

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

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

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FLOYD CLARK,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Petitioner filed a Motion for New Trial based upon newly discovered evidence in the form of a recanting affidavit from a material witness. Following an evidentiary hearing, the Motion was denied by the trial court. Petitioner appealed the denial to the United States Court of Appeals for the District of Columbia Circuit. The parties briefed the substantive issue and the issue of finality was not raised by either party. Prior to the filing of the appeal and during the pendency of the Motion for New Trial, Petitioner filed a Motion pursuant to *Johnson v. United States*, 576 U.S. 591 (2015) in the trial court.<sup>1</sup> In *Johnson*, this Court held that the Residual Clause of the Armed Career Criminal Act was unconstitutionally vague and in violation of due process. That issue remains pending before the trial court.

The Circuit Court did not reach the merits of petitioner's argument concerning the Motion for New Trial based upon newly discovered evidence. Rather, the Circuit Court dismissed the appeal following legal argument on grounds that there was not a final determination because the am issue remains pending before the trial court. Thus, the questions presented are,

1. Whether there was a sufficient final determination by the trial court such that the Circuit Court could have reached a determination of the substantive merits.
2. Whether a conflict exists within the Circuit Courts of Appeal of and this Court concerning the meaning of a final judgment.

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<sup>1</sup> The issue pending before the trial court is whether the federal carjacking statute constitutes a crime of violence and whether the federal carjacking charge can be reinstated. The parties have briefed the issue and the trial court has the issue under advisement.

## **LIST OF PARTIES TO THE PROCEEDING**

[ ] All parties appear in the caption of the case on the cover page.

[/]. All parties do not appear in the caption 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:

Floyd Carter, Petitioner/ Appellant

United States of America, Appellee

## **RELATED CASES**

There are no related cases pending before this Court.

## TABLE OF CONTENTS

	PAGE
Question Presented.....	i
Parties to the Proceeding .....	ii
Related Cases.....	ii
Table of Contents.....	iii
Table of Authorities .....	iv
Opinions Below .....	1
Basis of Jurisdiction .....	1
Constitutional Provisions .....	1
Statement of the Case .....	2
Reason for Granting the Petition .....	5
Conclusion .....	15
Appendix:	
Opinion of the United States Court of Appeals for the District of Columbia Circuit, filed 10/16/20 .....	A1
Opinion of the United States District Court for the District of Columbia, filed 4/22/19 .....	A10

## TABLE OF AUTHORITIES

### CASES

<i>Ashcroft v. Iqbal</i> , 566 U.S. 662 (2009).....	7, 8
<i>Clark v. United States</i> , 977 F.3d 1287 (D.C. Cir. 2000) .....	10, 11
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949) .....	6, 7, 12
<i>Cohen v. Beneficial</i> , <i>supra</i> , 337 U.S. at 546.....	13
<i>Coopers &amp; Lybrand v. Livesay</i> , 437 U.S. 463 (1978) .....	10, 11, 12
<i>Digital Equipment Corporation v. Desktop Direct, Inc.</i> , 511 U.S. 863 (1994) .....	12
<i>Eisen v. Carlisle &amp; Jacqueline</i> , 417 U.S. 156 (1974).....	7
<i>Everett v. U.S. Airways, Grp., Inc.</i> , 132 F.3d 770 (D.C Cir. 1998) .....	10, 11
<i>Fox v. City of West Palm Beach</i> , 383 F.2d 189 (5th Cir. 1967).....	9
<i>Gillespie v. United States Steel Corp.</i> , 379 U.S. 148 (1964) .....	5, 6, 7, 11
<i>Johnson v. United States</i> , 576 U.S. 591 (2015).....	i
<i>Oswalt v. Scripto</i> , 616 F.2d 191 (1980) .....	8
<i>Richardson-Merrell, Inc. v. Koller</i> , 472 U.S. 424 (1985) .....	13
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018) .....	3
<i>United States v. Clark</i> , 977 F.3d 1282 (D.C. Cir. 2020) .....	4
<i>United States v. Johnson</i> , 135 S. Ct. 2551 (2015).....	3, 4
<i>Will v. Hallock</i> , 546 U.S. 350 (2006) .....	13

### STATUTES AND RULES

18 U.S.C. § 922.....	2
18 U.S.C. § 924.....	2, 13

18 U.S.C. § 1201.....	2
18 U.S.C. § 2119.....	2
28 U.S.C .§ 1257.....	1
28 U.S.C. § 1291.....	1, 5
28 U.S.C. § 2253.....	14
28 U.S.C. § 2255.....	3
D.C. Code § 22-2801.....	2
D.C. Code § 22-2803.....	2
D.C. Code § 22-4502.....	2
D.C. Code § 22-4504.....	2
Fed R. Civ. P. 54 .....	11

## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears at Appendix 1 to the petition and is reported at 977 F.3d 1282 (D.C. Cir. 2020).

