23-6619

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Edward Lee Smith —PETITIONER

(Your Name)

VS.

United States —RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
United States Court of Appeals for the Eighth Circuit
Case No.'s: 23-1151 and 23-1146

(NAME OF COURT THAT LAST RULE ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Edward Lee Smith

(Your Name)
Federal Correctional Institution
FCI Manchester
P.O. Box 4000

(Address)

Manchester, Kentucky 40962

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Smith's two cases (a new charge and a supervised release revocation) were based on the same conduct, sentenced together as consecutive sentences, and appealed at the same time; but, were issued separate appeal numbers. Smith's §2255 motion was ruled as untimely because one appeal was disposed of a year earlier than the other, raising the following question:

I. **Whether Lundy's [1] "total exhaustion rule" applies to Motions under 28 U.S.C. §2255; and If so, was the district court in error to rule Smith's 2255 as untimely?**

With the upheaval of circuit precedent[2] wrought by this Court's Kisor[3] decision, was it error to not issue a Certificate of Appealability on either of the following:

II. **(a) Was Smith's counsel constitutionally ineffective when he failed to preserve, or even argue, the inchoate question when counsel's contemporaries were challenging precedent in multiple circuits?; or (b) Post Kisor, can guideline commentary be used to expand the pre 2023 Guideline text to include inchoate crimes as predicates for a career offender designation?**

Smith argued his first three claims were equitably tolled and his last two claims were timely brought under 28 U.S.C. §2255(f)(4). Contrary to the record before the court, and without an evidentiary hearing, Smith's arguments were denied because he was not diligent, prompting Smith to ask:

III. **Whether the Eighth Circuit erred when they did not grant a certificate of appealability, or remand for an evidentiary hearing on Smith's colorable diligence allegations?**

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1 - Rose v Lundy, 455 U.S. 509 (1982)

2 - Post Kisor many circuits overturned their precedence on including inchoate crimes as career offender predictes. See United States v Nasir, 17 F. 4th 459 (3rd Cir. 2021) (en banc); United States v Campbell, 22 F.4th 438 (4th Cir. 2022); United States v Havis, 927 F.3d 382 (6th Cir. 2019) (en banc); and United States v Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc). See Also 2023 U.S.S.G. Amendment cycle where the Commission struck §4B1.1's Commentary and inserted inchoate crimes in the list of Career Offender predicates.

3 - Kisor v Wilkie, 139 S. Ct. 2400 (2019)

LIST OF PARTIES

[x] 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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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 judgements below.

Opinions Below

This Petition is brought under S. Ct. **Rule 12.4** as both judgements appealed stem from two intertwined criminal cases from the same appellate court.

The opinion of the United States Court of Appeals at Appendix A (CA8 Case No.: 23-1151, the "new" (2019) criminal case) to the petition and is unpublished.

The opinion of the United States Court of Appeals at Appendix B (CA8 Case No.: 23-1146, the "revocation" (2008) case) to the petition and is unpublished.

Jurisdiction

The date on which the United States Court of Appeals decided both of my cases was March 16, 2023.

A timely petition for rehearing (on both cases) was denied by the United States Court of Appeals on the following date: June 22, 2023, and a copy of the order denying rehearing appeasers at Appendix C.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Constructional and Statutory Provisions Involved

Amendment 5 in relevant part -

> No person shall ... be deprived of life, liberty, or property, with out due process of law.

Amendment 6 in relevant part -

> In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.

Title 28 §2243 in relevant part -

> When the writ or order is returned a day shall be set for hearing ... The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts ... The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Title 28 §2246 -

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogations to affiants, or to file answering affidavits.

Title 28 § 2247 -

> On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

Title 28 §2253 in relevant part -

> **(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> ...
>
> **(c)(1)(B)** the final order in a proceeding under section 2255 [28 USC §2255]

(c)(1)(B)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 §2255 in relevant part -

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate

...

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgement on application for a writ of habeas corpus

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of

...

(f)(1) the date on which the judgement of conviction becomes final;

...

(f)(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Statement Of The Case

Underlying Criminal Case Background

In 2008, a jury convicted Smith of possession with the intent to distribute cocaine base and manufacturing cocaine base. He was sentenced to 120 months of imprisonment and eight years of supervised release. United States v. Smith, 983 F.3d 1006, 1007-1008 (8th Cir. 2020) (Reciting original 2008 case's history.) In May of 2019, a Minnesota grand jury indicted Smith for similar conduct. Doc. 1.

The day after the indictment was filed the Government, through attorney Thomas Hollenhorst, filed a document titled Ex Parte Notice to the Court of Possible Related Cases on both Smith's new case[4], Doc. 6 and the older revocation case, Revocation Entry

4 - Because the "new case" (D. MN. 19-CR-00144-ADM) and the "revocation case" (D. MN. 08-CR-00128-PAM) are significantly intertwined in this proceeding, Smith will refer to his 2019 case as the "new case," as it is the main case, where his §2255 documents and proceedings were docketed by the clerk. Smith will reference specific new case docket entries at "Doc. XX." He will refer to the matters on the 2008 case as the "revocation case" and specific documents via "Revocation Entry ##."

119. Later, the district court held the revocation proceedings in abeyance because "the final revocation hearing will be rescheduled ... in consideration of 19-CR-144," further connecting both cases. Revocation Entry 123 (Text only Order).

In the early stages of Smith's case, he persistently urged Attorney Goetz, his paid defense counsel, to fully investigate the evidence the Government planned on using against him. Specifically, Smith asked that the controlled buys be investigated based on the fact that he did not sell "crack" cocaine, nor was he ever known as a source for this drug. Thus, as demonstrated by the police searches, no evidence of the presence of "crack" cocaine was ever found. Furthermore, Smith asked that Goetz investigate the DNA test results based on the fact that Smith's DNA was on only one item seized during the searches of his relative's apartment and incidental transfer could easily have happened. Doc. 91-1 at 22.

Pretrial Investigation and Plea Stage

Each of these requests were either dismissed out of hand by Attorney Goetz as being irrelevant or on other occasions, Goetz would halfheartedly agree that further investigation was a "good idea", but he never followed through. See Exhibit A, Doc. 148-1 at 18.

