

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2017 Term

WENDELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For a Writ of Certiorari to

The United States Court Of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Wendell Johnson's case raises an issue of national importance essential to safeguarding the fair application of 28 U.S.C. § 2255 to prisoners seeking to vacate their convictions and sentences to vindicate violations of their constitutional rights. Specifically, does 28 U.S.C. §2255(b) prohibit a court from denying a prisoner an evidentiary hearing on a §2255 Motion where his allegations do not conclusively show that he is entitled to no relief, as at least four circuits have held, or must the petitioner provide evidentiary support for his allegations, as the Seventh Circuit and three other circuits have held?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a proceeding under 28 U.S.C. § 2255 in which Wendell Johnson was the petitioner before the United States District Court for the Southern District of Illinois, as well as the Petitioner before the United States Court of Appeals for the Seventh Circuit. Mr. Johnson is a prisoner serving a federal sentence of 300 months and in the custody of the Bureau of Prisons. The United States was the Respondent before the United States District Court for the Southern District of Illinois, as well as the Appellee before the Seventh Circuit Court of Appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Wendell Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

On January 18, 2018, the U.S. Court of Appeals for the Seventh Circuit issued a memorandum opinion affirming the district court's order denying Sixth Amendment ineffective assistance of counsel relief and an evidentiary hearing on Petitioner's Third Amended Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255. The January 18, 2018 opinion is unpublished and unofficially reported as *Johnson v. United States*, 708 Fed. Appx. 883 (2018) and is attached as Appendix A. On March 20, 2018, the Seventh Circuit issued an Order denying the petition for rehearing and rehearing en banc, attached as Appendix B. On April 21, 2017, the Seventh Circuit issued an Order granting rehearing and a certificate of appealability, also unreported. That Order is attached as Appendix C.

On April 8, 2016, the U.S. District Court for the Southern District of Illinois issued a Memorandum Opinion and Order denying Mr. Johnson's Third Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. The April 8, 2016 opinion also denied an evidentiary hearing and a certificate of appealability. The opinion is unpublished and unofficially reported as *Wendell Johnson v. United States*, 2016 WL 1394232 (S.D. Ill., Apr. 8, 2016), and is attached as Appendix D.

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C. §§1291, 2253(a). The District Court had jurisdiction over the habeas proceeding under 28 U.S.C. § 2255. This Court has

jurisdiction under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part as follows:

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

U.S. Const. amend. VI.

Section 2255 of the federal Judicial Code (Title 28, United States Code) provides, in pertinent part:

§ 2255. Federal Custody: Remedies on Motion Attacking Sentence.

Sections 2255(a) and (b) of Title 28, U.S. Code, provide:

(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 ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto....

28 U.S.C. § 2255(a)-(b)

STATEMENT OF THE CASE

A. Proceedings Below.

On March 17, 2009, a federal grand jury in the Southern District of Illinois filed a two count indictment against Mr. Johnson charging him with distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). *U.S. v. Wendell Johnson*, No. 09-CR-30025-WDS (S.D. Ill. Mar. 17, 2009), ECF No. 1. On June 10, 2009, following a jury trial, Mr. Johnson was convicted of both counts. *Id.*, ECF No. 30, 31.

Sentencing counsel was appointed after trial counsel was permitted to withdraw. *Id.*, ECF No. 40. On September 1, 2009, counsel filed a motion to continue the September 14, 2009 sentencing hearing. ECF No. 41. On September 9, 2009, the Court continued the sentencing hearing to October 14, 2009. ECF No. 45. There is nothing in the record to suggest that counsel would not have received additional time to conduct a reasonable investigation in order to prepare for sentencing if he had so requested.

On October 4, 2009, sentencing counsel filed an Objection to the Presentence Investigation Report (“PSR”) and a Motion for Downward Departure. ECF No. 46, 47. Counsel knew from the PSR that Johnson, at age 8, had witnessed his father murder his mother and shoot his grandmother. His father committed suicide days later. ECF No. 36, p. 15-16. Counsel knew that Mr. Johnson had never received any counseling or mental health treatment. *Id.*, ECF, ¶66. Further, he knew that one of Johnson’s brothers is mentally handicapped and that his sister murdered another sister. *Id.* at ¶57. Thus, he was alerted to the effects of violence and mental illness in Mr. Johnson’s family.

Counsel’s sentencing pleading consisted of 7 sentences addressing Mr. Johnson’s history and characteristics. ECF No. 47. He asserted certain traumatic experiences in Johnson’s young

childhood had “a significant impact on defendant’s emotional and psychological development” but failed to elaborate. *Id.* at 1. Counsel also asserted that “it does not appear that defendant ever received counseling to assist him with coping with this tragedy.” *Id.* The motion cited no legal authority, medical records or reports, or witnesses statement. Rather, it repeated brief portions of the PSR regarding Johnson’s history of abuse and substance abuse. *Id.*, ECF No. 36, pp. 15, 17. Counsel’s pleading included a completely erroneous diagnosis of Johnson’s mental health – “severe antisocial personality disorder” – which essentially told the judge that Johnson is an irredeemable criminal. ECF 47, p. 2.

