

No. _____

In the
SUPREME COURT OF THE UNITED STATES

ISAAC JEROME SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Isaac J. Smith #06384-017

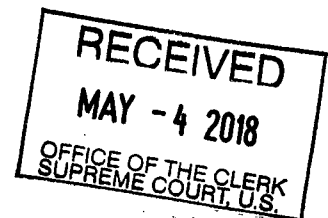
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24 April 2018



QUESTION PRESENTED FOR REVIEW

The Eleventh Circuit held: "Florida armed robbery conviction[s] under §812.13 categorically qualify[y] as a 'violent felony' under the ACCA's elements clause." United States v Fritts, 841 F.3d 937, 944 (11th Cir. 2016).

Whereas the Ninth Circuit held: "neither robbery, armed robbery, nor use of a firearm in the commission of a felony under Florida law is categorically a 'violent felony' ... under the force clause." United States v Geozos, 870 F.3d 890, 901 (9th Cir. 2017).¹

This Court recently granted certiorari in a case-on-point to the instant matter. See Stokeling v United States, 17-5554 (S.Ct. 2018); and Vol. 103, No. 1 Crim. Law Reporter 19 (Apr. 4, 2018).

The question presented is:

If the petitioner falls within the circuit that issued the inapposite ruling, then does that render his argument 'frivolous' warranting a procedural dismissal under the second prong of the In Forma Pauperis statute, despite the fact that he would have had merit had his case been from one of the apposite circuits?

1/ See also Lee v United States, 2016 WL 1464118 (W.D.N.Y. Apr. 12, 2016) ("Florida convictions for burglary and robbery do not qualify as predicate 'violent felonies' under the ACCA").

LIST OF PARTIES IN COURT BELOW

Pursuant to Supreme Court Rule 29.6, the following persons have an interest in the outcome of these proceedings:

- * Carnes, Julie E., Eleventh Circuit U.S. Circuit Judge
- * Hull, Frank M., Eleventh Circuit U.S. Circuit Judge
- * Johnson-Kellmayer, Beth, Eleventh Circuit Deputy Clerk of Court
- * Jordan, Adalberto J., Eleventh Circuit U.S. Circuit Judge
- * Nkrumah, Kafahni, Assistant Federal Public Defender
- * Register, Lennard B. III, Assistant U.S. Attorney
- * Rosenbaum, Robin S., Eleventh Circuit U.S. Circuit Judge
- * Smith, David J., Eleventh Circuit Clerk of Court
- * Smith, Isaac J., Petitioner
- * Swaim, Thomas P., Assistant U.S. Attorney
- * Wilson, E. Bryan, Assistant U.S. Attorney

TABLE OF CONTENTS

	<u>Page No.</u>
Question Presented for Review	i
List of Parties in Court Below	ii
Table of Authorities Cited	iv
Citations of Lower Court Decisions	1
Jurisdictional Statement	2
Constitutional & Statutory Provisions Involved	2
Statement of the Case	
A. Factual Background	2-3
B. Plea & Sentencing Background	3-4
C. Appellate Background	4-6
Preliminary Statement	7-8
Reasons for Granting the Petition	9
a. The In Forma Pauperis (IFP) Statute's "Frivolous" Provision	9-11
(i) This Case Involves a Circuit Split Among Two U.S. Courts of Appeals	11-12
(ii) In Regards to the Constitution's Guarantee of Due Process, the Eleventh Circuit has Departed From the Usual Course of Judicial Pro- ceedings, Warranting the Exercise of This Court's Supervisory Powers	12-14
b. Federal Rule of Civil Procedure 60	14
(i) Court's Failure to Consider an Issue ..	14-16
(ii) Independent Action	16-17
Conclusion	18
Certificate of Compliance	19
Certificate of Service	19

