

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ROY JOHNSON  
Petitioner

v.

UNITED STATES OF AMERICA  
Respondent

---

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

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PETITION FOR WRIT OF CERTIORARI

Roy Johnson#16817-078  
FCI Otisville  
P.O.Box 1000  
Otisville,N.Y.10963

Petitioner Roy Johnson Pro se

QUESTION PRESENTED

1. Was the Petitioner afforded his Constitutional Right to accurate assistance of Counsel in his sentencing stage.
  2. Did Petitioner fail to prosecute his case considering the standard measured by the Fifth Circuit Court of Appeals.
- Faretta v. California 422 U.S. 806 95 S.Ct. 2525 45 L.ed.2d 562 (1975)  
Makelvey v. AT&T Tech Inc. 789 f.2d 1518 (11th Cir. 1986) Love v.  
Bendily, 567 F.Appx 250 (5th Cir. 2014)

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ROY JOHNSON  
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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Petitioner, Roy Johnson, Pro se, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered August 17, 2021.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court denial of a Certificate of Appealability was filed August 17, 2021, and is attached hereto as Appendix A.

## JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 17, 2021.

☐ 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: August 17, 2021, and a copy of the order denying rehearing appears at Appendix A.

☐ 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. § 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).

## JURISDICTION

The judgment and opinion of the Fifth Circuit Court of Appeals was entered August 17, 2021, and this Petition was filed within (90) days of that date. The Court has jurisdiction to grant Certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth and Fourteenth Amendment of the Constitution guarantee that a person brought to trial in State or Federal Court be afforded the right to assistance of Counsel before he can validly be convicted and punished by imprisonment. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, U.S. L.ed. 2d 562 (1975).

## STATEMENT OF THE CASE

Defendant Roy Cornell Johnson was indicted on one Count of conspiracy to distribute or dispense or possess with intent to distribute or dispense crack cocaine based on overt acts committed on May 14, 2009, June 9, 2009, and June 12, 2009 (Count 1). He pleaded guilty in order to avoid a life sentence enhancement. The probation office prepared a presentence report. In it Johnson was considered a career offender. Immediately upon reviewing the psr Johnson filed a motion to withdraw his plea.

Following a hearing on that motion, Johnson was allowed to withdraw his plea. The government then filed a Notice of life sentence enhancement under 21 U.S.C. § 851, 841(b)(1)(A). Thereafter, the government filed a superseding indictment adding Three Count's of possession with intent to distribute or dispense crack cocaine to the original indictment. The case proceeded to a Three-day jury trial. The jury convicted Johnson on all Four Count's.

Under advisement of the psr Johnson was to be sentenced to life imprisonment. However, the Fair Sentencing Act was passed prior to Johnson Sentencing Hearing and he was sentenced to 360 months on all Count's.

Johnson then filed a timely Notice for Direct Appeal in which the Circuit ultimately Affirmed the convictions. Following the Affirming of the conviction Johnson proceeded Pro se in filing a Motion to vacate under 28 U.S.C. 2255. Based on Ineffective Assistance of Counsel. The motion was dismissed under failure to prosecute pursuant to Fed. R.Civ.P. 41(b).

Petitioner requested for a Certificate of Appealability in the Eastern District Court of Texas and was denied. He further advanced and requested a C.O.A. in the higher Court of the Fifth Circuit of Appeals, and was denied. Again he asked for a en banc reconsideration and was finalized with another denial.

#### REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has decided not to hear and judge on an important matter of law. Whether the Petitioner actually failed to prosecute his case pursuant to Fed.R. Civ.P. 41(b). Second, whether he was afforded accurate Assistance of Counsel during the sentencing phase of his judgement. Third, the very cases that I present show that the Fifth Circuit of Appeals have reversed and remanded decisions in very simular cases. Therefore to deny me a Certificate of Appealability is to go against and/or contridict their own previous rulings.

#### ARGUMENT

When the District Court denies a Hapeas Petition on procedural grounds without reaching the prisoner's underlying Constitutional



Claims, a C.O.A. should issue when A) The prisoner can show at least that, jurist of reason would find it debateable whether the Petition states a valid claim of denial of a Constitutional Right, and B) Jurist of reason would find it debateable if the District Court was correct in its procedural ruling. (Slack v. McDaniel) 529 U.S. 473, 484 (2000).

#### CONSTITUTIONAL CLAIM

"The Sixth Amendment and Fourteenth Amendment of our Constitution guarantee that a person brought to trial in State of Federal Court must be afforded the right to assistance of Counsel before he can be validly convicted and punished by imprisonment." (Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right to assistance of Counsel implicitly embodies a correlative right to dispense with a lawyer's help. (Id. at 814).