The opinion of the United States District Court for the District of Columbia appears at Appendix 2 to the petition.

## **BASIS OF JURISDICTION**

The date on which the United States Court of Appeals for the District of Columbia Circuit decided the case was October 16, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

Petitioner was indicted for the following offenses: one count of kidnapping in violation of 18 U.S.C. § 1201 (a)(1); two counts of using, carrying possessing, brandishing a firearm during a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); one count of carjacking, in violation of 18 U.S.C. § 2119 (2); one count of carjacking while armed, in violation D.C. Code §§ 22-2803 and 22-4502; two counts of possession of a firearm during the commission of a crime of violence, in violation of D.C. Code § 22-4504(b); one count of armed robbery, in violation of D.C. Code §§ 22-2801 and 22-4502; and one count of unlawful possession of a firearm by an individual under felony indictment, in violation of 18 U.S.C. § 922 (n).

Trial commenced before the Honorable Paul L. Friedman of the United States District Court for the District of Columbia. On December 13, 2010. The jury returned verdicts of guilty as to each of the indicted counts. Post-verdict the trial court granted a Motion to Vacate Defendant's conviction as to Count 4, one of the § 924(c) counts.

Petitioner was initially sentenced to an aggregate period of incarceration of 284 months of imprisonment to be followed by 5 years of supervised release. The United States Court of Appeals for the District of Columbia Circuit affirmed defendant's conviction on direct appeal on May 16, 2014, with the exception of the sentence for the 924(c) count that was remanded to the trial court. The trial court reduced Petitioner's sentence period of incarceration. Petitioner is not eligible for release until April 20, 2032.

On April 2, 2015 Petitioner filed a *pro se* Motion to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255. Counsel was appointed by the trial court who submitted a reply to the government's opposition to Motion to Vacate and additionally filed a supplement to the § 2255 motion.

Four grounds of relief have been asserted before the trial court. (1) a claim of newly discovered evidence based upon a recanting affidavit from the primary government witness; (2) and (3) were separate claims of ineffective assistance of counsel; (4). A claim pursuant to *United States v. Johnson*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The claims of ineffective assistance of counsel were denied by the trial court. The *Johnson* and *Dimaya* claims remain pending before the trial court. The issue regarding the recanting witness is the issue that went to the United States Court of Appeals for the District of Columbia Circuit.

The recanting affidavit was from the complaining witness (Walker) who at trial described being carjacked by Petitioner and being driven around Maryland and the District of Columbia in a robbery and an attempt to acquire money. There was no corroboration to Walker's factual version of the events. The trial court observed, "Mr. Walker offered the only direct evidence implicating Mr. Clark as one of the perpetrators of the crime."

The recanting affidavit was relevant in two critical aspects.

In contradiction to his trial testimony, Walker's affidavit represented that he did not know the identity of his assailant. Walker's affidavit stated, I changed my

story to the police and named Floyd [Petitioner] because I wanted to seek revenge against him because I was mad since finding out about an allegation that he was having an [sic] sexual encounter with my wife....”

The second reason for recanting his trial testimony was,

The police encouraged me to come up with a story and gave me a couple of days to do so. I made up a lot of details to make the story sound believable that Floyd was the suspect. I was being threatened by the police to help them make a case. I was on probation, so the police told me that they could see to it that my judge revoked my probation.

The trial court conducted an evidentiary hearing to address the recantation. The trial court, while acknowledging that the recantation would likely result in an acquittal at a new trial, denied the Motion for New Trial on ground that the court was not reasonably satisfied that Walker’s trial testimony was false.