At the sentencing hearing, counsel reiterated the false “severe antisocial personality disorder” diagnosis for which Johnson had never received treatment. Sentencing Hr’g. Tr. (“TR”), *U.S. v. Johnson*, 3:09CR-30025-WDS (S.D.Ill. Oct. 14, 2009), ECF No. 60, p. 17. Sentencing counsel argued that among the considerations relevant to Johnson having witnessed the murder of his mother and wounding of his grandmother as a small child was “these tragedies have lifelong, scarring affects [sic] ...We have psychologists come into courts every day.” *Id.* at p. 23. Counsel never sought CJA funds to hire a mental health expert to examine Johnson. Judge Stiehl found that “[o]ther than that traumatic event that counsel has referred to, I find nothing in [Johnson’s] record to suggest leniency to this Court.” *Id.* at 25.

On October 14, 2009, Mr. Johnson was sentenced to 25 years (300 months) imprisonment following his conviction for two counts of distribution of cocaine base. ECF No. 52, Judgment. Count 1 involved 0.3 grams of crack and Count 2 involved 1.1 grams of crack. Johnson has a prior felony drug conviction for unlawful delivery of less than 15 grams of a controlled substance for which probation was imposed. ECF No. 36, PSR. This permitted the government to file a notice of enhancement under 21 U.S.C. §851, raising the statutory maximum sentence to

30 years. ECF No. 21. The guideline range was determined to be 262-327 months pursuant to application of the career offender enhancement, U.S.S.G. § 4B1.1, with an offense level 34 and a criminal history of category VI. See U.S.S.G. Ch. 5, Pt. A (sentencing table), ECF 60, Tr. p.15. The Seventh Circuit affirmed Johnson's convictions and sentence on October 26, 2010. *U.S. v. Wendell Johnson*, 624 F.3d 815 (7th Cir. 2010).

B. §2255 Motion

On July 5, 2011, Mr. Johnson timely filed a pro se motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. *Wendell Johnson v. United States*, No. 3:11CV00580 (S.D.Ill. July 5, 2011), ECF No. 1. The government filed a response on November 9, 2012. *Id.*, ECF No. 18. On December 17, 2012 Judge Stiehl, the trial judge, appointed the Federal Public Defender for the Eastern District of Missouri to represent Johnson. ECF No. 23.

With counsel, Petitioner filed an amended §2255 motion on July 17, 2014. Petitioner's Third Amended Mot. To Vacate, *Johnson v. United States*, No. 3:11CV00580 (S.D.Ill. July 17, 2014), ECF No. 50. As a basis for relief, Johnson argued that sentencing counsel was constitutionally ineffective in failing to investigate and present mitigating evidence of Johnson's traumatic history, Post-Traumatic Stress Disorder, intellectual disability, and probable seizure disorder, in failing to obtain the services of a mental health expert, and in failing to argue meritorious grounds in support of a sentence below the career offender guideline. 28 U.S.C. § 2253(c)(2). *Id.*, ECF. 50. Johnson requested an evidentiary hearing. ECF No. 57, p.2.

In support of his § 2255 petition, Johnson submitted 130 pages of objective mitigating evidence, supported by 31 documentary exhibits, that sentencing counsel would have discovered and could have presented to the sentencing judge but for counsel's failure to investigate prior to sentencing. ECF No. 50-1 - 50-25; ECF No. 57, 57-1, ECF No.58. Johnson included three

psychiatric and psychological evaluations two of which were prepared by Donald J. Cross, Ph.D. of St. Louis, Missouri and Dr. Manuel Saint Martin, M.D., J.D. of Los Angeles, CA and retained by post-conviction counsel. ECF No. 50-1, 50-2. Mr. Johnson was examined in a Bureau of Prisons' facility by both Drs. St. Martin and Cross. Both experts agreed that Johnson suffers from lifelong Post-Traumatic Stress Disorder. ECF No. 50-1, p.8; ECF No. 50-2, pp 7, 8. Dr. Saint Martin believes that Johnson also suffers from probable seizure disorder. ECF No. 50-2, p. 8. Both Drs. Saint Martin and Cross determined that antisocial personality disorder and intermittent explosive disorder, as highlighted by counsel before and during the sentencing hearing, was not a legitimate diagnosis for Mr. Johnson. ECF Nos. 50-1, 50-2. Dr. Cross's report explained that intervention with medication had lessened Johnson's trauma symptoms and positively improved his level of functioning and behavior. ECF No. 50-1, p. 22.

