Petition Appendix

REVISED April 25, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 18, 2019
Lyle W. Cayce
Clerk

No. 17-60538

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

GLEN B. CLAY, also known as Glenn B. Clay,

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

Before JONES, HO, and OLDHAM, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The district court denied Petitioner's successive § 2255 habeas petition because he failed to establish that the sentencing court relied on the residual clause to impose his ACCA-enhanced sentence. Because this court concludes that a prisoner bringing a successive § 2255 petition must show that it is "more likely than not" that the sentencing court relied on the residual clause to prove that his claim "relies on" *Johnson*, the district court's judgment is AFFIRMED.

BACKGROUND

Following a jury trial in 2008, Petitioner Glen B. Clay, federal prisoner #09299-043, was convicted of violating 18 U.S.C. § 922(g)(1) for being a felon

in possession of a firearm. That conviction ordinarily carries a maximum sentence of ten years. *See* 18 U.S.C. § 924(a)(2). However, both the superseding indictment and the presentence report ("PSR") indicated that Clay was punishable under the Armed Career Criminal Act ("ACCA"), which imposes a 15-year minimum sentence on defendants who have at least three prior convictions for "violent felonies" or for "serious drug offenses" when the underlying crimes were committed on different occasions. *See* 18 U.S.C. § 924(e). During sentencing, Clay's counsel conceded that the ACCA applied. Thereafter, the sentencing court adopted the PSR's recommendations and applied the ACCA sentencing enhancement, sentencing Clay to 235 months' imprisonment.

Clay timely appealed both his conviction and sentence, but he did not challenge the ACCA sentencing enhancement on direct appeal or in his initial habeas petition. Clay's acceptance of the ACCA's applicability evaporated, however, after the Supreme Court issued its decision in *Johnson v. United States* and held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S. Ct. 2551, 2563 (2015). Claiming that the sentencing court relied on the residual clause to impose his ACCA-enhanced sentence, Clay sought permission to file a successive § 2255 habeas petition in light of *Johnson*. This court granted him permission in 2016, reasoning that because "[t]he record before us contains no documentation of Clay's predicate offenses," there is a "possibility that he was sentenced under the residual clause." In so doing, this court cautioned that its "grant of authorization [was] tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Clay has failed to make the showing required to file such a motion."

Clay filed his successive § 2255 habeas petition in district court. At bottom, Clay alleged that the sentencing court "only relied on the now invalid 'residual clause' to establish that [his] prior state court convictions supported an enhanced sentence" under the ACCA. Clay's petition acknowledged that the record did not include any documents relating to his underlying state-court convictions which proved that the sentencing court relied on the residual clause. Accordingly, Clay asked the district court to obtain "appropriate adjudicative records" during the process of evaluating his petition to determine "whether any of Clay's convictions qualify as violent felonies under the ACCA." *Id*.

The district court denied Clay's successive petition without obtaining the requisite documents. First, the district court held that it lacked jurisdiction over Clay's successive petition because Clay "has not demonstrated that the court relied on the residual clause in sentencing him" and therefore "has not shown that his case falls within the rule announced in *Johnson*." Second, in the alternative, the district court held that Clay "failed to show that he is entitled to relief on the merits" because his prior convictions qualify as "violent felonies" under the enumerated offenses clause of the ACCA, which means that any error from the sentencing court's reliance on the residual clause is harmless. In its order denying Clay's successive petition, the district court also denied a certificate of appealability ("COA"). Clay then sought a COA before this court.

This court granted Clay a COA to challenge the district court's denial of his successive § 2255 petition. The COA was granted on two issues, which parallel the district court's alternate holdings: (1) "whether a prisoner seeking the district court's authorization to file a successive § 2255 motion raising a *Johnson* claim must establish that he was sentenced under the residual clause to show that the claim relies on *Johnson*"; and (2) "whether any *Johnson* error

at sentencing was harmless because Clay's 1982 house burglaries constituted enumerated burglary under the ACCA."

STANDARD OF REVIEW

"In challenges to district court decisions under 28 U.S.C. § 2255, we measure findings of fact against the clearly erroneous standard and questions of law *de novo*." *United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994). "If the district court lacked jurisdiction, our jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam) (internal quotation marks, citation, and alteration omitted).

DISCUSSION

Under 28 U.S.C. §§ 2244(b) and 2255(h), "[a] second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application." *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018). "There are two requirements, or 'gates,' which a prisoner making a second or successive habeas motion must pass to have it heard on the merits." *Id.* (internal citation omitted). First, the prisoner must make a "prima facie showing" to the circuit court "that the motion relies on a new claim resulting from either (1) 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,' or (2) newly discovered, clear and convincing evidence that but for the error no reasonable fact finder would have found the defendant guilty." *Id.* (quoting 28 U.S.C. §§ 2244(b), 2255(h)). Second, after receiving permission from the circuit court to file a successive petition, "the prisoner must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence." *Id.* (citing 28 U.S.C. § 2244(b)). Where a prisoner fails to make the requisite

showing before the district court, the district court lacks jurisdiction and must dismiss his successive petition without reaching the merits. *Id*.

