No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

RIC THOMASON JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

I. **WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO HOLD A RESENTENCING HEARING, WITH THE DEFENDANT, PRESENT PRIOR TO IMPOSING A MODIFIED SENTENCE.**

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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The petitioner, **Ric Thomason, Jr.,,** respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on October 10, 2019

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-16 a) is published.

JURISDICTION

This is a direct appeal of an amended judgment in an underlying criminal case and the sentence imposed by the United States District Court for the Northern District of Florida after resentencing due in large part to District Court's granting in part Mr. Thomason's 28 U.S.C. §2255 motion. The District Court had original jurisdiction in Mr. Thomason's underlying criminal proceedings under 18U.S.C. §3231, and, jurisdiction in Mr. Thomason's civil proceedings under 28 U.S.C. §§1331 and 2255. Accordingly, this Court's jurisdiction over this appeal is predicated upon 18 U.S.C. §3742, 28 U.S.C. §§ 1291, 1294, 2253(c)(1) and 2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on 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 offense 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. Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On November 18, 2003, Mr. Thomason was charged in a Twelve Count Indictment with possession of firearms by a convicted felon, in violation of Title 18 U.S.C. § 922(g)(1) and § 924(e)(1); receiving, possessing and concealing stolen firearms that had traveled in interstate commerce in violation of Title 18 U.S.C. § 922(j) and § 924(a)(2); and possession of firearms by a fugitive, in violation of Title 18 U.S.C. § 922(g)(2) and § 924(a)(2). (ECF No. 1). He pleaded guilty to four separate counts of possession of firearms by a convicted felon (Counts 1, 4, 7, and 10), and four separate counts of possession of stolen firearms (Counts 3, 6, 9, and 12). (ECF Nos. 15, 16). The Government dismissed the remaining counts.

Mr. Thomason's Presentence Investigation Report ("PSR') calculated his Total Offense Level at 33, and his criminal history category as VI, yielding an advisory guideline imprisonment range of 235 to 293 months. The total offense level was derived from a base offense level of 26, two four-level adjustments due to the number of firearms and the fact that he used or possessed the firearms in conjunction with another felony offense, a two level adjustment because the firearms were stolen and a three level downward adjustment for acceptance of responsibility. (ECF No. 31, PSR ¶¶ 27-38). Noteworthy, the PSR was not updated for this "resentencing". (emphasis supplied)

The 2004 PSR also reflected that Mr. Thomason had four Alabama third-degree burglary convictions, two third-degree Alabama escape convictions, and one attempted escape conviction from Colorado. (ECF No. 31, PSR ¶¶ 47, 50-55).[1] This outdated PSR was filed on August 15, 2016. (ECF No. 31) As such, he was subject to an enhanced sentence under 18 U.S.C. § 924(e), which is commonly known as Armed Career Criminal Act or "ACCA". Mr. Thomason's classification as an Armed Career Criminal did not affect the guidelines calculations because the offense level from Chapter Two was higher than the otherwise applicable Chapter Four offense level. It also did not affect his Criminal History Computation. However, it did influence statutory sentencing options by removing the ten year statutory maximum on Counts 1, 4, 7, and 10, and subjecting Mr. Thomason to a minimum mandatory term of 15 years imprisonment and a maximum term of life. The statutory maximum sentence on Counts 3, 6, 9, and 12 was 120 months. (ECF No. 31, PSR 101-102).

[1] The PSR also reflected that he had three outstanding warrants for burglary in Baldwin County, Alabama, and twelve pending Escambia County Court cases involving multiple charges of burglary, grand theft, armed burglary, dealing in stolen property by trafficking, possession of a firearm by a convicted felon and fraudulent pawn broker transactions. (PSR In 63, 65-76). The offense conduct in the twelve cases took place on six separate dates, all within ten days from Defendant's release after a seven year period of incarceration. *(See* PSR ¶ 95). The Escambia County charges were set for jury trial in April of 2004. (PSR ¶ 64).