Petitioner also submitted sworn declarations attached to his petition from several members of Johnson's family recounting in detail instances of violence, abuse, and neglect that Johnson experienced as a child and adolescent. ECF Nos. 50-6 (Ruthie Johnson Owens), 50-8 (Viola Foster), 50-10 (Classie Butler), 50-14 (David Miller), R. 50-15 (Nicole Johnson). All of them stated they would have testified at Johnson's sentencing hearing, had they been contacted and asked by sentencing counsel.

Johnson also submitted a psychiatric report from C. Robert Cloninger, M.D. Ph.D., the Wallace Renard Professor of Psychiatry and former Head of the Department of Psychiatry at Washington University School of Medicine. ECF No. 57, Petitioner's Reply to Government's Response to § 2255, pp. 4-8; ECF No. 58-1. Dr. Cloninger has contributed to the American Psychiatric Association's development of the Diagnostic and Statistical Manual of Mental Disorders (DSM) since 1980 and has authored expert reports on personality disorders in leading

psychiatric textbooks. ECF No. 58-1. After reviewing evidence in Johnson's case, Dr. Cloninger thoroughly documented a longstanding and untreated Post Traumatic Stress Disorder suffered by Johnson, along with other psychological problems, limited intellectual functioning that placed him within the borderline mentally retarded range, and a history of several significant childhood traumas of a deeply scarring nature. ECF No. 57, 57-1. These traumas included his father holding a gun to Johnson's head as a small child while threatening to kill him and his mother, witnessing the violent abuse of his mother many times, and suffering sexual abuse when he was five or six at the hands of a cousin. *Id.* The trauma escalated with Johnson witnessing, at age 8, his father murder his mother, shoot his grandmother, and attempting to kill Wendell and his siblings after which his father committed suicide. *Id.* The trauma continued with physical and emotional abuse at the hands of Johnson's aunt with whom he was sent to live. *Id.*

Dr. Cloninger opined that the diagnoses of antisocial personality disorder found in the PSR and presented to Judge Stiehl by counsel was "psychometrically and professionally inadequate due to the failure to use standardized psychometric tests, reliable structured interviews, and validated diagnostic criteria as described by the American Psychiatric Association in its diagnostic manuals." ECF No. 57, p.5. Dr. Cloninger stated a diagnosis of severe anti-social personality disorder "cannot be justified with any reasonable degree of medical or psychological certainty." *Id.* pp. 5, 7-8. The antisocial personality diagnosis has long been considered a prophecy of future criminal conduct. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Dr. Cloninger also opined that the diagnosis of intermittent explosive disorder as presented by counsel at sentencing was not at legitimate diagnosis for Mr. Johnson. *Id.*, at pp. 7-8. At no time in ruling upon Johnson's § 2255 petition, did the District Court refer to Dr. Cloninger's psychiatric report. Appx. D, Memorandum and Order on §2255 motion.

Sentencing counsel conducted no investigation in preparation for sentencing nor did he obtain or review any documents beyond those in the record. Counsel did not interview Johnson or any of his family members for mitigation evidence in preparation for sentencing. Prior to sentencing, counsel knew from the PSR that Johnson, at age 8, witnessed his father murder his mother and shoot his grandmother, and that his father committed suicide days later. He also knew that Mr. Johnson had never received any mental health treatment. Further, he knew that one of Johnson's brothers is mentally handicapped and that his sister murdered another sister. Thus, counsel knew that mental illness ran in Mr. Johnson's family.

Counsel did not seek to learn the names of witnesses or to provide letters to the Court from Johnson's family. ECF No. 55-1. Counsel did not gather any records though many existed, including school and special education records, juvenile, psychological, and Social Security disability records that showed Johnson's IQ score in the mentally retarded range, and the Secretary of State's records suspending Johnson's driver's license due to seizures. *Id.* He did not call a single witness or present any evidence in mitigation at the sentencing hearing. Tr., ECF No. 60.

The sentencing judge was presented with none of the available evidence of Johnson's traumatic life history, mental illness, or neurological and cognitive impairments.

Sentencing Counsel's Affidavit.

In response to the ineffective assistance claim, the government in opposition, filed an affidavit from sentencing counsel. ECF No. 55-1. Sentencing counsel admitted he saw no need to have a psychological evaluation completed because the facts regarding the death of Johnson's parents were not in dispute and the PSR was sufficient to document Johnson's psychological issues. ECF No. 55-1, p.3. Counsel conducted no investigation or interviews of any family

members. He ordered no records. ECF No. 55-1. According to counsel, at no time did Johnson tell him additional information to include in the mitigation at sentencing. *Id.*, p. 3. Counsel's affidavit failed to refute Johnson's claim that he saw Johnson briefly only once prior to the sentencing hearing. Sentencing counsel's affidavit reported that he met with Johnson between September 7 and 15, 2009 and then again in October, 2009. *Id.*, p. 2. Johnson submitted the jail visitation records confirming that counsel only met with Johnson on October 12, 2009 for 1 hour at Perry County Jail in Pinckneyville, IL. ECF No. 57-1, pp. 41-44. There is nothing in the record to corroborate the first meeting that counsel claims to have had with Johnson.