Under the Strickland standard a petitioner must show that his Attorney's performance was deficient (cause) and that this deficiency prejudiced the defense (prejudice). To establish a threshold of deficient performance, a petitioner must first demonstrate that Counsel's representation fell below an objective standard of reasonableness. Courts judge this reasonableness of Counsel's challenge conduct. In Strickland, the United States Supreme Court specifically addressed a so-called "failure to investigate law and facts relevant to plausible options are virtually unchangeable." The Court further explained, however, that choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional Counsel has a duty to make reasonable decisions that make particular investigation unnecessary.

DENIAL OF SIXTH AND FOURTEENTH AMENDMENT  
CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The ineffectiveness occurred when Counsel failed to investigate, challenge, and/or object to the prior conviction of Delivery of a Controlled Substance. Movant's state charge of Delivery did not qualify as a "controlled substance" offense as described in the U.S.S.C. Guidelines career enhancement definition, due to the ruling in United States v. Gonzalez, 484 F.3d 715 (5th Cir. 2007).

DELIVERY OF A CONTROLLED SUBSTANCE  
TEXAS CODE 481.112

In Gonzalez, the 5th Circuit determined that Gonzalez's delivery of a substance charge prior conviction did not qualify as a "drug trafficking offense" as described in 2B1.1 because of the broadness of the language of the statute, stating: "The Texas Health and Safety Code defines the term 'deliver' broadly to include, inter alia, 'offer to sell' a controlled substance ... based on the broad definition, we have held that 4B1.1 encompasses 'both' conduct that does not constitute drug trafficking offenses (trafficking), and conduct that does not (offer to sell cocaine)."

PETITIONER MUST SHOW THAT  
JURIST OF REASON WOULD FIND IT  
"DEBATEABLE" WHETHER THE DISTRICT COURT  
WAS CORRECT IN ITS PROCEDURAL RULING

On March 19, 2018 the District Court made its judgment final in the matter of movant's motion to move the Court to reconsider its position on accepting magistrate judge's recommendation to dismiss movant's § 2255 motion. In its procedural ruling it declared that petitioner had failed to prosecute his case by the act of not mailing the Court Clerk his move from the Federal Institution of Three Rivers Prison to USP Atwater Prison.

In the opinion and report and recommendation the magistrate judge stated that the petitioner was sent mail at the Three Rivers address but the Court's mail was "returned to sender" and labelled "unable to forward." Also stating that the Clerk of Court had not been notified of the change of address. Concluding that the case had been dismissed due to failure to prosecute.

The initial report and recommendation was filed and sent to the movant at the address of Atwater USP. In which both times he immediately responded from the Atwater USP address. Following these responses, movant also filed supplements to the Courts amending his motion on new laws that had been implemented. These responses and supplements should clearly show that movant had no willful intention on holding up or hindering any Court proceedings. At best it would be a situation of confusion, not negligence.

The law states that the Court may, with or without notice, dismiss a civil case for want of prosecution if, A) A plaintiff or attorney willfully fails to make a case ready or refuses to come cause to be made ready for placement on the trial calendar. (Kiglo v. Ricks, 983 F.2d 189 (5th Cir. 1993)). Movant asserts there has never been a time he did not make any part of his case ready within the scope of time frames or limits. Nor was there ever a Court order that he ignored at any time.

Usually, in policy, mail follows all inmates upon their moves. This is a situation where it did not happen, nor is there any record of its existence. However, if he had been aware of a situation surely he would have acted in full compliance. Mere neglect or confusion is not sufficient to justify a finding of delay or willful misconduct

(Makelvey v. AT&T Techs Inc., 789 F.2d 1518 (11th Cir. 1986).

Furthermore, the Fifth Circuit in Love v. Bendily, 567 F. App'x 250 (5th Cir. 2014), held that it was improper for a District Court to dismiss a prisoner's petition based on a single instance of failing to file a "change of address" Notice.

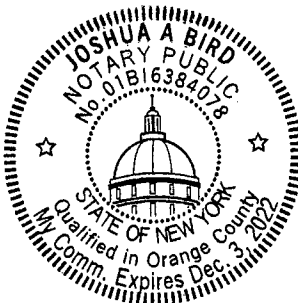
### CONCLUSION

Movant has a clear Constitutional Claim of being denied his Sixth and Fourteenth Amendment Rights to assistance and effective Counsel. Being that movant's Attorney failed to investigate, challenge, and/or object to the PSR, and the prior charge of Delivery of a controlled substance that was used to enhance movant as a "career offender" status. Furthermore, movant has shown that indeed jurist of reason would surely find it debateable whether or not the movant deliberately intended to hold up the Court or fail to prosecute his case.

This movant respectfully asks this Honorable Court, because of these showing, please Grant a Writ allowing this case to be re-opened.

Dated this 24 Day of NOV., 2021.

Joshua A. Bird  
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 Notary Public



Respectfully Submitted,

*[Signature]*  
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