From the outset of Smith's case, he consistently asked his attorney to allow Smith to view all the BRADY material the Government planned to use in their case. However, counsel could never produce any documentation which supported the Government's claim that Smith had made phone calls from specific areas in and around the city. Then on the day before the deadline for accepting the plea

agreement, almost as a last ditch effort, counsel produced a copy of a document marked only as "APPLICATION FOR SEARCH WARRANT." The document has no identifying marks showing what court it was submitted to and it referenced other search warrants counsel could not produce. /Id. This was the only "search warrant" Smith saw until years later in November of 2021.

When Attorney Goetz presented the proposed plea agreement to Smith, Smith questioned signing it in general. Primarily, Smith questioned the Career Offender stipulation as many of the men he was housed with in county jail were successfully challenging the Government's request that they be classified as Career Offenders. /Id.

Smith wanted to challenge the designation, not stipulate to it. Smith wanted the matter at least be preserved for later argument. Attorney Goetz told Smith to "just sign it." Goetz said Smith's jail mates were winning because "their priors are State convictions, your priors are Federal. You ARE a career offender, period." /Id.

Smith told Goetz to challenge the Career Offender Status no matter what, just to make a record. Goetz refused saying it would be frivolous and could upset the judge. /Id at 19.

The next month, despite Smith's reservations (supra), he signed a plea agreement in which the Government agreed not to object to Smith's probation revocation prison time running concurrently with his new case. Doc. 46 at 4. Of note, this document was only filed on the new case, not the revocation case, even though it affected both cases.

Sentencing

On November 12, 2019 the court held the combined sentencing and revocation hearing for both cases. See Doc. 66 (New case Clerk's minutes) and Revocation Entry 131 (Revocation case minutes). The next day, the court filed its judgement and commitment order on the new case committing Smith to 180 months incarcerated for the 2019 charges (Doc. 69 at 2) to "run consecutively with the sentence imposed in case 08-CR-128-PAM." /Id. Which the "Judgement in a Criminal Case for Revocation" reflected, running the 30 month revocation sentence consecutively "with the sentence imposed on case 19-CR-144-ADM/HB." Revocation Entry 133 at 2.

At the sentencing, the court established Smith's starting sentencing Guideline range at 118 to 210 months. The court then stated "we should deal with the revocation matter, since that's been riding along with this." ST[5] at 4:25-5:1. The court went on to confirm with Smith, his waiver on a revocation hearing (/Id at 5:8-9) and then stated, on the record (which was acknowledged by the appellate court) that:

> The record will reflect that the hearing has been waived, and we'll treat that case [the revocation case] as a part of this case [new case] under the circumstances and do both sentencing at once.

ST at 5:16-19; 983 F.3d at 1007. The court then proceeded to discuss the two cases interchangeably. Considering both as it crafted a single sentence from both convictions into a single judgement.

The Government did not object and in fact agreed with treating everything as a single sentence. ST at 13:8-9.

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5 - ST is the Sentencing Transcript found at Doc. 102-1, pages 5 to 37.

Finally, the defense also considered the "ultimate sentence" crafted by the court to be made of parts from both the new and revocation cases, considering the final sentence as reflecting both criminal cases. ST at 14:10-13.

Ultimately, the court treated the final sentence of 210 months as a package deal with 180 months for the new case and 30 months consecutively for the revocation. ST 21:7-13 and 22:1-7. This treatment is further supported by the court reminding both sides "they have the right to appeal this sentence under Rule 4 of the [Appellate Procedures]," (ST 24:10-11) and closing the hearing with:

> This sentence is a --as I've indicated, I have adjusted a downward from the career offender guideline, as well as an adjustment with regard to the, under 4A1.3, overstated criminal history, for a total of 210 months.

(ST at 22:2-6). Of note, the cover sheet of the transcript is titled "Sentencing and Final Revocation hearing" and indicates it is filed on both 19-CR-144 and 08-CR-128. ST at 1.

Defense counsel filed nearly identical Notices of Appeal on the new case (Doc. 69) and the revocation case (Revocation Entry 134) Mr Goetz indicated on both he was appealing the sentence and that IFP was pending before the district court. A few days later, Goetz applied for IFP status, a waiver of fees, and CJA appointment of counsel for both appeals. The court approved, and ordered, IFP status for both cases on December 4 (Doc. 73 and Revocation Entry 139) indicating in one sentence that "Smith [08-CR-144, ECF No. 138; 19-CR-144, ECF No. 71] are granted." /Id. By then, the Eight Circuit has issued two appeal numbers (19-3565 for the new case and 19-3528 for the revocation case) and consolidated the cases on December 3, 2019. See Consolidation

Order, CA8 Document 4857777, filed in Eighth Circuit case's 19-3528 and 19-3565.

The next day, the Government filed a Motion to Dismiss the appeal by enforcing Smith's plea waiver. Ultimately the Circuit Court dismissed Appeal 19-3565 and broke the consolidation. See 12/27/2019 19-3565 CA8 Document 4865676; 19-3528 CA8 Document 4865694. Yet, district court records such as transcripts and such like continued to be filed on the 19-3565 appeal docket even though it was both dismissed and unbound from Appeal 19-3528.

Throughout the appeal preparation, both before and after Smith was sent to Levenworth, Kansas to start his sentence, Smith insisted that Goetz include in the appeal a challenge to his status as a career offender because one of the priors used to career Smith was an attempted drug conviction. Under Smith's (and others) theory, his inchoate prior was not countable in career offender calculations. This is especially true applying Kisor v. Wilkie to the Guidelines making attempt crimes no longer countable under §4B1.1. See Petitioner's Declaration regarding Timeliness and Equitable Tolling or his 2255 Motion at ¶¶'s 7-8 filed as Exhibit C in Support of Smith's Objections, Doc. 102-2.

This discussion went on until Goetz definitively shut the door on it via an email to Smith where Goetz states he has "no doubts that your two prior federal felony drug offense convictions ... qualify as predicate offenses for career offender purposes." When Smith realized he would not be able to convince Goetz what, on it's face, appeared to be a credible appellate issue, he worked to determine how to get the matter raised with the appellate court on his own. Doc. 102-2, at ¶12.

In early April 2020, before the case was submitted to the direct appeal panel, Smith filed on the appellate docket "Appellant's Petition under CJA §II (6)", which requested the court substitute counsel pursuant sec. II, paragraph six of the Eighth Circuit's Criminal Justice Act Plan for reasons Smith outlined. He raised: the same inchoate challenges to his career offender status he had been trying to get Goetz to file. Smith's hope was the Circuit would hold the appeal and appoint different counsel to raise the issue. /Id at ¶13.

