Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARK ANTHONY JOHNSON,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

June 19, 2019

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QUESTION PRESENTED FOR REVIEW

Was the petitioner improperly denied his right of appeal?

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The United States Court of Appeals for the Fourth Circuit dismissed the appeal in *United States of America v. Mark Anthony Johnson,* No. 19-4078 (4th Cir. 6/13/19). (Appendix -A-)

JURISDICTION

The final judgment of the U.S. Court of Appeals, Fourth Circuit, was issued on June 13, 2019. This petition was filed within ninety days thereof. Jurisdiction in the trial court was based on 18 USC § 3231, since the appellant was charged with offenses against the laws of the United States of America. The jurisdiction of this Court is invoked under 28 USC § 1254 and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, which assures that no one "shall be deprived of life, liberty, or property, without due process of law." The case also involves 28 USC § 1291 concerning the petitioner's right of appeal.

STATEMENT OF THE CASE

By affirming his conviction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a

departure by a lower court, as to call for an exercise of this Court's supervisory power.

BACKGROUND OF THE CASE

The petitioner ("Mr. Johnson") was indicted on May 10, 2017, and charged with carjacking (18 USC § 2119) and brandishing of a firearm in furtherance of a violent crime (18 USC § 924[c][1][A][ii]). On August 21, 2017, he pleaded guilty to both counts in Eastern District of Virginia at Newport News under docket 4:17-cr-00051-RGD-RJK-1. On December 4, 2017, he was sentenced to 180 months in prison and three years of supervised release for carjacking, as well as 84 months in prison and two years of supervised release for brandishing a weapon, the sentences to run concurrently for a total effective sentence of 264 months in prison and three years of supervised release. Judgment was entered December 6, 2017. More than two years later, on January 31, 2019, Mr. Johnson filed a *pro se* notice of appeal.

On February 21, 2019, appellate counsel was appointed to represent him. On April 17, the respondent filed a motion to dismiss the appeal. On June 13, 2019, the Court of Appeals issued an order and judgment dismissing the appeal because judgment at the trial court was entered on December 6, 2017, and Mr. Johnson did not file a pro se appeal until January 31, 2019, past the time allotted under Fed. R. App. P. 4(b)(1)(A)(i) ["FRAP 4(b)"].

REASON FOR GRANTING THE WRIT

The Fourth Circuit Local Rule 27(f)(2) that makes mandatory the claims processing time periods under FRAP 4(b) is counter to this Court's holding in *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403 (2005).

ARGUMENT: BY MAKING JURISDICTIONAL THE NON-JURISDICTIONAL TIMING REQUIREMENT OF FRAP 4(b) THE FOURTH CIRCUIT HAS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS.

FRAP 4(b)(A)(i) states in relevant part, "In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after … the entry of either the judgment or the order being appealed." For good cause, the district court can grant an extension of up to thirty days.

Late filing of a notice of appeal does not deprive the Court of subject matter jurisdiction. That is because FRAP 4(b) is not statutorily derived. The time to appeal a criminal judgment – as opposed to a civil judgment – is set forth only in a court-prescribed rule of appellate procedure. Rule 4(b), unlike Rule 4(a), is not grounded in any federal statute. (*Bowles v. Russell*, 551 U.S. 205, 210, 127 S.Ct. 2360 (2007)

Instead, Rule 4(b) is a mandatory claim-processing rule. (*Manrique v. United States*, 137 S.Ct. 1266, 1271, 197 L.Ed.2d 599 (2017) A mandatory claim-

processing rule can be forfeited "if the party asserting the rule waits too long to raise the point." (*Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403 (2005)

The Fourth Circuit has instituted Local Rule 27(f)(2) which states, "Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or on other procedural grounds should be filed within the time allowed for the filing of the response brief. The Court may also *sua sponte* summarily dispose of any appeal at any time."