At issue here is the degree to which a prisoner "must actually prove" that the relief he seeks "relies on" *Johnson* to confer jurisdiction on a district court. *Id*. The circuits are split on this issue. To prove that a successive petition relies on *Johnson* in the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, a prisoner must show that it is "more likely than not" that the sentencing court invoked the residual clause. *See, e.g.*, *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018) ("[T]o successfully advance a [*Johnson*] claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause."); *see also United States v. Peppers*, 899 F.3d 211, 235 n. 21 (3d Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017). In contrast, to prove that a successive petition relies on *Johnson* in the Fourth and Ninth Circuits, a prisoner need only show that the sentencing court "may have" invoked the residual clause. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

Although this court has previously observed in passing that "the 'more likely than not' standard appears to be the more appropriate standard," we have yet to "conclusively decide" which standard of proof applies. *Wiese*, 896 F.3d at 724–25 (noting that the successive petition failed under either standard); *see also United States v. Taylor*, 873 F.3d 476, 479–81 (5th Cir. 2017) (describing the circuit split before concluding that "[w]e need not decide today which, if any, of these standards we will adopt because we conclude that Taylor's § 2255 claim merits relief under all of them"). For reasons described

below, resolving Clay's appeal will require this court to select a standard of proof. However, before resolving that issue, a little background is in order.

To receive a sentencing enhancement under the ACCA, a defendant must have previously been convicted of at least three "violent felonies" that occurred on different occasions from one another.[1] 18 U.S.C. § 924(e)(1). At the time Clay was sentenced for violating 18 U.S.C. § 922(g)(1), the ACCA defined "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" ("the force clause"); (2) "is burglary, arson, or extortion, [or] involves [the] use of explosives" ("the enumerated offenses clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" ("the residual clause"). *Id.* § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the residual clause was unconstitutionally vague, such that an ACCA-enhanced sentence could not be constitutionally imposed in reliance on that clause's definition of a "violent felony." 135 S. Ct. at 2557. In *Welch v. United States*, the Court held *Johnson* retroactively applicable to cases on collateral review, thus enabling the basis for Clay's successive petition. 136 S. Ct. 1257, 1265 (2016).

In this case, both the superseding indictment and PSR indicate that—at the time of his sentencing—Clay had nine prior Mississippi convictions for which he was sentenced to "imprisonment for a term exceeding one year": two for business burglary, two for armed robbery, one for aggravated assault, and four for house burglary. Although both documents report that Clay was eligible for an ACCA sentencing enhancement, neither document identifies which of Clay's prior convictions were used to make that determination or

[1] No parties contest that Clay qualified for an ACCA sentencing enhancement based on the commission of a "serious drug offense," so that predicate is not analyzed here.

which definitional clauses of the ACCA were used to define those convictions as "violent felonies." Moreover, because Clay's counsel conceded at his hearing that the ACCA applied, there was no occasion for the sentencing court to clarify how the requisite "violent felonies" were tabulated.

For the sentencing court to have lawfully imposed the ACCA sentencing enhancement, it would have needed to determine that at least three of Clay's prior convictions were for "violent felonies" under the ACCA. *See* 18 U.S.C. § 924(e)(1). Because Clay's armed robbery and aggravated assault convictions stemmed from the same incident, they would have counted together as only one ACCA-qualifying offense. Therefore, the sentencing court must have determined that at least two of Clay's six burglary convictions were "violent felonies." Neither the district court nor the parties allege that Clay's convictions for "business burglary" were "violent felonies." The question reduces to whether at least two of Clay's convictions for "house burglary" were correctly considered "violent felonies."

Clay argues that the only way the sentencing court could have counted his "house burglary" convictions as "violent felonies" is for the sentencing court to have relied on the now-unconstitutional residual clause. Alternatively, he claims that "[w]here no record exists explaining whether [a] petitioner's convictions fit the elements clause, the enumerated offenses clause, or the residual clause," this court should apply the rule of lenity and give him the benefit of the doubt. (internal quotation marks and citation omitted). The government responds that convictions for "house burglary" qualified expressly as "violent felonies" under ACCA's enumerated offenses clause. *See* 18 U.S.C. § 924(e)(2)(B)(ii). Consequently, even if the sentencing court relied on the residual clause, any error is harmless.

"[T]o determine whether a sentence was imposed under the enumerated offenses clause or the residual clause," this court "look[s] to the law at the time

of sentencing." *Wiese*, 896 F.3d at 724. In 2008, when Clay's ACCA-enhanced sentence was imposed, the sentencing court would have used the categorical approach to determine whether his prior "house burglary" convictions qualified as "violent felonies" under the enumerated offenses clause. Burglary is an enumerated offense in 18 U.S.C. § 924(e)(2)(B)(ii), but not all offenses labeled "burglary" constitute the enumerated, generic offense of burglary listed in the ACCA. *See Taylor v. United States*, 495 U.S. 575, 580, 598–99, 110 S. Ct. 2143, 2149, 2158 (1990). Under the categorical approach, to determine whether Clay's "house burglary" convictions were convictions for "generic burglary," the sentencing court would have compared the elements of the statute of conviction—here, the Mississippi statute criminalizing "house burglary" in 1982—with the elements of "generic burglary." *Id.* at 599–600, 110 S. Ct. at 2158–59. For purposes of the ACCA, "generic burglary" is defined by "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599, 110 S. Ct. at 2158. When comparing the elements, "[i]f the state statute [of conviction] is narrower than the generic view . . . the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary" and the conviction therefore qualifies as an enumerated "violent felony." *Id.* However, if the state statute of conviction "define[s] burglary more broadly, *e.g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings," the conviction generally will not qualify. *Id.* at 599–602, 110 S. Ct. at 2158–60.