The appellate clerk filed the motion on the appellate docket, 19-3528 at CA8 Document 4898472 on April 2, 2022, as a "Motion for Appointment of Substitute Counsel," which the Clerk, on CA8 Document 4898472, ordered to be "taken with the case for consideration by the panel which this case is submitted for disposition on the merits."

Smith's motion for appointment of substitute counsel set out the legal authorities and factual bases of his premise his career offender status was illegal. For the authority and facts, Smith cited to United States v. Winstead, 890 F.3d 1082 (D. DC. 2018) and Kisor v. Wilkie, supra. Noting that because the Guideline Text of §4B1.1 was not ambiguous it's reach cannot be expanded by the Guideline Commentary to include inchoate crimes, establishing in the 19-3528 appeal the same basis, facts, and authority raised in Ground One of his §2255.

Smith also raised specific and direct concerns regarding Goetz's failure to research the laws and facts of a viable issue. The very same issue he raised in the Second Ground of his 2255. See Doc. 91-1 at 9-17.

On December 23, 2020 the Circuit Panel issued it's opinion affirming the court's sentence. There are three relevant points within the Panel's opinion:

> For the purpose of this Opinion, all citations to the record originate from Case no. 19-CR-144 (ADM/HB), [the dismissed appeal.]

United States v. Smith, 983 F.3d at 1007 N. 2, the panel went on to recite the court's finding at sentencing stating in the opinion:

> [T]he record will reflect the hearing has been waived, and we'll treat that case [revocation] as a part of this case [new] under the circumstances and do both sentences at once.

/Id. Finally, in closing, the Circuit Court considered "the record in it's entirety" and found that the district court

> understood the sentencing guidelines were advisory rather than mandatory ... [and also found] no error. ... [therefore] we affirm Smith's consecutive sentences."

/Id at 1009.

A few hours later, a Circuit judge entered a separate order denying as moot Smith's Motion for Substitute Counsel. Appeal 19-3528, CA8 Document 4988136.

Smith filed a timely writ of certiorari on May 12, 2021 raising the same issue Goetz raised as Smith was procedurally barred from raising any other issue. In the writ, he noted how the sentencing court, and the appellate court, treated both cases as all part of the same case. On June 28, 2021, this Court denied the writ in case no.: 20-8146. See 141 S. Ct. 2873 (2021).

Post Conviction Investigation and Activities

At about the same time Smith reached out to a local Kansas university law school for help preparing his 2255 wanting to get it in early and secure a spot when it was time to do his 2255. Doc. 102-2 at ¶25. Smith was told, based on his application, they could not help him until after his appeal was done. /Id at ¶26.

In August of 2020, the appellate court set Smith's appeal for "no argument." Smith objected, pro se, which, within a few hours of docketing, a circuit judge denied. See 19-3528 at CA8 Documents 4958631 and 4958743.

During the summer of 2020, Smith spoke to a few fellow inmates who had extensive experience in the 2255 and habeas fields. They reviewed the correspondence from Attorney Goetz and Smith's Sentencing Transcripts. They told Smith that as they understood the law, coupled with how the courts have been treating his cases, he needed to wait until both appeals were complete before filing his 2255. They indicated if he filed too early he could lose the ability to challenge all parts of his sentence and convictions. Doc. 102-2 at ¶15. This was supported in Smith's own understanding of the law; the University's Post Conviction Center's answer; and what was clearly stated in 28 U.S.C. §2255 Standard Form instruction number 9.

After almost two years of constantly attempting to get copies of the full search warrants and affidavit application from his attorney, on November 4, 2021, Mr. Goetz's office released two of the multiple search warrants on Smith's case. See Doc. 102-2 at ¶19. Smith had never seen the search warrants before, and they raised a whole slew of questions about the legality of the property and cell phone searches which underpin his conviction

and plea. The very same concerns he has asked his attorney to look into to begin with.

In early 2022, Smith worked with Andrew Wilson of Clas and Wilson to potentially represent him on his §2255. /Id at ¶28. They got Smith's file from Attorney Goetz and sent Smith a copy (/Id at ¶31-31); some of what was in Goetz's file were material items Smith had never seen before. /Id at ¶33. Before Attorney Wilson would accept payment to engage on the case, he performed a timeliness review of Smith's case and determined that Smith was on track to file a §2255 in June of 2022. /Id at ¶29.

§2255 Motion Proceedings

Smith proceeded, based on his understanding that his 2255 Petition had to be filed on or before June 28, 2022 (28 U.S.C. §2255(f)(1)), to prepare his Motion under 28 U.S.C. §2255 where he eventually raised five grounds. The first three regarding the career offender status challenge and his attorney's failures therein; and the last two addressing potential questions raised by the contents of the two search warrants and the subsequent post conviction investigation their discovery spawned. Doc. 91; Doc. 102-2 at ¶20.

On May 17, 2022 the court's Clerk docketed Smith's §2255 Motion, and a couple of days later the court ordered the Government to respond to all five grounds. Doc. 92.

Because Smith's post conviction investigation was revealing a significant amount of new material evidence which supported and augmented Grounds Four and Five of his Petition, he filed a Verified Motion to Stay the Proceedings in June of 2022, via the prisoner mailbox rule, to allow him time to amend his petition

BEFORE the Government responded. Doc. 97. The district court ignored the motion until it dismissed Smith's 2255.

After an extension, the Government chose instead to file a Motion to Dismiss (Doc. 99) presumably under Civil Rule 12(b)(6) claiming that Smith's petition was untimely. To support their position, the Government had to treat Smith's two convictions (08-CR-00128 and 19-CR-00144) as separate cases and separate sentences. They claimed that Smith is time-barred on the new case because his 2255 was filed "nearly a year after it was due." Doc. 99 at 5; and none of the claims Smith raised pertained to the Revocation case. /Id at 6.

In response Smith filed an extensive Objection to Dismissal (Doc. 102) where Smith provided the court with "a complete picture of the whole record" (/Id at 2) instead of the cherry picked version the Government presented, noting as Smith does here, a fuller picture of the record. /Id at 2-12.