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page No.</u>
Aldana v Del Monte Fresh Produce, 741 F.3d 1349 (11th Cir. 2014) ...	14
Ashcroft v Iqbal, 556 U.S. 662 (2009)	10
Denton v Hernandez, 504 U.S. 25 (1992)	9
Gonzalez v Crosby, 545 U.S. 524 (2005)	9
Hudson v United States, 727 F.Supp.2d 1376 (S.D. Fla. 2010)	15
Johnson v United States, 576 U.S. ____ (2015)	5
Klapprott v United States, 335 U.S. 601 (1949)	14
Lee v United States, 2016 WL 1464118 (W.D.N.Y. Apr. 12, 2016)	i, 12
Neitzke v Williams, 490 U.S. 319 (1989)	9
SEC v Johnson, 683 Fed. Appx. 701 (11th Cir. 2017)	16
Stokeling v United States, 17-5554 (S.Ct. 2018)(cert. grant)	i, 12
United States v Beggerly, 524 U.S. 38 (1998)	14, 17
United States v Fritts, 841 F.3d 937 (11th Cir. 2016)	i, 11
United States v Geozos, 870 F.3d 890 (9th Cir. 2017)	i, 11
United States v Gonzalez, 570 Fed. Appx. 330 (4th Cir. 2014)	15
United States v Smith, 480 F.3d 1277 (11th Cir. 2007)	4
Welch v United States, 578 U.S. ____ (2016)	5
 <u>Statutes, Rules & Other Authorities</u>	
18 U.S.C. §922(g)(1)	3, 17
18 U.S.C. §924(e)	4
28 U.S.C. §1254(1)	2
28 U.S.C. §1915(e)(2)(B)(i)	2, 10
United States Constitution, Fifth Amendment	2, 12
Federal Rule of Civil Procedure 60	6, 14, 16
Black's Law Dictionary (10th ed. 2014)	10, 12
Volume 103, Number 1, Criminal Law Reporter 19 (Apr. 4, 2018)	i, 12
Thomas M. Cooley, A Treatise on the Constitutional Limitations 356 (1868)	13

CITATIONS OF LOWER COURT DECISIONS

Originating District Court Case No.:

3:06-cr-00026-RV-MD-1

Appendix A

(Direct Appeal)

United States v Smith, 480 F.3d 1277,
cert. denied 552 U.S. 872 (2007)

Appendix B

(§3582(c)(2) Appeal)

United States v Smith,
300 Fed. Appx. 738 (11th Cir. 2008)

Appendix C

(Initial §2255)

United States v Smith,
2009 U.S. Dist. LEXIS 46871 (N.D. Fla. May 15, 2009)
2009 U.S. Dist. LEXIS 46878 (N.D. Fla. June 4, 2009)
2009 U.S. Dist. LEXIS 76541 (N.D. Fla. July 24, 2009)

Appendix D

(§2241 Habeas Appeal)

Smith v United States,
2011 U.S. Dist. LEXIS 67634 (S.D. Miss. June 22, 2011)
2013 U.S. Dist. LEXIS 81191 (N.D. Fla. May 23, 2013)
2013 U.S. Dist. LEXIS 81121 (N.D. Fla. June 7, 2013)

Appendix E

(§2244 Applications Requests)

In re: Isaac Smith,
No. 16-12067-J (11th Cir. May 25, 2016)
No. 16-17592-D (11th Cir. Jan. 18, 2017)

Appendix F

(Rule 60(b) Appeal)

United States v Smith,
No. 17-13773-K (11th Cir. Jan. 22, 2018)

JURISDICTIONAL STATMENT

The United States Court of Appeals for the Eleventh Circuit issued its opinion in Appeal No. 17-13773-K on January 22, 2018. See Appendix F, attached hereto.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment states in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law...."

28 United States Code, Section 1915(e)(2)(B)(i), states: "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious."

STATEMENT OF THE CASE

A. Factual Background:

On January 27, 2006, Deputy Michael Gilmore, of the Escambia County Sheriff's Office, executed a traffic stop of a vehicle in which petitioner was a passenger. During the stop, Deputy Gilmore observed Smith attempt to conceal what appeared to be a firearm under the passenger seat. When the deputy opened the passenger door, he observed the petitioner place what appeared to be a bag of cocaine into his sock.

Deputy Gilmore instructed Smith to place his hands on his

head, but Smith instead reached underneath the seat. Deputy Gilmore then pulled on Smith's arm in an attempt to pull him from the vehicle. Smith managed to manoeuver out of Gilmore's grip, dropping the bag from his sock onto the car's floorboard, as he took flight on foot.

The deputy pursued Smith and observed him throw something to the ground. After Smith was apprehended, the deputy found a .38 caliber bullet in the location on the street where he had seen Smith throw the object. A search of Smith at the scene resulted in the recovery of another .38 caliber bullet from his front shirt pocket. Once Smith arrived at the county jail, a corrections deputy discovered yet another bullet in Smith's front pants pocket.