In this case, the district court found (and the government argues on appeal) that Clay's "house burglary" convictions were for violating Mississippi Code Annotated § 97-17-19 (1972), which criminalized "breaking and entering any dwelling house, in the day or night, with intent to commit a crime." S*ee Course v. State*, 469 So. 2d 80, 80–81 (Miss. 1985) (applying Mississippi Code

Annotated (1972) to a burglary committed in October 1982). Because that statute includes "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime," the district court concluded under the categorical approach that Clay's convictions for "house burglary" were enumerated "violent felonies" under the ACCA. *Taylor*, 495 U.S. at 599, 110 S. Ct. at 2158. Therefore, the district court reasoned, "even if the [sentencing] court relied on the residual clause . . . Clay's sentence was properly enhanced under the ACCA and thus, he has suffered no prejudice from any *Johnson* error." On these grounds, the district court denied Clay's successive § 2255 petition.

Clay disputes this result on three bases. His first two arguments challenge the district court's analysis under the categorical approach, insisting (for various reasons) that § 97-17-19 does not comport with "generic burglary" under the ACCA. This court finds those arguments unavailing.[2] Clay's third

[2] First, citing to a federal district court opinion, Clay claims that this court must apply "current law on the enumerated offense clause" to determine if a *Johnson* error is harmless. (citing *United States v. Scott*, No. CV 99-05-JJB-EWD, 2017 WL 3446030, at *2 (M.D. La. Aug. 10, 2017), *superseded on other grounds*, 2018 WL 2169965 (M.D. La. May 10, 2018) (emphasis omitted)). Clay appears to argue that, because this court held in 2017 that the current Mississippi burglary statute is broader than "generic burglary," his convictions under a now-superseded burglary statute cannot be enumerated felonies under the ACCA. (citing *United States v. Johnson*, 477 F. App'x 182, 183 (5th Cir. 2012) (per curiam) ("There is no dispute that [Mississippi Code Annotated § 97-17-33 (1992)] criminalizes conduct not covered by a generic burglary offense.")); The problem with this first argument is that, contra Clay's assertion, this court does not rely on current statutory elements when deciding whether a defendant's prior conviction constitutes a "violent felony." Rather, this court examines the statutory elements as they existed at the time the defendant committed the offense. As a result, it is irrelevant that this court—in a 2017 unpublished opinion—held that the 1992-version of Mississippi's burglary statute is broader than the generic definition. What matters is whether the version of the statute in effect at the time of Clay's house burglaries in 1982 matches the generic definition. Turning to the statutes in effect at the time of his conviction, Clay next contends that the "meaning of a dwelling-house" is broader than the "building or structure" contemplated in *Taylor*. Clay did not raise this issue until his reply brief. Thus, it is waived. *See United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (per curiam) ("Arguments raised for the first time in a reply brief, even by pro se litigants . . . are waived.").

argument, however, is more compelling and requires this court to resolve the first issue identified in the COA—namely, the degree to which a prisoner must prove that he was sentenced under the residual clause before he is entitled to bring a successive § 2255 petition raising a *Johnson* claim.

In his third argument, Clay contends that it is impossible for this court to determine whether his prior convictions were for enumerated felonies under the categorical approach because, at the time of his convictions, the Mississippi Code Annotated had multiple statutes criminalizing the burglary of a house and neither the superseding indictment, PSR, nor sentencing court indicated which of those statutes he was convicted of violating. Consequently, although Mississippi Code Annotated § 97-17-19 (1972) may comport with the definition of "generic burglary," it is not clear that Clay was convicted of violating § 97-17-19. Instead, his "house burglary" convictions could have been for violating Mississippi Code Annotated § 97-17-21 (1972) ("Burglary: Inhabited Dwelling"); § 97-17-23 (1972) ("Burglary: Inhabited Dwelling—Breaking in at Night While Armed With Deadly Weapon"); § 97-17-25 (1972) ("Burglary: Breaking Out of Dwelling"); § 97-17-27 (1972) ("Burglary: Breaking Inner Door of Dwelling at Night"); or § 97-17-29 (1972) ("Burglary: Breaking Inner Door of Dwelling by One Lawfully in House"). Not all of these statutes comport with the definition of "generic burglary" in the enumerated offenses clause. *See* § 97-17-25 (criminalizing unlawful exit of a dwelling house after committing a crime therein, with no mention of "unlawful or unprivileged entry into, or remaining in" that house "with intent to commit a crime").

Without conviction records, this court cannot conclusively determine which statute(s) Clay was convicted of violating—and, accordingly, whether his prior convictions for "house burglary" qualified as "violent felonies" under the ACCA's enumerated offenses clause. Therefore, this court cannot rule out the possibility that the sentencing court relied solely on the residual clause to

impose Clay's ACCA-enhanced sentence. In the face of this ambiguity, Clay asks this court to reverse the district court and vacate his enhanced sentence.