In his objection, Smith raised three distinct legal and factual arguments against the dismissal of his 2255 as untimely, specifically: Smith argued:

(1) His §2255 motion was timely because any procedural defaults are excused due to counsel's unconstitutional representation (Doc. 102 at 13-15); that under Burton v. Stewart, 549 U.S. 147, 156 (2007) Smith's two sentences comprised one judgement, which became final on June 28, 2021 (/Id at 15-16); and that Rose v. Lundy, 455 U.S. 509 (1992) prevents piecemeal litigation of habeas petitions (/Id at 16-18).

Additionally, Smith's Fourth and Fifth Grounds were timely because they were brought under 28 U.S.C. §2255(f)(4)'s clock for the newly discovered search warrants. Which Smith saw for

the first time in November of 2021. /Id at 21-22. And which would have completely changed Smith's position on pleading and/or withdrawing his suppression motion. Instead of pleading, if Smith had seen the search warrant, he would have insisted on supplementing the suppression motion and continuing with the hearing and trial. /Id.;

(2) Smith offered an alternate timeliness theory that if the Government was correct, and finality attached sooner, any clocks were tolled. Doc. 102 at 23-24. Smith noted that to have the time tolled he would have to show he was diligent and the circumstances that prevented his timely filing were both outside his control and extraordinary. /Id at 23. In his sworn pleading, Smith established: (a) his attorney withheld critical documents from him (the actual search warrants), misled Smith as to whether or not his case was still on appeal until June of 2021, and led Smith to believe his cases were treated as one (/Id at 24); and (b) that a reasonable person, all of the professionals, and the plain reading of the law --including the instructions of the 2255 standard form-- counseled Smith had to wait until both parts of his sentence were final before his judgement was final. (/Id.)

Smith argued this meets extraordinary circumstances under controlling law, warranting, at minimum, further hearings and briefings on tolling; and

(3) That Smith was diligent in the pursuit of his claims because from the outset of his post conviction proceeding Smith carefully documented the numerous steps he took to be involved, active, and engaged in both his criminal, appellate, and post conviction processes (see supra at 12-13). He alleged steps that he performed during an unprecedented global pandemic, with varying

obstacles thrown up by court and legal office closures, docket freezes, and lengthy quarantines even in transportation between jails all on top of other normal prison life. In the pleadings and exhibits, Smith colorably established he: (a) was involved day one and throughout his criminal case, (b) questioning counsel's actions (Doc. 91-1 at 10), (c) gave explicit instructions to counsel regarding the search warrants, including questioning what counsel did eventually turn up (Doc. 91-2 ¶8), and (d) throughout his COVID-19 impacted prison journey there were periods of time where he had no access to outside communication, his filings, or research abilities. Doc. 97 at 2. When that occured, Smith immediately worked with friends and family to get the actual search warrants on his case from the State authorities including State courts and his federal attorney. /Id.

Eventually, in late summer of 2021, he was able (via another attorney) to get counsel's records. /Id. In reviewing those records, Smith determined there were multipled search warrants he had never seen. /Id. By November of 2021, Smith successfully retrieved the actual complete search warrants (/Id at 3), in reviewing these documents, he discovered there were serious problems with them - including that at critical points in the Government's case-in-chief the warrants relied on were expired, or failed to mention the other warrants issued when applying for newer warrants from different State judges. None of which was presented to the district court. /Id.

Smith realized he was out of his depth, but that the legality of the search documents was central to his case. He contacted a private investigator who specialized in this field for follow ups and consultation. /Id. Realizing he was running out of time,

but that he had to preserve his Fourth Amendment claims, and counsel's failure to investigate claims even though they were still factually developing, Smith was required to file his 2255.

As to timeliness of these two grounds, Smith brought them pursuant 2255(f)(1) and (f)(4). He filed his motion with two skeletal grounds. Less then 30 days later Smith filed a motion to stay to allow him to finish gathering his facts and exhibits to properly flesh out and present his allegations regarding failures of his counsel to discover, or act upon, the Constitutional inadequacies in law enforcements search and investigation of his case. Doc. 97 at 2. Smith knew that without a valid search warrant the Government's case collapsed and his case would be dismissed, thus he had, and could, establish counsel's performance was deficient and counsel's failures prejudiced him because (separately) Smith's Fourth Amendment rights were also violated. Doc. 91-1 at 21-25. Further, Smith alleged he had seen, or been advised, about the discrepancies in the search warrants, he would not have pled the case out and insisted on going to trial. /Id at 19-20.

The district court denied Smith's §2255 Petition as untimely. Doc. 105, attached as Appendix D to the Petition.

Smith filed a timely Motion to Reconsider and Request for Clarification under Federal Rules of Civil Procedure, Rule 59(e) (Doc. 107) in which he raised two distinct errors at law or fact; and placed on the record the two recently discovered documents.

Smith raised two specific questions: (1) Did the district court manifestly err when it overlooked dispositive, controlling precedence and grant the Government's motion to dismiss as well as deny, without an evidentiary hearing, Smith's §2255? (/Id. at 6-13); and (2) Did the district court clearly err in its factual

finding on Smith's "diligent pursuit of the facts" determination when his well plead facts establish otherwise? (/Id at 13-16). He also specifically discussed the stay he requested (Doc. 93) which, he claimed, was intended to allow him to present the recently (November 2021) discovered sealed probation report (Doc. 107-3) and the two cell phone search warrants (/Id. attachments 1 and 2) which the district court's hasty denial prevented being litigated. /Id. at 16-17.

Smith recapped (Doc. 107 at 17 and 18) what, and how, the three new documents affect his grounds raised and would have changed the outcome of his criminal case if Smith had seen these three documents:

1. November 16, 2018 cell phone ping/locate search warrant, good for 60 days from issuance. Attached as Exhibit K, Doc. 107.

2. A second state cell phone ping/locate search warrant, issued by a different judge on February 6, 2019. Attached as Exhibit L, Doc. 107.

3. Probation's sealed amended Notice of Supervised Release Violation Letter. A seven page report provided to the court, which Smith never saw until he finally got a copy of it directly from probation. Attached as Exhibit M, Doc. 107.

The documents, at minimum, establish that the state police were still gathering location data on Smith's phone after the first warrant expired on January 17, 2019. But the state police reported to probation that:

> "On February 5 [a day before the second warrant is authorized] the undersigned was contacted by the Minneapolis, Minnesota, Police Department indicating the defendant was under investigation for a drug trafficking case. It was reported the defendant's phone was being pinged and he had been staying at an Apple Valley, Minnesota, address for two weeks." Exhibit M.