Strict application of Local Rule 27(f) runs counter to the Supreme Court's holding in *Eberhart v. United States* (at 18) "that failure to object to untimely submissions entails forfeiture of the objection ...." "When the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b) is mandatory and inflexible.... And where, as here, the government forfeits an objection to the untimeliness of a defendant's appeal by failing to raise it, we act within our jurisdiction when we decide to consider the appeal as though it were timely filed." (*United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) citing *Eberhart*, 546 U.S. at 17-18)

Mr. Johnson filed a notice of appeal on January 31, 2019. The government did not move to dismiss his appeal until April 17, which was 2 ½ months later, after counsel had been assigned to represent him on appeal and after the Court had issued a scheduling order.

Mr. Johnson's appeal has merit. Among the viable issues to be raised on a appeal is the district court's mistaken belief that it lacked the authority to take into consideration the mandatory minimum, consecutive sentence it was required to impose for brandishing a weapon when determining Johnson's sentence for carjacking. In *Dean v. United States*, 137 S.Ct. 1170, 197 L.Ed.2d 490 (2017) the Court held that a sentencing court has the authority to do so.

In his written "Position Concerning Sentencing" filed on November 29, 2017, and in court during the sentencing proceedings (Transcript of 12/4/17 p. 24-25) Mr. Johnson argued that the mandatory sentence imposed under 18 USC 924(c) resulted in an unduly harsh and excessive sentence. The district court agreed, stating that it would sentence Mr. Johnson to a total of 180 months in prison:

> THE COURT: Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Mark Anthony Johnson, is hereby committed to the custody of the United States Bureau of Prisons to be in prison for a term of 263 months. The term consists of 180 months on count 1 and a term of 84 months on count 2, all to be served – excuse me – 83 months on count 2, all to be served <u>concurrently</u> (*emphasis added*). Not 84. Excuse me. The defendant is remanded to the custody of the United States Marshal.
>
> Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of three years on count 1 and a term of five years on count 2, all to run concurrently. (12/4 pp. 45-46)

But then, when the court realized that count 2 required imposition of a consecutive sentence, it modified the sentence:

> THE COURT: The sentence of imprisonment – I didn't say the sentences were to be consecutive. The sentences imposed in this case as to count 1 and count 2 are consecutive. It's 180 months on count 1, 83 months on count 2 – they're consecutive sentences – for a total of 263 months. (12/4 p. 49)

The court modified the sentence again, specifically stating that it wanted to make the sentence as low as possible:

> MS. COWLES (*the prosecutor*): I'm sorry, Your Honor. Could I clarify the sentence on count 2? Was that 84 months consecutive to count 1?
>
> THE COURT: That was consecutive to count 1.
>
> MS. COWLES: And that was 84 months, Your Honor?
>
> THE COURT: 83 months.
>
> MS. COWLES: Because I believe it has to be at least seven years, which would be 84 months.
>
> THE COURT: Okay. I was trying to make it as low as I possibly could, Ms. Cowles. Okay. 84 months. I must correct that. It has to be a minimum of seven years. She is quite correct. I'm sorry.
>
> THE CLERK: It will be 264.
>
> THE COURT: 264 months in prison. The second one has to be 84 months. They're the guidelines. (Transcript of 12/4/17 p. 50)

The court's initial imposition of a lower sentence than the one it imposed, plus its statement that it wanted to make the sentence as low as it possibly could, indicate that it did not recognize it had the authority to reduce Mr. Johnson's sentence for carjacking in consideration for the mandatory minimum sentence it had to impose for brandishing a weapon. In *Dean v. United States*, the Court held that the sentencing court is not precluded from considering the impact of a mandatory minimum consecutive sentence imposed under 18 USC § 924(c) for brandishing a firearm during a crime of violence when determining an appropriate sentence for the predicate offense. (See also, *United States v. Dorsey*, 744 F. App'x 130, 134 (4th Cir. 2018)

Another viable issue concerns the constitutionality of 19 USC § 924(c) pursuant to *Johnson v. United States*, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015); *Sessions v. Dimaya*, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018); and their progeny. Pending the Supreme Court's decision in *United States v. Davis*, No. 18-431 this remains a viable issue on direct appeal.

CONCLUSION

FOR THESE REASONS, the petitioner respectfully asks this Court to issue a *writ of certiorari* to review the Court of Appeals for the Fourth Circuit's dismissal of Mr. Johnson's appeal, and for such further relief as this Court deems proper.

Respectfully submitted,
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