The District Court's Opinion and Order

On April 8, 2016, the district court denied Mr. Johnson's § 2255 petition finding that his sentencing counsel did not render ineffective assistance of counsel by failing to investigate and present available mitigation evidence and by failing to obtain the services of a mental health expert. Appx. D. The district court concluded that Johnson failed to demonstrate that he was prejudiced. *Id.*, pp. 9, 14, 26. Most significantly, the court denied an evidentiary hearing and a certificate of appealability. *Id.*, pp. 9, 10, 30.

The court reasoned that although both parties submitted conflicting evidence regarding sentencing counsel's actions prior to sentencing, a hearing was not required to determine the credibility of the evidence or to resolve the conflict "because it is clear that even if Johnson's version of events is correct, he cannot show that he suffered any prejudice." *Id.*, p. 9.

The district court found the lack of detail presented by sentencing counsel regarding Johnson's life history did not prejudice Johnson because the sentencing judge could read more detail into the PSR. *Id.*, p. 21. The district court stated the new information in the 130 pages of evidence presented by post-conviction counsel "simply provides background details for the

information presented in the PSR.” *Id.*, p. 21. The court determined the new evidence submitted by Johnson “is not so starkly different in strength and subject matter that it alters the entire evidentiary picture that was in front of the sentencing judge.” *Id.*, p. 23. The court concluded “the undersigned is unconvinced that Johnson would have received a lesser sentence had [the new information] been presented by Mr. Holmes to Judge Stiehl at the time of sentencing.” *Id.*, p.19.

The district court also concluded that the correct mental health diagnosis is irrelevant and all that matters is that the sentencing judge was aware that Mr. Johnson had some type of mental health problem. Appx. D, p. 22. The district court explicitly found that the correct diagnosis “is not the type of information that alters the entire evidentiary picture presented to the judge.” *Id.* The court’s Order does not even reference the psychiatrist Dr. Cloninger’s report that refuted the antisocial personality diagnosis. App. D, pp. 7-8.

Johnson filed a timely Notice of Appeal on June 3, 2016. ECF No. 71. He filed an Application for a Certificate of Appealability in the Seventh Circuit Court of Appeals on June 6, 2016 in Cause No. 16-2356. ECF No. 2. On January 24, 2017, a panel of the Seventh Circuit denied Petitioner’s request for a certificate of appealability. ECF No. 10. Petitioner filed a Petition for Rehearing on March 22, 2017. ECF No. 14. On April 21, 2017, the panel granted Petitioner’s Petition for Rehearing and vacated its order denying Petitioner a certificate of appeal “in light of *Buck v. Davis*, 137 S.Ct. 749 (2017), as well as the final order of the district court and the record on appeal.” Appx. C. “We find that Johnson has made a substantial showing of the denial of his right to the effective assistance of counsel at sentencing. 28 U.S.C. § 2253(c)(2).” *Id.*

The Court of Appeals heard oral argument on January 17, 2018. The following day, the Seventh Circuit affirmed the District Court’s order denying Johnson’s 2255 motion without a hearing. Appx. A., *Johnson v. United States*, 708 Fed. Appx. 883 (Jan. 18, 2018)(unpublished). In doing so, the Court gave a highly literal reading to Johnson’s allegations and the experts’ affidavits filed in support of his motion. The Seventh Circuit faulted Petitioner for failing to plead specific facts supported by evidentiary detail to justify an evidentiary hearing.

“[T]he evidentiary submissions in this collateral proceeding, which include several reports from mental-health professionals, do not maintain that Johnson’s recidivism risk could be materially affected by treatment for PTSD ... Because Johnson did not try to show in this collateral proceeding how it would have been possible in 2009 to persuade Judge Stiehl that better or different treatment would have produced a lower risk of Johnson’s continuing his life of violent crime, there was no disputed issue to hold a hearing about.”

Appx. A, p. 2. On this basis, the court held, petitioner was not entitled to a hearing.