On March 26, 2004, the District Court sentenced Mr. Thomason above the applicable guidelines range to terms of 327 months imprisonment on Counts 1, 4, 7, and 10, and, 120 months on Counts 3, 6, 9, and 12, with all counts to run **concurrently** with one another. (ECF No. 21). [emphasis supplied] The District Court recognized the general rule of thumb as to concurrent sentence and did not exercise any discretion as to consecutive sentence. The sentence included a five year term of supervised release on Counts 1, 4, 7 and 10 and a three year term on Counts 3, 6; 9, and 12.[2] The departure was explained in the Statement of Reasons as follows:

> The Court found that the extent and nature of the defendant's criminal history, taken together are sufficient to warrant an upward departure from a Criminal History Category of VI pursuant to §4A1.3. The Court considered the following: 1) the seriousness of the defendant's prior criminal convictions in excess of 13 criminal history points (defendant had a total of 18 criminal history points); 2) prior criminal convictions not assessed criminal history points (five juvenile convictions and three adult burglary convictions); and 3) and three pending matters (not related to this case) which involve similar type of conduct (burglary, theft of firearms and vehicle). Therefore the Court structured a departure from the applicable guidelines by moving incrementally down the sentencing table to the next higher offense level of 34, resulting in a guideline range of 262 to 327 months. The Court then imposed a sentence at the high end of that range based upon the above-noted factors.
> (ECF No. 21-1).

[2]The entire sentencing hearing lasted no more than fifteen (15) minutes; all attempts to secure the transcript have failed miserably, since they have been destroyed after the maximum retention period. (Cr. Doc. 53)

On February 16, 2017, the District Court opined that " it was charged with the task of fashioning an appropriate sentence without the application of the ACCA enhancement after the Supreme Court's decision in Johnson." (Doc. 37, 4) abbreviations in original] The Court stated that Section 5G1.2(d) of the Sentencing Guidelines permits the Court to run portions of sentences consecutively "to the extent necessary to produce a combined sentence equal to the total punishment." (Doc. 37, 4). The District Court did not cite any statutory basis for the consecutive sentence, simply because there is none. In any event the new imprisonment sentence is at the very high end of the previous advisory guideline imprisonment range. (ECF No. 31, PSR ¶ 102.) The District Court then resentenced the defendant as follows:

> Effective immediately, Defendant Thomason's term of incarceration on Counts 1, 4, 7 and 10 is reduced from **327 months** to **120 months.** These terms shall run **consecutively** to the extent necessary to achieve a total term of imprisonment of **293 months.** Thomason's term of supervised release is reduced from 5 years to 3 years on each of the aforementioned counts. The clerk is directed to enter an Amended Judgment reflecting this change, with all other provisions of the Court's Judgment and Sentence imposed on March 26, 2004 (ECF No. 21) to remain in full force and effect. (DE# 28,2) [emphasis in original]

Previously, on June 15, 2016, defendant Thomason filed a motion pursuant to 28 U.S.C. §2255 motion to vacate, set aside, or, correct sentence based on the application of the statutory armed career offender enhancement as to Counts 1, 4,

7, and 10 at initial sentencing. (DE #28). The Pre-Sentence Investigation Report along with Addendum was filed sua sponte by Probation, on August 15, 2016. (DE# 31). The Court had previously appointed counsel for the defendant on March 10, 2016. (DE #27)

On August 10, 2016, the defendant, through Court appointed counsel, filed a Memorandum In Support of The Motion to be resentenced. (DE# 30) The Government filed a Response conceding error as to the enhancement, but, invited the Court to resentence Defendant consecutively as to all the four relevant counts. (DE# 32) The defendant filed a Reply to the Response objecting to the proposed aggravation and requested that the counts run concurrently. (DE# 33) In that pleading, the defendant requested a full hearing regarding his resentencing and also requested to be present for such hearing. (DE #33) Two days later, the District Court entered an order requiring the parties to submit any additional evidence and arguments for resentencing in Chambers. (DE #34) The District Court summarily denied the request for a hearing.

In response to that order, the defendant renewed his request for a full hearing regarding his resentencing and to be present for such hearing. (DE #35) The Government responded stating that the request for resentencing did not constitute a de novo resentencing, and does not require a hearing nor the presence of the defendant. (DE #36)

On February 16, 2017, the Court entered a five page order on all of the outstanding issues. The District Court found that due to the Supreme Court's decision in Johnson[3], the defendant was entitled to be resentenced without the application of the ACCA enhancement. The defendant's guidelines on Counts 1, 4, 7, and, 10 were reduced from fifteen (15) years minimum to life, to one hundred (120) months maximum as to each of these Counts. (DE #37-5) After purportedly considering the factors required under 18 U.S.C. §3553(a) and arguments by both parties, the Court vacated the 327 months sentence as to these Counts and imposed a sentence at the high end of the "otherwise applicable guidelines range", that is, 293 months. The sentence previously imposed as to Counts 3, 6, 9, and, 12 presumably remained unchanged; therefore, a total sentence of 293 months was imposed upon the defendant. (DE # 37-5) See also DE #38-2.

