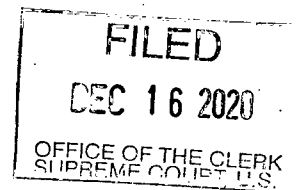


20-7826 ORIGINAL
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

Mr. Jimmie C. Johnson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

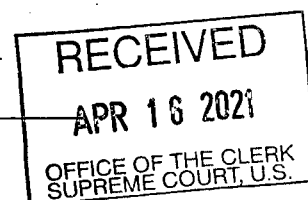
PETITION FOR WRIT OF CERTIORARI

Mr. Jimmie C. Johnson
(Your Name)

Po. Box 019001
(Address)

Atwater, CA 95301
(City, State, Zip Code)

N.A.
(Phone Number)



QUESTION(S) PRESENTED

①

Whether the district court and Eighth Cir. Erred when they determine that Mr. Johnson 2255 motion was not retroactive to cases on collateral review, when Mr. Johnson filed a pro se, motion on direct Appeal, with the same issue as his 2255 motion

② Whether Mr. Johnson sentence is invalid under Apprendi v. New Jersey, because Mr. Johnson was charged on 841 (A) without a drug quantity that was neither alleged in the indictment nor proven to the jury, Mr. Johnson should have a Constitution right to be sentenced under the statute that he was indicted on

③ Ineffective of Counsel, Mr. Johnson Counsel would not file a motion on my behalf after being asked to have Judge Richard Kopf disqualified or remove himself from Mr. Johnson case after the things he said, see DCD 220 and DCD 261

④ Whether Mr. Johnson Counsel not filing one post sentencing factor set out in 3582 (c) when Mr. Johnson sent Counsel 2 1/2 pages of positive things I've did while in prison

⑤ Whether Counsel was ineffective by not filing a motion on powder v. Crack, disparity, motion that was filed at my sentencing hearing, to preserve any and all issues which might be decided through a change in statutory mandatory minimums or sentencing guidelines related to the treatment of Crack for sentencing purposes.

⑥

Whether the Supreme Court should appoint Counsel, because the appointed would not file for Mr. Johnson.

⑦ Whether 21 U.S.C 841 (b) (1) (C) is a covered offense "Under The First Step Act of 2018."

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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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix yes to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix yes to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N.A.

☐ 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: N.A., 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 February 19-2021 (date) on April 19-2021 (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	

STATEMENT OF THE CASE

Mr. Johnson should have a Constitution right to be sentence under the statute that he was indicted on, Mr. Johnson was indicted on 841(A) without a drug amount, or Penalty. Mr. Johnson objected to all drug amounts at trial and sentencing hearing. Mr. Johnson also filed a pro se motion on direct Appeal to the Eighth Cir. Court of Appeals, Challenging the enhanced sentence under 841(A)(B)(1) when defendant was only indicted on 841(A) without a drug amount. At Mr. Johnson trial there was no evidence that defendant made at least one sale of at least 50[#] grams or more for 841(A)(B)(1) enhanced sentencing^{to} apply. The 8th Cir. said it was moot, then eight months later Apprendi v. New Jersey was decided, But when Mr. Johnson filed his 2255 motion on the drug amounts and 841(A) without penalty, the district court and the Eighth Cir. threw Mr. Johnson down. Mr. Johnson was indicted on May 23-1996, 25[#] years ago, Mr. Johnson was never charge with a drug amount which should go to 841(B)(1)(C) no more than 20[#] years Mr. Johnson is 4[#] years past his maximum sentence, he has 5[#] year of supervised release and that will be finish on 5-23-2021, Mr. Johnson has been trying to get resentence under the law 841(A) which he was indicted on or 841(B)(1)(C) as this Honorable Court has rule on in the past. The District Court judge erred when he ruled against Mr. Johnson on his 2255 motion. After Magistrate judge made his ruling that I should be resentence, that Magistrate judge knew that Mr. Johnson had raised the same issue on direct Appeal 20[#] year ago this Supreme Court heard Cotton and sent Mr. Johnson back for not having the original Court orders and ruling. Mr. Johnson Contend that his sentence are invalid under Apprendi v. New Jersey 530 U.S. 466 (2000) because a specific threshold drug quantity was neither alleged in the indictment nor proven to the jury beyond a reasonable

(2)

doubt. In *U.S. v. Promise* No 99-4737 (2001) WL 4 cir. 6-29 2001 held that because drug quantity "must be treated as an element of an aggravated drug trafficking offense under 21 U.S.C. 841, the failure to charge a specific threshold drug quantity in the indictment and submit the quantity issue to the jury constitutes plain error. We further concluded that such error affects defendants substantial rights where as here, the defendant are sentenced to a term of imprisonment greater than that set forth in section 841 (B) (1) (C) for a conviction base on an undetermined quantity of drugs and the defendant can demonstrate that their sentence is longer than that to which "they" would otherwise be subject.