The driver of the stopped car left the scene in the car when Deputy Gilmore began chasing Smith. The driver was never identified, and officers never recovered the suspected handgun or suspected cocaine that the deputy believes he observed in Smith's possession during the initial stop of the vehicle.

B. Plea & Sentencing Background:

Petitioner Smith was charged in a single-count indictment of being a convicted felon in possession of ammunition, in violation of 18 U.S.C. §922(g)(1), by the United States District Court for the Northern District of Florida. Smith's indictment listed four prior felonies, one of which was an alleged two-count Florida State robbery conviction occurring in 1982.

The government then filed a corrected notice of enhancement information, in which they split the Florida State robbery conviction into two qualifying offenses.

Smith entered a plea of guilty pursuant to a written statement of facts and plea and cooperation agreement. The PSR calculated Smith's base offense level at 24 and assigned a 4-level upward adjustment for possession of a firearm or ammunition in connection with another felony offense, pursuant to §2K2.1(b)(5) U.S.S.G. Petitioner was determined to be an Armed Career Criminal subject to sentencing under 18 U.S.C. §924(e), which resulted in his adjusted offense level pursuant to U.S.S.G. §4B1.4(b)(3)(A) being 34. With a total offense level of 34 coupled with a criminal history category of VI, Smith's guideline range was 262 months to 327 months imprisonment.

On July 13, 2006, Smith was sentenced at the mid-point of the applicable guidelines range, to a term of 294 months imprisonment, followed by 5 years of supervised release. After the imposition of the sentence, counsel objected, asserting that the Armed Career Criminal Act was a poorly written law that punishes indiscriminately and needs to be re-written.

C. Appellate Background:

Smith's sentence was affirmed by the Eleventh Circuit on direct appeal. See United States v Smith, 480 F.3d 1277 (11th Cir. 2007), cert. denied 552 U.S. 872 (2007).

Thereafter, Smith filed an initial timely motion to vacate

his sentence pursuant to §2255. Of significant import, Smith argued therein that his counsel was ineffective for (a) failing to argue the constitutionality of the ACCA, and (b) failing to contest the government's claims that his 1982 Florida State Robbery conviction (i) could be broken up into two ACCA qualifying offenses, and (ii) could even qualify as an ACCA offense. This §2255 was denied on June 4, 2009. See United States v Smith, 2009 U.S. Dist. LEXIS 46878 (N.D. Fla. May 15, 2009).

Smith then tried two unsuccessful saving clause petitions pursuant to §2241 in 2011 and 2013, both attacking the ACCA as applied to him. Both were denied as impermissible second §2255 motions. See Smith v United States, 2011 U.S. Dist. LEXIS 67634 (S.D. Miss. June 22, 2011), and 2013 U.S. Dist. LEXIS 81121 (N.D. Fla. June 7, 2013).

After this Court issued Johnson,² then made that decision retroactive less than a year later in Welch,³ petitioner moved the Eleventh Circuit twice for permission to file a second or subsequent §2255 motion, as it now appeared that the claims Smith had been making from sentencing onward were verified. In denying both these §2244 applications, the Eleventh Circuit continued to both construe Smith's single Florida State robbery conviction as two qualifying offenses, and hold that they both applied under the ACCA's elements clause. See In re: Issac Smith, Nos. 16-12067-J (11th Cir. May 25, 2016), and 16-17592-D (11th Cir. Jan.

2/ Johnson v United States, 576 U.S. ___, 135 S.Ct. 2551 (2015).

3/ Welch v United States, 578 U.S. ___, 136 S.Ct. 1257 (2016).

18, 2017).

Diligently, Smith then proceeded to file a motion under Federal Rule of Civil Procedure 60(b)(6), challenging the original §2255's process, as the district court failed to evaluate or rule upon a critical and meritorious claim advanced therein. The district court ignoring Smith's ACCA claim, which would later be verified by this Court when it invalidated the residual clause, presents a defect in the integrity of Smith's initial §2255 proceeding. That Rule 60(b)(6) motion was denied by the district court on July 26, 2017, without explanation.

