 587 Fed.App'x. 935 (6th Cir.2014)(remanding for an evidentiary hearing on whether counsel provided ineffective assistance on appeal by failing to request a Booker remand for resentencing)(citing Ballard v. United States, 400 F.3d 404, 408-409 (6th Cir.2005)). Id. at 940.

The Supreme Court issued its approval for recalling a mandate in Calderon v. Thompson, 523 US 538, 549 (1998). It is recognized as an appropriate procedural device to correct errors of law by an appeals court. See Williams v. Martinez, 586 F.3d 995 (D.C.Cir. 2009)(J.Brown, concurring)(holding a motion to recall the mandate is appropriate when a binding Supreme Court opinion is overlooked); and United States v. Murray, 2 Fed.App'x. 398 (6th Cir.2001)(recalling mandate and remanding for re-sentencing under the restrictions set-forth in Apprendi v. New Jersey, 530 US 466 (2000), when the issue was not argued by appellate counsel).

While the Sixth Circuit refused to grant William Johnson's "Motion to Recall Mandate" because of the time factor,

the significant passage of time in Williams v. Martinez, supra, played no role in that court's analysis. There, the defendant was convicted in 1990 of First-Degree Murder. It was nineteen years later when the appeals court considered his claim. The passage of time did not enter into the discussion and analysis. Id. at 1002-1006. See also United States v. Emeary, 794 F.3d 526 (5th Cir. 2015)(recalling a mandate nine years later to correct an injustice).

The Sixth Circuit's denial of William Johnson's motion to recall its mandate is in conflict with the jurisprudence developed by that circuit for reviewing such motions. For example, in Patterson v. Haskins, 470 F.3d 645 (6th Cir. 2006), maintaining finality played no role in the analysis of the motion to recall. It held, after recognizing that an error had occurred in the prior ruling:

(A) Our refusal to address Patterson's challenge to the sufficiency of the evidence was an unwarranted deviation from the longstanding prudential rule in this circuit that an appellate court faced with arguments both that the evidence was insufficient and that the trial was infected with other constitutional errors needs to address the sufficiency-of-the-evidence issue, even if the court orders a remand on the basis of trial error;

(B) because this general prudential rule is not constitutionally compelled and is subject to at least one narrow exception,

our error in Patterson 1 was not so grave as to justify the extraordinary step of revising a decision issued over three years ago; . . .

Id. at 651. Thus, the Sixth Circuit in Patterson, supra, recognized it had made an error in its initial ruling and was prepared to correct it, if required in order to avoid a miscarriage of justice. (citing Calderon v. Thompson, 523 US 538, 549 (1998)). However, the Sixth Circuit is refusing to correct its error that occurred in refusing to remand this petitioner's case for re-sentencing under an "advisory" Guidelines. Except for the mandatory Guidelines in effect at the time of William Johnson's sentencing on January 23, 2004, the district court would not have imposed a sentence of life imprisonment. That was made clear on July 19, 2004, when the district court William Johnson on a firearms related offense, and stated findings in direct conflict with the findings made on January 23, 2004. Those findings were the consequence of Blakely v. Washington, US (2004), which made the Guidelines appear to be unconstitutional, and returned sentencing discretion to district courts.

In Emeary, supra, the Fifth Circuit, addressing facts which mirror those in this proceeding, freely admitted to an error in Emeary's direct appeal, and granted his second attempt to have the mandate recalled: "Emeary's appointed attor-

ney and this court both committed plain error in reviewing Emeary's sentence and failing to notice that he was condemned to five more years of incarceration than the law allows." Id. at 528. Thus, just as Emeary's sentence exceeded the statutory maximum penalty, William Johnson's sentence exceeded the statutory maximum of twenty-years. However, unlike the Fifth Circuit, the Sixth Circuit refuses to correct its error because of a desire to enforce the "finality" principle. "A criminal defendant should not be unlawfully condemned to five excessive years in prison—a 'drastic loss of liberty', *Penson* [v. Ohio, 488 US 75 (1988)] at 85, based on the sort of clear and obvious error we made in this case." Emeary, at 530-31. There is no time limit against challenging unlawful sentences. Bozza v. United States, 330 US 160 (1948).

The holding in Emeary, *supra*, was relied upon in *United States v. Montalvo Davila*, 2018 U.S.App.LEXIS 12704 (5th Cir.), to prevent an injustice and, also, to correct the disparity in the defendants' sentences that, unless corrected, would undermine the Sentencing Guidelines. "'Recalling the mandate is also appropriate '""where there is a danger of incongruent results in cases pending at the same time.''" Id. (quoting *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir.1997) (quoting *Am. Iron & Steel Inst. v. EPA*, 560 F.2d 589, 594

(3rd Cir.1977)). Reference was made to Tolliver, *supra*, because it approved recalling the mandate so as to avoid sentence disparity between similarly situated defendants. "There are no per se time limits or any precise procedural hurdles that a movant must satisfy for a court to recall its mandate." Id.(citing *Emeary*, 794 F.3d at 529; and *Tolliver*, 116 F.3d at 123-24). It was further explained:

Courts exist not merely to decide cases, but to decide them correctly (citation omitted). The public interest in correcting an erroneous conviction or sentence "may counsel a more generous recall rule in criminal cases" than in other contexts (citation omitted).

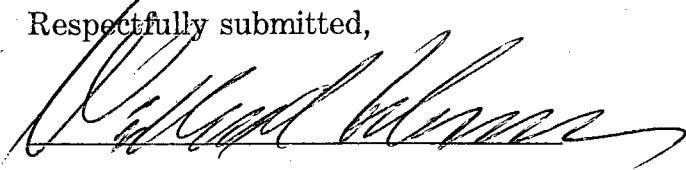
The Sixth Circuit's denial of William Johnson's motion to recall its mandate establishes that a circuit split exists as to the proper weighing of opposing interests when considering whether to grant a recall motion. "Finality" assumes primacy in the Sixth Circuit, regardless of the injustice inherent in the prior decision. The Sixth Circuit totally ignored the injustice from sentencing William Johnson to life imprisonment when the statutory maximum penalty was twenty-years. By refusing to correct the injustice, the Sixth Circuit went against its own precedent concerning void judgments. In addition, it refused to apply jurisprudence from Supreme Court rulings. See Buck v. Davis, 137 S.Ct. 759, 779 (2017).

(holding that a state's interest in finality carried little weight); House v. Bell, 547 US 518, 536 (2006) ("In appropriate cases, the court has said the principles of comity and finality that inform the concepts of cause and prejudice, 'must yield to the imperative of correcting a fundamental unjust incarceration.'"); and Schlup v. Delo, 513 US 298, 324 (1995) (Sensitivity to the injustice of incarceration on innocent individuals is not to be abated when the impediment is AEDPA's statute of limitations). It constituted an "abuse of discretion" for the Sixth Circuit to deny William Johnson's "Motion to Recall Mandate" based solely on a theory of enforcing the "finality" principle. Jordon v. Gilligan, 500 F.2d 701, 704 (6th Cir.1974).

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Massa".

Date: November 26, 2018