In the remainder of the Order, the District Court tacitly denied the defendant's request for a downward variance or a maximum of One Hundred Twenty (120) months on all Counts to run concurrently, (DE# 37-1,5), and, implicitly found that a hearing was not required and therefore the defendant had no right to be present. On April 4, 2017, the defendant, filed a pro se federal prisoner, Notice Of Appeal. (DE # 39). The defendant is currently incarcerated at the United States Federal Correctional Institution, Talladega FCI, Talladega, Alabama 35160.

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[3] Johnson v. United States, 576 U.S. _, 135 S. Ct. 2551 (2015)

REASON(S) FOR GRANTING THE PETITION

I. THE TRIAL COURT ERRED IN RESENTENCING THE DEFENDANT WITHOUT HOLDING A HEARING AND REQUIRING THE PRESENCE OF THE DEFENDANT.

In its ruling, the District Court inexplicably failed to address the issue of whether a Hearing was required and whether the Defendant was required to be present. The District Court, relying on no stated precedent, implicitly ruled that the defendant had no right to be present because the Court was merely resentencing the defendant under it's inherent powers or 28 U.S.C. 2255, none of which expressly authorized the procedure utilized. Previously as to Counts 1, 4, 7, and, 10, the Court had imposed a total enhanced aggravated sentence of 327 months to run concurrently to the sentence imposed as to the remaining counts. With the Supreme Court's Johnson case, to which the government conceded was controlling and otherwise applicable, the District Court was obligated to resentence without the ACCA enhancement. (DE #37-4)

After conducting a de novo review of the civil and criminal files, the court decided to grant the § 2255 motion but denied the defendant's right to be present. Though the Court presumably classified its ruling as a "reduction", due to the original sentence imposed as to Counts of 327 months, the court effectively was conducting a de novo sentencing. The Court had last seen and heard from the defendant over a

decade ago having imposed the 327 months sentence back in 2004. With this § 2255 motion and the court exercising its discretion (conceded by the government and required by Supreme Court precedent), and, vacating the 327 months sentence previously imposed upon the defendant, it was imperative for the court to hear from the defendant and have the defendant present in court in order to determine the appropriate sentence for the defendant. The Court noted in its Order the facts of the case and that the defendant was charged in 2003; the Court also noted the defendant's prior contact with the criminal justice system, but noticeably cannot account whether the defendant had changed his path and was now 14 years older, mature, and, rehabilitated.

Having determined his eligibility for the resentencing, the Court literally gave the defendant back a chance of having a life outside of prison. The defendant was no longer resigned to literally spend the rest of his life behind bars. Though the Court found that the defendant was no longer a career offender and had an amended guideline range of 120 months per count (concurrently), the Court was faced with a defendant who had been incarcerated since 2003. The defendant, in the last 14 years had literally completed the 120-month concurrent portion of his sentence and the resentence as to Counts 1, 4, 7, and, 10, would determine likely how he will spend the rest of his life.

The defendant is mindful of the case law including Anderson v. United States, 241 Fed. Appx. 625 (11th Cir. 2007); United States v. Brewer, 360 Fed. Appx.

28 (11th Cir. 2010); United States v. Grafton, 321 Fed. Appx. 899 (11th Cir. 2009), and, United States v. Moreno, 421 F. 3d 1217 (11th Cir. 2005) which have interpreted Fed. R. Crim. P. 43(b)(4) and have held that a defendant does not have a right to a hearing and nor a right to be present, but, those cases are dated and are not directly on point.