In making this argument, Clay returns this court to our prior discussion of the appropriate standard of proof. On the record before this court, Clay has shown that the sentencing court "may have" relied on the residual clause to enhance his sentence. Therefore, if this court adopts the standard articulated by the Fourth and Ninth Circuits, Clay will have sustained his burden of proof and the district court will have had jurisdiction over his successive § 2255 petition. However, Clay has not shown that the sentencing court "more likely than not" relied on the residual clause. Mississippi Code Annotated § 97-17-19 (1972) appears to have been the primary statute criminalizing "house burglary" in 1982—as indicated in part by its title: "Burglary: Breaking and Entering Dwelling"—which makes it just as likely that the district court correctly identified § 97-17-19 as the statute of conviction as that it incorrectly identified it. Moreover, the PSR's descriptions of Clay's "house burglary" convictions suggest that § 97-17-19 was the likely statute of conviction, and Clay has pointed to nothing in the record indicating otherwise. *See Wiese*, 896 F.3d at 725 (declaring that this court may look to the PSR "[i]n determining potential reliance on the residual clause by the sentencing court"). Therefore, if this court adopts the standard articulated by the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, Clay will have failed to prove that his successive § 2255 petition relies on *Johnson* and the district court will have lacked jurisdiction. *Cf. Beeman*, 871 F.3d at 1224–25 (explaining that if "it is unclear from the record whether the sentencing court had relied on the residual clause," the prisoner—who bears the burden of proof—"loses") (internal quotation marks and citations omitted).

Faced with a situation where the standard of proof makes a difference to the outcome,[3] this court sides with the majority of circuits and holds that a prisoner seeking the district court's authorization to file a successive § 2255 petition raising a *Johnson* claim must show that it was more likely than not that he was sentenced under the residual clause. This standard best "comports with the general civil standard for review and with the stringent and limited approach of [the Antiterrorism and Effective Death Penalty Act] to successive habeas applications." *Wiese*, 896 F.3d at 724; *cf. Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) ("In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence.").

Applying that standard to the facts in this case, Clay has failed to show by a preponderance of the evidence that he was sentenced under the residual clause and, thus, that his claim relies on *Johnson*. As a result, the district court lacked jurisdiction over his successive § 2255 petition. Moreover, because the district court lacked jurisdiction, there is no occasion for this court to address the district court's alternate holding on the merits or the second issue identified in the COA. *See Key*, 205 F.3d at 774.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Clay's successive § 2255 petition for lack of jurisdiction is **AFFIRMED**.

[3] The ambiguity in the record distinguishes this case from *Wiese* and *Taylor*, where this court was able to resolve the appeal without deciding on a standard of proof. *See Wiese*, 896 F.3d at 725 (holding that the defendant failed to show that his claim relied on *Johnson* under either standard); *Taylor*, 873 F.3d at 482 (holding that the defendant successfully showed that his claim relied on *Johnson* under both standards).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60538

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GLEN B. CLAY, also known as Glenn B. Clay,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

O R D E R:

Glen B. Clay, federal prisoner # 09299-043, seeks a certificate of appealability (COA) to appeal the denial of a 28 U.S.C. § 2255 motion challenging his 235-month sentence under the Armed Career Criminal Act (ACCA). With the benefit of liberal construction, Clay disputes the district court's procedural ruling that his successive § 2255 motion does not "rely on" *Johnson v. United States*, 135 S. Ct. 2551 (2015), for purposes of 28 U.S.C. §§ 2244(b)(4) and 2255(h). Clay also challenges the district court's determination on the merits that any error at sentencing under *Johnson* was harmless because his prior Mississippi house burglary offenses constituted enumerated burglary under the ACCA. Additionally, he asserts that his other prior offenses no longer qualify as ACCA predicates after *Johnson*.

A movant can satisfy the COA standard "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [he] will not prevail." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) (internal quotation marks and citation omitted). Reasonable jurists could debate the district court's procedural ruling and its assessment of the merits of the *Johnson* claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is GRANTED on whether a prisoner seeking the district court's authorization to file a successive § 2255 motion raising a *Johnson* claim must establish that he was sentenced under the residual clause to show that the claim relies on *Johnson*. *See* § 2244(b)(4); *Reyes-Requena v. United States*, 243 F.3d 893, 896, 899 (5th Cir. 2001). A COA also is GRANTED on whether any *Johnson* error at sentencing was harmless because Clay's 1982 house burglaries constituted enumerated burglary under the ACCA. The Clerk is DIRECTED to establish a briefing schedule and to include the appellee. The parties are DIRECTED to address, to the extent it is relevant, this court's decision in *United States v. Taylor*, 873 F.3d 476, 479-82 (5th Cir. 2017).

To the extent Clay also contends that he should receive the benefit of Amendment 798 to the Sentencing Guidelines, this court ordinarily does not consider arguments raised for the first time in a COA motion filed in this court. *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). As to this claim, a COA is DENIED.

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

GLEN B. CLAY

VS. CRIMINAL NO. 3:07CR73TSL-LRA
CIVIL ACTION NO. 3:16CV523TSL

UNITED STATES OF AMERICA

ORDER

This cause is before the court upon the pro se motion of defendant Glen B. Clay for relief pursuant to 28 U.S.C. § 2255. The government opposes the motion. The court, having considered the parties' memoranda and the record in this case, concludes that the motion is due to be denied.