On appeal of his Rule 60(b) motion, the Eleventh Circuit craftily dismissed Smith's appeal under the in forma pauperis (IFP) standard, by holding that even though Smith is a pauper, he cannot meet the second prong of IFP since his appeal in the **Eleventh Circuit** is deemed to be frivolous. Although both the Second and Ninth Circuits have held that the Florida State robbery statute does not qualify as a violent felony for ACCA predicate purposes, the Eleventh Circuit held that it does qualify. Since Smith is in the Eleventh Circuit, his appeal is frivolous in the Eleventh Circuit, thereby warranting dismissal unless he can pay the \$455 filing fee. Of course Smith couldn't pay the filing fee, and his appeal was dismissed. See United States v Smith, No. 17-13773-K (11th Cir. Jan. 22, 2018).

This petition for writ of certiorari ensued seriatim.

PRELIMINARY STATEMENT

Petitioner is clearly a drug addict who committed multiple criminal acts to support his habit which added to his criminal record. As recent studies have shown, petitioner would have been better served by shifting him toward a rehab-type of sentence to get him the help he needs. Yet Smith was sentenced by the district court to a prison sentence of 24½ years for a few bullets, despite strenuous objections.

Most notably, Smith's defense counsel objected during sentencing, in a presentient manner, that the ACCA was a poorly written law and needed to be rewritten. This Court would later prove this true by its Johnson/Welch combo holding part of that law void-for-vagueness.

Every step of the appellate process Smith has vigorously maintained that the ACCA appellation was erroneous. This has to be one of the best-preserved issues throughout history. Yet, through a series of procedural rigamarole, Smith has been unable to have this claim receive the meritorious review that it deserves, leaving him languishing in prison with a sentence a decade longer than his statutory maximum calls for.

The latest escapade by the Eleventh Circuit held that, albeit Smith was a pauper, his claim under the IFP standard was "frivolous" because Eleventh Circuit precedent has held Smith's Florida State robbery predicates were violent felonies under the ACCA's elements clause, thereby applying the second prong of IFP. And unless this pauper could afford to pay the \$455 filing fee,

his claim would be dismissed for want of prosecution.

A circuit split exists in this matter. The Ninth Circuit said the Eleventh Circuit was wrong, and the Florida State robbery convictions do NOT qualify as violent felonies under the ACCA's force clause. The Second Circuit agreed with the Ninth. In addition, this Court just granted certiorari on this precise circuit split.

What is the definition of "frivolous" in this IFP context? Can the Eleventh Circuit say Smith's issue is frivolous warranting dismissal despite two other circuits saying essentially if Smith was in their circuit he would have merit? Even though a sister circuit's rulings are only persuasive, shouldn't they satisfy the low-threshold requirement of an IFP "frivolous" determination? How rigorous is this frivolous determination?

Smith posits that the Eleventh Circuit's ruling in his case has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision in Smith's case hinges on two factors of import: (a) the in forma pauperis (IFP) statute's "power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless," Neitzke v Williams, 490 U.S. 319, 327 (1989), and (b) the "role" Rule 60(b) has "to play" in this matter. Gonzalez v Crosby, 545 U.S. 524, 534 (2005).

The two above factors hinge on (i) a split between two of the United States Courts of Appeals, and (ii) a violation of the Constitution's Due Process clause, warranting the exercise of this Court's supervisory powers.

(a) The In Forma Pauperis (IFP) Statute:

In enacting the federal in forma pauperis statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because poverty makes it impossible to pay or secure the costs of litigation." Denton v Hernandez, 504 U.S. 25, 31 (1992).

Although Congress sought to lower judicial access barriers to the indigent, it also recognized that indigent litigants will "lack[] an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Id.* In response to this concern, Congress included in the statutory provision that "the court shall dismiss the case at any time if the court determines

that the action or appeal is frivolous or malicious." 28 U.S.C. §1915(e)(2)(B)(i).

The term "frivolous" under this provision has been defined as "lack[ing] an arguable basis either in law or in fact." Neitzke, at 325. Black's Law Dictionary (10th ed. 2014) defines "frivolous" as "lacking a legal basis or legal merit; not serious; not reasonably purposeful." *Id.* at 783.

This Court gave examples of what could be construed under this frivolous context: i.e., "claims whose factual contentions are clearly baseless," "fanciful," or "fantastic or delusional scenarios." Denton at 33. This Court held that a determination of frivolousness is only "appropriate when the facts alleged rise to the level of the irrational or the wholly incredible," *id.*, such as "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." Ashcroft v Iqbal, 556 U.S. 662, 696 (2009). Basically, "[t]he frivolousness standard, authoriz[es] sua sponte dismissal of an in forma pauperis complaint, only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief." Neitzke at 322-323.