In United States v. Brown, 879 F.3d 1231 (11th Cir. 2018), this Court changed the landscape and made a precedential, pivotal, decision favorable to Mr. Thomason's plight. The Brown panel explored the history of Rule 35 and the interplay of §2255 post sentencing remedies upon resentencing and decided:

> Because both of these cases were brought under and expansive version of Rule 35 that is no longer available, the cases do not bind us here. Even so, we find the logic of Jackson persuasive. When an "entire sentencing package" has been vacated, the sentencing court must revisit every part of the sentencing package, and, this more expansive remedy may require a defendant to be present at a resentencing hearing to "contribute to the fairness of the procedure." See Stincer, 482 U.S. at 745, 107 S. Ct. at 2667.
> Still, there remains the question of what it means for an entire sentencing package to be vacated. A purely formalistic test might require resentencing hearings for every sentence modification made pursuant to § 2255. That is because, by its terms, §2255 requires a Court to first "vacate and set the judgment aside," and then apply the appropriate remedy. See 28 U.S.C. § 2255(b). However, our precedent takes a more pragmatic approach. Rather than relying solely on a formal analysis of whether the sentences of all counts were vacated, we undertake a more fact-intensive inquiry into whether the errors requiring the grant of habeas relief undermine the sentence as a whole.

The Brown panel further stated:

> From our precedent. two inquiries emerge to guide our consideration of whether a defendant is entitled to a resentencing hearing when a change to his sentence is required as a result of his § 2255 motion. First, did the errors requiring the grant of habeas relief undermine the sentence as a whole? Second, will the sentencing court exercise significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentencing? When these factors are present, a District Court's sentence modification qualifies as a critical stage in the proceedings, requiring a hearing with the defendant present. Stincer, 482 U.S. at 745, 107 S. Ct. at 2667.

Applying this framework to Mr. Thomason's case, Mr. Thomason notably filed a habeas petition challenging his only remaining invalid unexpired counts of conviction. The District Court granted Mr. Thomason's § 2255 motion and wrote that defendant's sentence "is slightly reduced from the sentence previously imposed and is just and reasonable." (DE# 37, 4-5) The amended judgment describes Mr. Thomason's previous sentence as having been "amended as a direct motion to District Court pursuant to 28 U.S.C. § 2255." (DE# 38,1); the term of incarceration ... is reduced from 327 to 120 months. These terms shall run consecutively to the extent necessary to achieve a total term of imprisonment of 293 months. (DE#38, 2)[4] In effect, the District Court vacated the sentence on Mr.Thomason's only unexpired counts of conviction and modified his sentence without conducting a Resentencing Hearing.

The latter supports defendant's contention that the District Court abused its discretion. Mr. Thomason's original sentence was set by the mandatory minimum under the ACCA, 18 U.S.C. § 924(e)(1). When that sentence was found to be in error, his new sentence was imposed under a different statutory provision, 18 U.S.C. §924(a)(2). As a result, the only statutory basis for Mr. Thomason's sentence was invalidated, and the District Court was required to resentence him under a new

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[4] USSG 5 G1.2(d) provides:

§ 5G1.2. Sentencing On Multiple Counts Of Conviction

(D) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentence on all counts shall run concurrently, except to the extent otherwise required by Law.

The District Court below essentially "cherry picked" one part of an entire elongated sentence of USSG 5 G1.2(d) to support the sentence but failed to adequately explain its effect on the real issue of resentencing in a § 2255 case where the sentence package is affected. A pragmatic, rather than a formalistic approach, in Mr. Thomason's case, mandates a resentencing hearing than otherwise

statutory provision, with a new sentencing guidelines range. Because the sentence on Mr. Thomason's unexpired counts of conviction was found to be in error, Mr. Thomason's entire sentence was necessarily undermined, and, the District Court was tasked with crafting an entirely new sentence. As a result, Mr. Thomason was entitled to a resentencing hearing. See Jackson , 923 F.2d at 1497; Johnson, 619 F.2d at 368.

The need for Mr. Thomason to receive a resentencing hearing is also supported by the wide discretion exercised by the District Court in imposing Mr. Thomason's new sentence, especially when we consider Mr. Thomason's first sentencing hearing. As to the first sentencing hearing, the transcript is unavailable (DE# 53), however, the Clerk's minutes is telling. The Government was represented by a substitute Attorney who was listed for that sentencing hearing only. There is no mention of any substantive discussion of the PSR, the §3553(a) factors, nor expressed showing of defendant's advocacy, no witnesses, no evidence, no exhibits, and, no sentencing memoranda. The Clerk's minutes made no mention of Mr. Thomason's Presentence Investigation Report ("PSR") or the 18 U.S.C. § 3553 factors. In total, Mr. Thomason's original sentencing hearing lasted fifteen (15) minutes starting at 9:05a.m. and ending at 9:20 a.m.; defendant was reportedly (but unverifiably) given an opportunity but did not speak. See U. S. v. Perez, 661 F.3d 568, 584-86, 1086-87 (11th Cir. 2018); United States v. Machado, 886 F.3d 1070, 1086-87 (11th Cir. 2018). With such an abbreviated procedure, and the District Court's reliance on a mandatory minimum that no longer applies, the District Court has not "made the necessary credibility determinations and exercised the necessary discretion to fashion a

sentencing package which he has determined, in fact, is the appropriate penalty." Jackson, 923 F.2d at 1497. Mr. Thomason's presence is therefore required at a resentencing hearing to "contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745 (1987).