Generally, a conviction under 18 U.S.C. § 922(g) for being a felon in possession of a firearm provides for a ten-year maximum term of imprisonment. See 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection ... (g) of section 922 shall be ... imprisoned not more than ten years"). However, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), increases a defendant's prison term to a minimum of fifteen years and a maximum of life if the government proves that he has three or more previous convictions for "violent felonies" committed on occasions different from one another. See 18 U.S.C. § 924(e)(1). The ACCA, as enacted, defined "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical

force against the person of another" (force clause); (2) "is burglary, arson, or extortion, [or] involves the use of explosives" (enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause). 18 U.S.C. § 924(e)(2)(B). The Supreme Court in Johnson v. United States held that the residual clause was unconstitutionally vague, so that imposing an enhanced sentence based thereon violated due process. 576 U.S. –, 135 S. Ct. 2551, 2557-58, 192 L. Ed. 2d 569 (2015). However, the Court made clear that its holding with regard to the residual clause did not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a "violent felony." 135 S. Ct. at 2563. The Supreme Court has held that Johnson announced a new substantive rule that is retroactively applicable to cases on collateral review. See Welch v. United States, –- U.S. –, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).

On September 12, 2007, Clay was charged by a superseding indictment with two counts of possession of a firearm by a convicted felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Count 1 was alleged to have occurred on February 2, 2006, while count 2 was alleged to have occurred on February 20, 2006.. Both counts contained the same recitation of nine prior felony

convictions in support of the government's intention to have Clay sentenced under the ACCA. Specifically, the indictment recited that Clay had been convicted in the Circuit Courts of Madison and Hinds County of the following felonies which were committed on occasions which were different from each other:

> (1) on or about January 10, 2000, in the Circuit Court of Madison County in Case Number 98-0044 of the crime of Business Burglary;
>
> (2) on or about January 5, 1994, in the Circuit Court of the First Judicial District of Hinds County in Case Number 92-2-371-01 of the crime of Armed Robbery;
>
> (3) on or about January 5, 1994, in the Circuit Court of the First Judicial District of Hinds County in Case Number 92-2-371-02 of the crime of Armed Robbery:
>
> (4) on or about January 5, 1994, in the Circuit Court of the First Judicial District of Hinds County in Case Number 92-2-371-03 of the crime of Aggravated Assault;
>
> (5) on or about July 26, 1983, in the Circuit Court of the First Judicial District of Hinds County in Case Number U-1079 of the crime of House Burglary;
>
> (6) on or about July 26, 1983, in the Circuit Court of the First Judicial District of Hinds County in Case number U-1075 of the crime of Business Burglary;
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> (7) on or about July 26, 1983, in the Circuit Court of the First Judicial District of Hinds County in Case Number U-186 of the crime of House Burglary;
>
> (8) on or about July 26, 1983, in the Circuit Court of the First Judicial District of Hinds County in Case Number U-1077 of the crime of House Burglary; [and]
>
> (9) on or about May 24, 1983, in the Circuit Court of the First Judicial District of Hinds County in Case U-860 of the crime of House Burglary.

Clay was arraigned on the superseding indictment on October 4, 2007, entering a plea of not guilty and asserting his right to a speedy trial.

On December 7, 2007, a jury found Clay found guilty of illegally possessing a firearm on February 2, 2006.[1] The Presentence Investigation Report (PSIR) recommended that Clay's sentence be enhanced under the ACCA without specifying which convictions supported this recommendation. While Clay did object to the calculation of his criminal history points, he specifically pointed out at his sentencing hearing that he did not object to his classification as an armed career offender. On June 18, 2008, having overruled Clay's objection to his criminal history calculation and having found that he was an armed career offender, the court sentenced him to a 235-month term of imprisonment and three-year term of supervised release. On appeal, the Fifth Circuit affirmed his conviction and sentence.

In April 2016, Clay sought authorization from the Fifth Circuit to file his second/successive motion premised on Johnson II. By his memorandum offered in support of his motion, he complained that this court's use of the burglary convictions to enhance his sentence under the ACCA was in error because Mississippi's definition of "burglary" was broader than the definition of "generic" burglary set forth in Taylor v. United States, 495 U.S. 575, 598-99, 110 S. Ct. 2143, 2158, 109 L. Ed 2d 607 (1990)(generic burglary is defined as "an unlawful or

[1] The court granted Clay's motion to dismiss count 2 of the superseding indictment on speedy trial grounds.

unprivileged entry into, or remaining, in a building or other structure, with the intent to commit a crime"). On May 26, 2016, the Fifth Circuit granted Clay's motion for authorization to file a successive motion in this court, stating as follows:

> The record before us contains no documentation of Clay's predicate offenses and does not rule out the possibility that he was sentenced under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). Because he has made a prima facie showing that he satisfies the requirements of § 2255(h), IT IS ORDERED that the motion for authorization is GRANTED. See § 2255(h); 28 U.S.C. 2244(b)(3)(C); Reyes-Requena v. United States, 243 F.3d 893, 897-98 (5th Cir. 2001). This grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Clay has failed to make the showing required to file such a motion. See 2244(b)(4); Reyes-Requena, 243 F.3d at 899.

In re: Glen Clay, No. 16-60244 (5th Cir. May 26, 2016).