Further, this "is a more lenient standard," and "unless there is indisputably absent any factual or legal basis for the wrong asserted in the complaint," the court "in a close case should permit the claim to proceed." *Id.*

In the case sub judice, the Eleventh Circuit has so far departed from the accepted and usual course of judicial

proceedings by dismissing Smith's claims in blatant disregard to this Court's above directives. Notwithstanding the fact that two of its Sister Circuits have ruled in Smith's favor, the Eleventh Circuit decided that in its circuit that a Florida State robbery conviction is a violent felony under the ACCA's elements clause; therefore, Smith's claim in the Eleventh Circuit is frivolous and is to be dismissed unless he, a recognized pauper, can pay the \$455 filing fee.

This case clearly (a) does not contain fantastical far-fetched claims of the sort this Court recognized to be frivolous, (b) is a "close case" in that the underlying issue has produced a circuit split and a recent grant of certiorari by this Court, and (c) decimates the Due Process clause.

(i) Circuit Split

The Eleventh Circuit held: "Florida armed robbery conviction[s] under §812.12 categorically qualif[y] as a 'violent felony' under the ACCA's elements clause." United States v Fritts, 841 F.3d 937, 944 (11th Cir. 2016).

Whereas the Ninth Circuit held: "neither robbery, armed robbery, nor use of a firearm in the commission of a felony under Florida law is categorically a 'violent felony' ... under the force clause." United States v Geozos, 870 F.3d 890, 901 (9th Cir. 2017).

Further, the Western District of New York held: "Florida convictions for burglary and robbery do not qualify as predicate

'violent felonies' under the ACCA." Lee v United States, 2016 WL 1464118 (W.D.N.Y. Apr. 12, 2016).

This Court recently granted certiorari on this issue in Stokeling v United States, 17-5554 (S.Ct. 2018); and Vol. 103, No. 1 Crim. Law Reporter 19 (Apr. 4, 2018).

When the Eleventh Circuit dismissed Smith's case as "frivolous" under the IFP standard, it made this determination based on Eleventh Circuit precedent, irrespective of its sister circuits' rulings. This falls afoul of the "arguable basis either in law or in fact," Neitzke at 325. Clearly Smith's argument is **arguable** if a panel of judges from another circuit agrees with Smith, implying that this frivolous determination was clearly erroneous on this close case.

(ii) Constitutional Due Process

The Fifth Amendment of the United States Constitution holds that "No person shall ... be deprived of life, liberty, or property, without due process of law...."

"Due Process" is defined as: "The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." Black's Law Dictionary 610 (10th ed. 2014).

"Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of

individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Thomas M. Cooley, A Treatise on the Constitutional Limitations 356 (1868).

In the case sub judice, Due Process concerns are implicated by the Eleventh Circuit's utilization of a low-threshold provision of the In Forma Pauperis (IFP) statute in a manner not sanctioned by Congress or this Court.

The IFP statute has two prongs that must be met in order for a petitioner to be granted: He must be indigent, and his claims cannot be "frivolous." As every court to consider the matter has held Smith to be a pauper, the only consideration left is whether his claims are "clearly baseless" to be dismissed under the IFP's frivolous determination.

To be "clearly baseless" under this frivolity determination, the claims must "rise to the level of the irrational or the wholly incredible." Denton, supra at 33. If there is an **arguable** basis to Smith's claims either in law or in fact, Neitzke, supra at 325, then the Eleventh Circuit was precluded from utilizing this provision to dismiss Smith's motion.

Clearly there was an **arguable** basis in both law and in fact that Smith's claims had merit, as (a) the Ninth Circuit ruled in his favor, (b) a Second Circuit district court also ruled in his favor, and (c) this Court granted certiorari to resolve the circuit split.

This case is also clearly one that would be termed a "close case" since it has been ruled on by different courts in a

directly antithetical manner. As such, as this Court held in Neitzke, supra at 323, the Eleventh Circuit violated Due Process by utilizing this "more lenient standard" to dismiss a case that should have been permitted "to proceed at least to the point where responsive pleadings [wer]e required." Id.

