

No. 20-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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PERCY JONES,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Whether the appellate court's determination that the government has the final say on whether petitioner had the right to pursue his late-filed appeal is unconstitutional because it unlawfully delegates to the Executive a decision that should be made by the Judiciary.

## **PARTIES TO THE PROCEEDING**

The caption contains the names of all parties to the proceedings.

## **RELATED PROCEEDINGS**

The following proceedings are directly related to this Petition:

*United States v. Jones*, No. 1:18-cr-20053-UU (S.D. Fla.) (Judgment entered October 25, 2019), *aff'd*, *United States v. Jones*, No. 19-11220 (11th Cir. July 17, 2019) (unpublished).

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Percy Jones (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

**OPINION BELOW**

The Eleventh Circuit’s opinion (App. A) is unreported.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Article III, §1 of the United States Constitution. The petition is timely filed. The Eleventh Circuit entered judgment on October 25, 2019.

The Eleventh Circuit Court of Appeals issued an opinion on October 25, 2019, dismissing petitioners' motion for reconsideration of the July 17, 2019 Order dismissing the appeal as untimely. App.A. This Court has jurisdiction to review the Eleventh Circuit's judgment under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Article III, §1 and U. S. Constitution Amendment 5 (due process and equal protection).

## **INTRODUCTION**

Petitioner Percy Jones respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit. The United States claimed that Jones's appeal was untimely because it was filed over a month after the good-cause or excusable-neglect period had elapsed. The Court of Appeals delegated to the Executive the determination of whether the appeal should nonetheless go forward.

## **COURSE OF PROCEEDINGS**

On September 14, 2018, Petitioner Jones pled guilty to a one-count superseding Information. (DE 32). On December 13, 2018, the district court sentenced Mr. Jones to 120 months imprisonment. (DE 48). On January 18, 2019, Mr. Jones surrendered to the United States Marshal to begin serving his sentence. (DE 48). On April 2, 2019, the clerk's office docketed a letter dated March 28, 2019, from Mr. Jones. (DE 53). The letter was styled "Ineffective Assistance of Counsel- Notice of Appeal." (DE 53). The letter states, "Mr. Jones is requesting the court appoint counsel so he can perfect a direct appeal." (DE 53). The district court construed the letter as a notice of appeal and transmitted it to the Eleventh Circuit Court of Appeals. On May 13, 2019, the Eleventh Circuit asked the parties to address whether Mr. Jones' letter "can be construed as a notice of appeal under Federal Rule of Appellate Procedure 3(c)."

Appellant Jones submitted a properly construed handwritten notice of appeal (D.E. 53) under Fed. R. App. P. 3(c). The notice correctly identified the style of the case, the case number, the sentence imposed, and his request for court-appointed counsel. The government agreed that Jones's letter "served as a functional equivalent of a notice of appeal" (AUSA Response to Jurisdictional Inquiry, pg. 4). And the Court found that the letter was the functional equivalent of a notice of appeal. Federal law construes these filing deadlines as non-jurisdictional, thereby preserving for courts the authority to hear an untimely appeal. *United States v. Kwai Fun Wang*, 135 S.Ct. 1625, 1632 ("time and again, we have described filing deadlines as 'quintessential

claim-processing rules’ which ‘seek to promote the orderly process of litigation,’ but do not deprive a court of the authority to hear a case” (internal citations omitted)).

The Government’s jurisdictional statement argued that because “Jones’s appeal is untimely and was filed over a month after the good-cause or excusable-neglect period had elapsed, this Court should dismiss his appeal.” Further stating that in the event that this Court chose to reach the issue, Jones’s March 28, 2019 letter was the functional equivalent of a notice of appeal. Thus, the government agreed that the time limits for entering an appeal under Fed. R. App. P. 4(b) are not jurisdictional (AUSA Response to Jurisdictional Inquiry, pg. 3).

On May 29, 2019, undersigned counsel was appointed to represent Defendant/Appellant Percy Jones. At the time, the jurisdictional statements that had been submitted by Appellant Percy Jones and by the Government were pending. No briefing schedule was set, and the case was decided based upon the jurisdictional statements.

On July 17, 2019 the Eleventh Circuit Court of Appeals issued an Order dismissing the appeal finding that the Government opposed the late filing and therefore, even if the court had jurisdiction, the appeal had to be dismissed because his construed notice of appeal, dated and deemed filed on March 28, 2019, is untimely to appeal from the district court’s December 20, 2018 final judgment. *See* Fed.R.App.P. 4(b)(1)(A), (c); *see also* Fed.R.App.P. 4(c)(1); *Daniels v. United States*, 809 F.3d 588, 589 (11<sup>th</sup> Cir. 2015). Because the government has raised the issue of

timeliness, “we must apply the time limits of Rule 4(b).” *United States v. Lopez*, 562 F.3d 1309, 1313-14 (11<sup>th</sup> Cir. 2009).

Undersigned filed a request for reconsideration (July 30, 2019), which was denied (October 25, 2019).

### **STATEMENT OF FACTS**

On January 25, 2019, Petitioner Jones was arrested in his home (DE 7) and charged relating to an incident that occurred in the city of Miami on January 29, 2014 (DE 3). The incident that led to Mr. Jones’s arrest began with a call to the Miami Police Department concerning a gentleman who had brandished a weapon in public. The gentleman was seen to have had a weapon on his person, and to have left the scene on a bicycle.