On June 20, 2016, Clay filed his current § 2255, maintaining that because "all" of his state court burglary convictions were obtained under a divisible statute, which proscribes "breaking into a 'water vessel, commerial [sic] or pleasure craft, ship, steamboat, flatboat, railroad car, automobiel [sic], truck or trailer,'" then the court should have required the government to produce documentation to prove that his burglary convictions rested on facts equating to the generic offense of burglary. According to Clay, because the court did not conduct such an inquiry, then "it is clear that the district court only relied on the now invalid residual clause." The government responded to the

motion, urging that it is due to be dismissed on the merits or as time barred. In his traverse, Clay makes new arguments. First, he now takes the position that, employing the categorical approach, none of the state court convictions listed in the indictment qualifies as a violent felony under the ACCA. Finally, he purports to add an ineffective assistance of counsel claim against trial counsel, maintaining that she was deficient for failing to object to the "career offender enhancement at sentencing." Based on the following, the court concludes that the motion is due to be dismissed pursuant to § 2244(b)(4). Alternatively, the motion is due to be denied on the merits.

The Fifth Circuit has found that defendant has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." Reyes-Requena v. United States, 243 F.3d 893, 899-900 (5th Cir. 2001) (quoting Bennett v. United States, 119 F.3d 468, 469-70 (7th Cir. 1997)). Accordingly, it is now this court's duty to undertake its own "thorough review of all allegations and evidence presented" to determine whether defendant has satisfied the requirements for the filing of such a successive motion, i.e., by showing that his claim "relies upon a new rule of constitutional law." Id. at 899 (quoting Bennett, 119 F.3d at 470). See also id. (district court then is "the second 'gate' through which the petitioner must pass before the merits of his or her motion are heard."); see also

United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (describing required district court review) (cited in xxx); Johnson v. Dretke, 442 F.3d 901, 908 (5th Cir. 2006). Obviously, by invalidating the ACCA's residual clause, Johnson created a new rule of constitutional law retroactive to cases on collateral review, Welch, 136 S. Ct. at 1265, and Clay's argument based on the invalidation of the "residual clause" was unavailable to him before Johnson was decided. However, Clay has not shown that his case falls within the rule announced in Johnson. That is, he has not demonstrated that the court relied on the residual clause in sentencing him.

As stated above, the indictment set forth nine prior state court felony convictions in support of the government's attempt to enhance Clay's sentence under the ACCA: four house burglaries, two business burglaries, two armed robberies and one aggravated assault. The PSIR purported to detail the underlying factual basis for each of these convictions. These factual summaries supported a conclusion that the manner in which the six burglaries were committed conformed to the generic definition of burglary, see Taylor, 495 U.S. 598-99, and that the armed robberies/aggravated assault involved the actual use of physical force.[2] However, because there was no objection from Clay as to

[2] While Clay alleges in his traverse that the court impermissibly relied on the PSIR to establish his ACCA predicate

this aspect of his sentence, the court therefore was not called upon to explicitly state under which of the ACCA's three definitions these convictions qualified as "violent felonies".[3] In any event, defendant has failed to show that he is entitled to relief on the merits.

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Gaudet, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). Four types of claims are

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offenses, he does not take the position that he was not, in fact, convicted of the enumerated offenses or that the summaries are inaccurate in any way. See United States v. Martinez-Cortez, 988 F.2d 1408, 1416 (5th Cir. 1993)(concluding that where defendant failed to object, relying on PSIR alone to establish prior ACCA convictions, rather than Shepherd documents, produces a "voidable" rather than a "void" offense, and concluding that defendant still must show at underlying conviction did not qualify).

[3] Cf. In re Morris, 328 F.3d 739, 741 (5th Cir. 2003) (holding that to file a successive petition under § 2244(b)(2)(A) based on retroactive application of Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that mentally retarded may not be executed, petition was required to show he should be categorized as mentally retarded); see also In re: Moore, 830 F.3d 1268, 1273 (11th Cir. 2016); but see United States v. Winston, 850 F.3d 677, 692 (4th Cir. 2017)("We therefore hold that when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in Johnson II, the inmate has shown that he "relies on" a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A).").

cognizable via a § 2255 motion: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255(a). The defendant bears the burden of establishing his claims of error by a preponderance of the evidence. See Wright v. United States, 624 F.2d 557, 558 (5th Cir. 1980). While relief automatically follows if certain "structural" errors are proven, see Burgess v. Dretke, 350 F.3d 461, 472 (5th Cir. 2003), for most errors, the sentencing court may grant relief only if the error "had substantial and injurious effect or influence" in determining the outcome of the case. Brecht v. Abrahmson, 507 U.S. 619, 637, 507 U.S. 619, 123 L. Ed. 2d 353 (1993); see also United States v. Chavez, 193 F.3d 375, 379 (5th Cir. 1999) (applying Brecht's harmless error standard in a § 2255 proceeding). When the court finds that a defendant is entitled to relief, it "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

Following the Supreme Court's invalidation of the residual clause in Johnson, a conviction can only qualify as a "violent

felony" under the ACCA if it falls under either the force clause, i.e., it "has as an element the use ... of physical force," or the enumerated clause, i.e., it "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. §§ 924(e)(2)(B)(i) and (ii). Defendant's two armed robbery convictions and his aggravated assault conviction fall under the definition of "violent felony" in the force clause. However, because all of the events that form the basis of those convictions occurred on the same occasion, only one of the qualifying convictions is relevant to the ACCA analysis.[4]