Petitioner noted an appeal to the United States Court of Appeals for the District of Columbia Circuit. The issue to the Circuit was the denial of the Motion to Vacate based upon the recantation. The *Johnson* issues remain pending before the trial court. At oral argument, the Circuit Court did not address Petitioner’s arguments concerning the recantation. Rather, the Circuit Court ruled that the trial court proceedings were not final as there remained a pending Motion addressing the 924(c)conviction. “If a decision is not final so long as a plaintiff may file additional claims (or amend existing ones), then, a fortiori, the district court’s failure to decide supplement claims already filed cannot make an otherwise interlocutory order.”

*United States v. Clark*, No. 977 F.3d 1282, 1290 ( D.C. Cir. 2020).

## REASONS FOR GRANTING THE PETITION

The opinion of the United States Court of Appeals for the District of Columbia Circuit is in conflict with other decisions of this Court and other federal Circuit courts.

28 U.S.C. § 1291 provides the statutory authority for appellate jurisdiction.

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district Courts of the United States...except where a direct review may be had in the Supreme Court.

### **A. Decisions of the United States Supreme Court**

*Gillespie v. United States*, 379 U.S. 148 (1964) was relied upon by Petitioner before the Circuit Court in support of his argument that the Order that was the subject of the appeal was properly before the Court. *Gillespie* involved the Jones Act, a federal maritime law governing liability for a seaman's injury, and whether it preempted state and common law remedies.

The district court ruled that the Jones Act provided the exclusive remedy for all allegations falling within the purview of the statute and struck all parts of the complaint relating to other theories of recovery. However, the ruling left the merits of plaintiff's Jones Act claim viable for further litigation.

*Gillespie* noted that "this Court has pointed out, a decision 'final' within the meaning of Sec. 1291 does not necessarily mean the last order possible to be made

in the case. Id., 152, citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949), it was noted,

And our cases long have recognized that whether a ruling is ‘final’ within the meaning of Sec. 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality. Because of this difficulty this Court has held that the *requirement of finality is to be given a “practical rather than a technical construction,* emphasis supplied.

*Gillespie*, 379 U.S. 152.

The *Cohen* Court considered the applicability in a federal diversity action of a forum state statute making the plaintiff in a stockholder’s derivative action liable for the litigation expenses of an opposing party. The trial court held the subject statute inapplicable and the opposing party sought immediate appellate review over objection that the order was not final.

The *Cohen* Court held the issue to be appropriate for immediate appellate review.” This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration be deferred until the whole case is adjudicated.” Id 546.

In *Cohen* this Court construed the term “final decision” to include those orders which, although not ending the entire case, are “practically” or “effectively” separate from the merits of the case.

*Cohen* further noted that one of the considerations to be taken into account is whether “rights asserted in the action, [are] too important to be denied review....”

Id. The rights asserted by Petitioner could not be more important. He was asserting his right to freedom from what he considers to be a tainted verdict. The verdict is being challenged by an affidavit from the only witness against him and introduced at trial. The indefinite delay in waiting for a determination of an entirely collateral matter from the Circuit amounts to an egregious deprivation of a legitimate issue that required immediate consideration by the Circuit Court.

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) involved an individual who brought an action alleging that two Wall Street dealers conspired to charge excessive fees. The plaintiff sued on behalf of himself individually and on behalf of all similarly situated harmed persons. The defendants move to dismiss the case. The trial court ordered dismissal of the class action but did not dismiss the individual claims.

This Court, citing *Gillespie*, took into account the ‘practical purposes’ in defining finality and allowed the appeal to go forward on its merits. “Section 1291 does not limit appellate review to those final judgments which terminate an action...but rather the requirement of finality is to be given a practical rather than a technical construction.” Id. 156-57.

In *Ashcroft v. Iqbal* a pretrial detainee brought an action against government officials alleging they engaged in unconstitutional actions related to his confinement in prison. The United States District Court denied in part the

defendants' motions to dismiss on ground of qualified immunity. The denial was appealed by defendants.

This Court ruled the appellate court had subject matter jurisdiction even though part of the initial claim remained pending before the trial court.

Under the collateral-order doctrine a limited set of district-court orders are reviewable though short of final judgment. The orders within this narrow category are immediately appealable because they finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

556 U.S. 662, 671 (2009), internal quotations omitted.

## **B. Decisions of Circuit Courts of the United States**

*Oswalt v. Scripto*, 616 F.2d 191(1980) concerned the issue of whether in a diversity action due process permitted the application of a Texas long-arm statute to impose personal jurisdiction over an individual. Before proceeding on adjudicating the substantive merits, the Court explained why the case was properly before it.