The defendant argue that the district court erred not only by failing to instruct the jury on an essential element drug quantity of an aggravated drug offense, but that the district court exceeded its jurisdiction by sentencing them for a crime with which they were never charged.

In this case the government indicted Mr. Johnson for a violations of section 841 (A) base upon a mixture or substance containing a detectable amount of cocaine base, yet the district court in turn sentenced defendant to a term of imprisonment greater than twenty years the maximum penalty provided for a violation of section 841 (b) (1) (C) base upon an indeterminate but unspecified quantity of cocaine base, Consequently by sentencing defendant to a term of imprisonment greater than that provided for in section 841 (B) (1) (C) appellants received a sentence for a crime an aggravated drug trafficking offense under section 841 (B) (1) (A) with which they were neither charged nor convicted.

The Fifth Amendment to the United States Constitution requires that no person shall be held to answer for a

(3)

capital or other wise infamous crime, unless on a presentment or indictment of a grand jury. The Supreme Court has explained that an indictment found by a grand jury is indispensable to the power of the Court to try petitioner for the crime with which he was charged "Ex Parte Bain, 121 U.S. 1, 12-13 (1887) and that a Court can not permit a defendant to be tried on charges that are not made in the indictment against him," U.S. v. Stiron 361 U.S. 212, 217 (1960). Thus when an indictment fails to set forth an essential element of a crime the Court has no jurisdiction to try a defendant under that count of the indictment. U.S. v. Hooker 841 F.2d 1232-33 4th Cir. (1988)

And of course a district Court can not impose a sentence for a crime over which it does not even have jurisdiction to try a defendant. Indeed the Supreme Court explained in Apprendi v. New Jersey 530 U.S. 466 (2000) that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted 530 U.S. at 490 n.15 (emphasis added quoting U.S. v. Reese 92 U.S. 214, 232-33 (1817) because the judge role in sentencing is constrained at its outer limits by facts alleged in the indictment and found by jury. Thus, because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional and a defendant can not be held to answer for any offense not charged in an indictment returned by a grand jury. U.S. v. Tran 234 F.3d 798-808 2d Cir. (2000) A Court is without jurisdiction to impose a sentence for an offense not charged in the indictment "id (emphasis added, id A prosecutor can not make a jurisdictional end run and then urge the Court to sentence the defendant for an offense for which the defendant was neither charged nor

(4)

convicted. To hold otherwise would be to allow the court to impermissibly broaden the indictment on its own accord during the sentencing phase, to be sure, the district court's actions in this case did not technically result in a constructive amendment of the indictment as the court did not broaden "the possible bases for conviction beyond those presented by the grand jury" *U.S. v. Floresca* 38 F.3d 706, 710 (1994), but there is no question that the effect of what did was the same; *Stirone* 361 U.S. at 217 because the district court sentenced defendant for a crime with which they were never charged, see *Promise* (2001) WL 732389 at 32 although the government presented the grand jury with an indictment containing only the elements necessary to charge the defendant with a violation of 841 (b) (1) (C) the district court sentenced him to more serious crime defined in 841 (b) (1) (A) the court did not formally amend the indictment but its sentence had the same effect") in doing so the district court encroached upon the prerogative of the grand jury because only the grand jury has the power to broaden the charge after an indictment has been returned *Stirone* 361 U.S. at 215-16. Accordingly the district court exceeded its jurisdiction in sentencing appellants for a crime with which they were never charged, thus depriving them of the constitutional right to answer only for those crimes presented to the grand jury.

Whether Petitioner Counsel was ineffective.

1st by not filing one 3582 (C) post sentencing factors when ask to.