Regarding the crimes listed in the enumerated clause, including burglary, the Supreme Court has held that "Congress referred only to their usual or (in our terminology) generic versions—not to all variants of the offenses." Mathis v. United States, – U.S. –, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016) (citing Taylor, 495 U.S. at 598, 110 S. Ct. 2143). "That means as to burglary—the offense relevant in this case—that Congress meant

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[4] As the government correctly contends, at least one of Clay's armed robbery convictions from 1992 is countable under the ACCA. See United States v. Coker, Criminal No. 3:12CR70TSL, slip op. at 14-17 (S.D. Miss. Jan. 26, 2017)(concluding that Mississippi armed robbery conviction was categorically a violent felony under § 924(e)(i)(force clause). The court has likewise previously concluded that a conviction under Mississippi law for aggravated assault qualifies as a violent felony. See United States v. Griffin, 3:07Cr75TSL, slip op. at 9-10 (S.D. Miss. June 19, 2017).

a crime 'contain[ing] the following elements: an unlawful or unprivileged entry into ... a building or other structure, with intent to commit a crime.'" Id. (quoting Taylor, 495 U.S. at 598).

As the Supreme Court explained in Mathis:

> To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. See [Taylor, 495 U.S.] at 600–601, 110 S. Ct. 2143. Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." Black's Law Dictionary 634 (10th ed. 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty, see McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. ... They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. And ACCA, as we have always understood it, cares not a whit about them. See, e.g., Taylor, 495 U.S., at 599–602, 110 S. Ct. 2143. A crime counts as "burglary" under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA "burglary"—even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries.
>
> The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or "indivisible") set of elements to define a

> single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match.

Mathis, 136 S. Ct. at 2248–49.[5]

The indictment and PSIR identified six previous felony convictions for burglary which were committed on occasions different from one another – two business burglaries and four house burglaries.[6] At the time of the offenses and Clay's convictions, Mississippi law defined the burglary of a dwelling house as "breaking and entering any dwelling house, in the day or night, with intent to commit a crime...." Miss. Code Ann. 97-17-

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[5] The analysis varies if the statute has a "more complicated (sometimes called 'divisible') structure, making the comparison of elements harder," such as when a single statute lists elements in the alternative and thereby defines multiple crimes. Mathis v. United States, – U.S. –, 136 S. Ct. 2243, 2248-49, 195 L. Ed. 2d 604 (2016) (internal citation omitted). Both of the statutes at issue here are indivisible.

[6] In its response, the government asserts that because all of Clay's July 26, 1983 house burglary convictions "occurred at the same time with no intervening arrest," only one of these convictions is counted in determining his career offender status. However, while these convictions were obtained the same day, they were each adjudicated under a separate cause number and stemmed from actions which were distinct in time. Thus, each offense is a separate felony for purposes of the ACCA. See United States v. White, 465 F.3d 250, 253 (5th Cir. 2006)(crimes that are "distinct in time" are considered separate criminal transactions for the purposes of § 924(e)," so proper inquiry in deciding whether separate offenses occurred on "occasions different from one another" is whether they occurred sequentially; fact that charges were tried together is irrelevant to the determination of whether offenses constituted two criminal transactions). Notably, defense counsel did not object on this basis.

19 (1972).[7] A "dwelling house" was, in turn, defined as "[e]very building joined to, immediately connected with, or being part of the dwelling house...." Miss. Code Ann. § 97-17-31 (1972).[8] This definition of burglary clearly comports with the generic definition set out in Taylor, 495 U.S. at 598-99 (generic burglary is defined as "an unlawful or unprivileged entry into, or remaining, in a building or other structure, with the intent to commit a crime")[9]. In light of Clay's four qualifying convictions for house burglary, even if the court relied on the residual clause during sentencing, it is nonetheless clear that Clay's sentence was properly enhanced under the ACCA and thus, he has suffered no prejudice from any Johnson error.

Accordingly, based on the foregoing, it is ordered that defendant's § 2255 motion is denied.

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[7] While this section was repealed in 1996, Miss. Code Ann. § 97-17-23 was amended the same year to include the substance of the statue.

[8] This section was also repealed in 1996.

[9] Contrary to Clay's assertion otherwise, Miss. Code ann. § 97-17-33 does not criminalize entry into the curtilage of a house. Rather, it criminalizes breaking and entering a building within the curtilage of a dwelling house. See Miss. Code Ann. § 97-13-33 ("Every person who . . . shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary").

Finally, this court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. It is hereby ordered that a certificate of appealability is denied.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 11th day of July, 2017.

/s/ Tom S. Lee_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60244

In re: GLEN B. CLAY,

Movant

A True Copy
Certified order issued May 26, 2016

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Southern District of Mississippi, Jackson to consider
a successive 28 U.S.C. § 2255 motion

Before DAVIS, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

Glen B. Clay, federal prisoner # 09299-043, moves for authorization to file a successive 28 U.S.C. § 2255 motion challenging his 235-month sentence for possession of a firearm by a convicted felon under the Armed Career Criminal Act (ACCA). Relying on *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), he contends that he was unconstitutionally sentenced under the residual clause of the ACCA. The Supreme Court recently determined in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), that *Johnson* applies retroactively to cases on collateral review.