(b) Federal Rule of Civil Procedure 60:

Rule 60(b)(6) holds that a court "may relieve a party ... from a final judgment" for any "reason that justifies relief." Id. This provision "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v United States, 335 U.S. 601, 615 (1949).

Whereas Rule 60(d)(1) "preserves a court's historical equity power to entertain an independent action to relieve a party from a judgment, order, or proceeding." Aldana v Del Monte Fresh Produce, 741 F.3d 1349, 1359 (11th Cir. 2014)(citing United States v Beggerly, 524 U.S. 38 (1998)).

Both of these provisions of this Rule are implicated in this appeal.

(i) Court's Failure to Consider an Issue

The proceedings appealed from arose from a Rule 60(b) motion filed in the district court claiming that it failed to consider an issue from the initial timely \$2255, thereby clearly demonstrating a defect in that prior proceeding warranting relief

under Rule 60(b).

Smith reiterated the ignored claim in his Rule 60(b) motion solely to show the court that it was a viable claim that should have been addressed. Yet the district court denied the motion without reasoning. The Eleventh Circuit, after first recognizing the district court's lack of explanation, seized upon Smith's iteration of the ignored claim to hold that he was attacking his conviction and/or sentence, therefore making the motion in actuality an impermissible second or successive §2255 motion.

Courts have held that a district court has jurisdiction to reopen a case under Rule 60(b) when the court failed to consider an issue. See, e.g., United States v Gonzalez, 570 Fed. Appx. 330 (4th Cir. 2014).

The issue the district court failed to address was that his counsel was ineffective for failing to object to the government's "corrected notice of enhancement," where the government decided to split Smith's single 1982 Florida State robbery conviction into two ACCA qualifying offenses.

There was no distinction in time and location with respect to these alleged robberies, and Circuit precedent confirms that they probably would not constitute two ACCA predicates. See, e.g., Hudson v United States, 727 F. Supp. 2d 1376 (S.D. Fla. 2010) (holding that two prior convictions occurring on different dates were insufficient to be classified as separate crimes for purposes of enhancing a sentence "because there was no intervening arrest and the sentences were imposed the same day").

While this appeal was pending, the Ninth Circuit held the Eleventh Circuit was wrong, and that Florida State robbery convictions did not qualify under the ACCA's force clause.

At this point, Smith was in a quandary. It appeared that, irrespective of whether his prior Florida State robbery was counted as a single or double ACCA predicate, both of them would be invalidated under the void-for-vagueness ACCA's residual clause.

Applying the liberal construction doctrine for pro se incarcerated persons, the court should have ignored the couching of the motion, and applied Rule 60(d)(1)'s independent action to grant the relief requested therein.

(ii) Independent Action

"This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding." Rule 60(d)(1).

The Eleventh Circuit has held that the elements under this rule are: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action of which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any remedy at law." SEC v Johnson, 683 Fed. Appx. 761 (11th Cir. 2017).

This Court held that Rule 60(d)(1)'s independent action "appears to have been more broadly available than the more narrow writs." United States v Beggerly, 524 U.S. 38, 45 (1998). Yet independent actions, this Court went on to hold, are to "be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." Id. at 46. "An independent action should be available only to prevent a grave miscarriage of justice." Id.

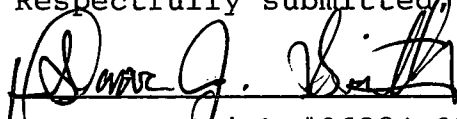
It's at this point of the proceedings that Smith's claims rise to the level of a miscarriage of justice. This is due to the fact that Smith's statute of conviction, 18 U.S.C. §922(g), has a statutory maximum sentence of ten years. But, due to the unconstitutional ACCA appellation, Smith was sentenced to 24½ years; over double his statutory maximum. Further, Smith has already served over ten years, and this removal of the ACCA appellation would render an immediate release from custody.

This would be the precise situation where a judgment ought not, in equity and good conscience, to be enforced. Each of the elements of a Rule 60(d)(1) independent action would be met in the instant case.

CONCLUSION

Wherefore, premises considered and good cause shown, Smith prays this Court for Writ of Certiorari, at the de minimus to determine whether the Eleventh Circuit's use of the frivolous prong of IFP was erroneous; or, in the alternative, to hold this petition in abeyance until this Court rules on Stokeling, then GVR in light of that ruling.

Respectfully submitted



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24 day of April 2018