The way the District Court exercised its discretion in modifying Mr. Thomason's sentence also counsels in favor of having a hearing. Mr. Thomason was originally sentenced to a 327 month term of imprisonment. Mr. Thomason's corrected guideline range under the new rules was 235 to 293 months of imprisonment, but the Court sentenced him to 293 months, which is a longer prison term permitted by statute for each count running concurrently. Indeed, the advisory guidelines for each count concurrently should be 120 month maximum. The maximum for each separately is only offense level 20, Category VI at 120-150 months. The guise of a consecutive sentence under USSG 5§ G1.2(d) is similarly unavailing since the Court did not allow defendant in person to address the Court. Upward variances are meant to apply only after "serious consideration" by the Sentencing Court, and only then when accompanied by a "sufficiently compelling" justification. Gall v. United States, 552 U.S. 38, 46, 50, 128 S. Ct. 586, 594, 597 (2007). The fact that the District Court provided little or no additional justification for imposing an upward variance to Mr. Thomason's sentence is itself error. See 18 U.S.C. § 3553(c)(2).

Although the Court's written Statement of Reasons dated March 26, 2004 (relied upon by the District Court in 2017) attempted to include an explanation, applying an upward variance in 2017, is a clear act of open-ended discretion,

bolstering defendant's contention that it was error for the court to modify Mr. Thomason's sentence without a resentencing hearing. While it is true that the Court that initially imposed sentence is not required to provide advance notice that it is considering an upward variance, "[s]ound practice dictates that Judges in all cases should make sure that the information provided to the parties in advance of the hearing itself has given them an adequate opportunity to donfront and debate the relevant issues". Irizarry v. United States, 553 U.S. 708, 715, 128 S. Ct. 2198, 2203 (2008). Mr. Thomason should have had an opportunity, at a hearing, to guide the District Court's discretion before it imposed an upward variance. Mr. Thomason was given none. Thus, the imposition of the new sentence based on an upward variance also supports the contention that Mr. Thomason's attendance at the resentencing hearing is essential to the just administration of his case.

"Under the Due' Process Clause, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure" United States v. Parrish, 427 F.3d 1345, 1348 (11 th Cir. 2005) This Court went on to note that "other circuits have noted that the right to be present under the Due Process Clause is narrower than the right to be present under Rule 43. United States v. Grafton, 321 Fed. Appx. 899, 901 (11th Cir. 2009).

The right to be present at sentencing is based in both the Due Process Clause of the United States Constitution and Federal Rule of Criminal Procedure 43. See Fed. R. Crim. P. 43(a)(3), (b)(4) stating that a defendant "must" be present at sentencing, unless "the proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)"); United States v. Parrish, 427 F.3d 1345, 1348 (11th Cir. 2005) ("Under the Due Process Clause, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.'") (citing United States v. Novaton, 271 F.3d 968, 998 (11th Cir. 2001)).

Although the right to a resentencing hearing does not extend to every modification of a sentence, *see* Fed. R. Crim. P. 43(b), it applies here, where Mr. Thomason's entire sentence was essentially vacated. See Adams v. United States, 338 Fed. Appx. 799, 800 (11th Cir. 2009) ("The prisoner's right to a resentencing hearing depends on whether his original sentence package was vacated in its entirety.") (emphasis added) (cited United States v. Jackson, 923 F.2d 1494, 1496-97 (11th Cir. 1991)); United States v. Stevenson, 162 Fed. Appx. 907, 908 (11th Cir. 2006) ("Because Stevenson's original sentence was vacated in its entirety, the District Court erred by not granting him a hearing...."); Taylor, 11 F.3d at 151-52

('[t]here is a distinction between modifications of sentences and proceedings that impose a new sentence after vacation of the original sentence. In the former instance, the defendant's presence is not required, but in the latter, the defendant has a right to be present....") (citing United States v. Moree, 928 F.2d 654, 655-56 (5th Cir. 1991)); see also United States v. Behrens, 375 U.S. 162 (1963) (holding that it was error for the District Court to impose a sentence without the defendant or his counsel present).