An individual was injured when using a lighter distributed by defendant. The injured party sued the distributor and manufacturer of the lighter. The district court dismissed the claim against the manufacturer and granted permission to appeal.<sup>2</sup>

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<sup>2</sup> Similarly, in this case, the district court granted a Certificate of Appealability.

The Circuit Court raised the issue of appealability on its own and issued the following ruling.” It is a fact that there is no final order or judgment dismissing the claim...which raises the question of whether the judgment below is final...there is some flexibility in this rule in order that justice, and the economic termination of litigation may not suffer from an overly strict adherence of formalism. It must be remembered that practical, not technical, considerations are to govern the application of principles of finality. Id., 194, internal citations omitted.

In *Fox v. City of West Palm Beach*, the plaintiff filed a notice of appeal from an Order denying mandatory injunctive relief and from the Order denying leave to amend the complaint. The defendant filed in the Circuit Court a motion to dismiss the appeal on ground that the orders were not appealable. The Circuit posed the issue as follows: “On the issue of appealability plausible and forceful reasons can be urged for and against. What then must we do? We think the answer is to be found in *Gillespie v. U.S. Steel Corporation*” 383 F.2d 189, 93 (5<sup>th</sup> Cir. 1967). The Circuit ruled in favor of allowing the appeal to proceed.

We give to the requirement of finality a practical rather than a technical construction. We have considered the inconvenience and cost of piecemeal review and the danger of denying justice by delay. We have concluded that the validity of the district court’s order in denying appellant the right to assert a claim for a mandatory injunction was fundamental to the further conduct of the case, and hence has such attributes of finality as to bring it within Section 1291 as an appealable Order.

383 F.2d 189, 193-94 (5<sup>th</sup> Cir. 1967).

### **C. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IS IN CONFLICT WITH OPINIONS OF THIS COURT AND FROM OTHER CIRCUITS**

In ruling on Petitioner's appeal, the Circuit Court determined, "Because it [Petitioner's brief before the Circuit Court] leaves Clark's 924(c) claim pending, the district court's order appears nonfinal on its face." *Clark v. United States*, 977 F.3d 1287, 1292 D.C., 2000). The Circuit Court added, "Notwithstanding this well-established doctrine, Petitioner relies on an old Supreme Court case, *Gillespie United States Steel Corp*, 379 U.S. 148 (1964), which, he claims, opens the door a little bit and allows ostensible nonfinal orders to be regarded as practically final" *Id.*, internal quotations omitted.

The Circuit went on to characterize *Gillespie* as "a rather confusing case", *Id.* and concluded that the "practical rather than technical construction" of the finality rule was "dictum", citing *Everett v. US Airways grp., Inc.* 132 F.3d 770, 774 (D.C. Cir. 1998). The Circuit added that in *Coopers & Lybrand v. Livesay*, the Supreme Court explained that *Gillespie*<sup>3</sup> was based in part "on the parties failure to raise the finality issue until argument on the merits...limiting that case [Gillespie] to its unique facts." *Id.* 6.

*Everett* involved an action by retired and active US Airway pilots who appealed an order of the district court dismissing several counts subject to mandatory arbitration and staying proceeding on another count pending the

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<sup>3</sup> 437 U.S. 463, 477 n. 30 (1978)

outcome of the arbitration. The district court retained jurisdiction over the stayed count. The appeal was dismissed citing Fed R. Civ. P. 54 (b).

When more than one claim is presented in an action, ...the court may direct the entry of a final judgment as to one or more but fewer than all of the claims... *only* upon an express determination that there is no just reason for delay *and* upon an express direction for the entry of the judgment....

*Everett*, 132 F. 2d at 773

The *Everett* Court addressed the “practical finality” doctrine drawn in *Gillespie* and acknowledged that the *Gillespie* Court stated that in “marginal cases, i.e., where finality is a close question, courts should consider the...danger of denying justice be delay.” Id., 774, internal quotations omitted. Petitioner reiterates that the danger in his delay is the prolonged loss of liberty while waiting for a ruling on the pending 924(c) argument in the district court. Everett was denied relief pursuant to *Gillespie* on the specific facts in Everett. Those facts are not dispositive of the facts presented by Petitioner herein.