Miami police began searching the area, and found a gentleman walking with his bicycle. He fit the description the witnesses to the firearm incident had provided. Mr. Jones was arrested, and crime scene investigators found a 22-caliber revolver in the bushes. The revolver was discovered to have been stolen, and Mr. Jones admitted in a written statement to the district court that he knew or should have known that he had been in possession of a stolen firearm.

The Government charged Mr. Jones as a career criminal, given his battery conviction about **30 years earlier**, and a handful of **petty drug charges**. Mr. Jones faced life in prison, and pled to a lesser charge, agreeing to the statutory maximum of 10 years. Judge Ursula Ungaro noted during the proceedings the outrageousness

of the sentence but chose to accept the plea for policy reasons. (DE 68, pg. 7) (“I do feel a little badly. I do feel it’s a very harsh sentence under the circumstances.”). *Id.*, at 8 (“I will say to the Government that this is very harsh... what I don’t get really... is why the Government decided to take such an aggressive position on this offense when it was so old and it really didn’t pose any immediate danger to anyone.”).

### **REASONS FOR GRANTING THE PETITION**

Although prosecutors enjoy wide discretion in some of their decisions – for example, in the decision whether or not to bring a case, *United States v. Chemical Foundations, Inc.* 272 U.S. (1926) – the freedom given to prosecutors is not boundless. A prosecutor’s discretion is subject to constitutional constraints. *United States v. Batchelder*, 442 U.S. 114 (1979); *United States v. Armstrong*, 517 U.S. 456 (1996). Among the constraints are issues of due process *Oyler v. Boles*, 368 U.S. 448 (1962), and of equal protection *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Courts have granted prosecutors wide discretion under the theory that the prosecutor was through his actions enunciating the will of the Executive, and therefore that the courts should interfere as little as possible with the prerogatives of a separate, co-equal branch of government. Implicit in the theory of prosecutorial discretion is the concept that a prosecution is mainly an Executive function. In the present case, the prosecutor’s discretion has been extended by the court to make the decision of whether or not a court may hear an appeal, delegating to the Executive Branch a Judicial function.

Although the taking of an appeal within the prescribed statutory timeframe is jurisdictional in civil cases *Bowles v. Russell*, 551 U.S. 205 (2007), untimeliness in criminal appeals does not deprive a court of jurisdiction. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Courts, for example, may consider a late appeal where a defendant's lawyer failed to file an appeal in such a way that his untimeliness falls below an objective standard of reasonable behavior for a legal professional. *Strickland v. Washington*, 466 U.S. 688 (1984). Supreme Court precedent therefore acknowledges both that (1) a court may hear an untimely appeal, and (2) a defendant's constitutional rights may be implicated if a court fails to hear an untimely appeal.

In the instant case, Appellant's rights are implicated because the court abdicated to the prosecutor's office the court's own responsibility to determine whether or not to hear Appellant's case. The court thereby deprived Petitioner of his right to a fair hearing before a branch of government established by clear constitutional structure and by precedent as a check to Executive power.

The United States Constitution assigns judicial authority to "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, §1. The courts, having been informed with such power, cannot delegate that power to the arbitrary use of another branch. Most judicial labor concerning non-delegation has been expended upon the legislature's delegation of its lawmaking authority *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799), *In re: Adams* 21 Mass., 245 (1826), *Thorne v. Cramer*, 15 Barb. 112 (N.Y. Gen. Term. 1851), *Parker v. Commonwealth*, 6 Pa. 507 (1847), *State v. Field*, 17 Ma. 529 (1853).

The principle is, therefore, that the three constitutionally prescribed branches cannot abdicate so much of their fundamental purpose as to cede essential work to another body, a principle that applies equally to all branches. In the present case, the court allowed the whim of the prosecutor to decide whether or not the court would hear Petitioner's case.

Though it is within a court's powers to make its calendar and to promulgate rules of timeliness, it is not within the court's purview to consign its role as natural arbitrator to the behest of one of the parties of a contest. A prosecutor should not have authority to decide whether or not a court will invoke equitable tolling and hear a defendant's case; that decision rests with the institution charged by custom with the exercise of the powers of equity in federal controversies: The Article III courts.

The status of the law in the Eleventh Circuit is that the appeal cannot proceed if the government does not agree, but the government can allow it to proceed. This, however, allows the government to arbitrarily decide when a defendant may have his rights reviewed by the Court. Allowing the government to make this arbitrary decision violates due process and equal protection and unlawfully delegates a judiciary function to the Executive. Defendants' right to appeal can be arbitrarily terminated by the Government's decision to object, and in this case without any stated reasons for its objection. The decision in *United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009) allows for such arbitrariness and violates the constitutional protections of the due process clause.



The government cited *Lopez* to contend that Mr. Jones cannot present his appeal without the government's waiving his tardy notice. However, precedent exists in Federal caselaw allowing a court to act upon an untimely appeal in certain circumstances. *See, e.g., Holland v. Florida*, 560 U.S. 631, 650 (2010) (“we have followed a tradition in which courts of equity have sought to ‘relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules”(internal citations omitted)).

One branch of government's decision to abdicate or delegate essential elements of its role to another branch of government is unconstitutional. *United States v. Smith*, 18 U.S. 153 (1820), *Wayman v. Southard*, 23 U.S. 1 (1825), *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Certiorari is proper to review whether this policy and precedent of the appellate court abdicates an essential prerogative of the Judiciary to the Executive, and therefore constitutes an unlawful delegation.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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