These two documents show that the Minneapolis police, a department with a history of abuses, was illegally monitoring Smith's phone based off a warrant that had been expired for at least 2-3 weeks. This alone was never presented to Smith, or the district court and would have caused him to refuse the plea and proceed to trial.

Also, the second warrant used to secure additional coverage and provide the application of authorization, which apparently fooled Mr. Goetz, was issued February 6, 2019 by a different judge than who issued the first warrant. Compare Exhibit K and L showing different issuing judges.

This is critical because a review of the second warrant application establishes there is no mention of a first warrant, or the fact it failed to produce any actionable activity beyond tracking some of Smith's movements. This is a pivotal fact and should have been tested under a Frank's hearing, but due to ineffectiveness of counsel, it was not. This alone would have deterred Smith from taking the plea, if only he had known.

As alleged in his petition, but for Smith's attorney's misadvice that the searches were legal, when clearly they were not, he would not have pled, the suppression hearing would have proceeded, and the outcome would have been different. Doc. 91-1 at 21-25.

The district court in a terse order, denying Smith's 59(e) motion, claimed "none of the movant's arguments or exhibits ... warrant clarification." Doc. 109 at 2. Smith timely appealed the court's denial to the Eighth Circuit.

Application For Certificate Of Appeal

Smith raised multiple questions for the circuit to consider but grouped the questions by five issues. Four are relevant here:

Jurist of reason would strongly disagree and find very debatable the district court's procedural failure to abide by 28 U.S.C. 2255(b)'s direction that unless the record contradicts, or the allgeations are palpably false, colorable claims and allegations are palpably false, colorable claims and allegations require an evidentiary hearing (COA Application at 6-8;

Smith presented three newly discovered (to him) documents with his 59(e) motion. The warrants were substantially different than what attorney Goetz based his Motion to Suppress on (compare 2019 Doc. 33 at 7-22 with Exhibits J and K attached to Doc. 107) and the section of the probation report discussing local law enforcement's monitoring of Smith's cell phone after the first warrant expired (/Id at 8).

This should have prompted the lower court to order an evidentiary hearing, or at least additional briefing, on these newly discovered documents, instead it claimed the documents would have no effect. This is error under existing precedence and statute (/Id);

Jurists of reason would disagree with the lower court's finding that Smith's petition was untimely, untollable, or otherwise procedurally barred from being heard (/Id at 9); and

Whether inchoate crimes can count as predicate for career offender purposes is now, post Kisor, a matter in serious doubt. Many Circuits, and even the U.S. Sentencing Commission has recognized the question foreshadowed by the state of the law at the time of Smith's plea and sentencing. Yet, his counsel, and the lower court, declared --without review, or a hearing-- the matter was foreclosed (/Id at 10-11).

In a single sentence, the appellate court denied Smith's Certificate of Appealability application on March 16. See CA8 Appeal No. 23-1151 (New Case) attached at Appendix A; CA8 Appeal No. 23-1146 (Revocation) attached at Appendix B.

Smith timely filed, and the circuit docketed, his Motion for en banc Rehearing where he raised two questions, recapped in relevant part:

... [D]id the Panel here err by denying COA instead of remanding the matter because the judgement lacked finality due to: Smith's unresolved Burton and Lundy timeliness defense (a question of first impression) and his unaddressed misadvice of plea counsel claim?; and

Did the Panel fail to conform to this, and the Supreme Court's controlling precedence on the holding of evidentiary hearings when it did not grant COA on whether or not the district court erred when by not holding an evidentiary hearing regarding Smith's diligence or colorable tolling allegations and claims?

Both of which the Circuit denied on June 22, 2023 as overlength (Appendix C). This timely Petition for Certiorari follows.

Reasons To Grant The Writ

I. To promote: uniformity and fairness, the AEDPA's finality policy, and vigorous protection of citizen's rights Lundy's total exhaustion rule needs to be explicity applied to Motions under 28 U.S.C. §2255. This would prevent lower courts from erring regarding when finality happens, like Smith's district Court did.

In Jones v. Hendrix, No. 21-857 (June 23, 2023) this Court clearly spoke: finality matters, establishing that federal prisoners have one realistic shot, barring a watershed moment, to bring their extra record claims and concerns forward. Therefore, it is critical to preserving a citizen's right to a one full and fair hearing, that lower courts get the finality question right.

Here, both of the lower courts got it wrong.

Ignoring the language and statutory history of §§'s 2244 and 2255, and this Court's precedence, the lower courts denied Smith access to the full panoply of habeas proceedings his colorable claims and allegations warranted.

Smith's case provides the perfect vehicle to settle this area of law: Balancing a federal prisoner's right to one full, and fair, hearing on his post conviction concerns (correct, and fair, application of the law) with the Congress' concerns over finality of the conviction (via the AEDPA); while preserving the court's system's reputation.

A. In the context of a federal Prisoner's habeas motion, post Jones v Hendrix, getting the "When is it final?" question right is a critical process needing clear guidance.

Over the next few decades, as this Court continues to review and revise Constitutional law and full implementation of prison reform is achieved, there will be a significant up tick in cases like here, where there is a sentence for a new charge, and one for a revocation. Which will lead lower courts to grapple with the very same issues this Court settled in Lundy, albeit in a state prisoner context. Like the recent grant of certiorari in United States v. Rahimi (22-915, June 30, 2023), it would be prudent for this Court to be ahead of the curve and speak now.

Because there is a significant body of law developed on the subject in the state habeas context, and only one respondent (the Government), the normal custom of waiting for circuits to decide first is not necessary, nor would it add value to the discussion.

Justice Thomas made it clear in Jones that the types of relief, and the breadth of relief between petitioners under §2254 versus §2255 are different and specific. /Id Op. Slip at 21-22, indicating §2254 relief is narrower that §2255.

Justice Thomas also recognized that the AEDPA imposes a "modified res judicata" bar on second or successive 2255 motions. /Id at 24. The Jones decision rests on "Congress' judgement regarding the central policy question of post conviction remedies - the appropriate balance between finality and error correction." /Id. As happened here, when lower courts get the central question wrong, the Court's reputation suffers, Congress' will is thwarted, and individual citizen's suffer.