Johnson plainly alleged facts that, if substantiated at an evidentiary hearing, would entitle him to relief. His petition in particular argued that,

“... Johnson’s PTSD was the predominant cause of Johnson’s behavior and that, *with appropriate medication and therapy, his illness was treatable*. The Seventh Circuit has held that a heavy sentence would not have a significant general deterrent effect on mentally ill defendants. *United States v. Dyer*, 216 F.3d 568, 570 (7th Cir. 2000). *If the mental illness is treatable, as is the case with Johnson*, the goal of incapacitation may not be advanced by a heavy sentence. 216 F.3d at 570. *Instead, mental health treatment would “incapacitate” Mr. Johnson from committing further crimes.* *United States v. Miranda*, 505 F.3d 785 (7th Cir. 2007).

Petitioner’s Third Amended §2255 motion, at pp. 61-62, *Johnson v. United States*, No. 3:11-CV-580-NJR (S.D.Ill, July 17, 2014), ECF No. 50 (emphasis added).

This petition follows.

REASONS FOR GRANTING THE PETITION

Section 2255(b) of Title 28 of the United States Code prohibits a district court from denying a motion to vacate without conducting an evidentiary hearing where the movant has alleged facts in support of a non-frivolous claim and those facts are not conclusively contradicted by the files and records of the case.

In reaching its conclusion to affirm the denial without a hearing of Johnson's §2255 motion, the court below contravened this Court's controlling precedent and the governing statute. In addition, the court below put itself in conflict with several other Circuits and deepened a circuit split on the standard that applies to analysis of a petitioner's allegations in support of a §2255 motion. The conflicting views of the proper standard for determining whether petitioners are entitled to a hearing are clearly defined with at least seven circuits weighing in. This split of authority undermines this Court's precedent and threatens to deny the constitutional rights of prisoners who can establish a violation only through an evidentiary hearing.

The proper standard for obtaining an evidentiary hearing is a frequently recurring issue. Thousands of §2255 motions are filed by prisoners and evidentiary hearings must be granted for the specific purpose of developing facts to support their claims. To ensure uniformity, the standard must be clarified. Moreover, petitioners must understand their burden in requesting an evidentiary hearing - to what extent are they obligated to obtain supporting evidence before even filing their motions.

This case provides an ideal vehicle for reviewing the question presented. Johnson's case demonstrates the need for an evidentiary hearing by many 2255 petitioners. Like the claims of many petitioners, Johnson could not prove his underlying claim that sentencing counsel provided ineffective assistance without an evidentiary hearing.

This Court's review is necessary to ensure that petitioners receive the opportunity to obtain and present the facts to support their post-conviction claims.

I. The Court Should Grant Certiorari Because the Seventh Circuit Applied An Improper and Unduly Burdensome Evidentiary Hearing Standard to Johnson's §2255 Claim That Contravenes This Court's Precedent, the Governing Statute, and Conflicts With Decisions of Other Circuits.

In his 2255 motion, Johnson presented evidence in support of his ineffective assistance of counsel claim that sentencing counsel failed to uncover and present substantial mitigating information of childhood abuse and trauma resulting in longstanding untreated mental illness. Petitioner's Third Amended §2255 motion, *Johnson v. United States*, No. 3:11-CV-580-NJR (S.D.Ill, July 17, 2014), ECF No. 50. He further alleged that counsel's failure to correct the presentence investigation report's claim that Johnson had "severe antisocial personality disorder," intermittent explosive disorder, and counsel's offering that misdiagnosis at sentencing was deficient performance and prejudiced him. In support of his motion, Johnson furnished the court with three psychological and psychiatric reports attesting to Johnson's suffering from longstanding untreated Post-Traumatic Stress Disorder and their views that PTSD was a treatable condition. The experts described the impairing effects of Johnson's mental illness in terms of his emotional and behavioral functioning related to his past crimes. A report of the psychologist opined that Johnson had responded well to medication. All three experts ruled out antisocial personality disorder (APD) as a valid diagnosis which this Court has recognized represents depravity and "irreparable corruption." *Roper v. Simmons*, 543 U.S. 551, 573 (2005).¹

¹ According to the Diagnostic and Statistical Manual of Mental Disorders, (5th Ed.; (DSM-V; American Psychiatric Association, 2013), antisocial personality disorder should not be diagnosed without ruling out symptoms as manifestations or consequences of another mental disorder, or effects of drugs, or effects of a medical condition (e.g., head trauma). *Id.* at 646-647. An individual's social background must be taken into account. *Id.* at 648. When personality changes emerge and persist after an individual has been exposed to extreme stress, a diagnosis of PTSD, rather the personality disorder, must be considered. *Id.* at 649. Depressive and anxiety disorders have symptoms that mimic personality disorders thus making it more difficult to accurately diagnose and individual's long-term functioning. *Id.* at 648-649.