2nd Defendant wanted a motion file on his crack versus

(5)

Powder disparity that defendant preserve, at his sentencing hearing, that defendant desires to preserve "Any and All Issues which might be decided through A change in Statutory mandatory minimums and/or the Sentencing Guidelines related to the treatment of Crack Versus Powder Cocaine for Sentencing Purposes.

Mr. Johnson sent in a ineffective of Counsel Motion on August 4th 2020 to the Eighth Cir Court of Appeals but for some reason the Court would not make it a part of the record, even when it was sent back in with a reconsider motion it still was not heard or made a part of the record?

Ineffective assistance of Counsel claims are governed by the familiar standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2652, 80 L. ed. 2d 674 (1984). the movant must demonstrate that (1) his Counsel performance was deficient, meaning that it fell below objective standards for reasonably effective representation under "Prevailing Professional norms" and (2) the deficient Performance prejudiced the defense, meaning that but for the deficient representation, the result of the appellate process would have been different, Strickland 466 U.S. at 687-88, 694.

The Court views the Attorneys performance determination essentially particularly Counsels choice of strategies to establish the deficiency of counsels performance, Movant must overcome the strong presumption that the challenged action might be considered sound strategy "Id. At 689 1" whether the district Court judge should of been told that defendant had A two year degree in Food technology or that defendant worked in the prison shops for over 12th before years, before working in the prison kitchen for 7th years.

(6)

2nd Whether Counsel was ineffective for not filing a motion for defendant, based upon crack versus powder disparity, that defendant desires to preserve "Any and all Issues which might be decided through a change in Statutory mandatory minimums and or the Sentencing Guidelines related to the treatment of crack versus powder cocaine for sentencing purposes. When asked to file the motion

Defendant has complained to the district judge as well as the 8th Cir court of Appeals about Attorney not knowing the issues of defendant case.

Morant contends that Counsel rendered ineffective assistance of Counsel by failure to raise all issues Morant asked Counsel to raise was objectively unreasonable and that prejudiced Morant in the sense that there is a reasonable probability that his case would have been remanded for resentencing. Here if Counsel had raised the issues stated in the Petition, however this Counsel failed to raise downward departure based upon crack versus powder disparity, Defendant challenged the then Sentencing Guidelines which treated defendants convicted of crack cocaine 100 times more severely than defendants who distributed a like quantity of powder cocaine. The preserved issue raised at defendant sentencing hearing is a strong if not stronger as any issues presented by Counsel, the Appellate Counsel has no stated reason for not including the issue, as the issue is a valid one, the likely hood of success on appeal is significant, in that the issue demonstrates the ineffectiveness of Counsel, Therefore, Counsel's performance was deficient in not including the issue, and the performance prejudiced Defendant in preventing his chance for appellate success.

Conclusion

(7)

Further Defendant Prays this Honorable Court will liberally construe the Pleading of this Pro se, Defendant and give his issues full and fair consideration, even though his inartful Pleading may not meet the exact standards of Counsel, and grant such relief as deemed appropriate in the premises, Haines V. Kerner 404 U.S. 519 (1972).

REASONS FOR GRANTING THE PETITION

Because Mr. Johnson was indicted under 841 (A) without a drug amount which would go to 841 (b) (1) (C).

Because the Judge sentenced Mr. Johnson to a Term greater than that set forth in section 841 (b) (1) (C) for a conviction base on an undetermined quantity of drugs

Because Mr. Johnson would have serve 25[#] years on May 23-2021 5 more than the maximum sentence under 841 (b) (1) (C).

Terry V. United States, No 20-5904- Certiorari Granted
(B)(1)(C) not "Covered offense"

- 1- U.S. V. Birt, 966 F.3d 257, 265 (3rd Cir. 2020)
 - 2- U.S. V. Foley, 798 F. APPX 534, 536 (11th Cir. 2019)
 - 3- U.S. V. MarTime, 777 F. APPX. 946, 947 (10th Cir. 2019)
 - 4- U.S. V. Wiseman, 932 F.3d. 411, 417 (6th Cir. 2019)
- (B)(1)(C) "Covered offense"

1- U.S. V. Smith, 954 F-3d 446, 449 (1st Cir. 2020)

2- U.S. V. Woodson, 962 F3d 812, 817 (4th Cir. 2020)

3- U.S. V. Hogsett (No 3465) (7th Cir. Dec. 7 2020)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jimmie O Johnson

Date: 4-7-2021