By answering Smith's question: whether Lundy, and its progeny's holdings (that piecemeal habeas litigation is disfavored) applies equally to §2255 petitions, the Court will settle a brewing issue before it boils over. similar to why the Government asked the Court to step in and settle Rahimi's Second Amendment question before it had percolated in Circuits more.

Additionally, the process and line of reasoning this Court applies to the question here will inform and instruct lower courts as they grapple with the shifting foundations upon which decades of law was built, but now is being adjusted as this Court continues to review and revamp how the Constitution is interpreted and applied to criminal law: both what is considered criminal (Rahaimi) and how criminal procedure is to work (Jones).

B. Due process, the justice systems reputation for fairness, and 28 U.S.C. §§'s 2244 & 2255(f) text, as well as history require Lundy, and its progeny (Burton[6], Walker[7], and Rhines[8]) holding(s) be applied to Motions brought under 28 U.S.C. §2255.

At their core, this Court's opinions on filing mixed petitions is summed up in the United States Court Administrator's standard 28 U.S.C. §2255 Form's instructions, which state:

> [Petitioner] must include in this motion, all grounds for relief from the conviction or sentence that [he] challenge[s].

Instruction Number Nine of Form A0243 (Rev. 09/17).

This warning stems from well settle foundational habeas law. First settle in Lundy where a plurality of the High Court states that district courts should dismiss "mixed petitions" --those with exhausted and unexhausted claims-- and that petitioners with such petitions have two opinions. They can withdraw a mixed petition, exhaust the rest of their claims, and then return to the lower court with a fully exhausted petition. /Id at 550-22. Alternatively, prisoners could proceed with only the exhausted claims in the mixed petition and risk subjecting later petitions that raise new claims to rigorous procedural obstacles. /Id at 520-21. This reasoning was adopted by Congress and codified into AEDPA amending the habeas statutes accordingly.

A few years after the 1996 adoption of the AEDPA the High Court further settled this matter by establishing "piecemeal litigation" is disfavored. Walker, U.S. 533 at 180. As piecemeal litigation is at cross purposes with the AEDPA's goal of "streaming federal habeas proceedings." Rhines, U.S. 544 at 277.

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6 - Burton v. Stewart, 549 U.S. 147 (2007)

7 - Duncan v Walker, 533 U.S. 167 (2001)

8 - Rhines v Weber, 541 U.S. 269 (2005)

In 2007, this Court issued a per curiam decision, Burton, which should be dispositive here. Smith's district court condoned the Government's premise which was very similar to what Lonnie Burton did in his habeas case, that if he, Burton, had waited to file his first petition until the review of his sentence to become final, he would lose the opportunity to challenge his conviction. This position was soundly rejected by this Court, (Burton, 549 U.S. at 151) because it misread the limitations language, which here reads "the date on which the judgement of conviction becomes final." §2255(f)(1). Relying on Berman v. United States, 302 U.S. 211, 212 (1937) the Burton ccurt held that "final judgement in a criminal case means a sentence. The sentence is the judgement. Accordingly, Burton's limitations period did not begin until both his conviction and sentence became final by the conclusion of direct review or the expiration of the time for seeking such review." Burton at 156.

Because §2255 motions are a federal prisoner's only realistic chance to present his extra record concerns on how his conviction was obtained outside the bounds established by the Constitution and Congress. It is reasonable that the same protections afforded state prisoners in federal habeas litigation should be provided, post Jones explicitly, to federal prisoners. This is especially true when state prisoners have already had opportunities for their concerns to be aired, but federal habeas litigators have jsut the §2233, nothing more.

Additionally, courts have interpreted this Court's pro se pleading jurisprudence to understand that prisoner litigants fight an uphill battle, with the deck stacked against them and a court should read their pleadings with leniency as incarcerated litgants are laymen in the law, and many have less than a high school education.

Fundamental fairness and the reputation of the court system call for the application of Lundy's, and progeny, to be applied with equal force to 28 U.S.C. §2255 motions as it currently does to motions brought under 28 U.S.C. §2254.

C. The district court erred by ruling that Smith's mixed petition was untimely just because one component of his judgement became final in March of 2019; and the other in June of 2021.

At its core what the Government suggested, and the lower courts adopted, is that Smith should have filed a "mixed petition", one that addressed what it presumes are claims stemming solely from the new case (19-CR-144) Doc. 99 at 6. And then a second petition for anything arising from the revocation case (08-CR-128). This approach is disfavored.

The Government's reasoning adopted by implication by both lower courts, conflicts with both Lundy and 28 U.S.C. §2244(b). Further, if followed, the reasoning would allow prisoners to file separate habeas petitions in the not uncommon situation where a conviction is upheld but a sentence is reversed, a real possibility in the instant case.

Applying Burton's logic to Smith's case, his sentence was not final until both of its components (convictions) were final. Which was June 28, 2021, the conclusion of the direct review phase of his revocation case. Put another way, because his two convictions were treated by all (court, Government, and defense) as one case, his judgement, which was the subject of his 19-3528 (revocation case) did not become final until this Court denied his writ of his certiorari on June 28, 2021, 11 months before the filing of Smith's timely petition under 28 U.S.C. §2255.

This legal position is further supported by the fact that the revocation appeal (19-3528) was about whether or not the court erred by treating the revocation portion of Smith's judgement as required to be served consecutively. A matter which was addressed only in the plea agreement for the new case, and only filed on 19-CR-144. By the revocation appeal focusing solely on a matter within the four corners of the new case, the boundaries of the two cases were further blurred. Viewed another way, the sentence the district court issued Smith was a package deal incorporating both his convictions into a single intertwined entity or judgement.

With the above law and facts in mind, the pivotal finality question is answered: Smith's judgement was final when the last component (sentence) was final which was June 28, 2021 when this Court denied certiorari. Making his May, 2022 filed §2255 timely under 28 U.S.C. §2255(f)(1).

II. Smith's Sixth Amendment right to effective representation was denied when counsel failed to argue, or even preserve, U.S.S.G. §4B1.4's inchoate prior question roiling through the circuits due to counsel's contemporaries challenging precedent post this Court's Kisor decision.

Smith's plea, sentence, and appeal were right on the cusp of Kisor's release and perfect to test whether or not, and how, Kisor affected the Sentencing Guidelines, specifically the career offender designation. Smith's defense counsel missed the boat. Ever since Smith has been asking a court to correct counsel's error, or give him an opportunity (hearing) to prove how and why it would affect the outcome of case.