Instead of conducting an evidentiary hearing to resolve this dispute and to allow Johnson to develop his claim, the District Court simply denied Johnson's motion. It concluded that the correct mental health diagnoses was irrelevant. And on the basis of its own speculation, the District Court determined that it would not have made any difference to the judge who actually sentenced Johnson because the sentence was based on his criminal history. Such undue deference to the sentencing judge as grounds for denying a petitioner's statutory right ignores the strong presumption in favor of granting an evidentiary hearing required by the plain language of §2255. The Seventh Circuit compounded this error by failing to remand for an evidentiary hearing on the issue and ignoring the plain language of §2255.

Title 28 U.S.C. § 2255 sets forth a uniform standard governing the grant of evidentiary hearings: "Unless the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon...." 28 U.S.C. § 2255(b)(emphasis added). Because the Court has recognized the importance of the full and fair evidentiary hearing required by the statute, it has found the denial of a hearing worthy of reversal. See *Sanders v. United States*, 373 U.S. 1, at 19-20 (1964)(holding petitioner entitled to second habeas petition to obtain "full and fair" hearing); see also *Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus"); *Fontaine v. United States*, 411 U.S. 213, 214-15 (1973); *Machibroda v. United States*, 368 U.S.487, 494-96 (1962); *Blackledge v. Allison*, 431 U.S. 63, 72-75 (1977) (affirming appellate ruling that denial of § 2255 hearing was reversible error). In *Machibroda*, the allegations of the prisoner's pro se complaint were promptly and thoroughly contradicted by an affidavit from the Assistant U.S. Attorney. Yet this Court held he was entitled to a hearing under the plain language of the statute, thus

setting the standard by which all federal courts are bound. *Machibroda*, 368 U.S. at 495. The Court reiterated that the provision of a hearing can be crucial to the function of § 2255. It determined that the district court could neither rely on the files and records of the trial court nor the personal knowledge or recollection of the district judge where the factual allegations at issue “relate[] primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light.” *Id.* at 494-95.

Ignoring this precedent and the clarity of the governing statute, the Seventh Circuit endorsed the District Court’s denial of an evidentiary hearing because

“the evidentiary submissions in this collateral proceeding, which include several reports from mental-health professionals, do not maintain that Johnson’s recidivism risk could be materially affected by treatment for PTSD ... Because Johnson did not try to show in this collateral proceeding how it would have been possible in 2009 to persuade Judge Stiehl that better or different treatment would have produced a lower risk of Johnson’s continuing his life of violent crime, there was no disputed issue to hold a hearing about.”

Appx. A. The decision to grant a hearing under § 2255 does not depend on whether the papers submitted detail the petitioner’s allegations, but on whether the petitioner has raised claims that, if established at a hearing, would entitle the petitioner to relief. Analysis of the motion can excuse the need for a hearing only when the allegations of the verified pleading patently fail to state a claim for post-conviction relief, or are “vague, conclusory, or palpably incredible.”

Machibroda, at 495. The court below strayed far from this touchstone standard. Contrary to the Seventh Circuit’s conclusion, there was no deficiency in Johnson’s §2255 motion that could justify denial of a hearing. Johnson raised a claim that he was denied the effective assistance of counsel at sentencing, which if established would entitle him to relief. Johnson did specifically assert, through the experts’ mental health reports, that his correct mental illness diagnosis was a treatable condition and that with treatment and medication, his behavior and functioning could

improve, which, if established, would entitle him to relief. Johnson’s habeas experts’ showing the credible mitigating evidence that sentencing counsel could have presented is enough to show “how it would have been possible to persuade Judge Stiehl that better or different treatment would have produced a lower risk” of recidivism to make out a colorable claim of prejudice and warrant an evidentiary hearing. But the Seventh Circuit disregarded that evidence and denied him the opportunity to establish that claim at an evidentiary hearing.

In this case, the Seventh Circuit placed an insurmountable burden on Johnson in requiring him to plead facts with such strict specificity and evidentiary detail to obtain a hearing, when he is seeking the hearing to procure such evidence – a classic catch-22.²

The burden on the petitioner in a 2255 case for establishing an entitlement to an evidentiary hearing is light. The defendant's burden to show his right to a hearing is significantly lower than his burden to show he is entitled to § 2255 relief. *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999). The fact that the petitioner's allegations may be “improbable” is insufficient to forego a hearing. *Machibroda*, 368 U.S. at 495. Indeed, the petitioner's “claim may prove false at the evidentiary hearing, but [where] it is impossible to assess [the] veracity based on th[e] record alone, [t]he purpose of the hearing ... is to allow the court to make these factual determinations based on more than a defendant's affidavit and the contrary