In denying Mr. Thomason the right to be present at resentencing, the District Court also denied Mr. Thomason an opportunity to address the Court personally and through counsel in violation of Federal Rule of Criminal Procedure 32(i)(4)(A). *See* Fed. R. Crim. P. 32(i)(4)(A)(i) & (ii) (stating that before imposing a sentence, the District Court must: (1) provide the defendant's attorney an opportunity to speak on the defendant's behalf, and, (2) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence); *see also* Green v. United States, 365 U.S. 301, 304 (1961) ("[A]s early as 1689, it was recognized that the Court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal."); *see also* Taylor, 11 F. 3.d at 152 ("as this was a resentencing after vacation of the original sentence, Taylor had a right to be present and allocute.");United States v. Prouty, 303 F.3d 1249, 1252-53

(11th Cir. 2002) (holding that it is plain error if a defendant is denied an opportunity to allocute and does "not receive the lowest possible sentence within the applicable guideline range").

By denying Mr. Thomason's request for a resentencing hearing, the District Court violated the Due Process Clause of the Constitution as well as Federal Rules of Criminal Procedure 32(i)(4)(A) and 43 (a). Accordingly, Mr. Thomason respectfully requests that this Court vacate his judgment and remand this case with instructions that the District Court schedule a resentencing hearing.

In the instant case there clearly were factual disputes. The government though conceding that the defendant was eligible recommended that the defendant remain incarcerated for the rest of his life. The defendant requested that the Court grant the new sentence as to the affected counts due to the progress, rehabilitation and metamorphosis that the defendant had undergone in the past14 years in prison. Due process demanded that the defendant have a hearing, the opportunity to be present, and, the opportunity to be heard.

In United States v. Hernandez, F.3d, 2018 U. S. App. LEXIS 14563, 2018 WL 2427573, at *1-3 (11th Cir. May 30, 2018), the Eleventh Circuit concluded that where a defendant is sentenced on multiple counts of conviction, and, where removal of the §924 (c) sentence, which runs consecutive to any other sentence

imposed, then the ACCA error has no effect on movant's guideline range and the error does not undermine the sentence as a whole. Id. Consequently, unless the movant were entitled to vacatur of the §924(c) or §3559(c) enhancements, it would not appear that the Court would be required to conduct a complete resentencing hearing. Hernandez is inapposite to the movant herein. Unlike the Hernandez defendant, the removal of the ACCA enchancement has removed the statutory basis for the total sentence imposed and it does affect the §922 sentence statutorily.

After vacating Mr. Thomason's sentence, the District Court, without a resentencing hearing, applied an upward variance and resentenced Mr. Thomason to a consecutive term of imprisonment not pursuant to the statutes but utilizing the guidelines, an option not previously envisioned at the original sentencing. In doing so, the District Court denied Mr. Thomason an opportunity to directly address the Court and to provide evidence of his post incarceration rehabilitation. This is error.

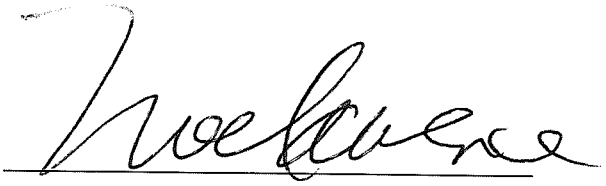
There is obviously a split in the Circuits on whether a District Court can correct a sentence or resentence a Defendant. See U. S. v. Flack, 941 F.3d 238 (6th Cir. 2019), which held that a District Court resentences a Defendant, for purposes of § 2255, when it revisits the § 3553(a) factors and determines anew what the sentence should be. See also, United States v. Jackson, 923 F.2d 1494,

1496, (11th Cir. 1991); Contra, Cody v. United States, 2019 U. S. App. Lexis 34052 (11th Cir., Nov. 14, 2019)

CONCLUSION

This Court should grant this Petition to resolve the issue as to the limits of correction of a Final Criminal Judgment versus s Resentencing where the defendant is required to present and allocute.

Respectfully submitted



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