A. A GVR in light of Kisor and Stinson would bring parity to thousands, confirm how agency deference doctrine applies to the Guidelines, and reaffirm counsels obligation to challenge questionable sentences.

There are thousands of career offender whose priors would no longer count as a predicate potentially reducing their sentence drastically. To accomplish this all that is needed is a grant, vacate, and remand (GVR) in light of Kisor and a simple answer would suffice.

Additionally, this case provides the opportunity to clearly indicate in this plea dominated system it is a counsel's duty to stay informed of, on top of, and be ready to challenge any changes in the complex web of federal criminal sentencing law.

B. Smith's counsel failed to invesitgate readily available law indicating a major shift in sentencing precedence was a foot, causing his client to be subjected to a starting guideline range three times what it should have been.

Here, counsel's contemporaries were challenging, or at least preserving, whether or not after Kisor, inchoate priors counted as career offender predicates [9].

As established following, under Strickland's [10] familiar two part test, Smith's attorney's failure to preserve, or argue, the then new Kisor inflicted change to the inclusion of inchoate priors as career offender predicates violated Smith's Sixth Amendment rights.

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9 - See United States v. Nasir, 982 F. 3d 144 (3rd Cir. 2020) (en banc) where in defense counsel Keith M. Donoghue successfully argues Kisor overturned Stinson's presumption and removed inchoate crimes from the list of possible career offender predicates; United States v. Dupree, 57 F. 4th 1261 (11th Cir. 2023) (en banc); where Conrad B. Kahn in 2018 did the same; and United States v. Campbell, 22 F. 4th 438 (4th Cir. 2022) where Jenny R. Thoma did the same in 2019.

10 - Strickland v. Washington, 466 U.S. 688 (1984)

(1) As evidenced by counsel's contemporaries actions, it was deficient performance, under Strickland's (466 U.S. at 687) test for counsel to not argue, or at least preserve the inchoate question.

At the point where counsel was advising Smith to take a plea stipulating that Smith was a career offender, this Court issued Kisor narrowing the deference afforded federal executive agencies interpretations of their own regulations.

Competent members of the Federal Defense[11] Bar immediately saw the implications of that change on the question of inchoate priors and career offenders predicates. Because, at the time[12], inchoate crimes were only listed in the commentary to §4B1.1, not the Guideline text. Savy defenders knew that Kisor applied to the Guidelines via Stinson v. United States, 508 U.S. 36 (1993). Specifically that the guideline comments are the Commission's opinions on the Guideline (regulation) text. /Id at 38. Which, at the time of Stinson, were given heavy deference.

Up to date and competent defense attorneys recognized that Kisor's deference narrowing applied to Stinson, and narrowed the deference applied to the commentary when, like the career offender guideline, the text was unambiguous. Based on that understanding, defense and sentencing attorneys across the country filed challenges to the inclusion of inchoate crimes as career offender predicates.

None of this registered with Smith's counsel, he insisted, even during the appeal when Smith had informed him of Kisor's implications, that none of it mattered. Smith was unquestionably a career offender.

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11 - Note 9, supra

12 - The U.S. Sentencing Commission recently moved the commentary into the text of the Guideline. See 2023 Amendment.

With modern methods of legal research, all Smith's counsel had to do was reach for his keyboard, and check what was happening in other circuits, or even post on any of the sentencing blogs the inchoate question. He would have found numerous examples of challenges his duty to zealously represent his client required him to raise. He did none of that, therefore he was deficient in his representation of Smith.

The professional norm expected of modern federal defenders is to be aware of changes in controlling law, and challenge application of questionable guidelines. Here, counsel's representation fell far below that standard rendered a Constitutionally deficient performance. Strickland, 466 U.S. at 687; Hinton v. Alabama, 571 U.S. 263 (2014) (per curiam).

Because counsel's inadequate performance affected Smith's starting guideline range by almost tripping the range prejudice can be presumed; as any error in calculating the guideline range is sufficient to "show a reasonable probability of a different outcome." Molina-Martinez v. United States, 578 U.S. 189, 201 (2015). This squarely meets Strickland's prejudice prong. Strickland 466 U.S. at 691-96.

C. U.S.S.G. §4B1.1 (2018) is unambiguous as to what it considers career offender predicates and therefore the commentary cannot expand its definition to include inchoate crimes.

A circuit split has developed over this question. it is resolved by a straight forward application of Kisor's instrucions:

> Is the regulation (guideline) text ambiguous? No - then nothing further needs to be done.

Kisor, 139 S. Ct. at 2414.

Therefore as applied to the pre 2023 U.S. Guidelines, career offender (§4B1.1) inchoate crimes cannot be counted as predicates to designate a particular defendant a career offender.

This Court should resolve this Circuit split, and this case provides a great simple opportunity to grant, vacate, and remand to accomplish the task.

III. Smith alleged his post conviction actions met the reasonable diligence standard, the Government did not dispute this. It was error for the lower courts to not issue C.O.A. because Smith had met §2255(b)'s threshhold for a hearing.

After Jones, §2255 motions are the only realistic shot federal prisoners have to challenge, with extra-record facts, their convictions, or procedurally how the conviction was brought about. Here there are two fact intensive and specific area's where statute and case law called for an evidentiary hearing; but the district court ignored the law to declare, contrary to the record, that Smith was not diligent (Doc. 105 at 8); and denying both Smith's alternate timeliness defenses (equitable tolling and newly discovered evidence) because Smith somehow was not diligent.

The Eighth Circuit, despite a clear showing many jurists would disagree with the lower court's decision, declined to hold the district court responsible for the gross failure is substantive habeas procedure.

A. Nearly all habeas petitions (§§'s 2254 & 2255) are initialized by pro se incarcerated individuals; a specific understanding of the reasonable diligence standard in the incarcerated context would benefit all parties.

When a prisoner litigator establishes his allegations are: not palpably false; not contradicted by the record: material to his claims of relief; and the relief he is requesting is warranted if his facts are true; he by statute and precedent, is required to get an evidentiary hearing.

Too often that does not happen. district court judges make a call, like here, without a hearing forgetting that although what happened before them, on the criminal record, appeared to be correct; looks can be deceiving. Due process, and the courts reputation for fairness, requires a deeper look if a petitioner meets specific criteria, which was done here.

This case presents a good candidate to address exactly what diligence is needed, how and when an evidentiary hearing should be held on diligence, and how undisputed material facts should be handled in a habeas context.