²The decision to deny an evidentiary hearing is also in conflict with the Seventh Circuit’s decision to grant Petitioner a certificate of appealability. Specifically, 28 U.S.C. § 2253 requires that the Court of Appeals issue a certificate of appealability only when a petitioner makes a “substantial showing of the denial of a constitutional right.” This standard, a high one, is met when a petitioner can demonstrate that the district court’s determination on the merits of the claim was wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring that a “prisoner demonstrate substantial underlying constitutional claims”). The Seventh Circuit’s conclusion, then, that Petitioner failed “to show in this collateral proceeding how it would have been possible in 2009 to persuade [the sentencing judge] that better or different treatment would have produced a lower risk of Johnson’s continuing his life of violent crime” does not square with its grant of a certificate of appealability. In granting the COA, the panel explained that it “has considered Johnson’s argument in light of *Buck v. Davis*, 137 S. Ct. 759 (2017), as well as the final order of the district court and the record on appeal and “[w]e find that Johnson has made a substantial showing of the denial of his right to the effective assistance of counsel at sentencing. See § 2253(c)(2).” See Appx. C, *Johnson v. U.S.*, 7 Cir. No. 16-2356, Doc. 15 (Apr. 21, 2017).

representations of the government.” *Valentine v. United States*, 488 F.3d 325, 334 (6th Cir. 2007). Considering the precedent in favor of granting a hearing, Johnson's specific allegations, and the light burden necessary to receive an evidentiary hearing, the claim put forward by Johnson regarding his counsel's ineffectiveness satisfies his burden and entitles him to “an opportunity to support them by evidence.” *Machibroda*, 368 U.S. at 495 (quoting *Walker v. Johnston*, 312 U.S. 275, 287 (1941)).

The Seventh Circuit’s overly restrictive burden for an evidentiary hearing defies this Court’s controlling precedent and the governing statute. This Court should grant the petition for certiorari and reverse the court of appeal’s judgment. Alternatively, the petition should be granted to reiterate the standard for which a hearing must be granted under 28 U.S.C. §2255.

The Seventh Circuit’s Decision Further Deepened the Circuit Split On When §2255 Petitioners Are Entitled to An Evidentiary Hearing.

The Seventh Circuit’s denial of Johnson’s request for a hearing also underscores wide disagreement and inconsistency among the circuits as to the proper approach to granting an evidentiary hearing under § 2255. This Court has not addressed the question since its decision in *Blackledge*, unanimously reaffirming the principles of *Machibroda*, over four decades ago. Since then, many circuits have addressed the availability of a §2255 hearing, and the differences among circuits are varied and entrenched.

The First, Fifth, Sixth and Seventh Circuits require that a §2255 movant provide substantial corroborating evidence in his pleading of constitutional allegations before they will grant an evidentiary hearing. *U.S. v. Butt*, 731 F.2d 75, 80 n.5 (1st Cir. 1984); *U.S. v. Arriola*, 172 F.3d 866 (TABLE), 1999 WL 129668, at *1-2 (TEXT IN WESTLAW) (5th Cir. 1999) (*per curiam*) (unpublished); *MacLloyd v. United States*, 684 Fed.Appx. 555 (6th Cir. 2017); *U.S. v. Busch*, 411 Fed. App’x 872, 877 (6th Cir. 2011) (unpublished); *Brock-Miller v. United States*,

887 F.3d 298 (7th Cir. 2018); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991; *See, e.g., Porcaro v. U.S.*, 832 F.2d 208, 212 (1st Cir. 1987) (“An evidentiary hearing is unnecessary where a petitioner lacks sufficient evidence to establish his claims”).

On the other hand, the Second, Third, Eighth and Eleventh Circuits take an approach more faithful to this Court’s precedent and the plain language of § 2255 by requiring only a *prima facie* showing that a movant is entitled to relief, and thereby undertaking the proper inquiry of whether petitioner *could* introduce evidence to support his claims at the evidentiary hearing. *See Chang v. U.S.*, 250 F.3d 79, 84 (2d Cir. 2001); *Cherys v. U.S.*, 405 F. App’x 589, 591 (3d Cir. 2011) (Unpublished); *Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996) (“[T]he petitioner is entitled to an evidentiary hearing ‘when the facts alleged, if true, would entitle him to relief’”); *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990) (referring to § 2254 petition); *Gallego v. U.S.*, 174 F.3d 1196, 1197-98 (11th Cir. 1999).

The approach of the Second, Third, Eighth, and Eleventh Circuits makes the most sense. The purpose of an evidentiary hearing is to afford a petitioner the means to secure and present supporting evidence. In many cases, the evidence confirming a violation of the movant’s constitutional rights is outside his or her control. Without the opportunity to obtain that evidence, a petitioner may have no choice but to state allegations in somewhat conclusory or speculative terms.

Had the Seventh Circuit applied the standard followed by the Second, Third, Eighth, and Eleventh Circuits, Johnson would have received an evidentiary hearing and thus the opportunity to develop the evidence necessary to prove his claim. These circuits would not have performed the Seventh Circuit’s most stringent and overly-literal analysis to Johnson’s allegations, but rather would have found that a hearing was required. *See e.g. Evans v. United States*, 200 F.3d

549, 551 (8th Cir. 2000) (finding that an evidentiary hearing is required when Petitioner's allegations, if accepted as true, would entitle him to relief).