The United States Court of Appeals for the District of Columbia Circuit relied upon this Court’s opinion in *Coopers & Lybrand v. Livesay* and ruled that it “closed the door on Petitioner’s reading of *Gillespie*.” *Clark v. United States*, 977 F. 3d, 1293 page 6. Notwithstanding the determination of the Circuit, Petitioner submits that this Court’s holding in *Coopers* supports his position. The *Coopers* Court specifically determined that,

In *Gillespie*, the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national signifi-

cance because review of that issue unquestionably implemented the same policy Congress sought to promote in § 1292 (b)...and the arguable finality issue had not been presented to the Court until argument on the merits, thereby ensuring that none of the policies of judicial economy served by the final requirement would be achieved were the case sent back with the important issue undecided.

437 U.S. 463, 477 n.30 (1978).

This is precisely part of the issue presented herein. Neither party raised the issue of finality prior to scheduling of oral argument. Just prior to oral argument on the substantive merits the Circuit Court asked counsel to address the issue of finality. The request was made after all the briefs in the appeal were filed. Thus, issues related to judicial economy are not served by sending the case back to the trial court. Rather, after having been fully briefed, judicial economy would have been best served by a determination on the substantive merits following oral argument in 2020

## **COLLATERAL ORDER DOCTRINE**

The “collateral order doctrine” was first identified by this Court in *Cohen v. Beneficial Industrial Loan Corp*, 337 U.S. 541 (1949) The rule is “best understood not as an exception to the final decision rule laid down by Congress in § 1291, but as a practical construction of it.” *Digital Equipment Corporation v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

“The doctrine allows interlocutory review of a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action. The claims are too important to be

denied review...." *Will v. Hallock*, 546 U.S., 350 (2006), internal citations and quotations omitted. In order to fall within the collateral order doctrine, "It must conclusively determine the disputed question, resolves an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985).

[T]he Court recognized an exception to the final judgment rule for a small class of prejudgment orders which finally determine claims of right separable from, and collateral, rights asserted in the action, [and are] too important to be denied review and too independent to the cause itself to require appellate consideration be deferred until the whole case is adjudicated.

*Cohen v. Beneficial*, supra, 337 U.S. at 546.

Delaying adjudication on the merits of Petitioner's appeal concerning the denial of the Motion to Vacate Conviction for an indeterminate period of time can and does cause irreparable harm. Petitioner has a meritorious constitutional claim that if he prevails upon will result in a new trial. This claim cannot be denied while an entirely separate 924(c) claim is being litigated in the trial court.

#### **CERTIFICATE OF APPEALABILITY AND THE UNITED STATES NEVER RAISED A CLAIM OF LACK OF FINALITY**

Petitioner's claims concerning his Motion to Vacate are far too important to justify an extended and indefinite delay by the Circuit Court. His liberty is at issue within the context of the post-conviction proceeding related to his conviction. Petitioner emphasizes two important factors in this regard.

**a. The district court granted a certificate of appealability.**

28 U.S.C. § 2253 (a) states, “In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.} Section 2 adds: “ A certificate of appealability may issue under (1) only if the applicant has made a substantial showing of the denial of a constitutional right.”

The district court’s grant of a Certificate of Appealability conclusively established that the Order that was the subject of the appeal was final and affirmed that the issue was of constitutional significance.

**b. The United States never raised an objection to the subject matter jurisdiction of the Circuit Court.**

The issue of finality was never raised by the United States and an objection to an adjudication on the merits was never requested by the government. Rather, approximately thirty days prior to oral argument the Circuit Court requested that counsel be prepared to address the issue of finality. This is an acknowledgment by the United States that it did not consider finality to be an issue necessary for determination prior to an adjudication on the merits.

## CONCLUSION

The Circuit Court should have addressed the substantive issue over which it had subject matter jurisdiction. A practical approach to the litigation clearly demonstrated that the substantive issue was ripe for resolution and the interests of judicial economy would not have been adversely affected by a determination on the substantive merits. The decision of the United States Court of Appeals for the District of Columbia in conflict with decisions from other Circuit Courts of Appeal as well as being in conflict with opinions from this Court.

Respectfully submitted,

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