B. The lower court erred when they failed to conform to controlling precedent on the holding of an evidentiary hearing where the record before the district court did not conclusively show Smith was not entitled to the relief he was requesting.

(1) Controlling law establishes evidentiary hearings "shall be held" if the record does not conlusively establish a petitioner is not entitled to relief.

The panel failed to enforce Machibroda's command that a court's fact findings are not "impervious to extra-record" review if the findings were "clearly wrong." Machibroda, 368 U.S. 487, 494-95 (1962). Put simply as demonstrated below, infra, there were

"extra-record" or habeas-record facts that clearly replaced facts in the prior criminal record; placing those facts in dispute. Under Machibroda, "a hearing must be held." /Id.

Both the district court, and the Panel, failed to abide, or enforce, this Court's clear precedent that when a habeas petitioner alleges facts that if true, amount to ineffectiveness of counsel (like here) a hearing **must be held** unless the record affirmatively refutes (which it clearly does not) the factual assertions upon which the claim is based. Machibroda, 368 U.S. at 494-95.

The Panel, or lower court's, failure to follow clearly settle law regarding ineffective assistance of counsel claims is clear legal error. Hinton (Failure to investigate a fundamental part of the Government's case is a "quintessential example," of unreasonable performance under Strickland standard.)

When the record (criminal plus habeas) contains sharply conflicting evidence, as established supra, §2255(b) mandates an evidentiary process be conducted.

Thus, the Panel clearly erred when it did not issue a COA on, at minimum, the lack of an evidentiary hearing in Smith's §2255 proceedings.

> (2) The record before the district court contained numerous colorable allegations discussing Smith's diligence in pursuit of the facts, law, and evidence supporting his post conviction petition.

Smith carefully detailed his active involvement in his case, despite the obstacles thrown up the COVID-19 pandemic, a reluctant lawyer, and prison life in general, Smith established he: stayed in regular contact with his attorney pre-trial (Doc. 91-2 at ¶¶'s 5-9); was involved as much as his attorney would allow during

the direct appeal (/Id at 13), going so far as to send written instructions, which counsel declined, and even filing a separate motion with the Appellate Court discussing problems with counsel, and raising the inchoate question Smith wanted heard (Doc. 91-2); and then he submitted a pro se certiorari petition to finalize his criminal appeal. Pet. at 2.

During the post-conviction phase the record shows Smith was even more proactive, where he: worked under significant COVID protocol restructions to research the state of the law, tracking developments spawned by Kisor (Doc. 91-2, ¶10); wrote letters, called and coordinated with family to get the search warrants issued by state law enforcement officers used in his criminal case (Doc. 102-2, ¶¶'s 14-16); communicated with various legal professionals regarding process and claims within his 2255 (/Id at 24-32); and stayed in regular contact with his appellate attorney. Smith's diligence in searching for the warrants finally paid off in November of 2021, at which point he engaged the service of a private investigator to determine the problems with the warrants (/Id at 19).

All of which was on the record before the habeas court, yet without holding an evidentiary hearing or discussion on the record, the court held "Smith has provided no details or documentation to show he exercised due diligence," Doc. 105 at 8 (cleaned up).

At minimum, Smith met the low threshold for an evidentiary hearing on the question of whether or not he was diligent in his pursuit of his claims, because nothing in the record conclusively established he was not diligent (28 U.S.C. §2255(b)) and if his undisputed allegations were proven true, the relief he was requesting (tolling or timeliness under §2255(f)(3)) would be granted.

These deficiencies were raised both in Smith's 59(e) motion at pages 13 and 14; and in his Application for COA, Second Issue, Question (e).

It is very curious that neither the lower court in response to Smith's Motion to Reconsider, nor the Panel, addressed the initial denial when it is very well settled that diligence, especially by an incarcerated litigant, is not "maximum feasible diligence," but instead is "reasonable diligence" in light of the circumstances faced by the incarcerated petitioner. Holland, 560 U.S. 631, 653 (2010).

This failure to follow, or enforce, Smith's basic rights to a fair and just hearing on his one and only habeas proceeding necessitates this Court correct the errors below.

> 3) The lower court overlooked Smith's tolling allegations, presumed facts not in the record, and did not address conflicts in evidence between the Government's claims and Smith's sworn allegations.

In his objection to the Government's Motion to Dismiss Smith presented equitable tolling as an alternate theory of timeliness specifically Smith showed where in the record already before the court (criminal and habeas pleadings and exhibits), he met the first requirement (diligence) for his statutory limit to be equitably tolled. The record he cited to established, for equitable tolling purposes, he had taken concrete active steps in protecting and pursuing his rights.

For extraordinary circumstances, Smith established that the situation was "beyond his control" (misinforming Smith on appeal status); in some part the result of attorney misconduct (hiding search warrants) or the by-product of a reasonable application

of then existing law. This is especially true in light of the fact. "Every professional to view this ... misled and misrepresented a material fact." Doc 100 at 24.

The district court claimed, erroneously, that Smith had not provided any documentation or proof he was diligent (Doc. 105 at 8) while misapprehending Smith's claim that no one, not even the professionals saw the untimeliness claim coming as it upends well established law regarding timely filing of habeas petitions (first three Grounds); or rests on a statutory expectation for newly discovered evidence (Grounds Four and Five.)

Either way, the lower court's failure to hold an evidentiary hearing on the clear, specific, colorable allegations supporting tolling was error. Which the Panel glossed over in their single sentence denial of COA, and Smith respectfully asks this Court correct.

> (4) The district court failed to follow, and the Panel failed to enforce, well established law regarding the granting of evidentiary hearings necessitating this Court correct the errors below below to maintain conformity with the law.

All circuit's and this Court have held that when colorable facts are (1) material to the relief requested; (2) in dispute, sharply conflicting with the criminal record facts, or involve questions of counsel's ineffectiveness; and (3) if true, would warrant the relief requested 2255(b); Townsend v. Sain, 372 U.S.

293 (1963). Smith met that threshold, requiring by controlling law an evidentiary hearing be held on his diligence, tolling, ineffectiveness claims, or the timing of his newly discovered evidence.

Smith simply asks this Court to enforce the law and order at minimum COA's to issue his questions or vacate and remand the matter back to the appellate court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Smith
Edward Lee Smith

Dated this 11 day of September 2023.