This inconsistency is particularly problematic where the movant's claims involve mental health. The availability of the critical safeguard of an evidentiary hearing should not depend on the geography of a petitioner's federal conviction. This Court has determined that claims involving mental health evidence are best evaluated with the assistance of an evidentiary hearing. See *Sanders v. United States*, 373 U.S. 1, at 19-20 (1964); *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). Consistent with this Court's decisions, some circuits grant evidentiary hearings where non-frivolous claims of these types are raised, recognizing that such a hearing is necessary to resolve the complex issues of mental capacity and ineffective assistance that often depend on evidence outside the existing record. The Tenth Circuit has ruled that "when one of the grounds asserted for relief under a § 2255 motion is mental incompetence at the time of a guilty plea, the matter may not be disposed of without a hearing." *Nunley v. United States*, 364 F.2d 825, 825 (10th Cir. 1966); accord *Nolan v. United States*, 466 F.2d 522, 524 (10th Cir. 1972). The Fourth Circuit reversed the denial of an evidentiary hearing and remanded so that the testimony offered by the mental health professionals for both defendant and prosecution could be fully assessed. *United States v. Golden*, 37 F. App'x 659, 659-60 (4th Cir. 2002)(unpublished).

The circuits have adopted inconsistent standards and approaches in determining the propriety of a §2255 evidentiary hearing. This circuit split threatens to deny the constitutional rights of defendants. In some circuits, defendants will have the chance to discover and present evidence that they were deprived of a constitutional right. In others, they will not. Like Johnson, some defendants may be convicted or given longer sentences because they received

constitutionally ineffective assistance of counsel, but if they are denied evidentiary hearings, supporting evidence is beyond their control and they may never be able to vindicate that right.

Accordingly, this Court should grant this petition for certiorari to resolve the conflicting approaches among the circuits for granting a petitioner's statutory right to an evidentiary hearing under §2255.

II. THE SEVENTH CIRCUIT'S DECISION PRESENTS A RECURRING LEGAL ISSUE.

The question of the proper standard for obtaining an evidentiary hearing arises with considerable frequency. For example, 25,279 §2255 petitions were filed in 2017. *See* U.S. District Courts—Civil Cases Filed, by Jurisdiction and Nature of Suit—During the 12-Month Periods Ending March 31, 2017.³ Many movants seek evidentiary hearings to develop and present evidence supporting their claims.

When a petitioner requests an evidentiary hearing, the federal court must apply the proper standard to determine if a hearing is warranted. While § 2255 provides the general standard, courts do not interpret and apply it consistently in determining whether a petition's factual allegations are sufficient for a hearing. Uniformity in this area is critical. In most cases, petitioners are ultimately seeking to vindicate their constitutional rights. A petitioner's ability to do so should not depend on the jurisdiction of the federal court where he must file his motion.

The split in the circuits creates uncertainty for defendants seeking to file habeas petitions, the vast majority of whom are pro se prisoners. Without guidance from this Court, they will be hard pressed to understand their obligations in preparing a meritorious petition. To what extent are they obligated to obtain and present supporting evidence for every aspect of their claim?

³ Available at http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf

How must they allege their factual claims? These questions are frequently recurring, reinforcing the need for this Court's review.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

It has been over four decades since the Court decided *Blackledge*, unanimously reaffirming the principles of *Machibroda*. Opposing interpretations of the evidentiary hearing standard have developed. At least eight circuits have addressed the issue, and they are sharply divided.

Moreover, the circumstances of Johnson's case demonstrate the need for an evidentiary hearing even where a petitioner cannot support every aspect of his claim with evidence upon filing his motion. Johnson received constitutionally ineffective assistance of counsel when his lawyer failed to uncover and present substantial mitigating evidence at sentencing of his true mental illness. A hearing provides the only mechanism for movants like Johnson to develop the evidence necessary to show they were deprived of a constitutional right. The Court should not allow lower courts to enforce the wrong burden against habeas petitioners. Instead, it must remind courts that the burden "for establishing an entitlement to an evidentiary hearing is relatively light," and "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); 28 U.S.C. § 2255(b).

Because Johnson's claim involves a false and highly prejudicial diagnosis, tantamount to a prophecy of criminality, presented to the sentencing judge, the Seventh Circuit's refusal to remand for an evidentiary hearing becomes even more egregious. Johnson's prior crimes and future danger were a central issue at sentencing.

This case provides the Court an opportunity to clarify when a hearing is warranted under § 2255 and to emphasize the importance of ensuring procedural safeguards in § 2255 proceedings.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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