The record before us contains no documentation of Clay's predicate offenses and does not rule out the possibility that he was sentenced under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). Because he has made a prima facie showing that he satisfies the requirements of § 2255(h), IT IS ORDERED that the motion for authorization is GRANTED. *See* § 2255(h); 28 U.S.C.

§ 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001). This grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Clay has failed to make the showing required to file such a motion. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

GLEN B. CLAY

VS. CRIMINAL NO. 3:07CR73TSL-LRA
CIVIL ACTION NO. 3:10CV589TSL

UNITED STATES OF AMERICA

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Glen B. Clay for relief pursuant to 28 U.S.C. § 2255. The government has responded in opposition to the motion and the court, having considered the parties' memoranda and the record in this case, concludes that the motion is not well taken and should be denied.

On February 2, 2006, City of Clinton, Mississippi police officers stopped the vehicle which Clay was driving for traffic violations. During the stop, an officer observed a firearm protruding from under the driver's seat. Clay was arrested and charged with a variety of state law violations. According to Clay, on April 26, 2006, he entered nolo contendere pleas in Clinton Municipal Court to charges of "possessing a Bryco .380 handgun by a convicted felon,"[1] having no driver's license, having

[1] Under Mississippi Code Annotated § 97-37-5, it is unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic

no tag, DUI-first offense and possession of marijuana.[2] Clay further recites: "However, the state judge entered a judgment to bond over the felon in possession offense to the grand jury."

Thereafter, on July 11, 2007, the federal grand jury issued a one-count indictment, charging that on February 20, 2007, Clay possessed a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). On July 30, 2007, Clay, who was in state custody, was arrested and arraigned on the federal charge, entering a plea of not guilty. Later, on September 12, 2007, a superseding indictment charged that, in addition to the unlawful possession on February 20, 2007, Clay also unlawfully possessed a firearm on February 2, 2006. Clay was arrested and arraigned on the superseding indictment on October 4, 2007. Clay again entered a plea of not guilty and asserted his right to a speedy trial.

> knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the United States Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

[2] The court notes that while on page 16 of the brief in support of his motion, Clay recites that he entered a nolo contendere plea to possessing a firearm by a convicted felon and to driving without a license and pled guilty to the remaining charges, on page 23 of the brief, he indicates that he pled nolo contendere to all of the charges.

On November 20, 2007, Clay's counsel filed a motion to dismiss count 2 of the indictment, which charged possession on February 20, 2007, on the basis that the government, in violation of the Speedy Trial Act, 18 U.S.C. § 3161(c)(2), failed to bring Clay to trial on the charge within seventy days of his arraignment on the first indictment. On December 7, 2007, the court granted Clay's motion and dismissed count 2 of the superseding indictment. That same day, Clay proceeded to trial before a jury on count one and was found guilty of having illegally possessed a firearm on February 2, 2006. On June 18, 2008, the court sentenced Clay to a 235-month term of imprisonment and three-year term of supervised release.

Clay, via the same counsel who represented him at trial, timely appealed, raising the following issues: (1) the district court erred by assigning criminal history points for several burglary convictions from 1983; (2) the court's guidelines minimum sentence was substantively unreasonable; (3) the district court erred in admitting the testimony of the ATF agent; and (4) the evidence was insufficient to support the conviction. On June 4, 2009, the Fifth Circuit affirmed Clay's conviction and sentence, and on October 13, 2009, the Supreme Court denied his petition for certiorari.

Thereafter, Clay filed this § 2255 motion, setting forth the following heretofore unasserted grounds for relief:

> Ground - One. Counts 1 and 2 of the indictment failed to charge petitioner with [a] federal gun offense agaist [sic] the laws of the United States in this case;
>
> Ground-Two. Counts 1 and 2 failed to allege the type of firearm petitioner possessed;
>
> Ground-Three. The superseding indictment was obtained in violation of the 30-day Speedy Indictment Clause Limitation Period, under 18 U.S.C. § 3161(b) Fed. R. Crim. P.;
>
> Ground-Four. Petitioner did not give his written consent, signed in open court to remove his state firearm offense to federal prosecutorial jurisdiction as mandated by 28 U.S.C. § 1446;
>
> Ground-Five. This court lacked subject matter jurisdiction to proceed against petitioner on the firearm offense;
>
> Ground-Six. Petitioner's convicted felon in possession offense, violates the double jeopardy clause of the Fifth Amendment; and
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> Ground-Seven. The trial court constructively amended the superseding indictment during its final jury instruction.

Finally, while Clay did not purport to denominate it as a separate ground for relief, he asserts in the last paragraph of his memorandum in support of his motion that "defense and appellate counsel failed to argue and raise each and every ground in this memorandum of law for relief on her clients [sic] behalf, thus, she was constitutionally ineffective at all critical stages of the court's proceedings."

The government has responded in opposition to the motion, urging with regard to Grounds One through Seven that Clay has failed to assert a ground for relief of a constitutional or jurisdictional magnitude and that he is, in any event, procedurally barred from asserting these claims for the first time via this collateral attack. See United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc) (defendant "may not raise an issue for the first time on collateral review without showing both cause for his procedural default, and actual prejudice resulting from the error") (internal quotation marks omitted). Regarding the ineffective assistance of counsel claims asserted in the last paragraph of Clay's memorandum, the government takes the position that Clay's conclusory allegations fail to establish either cause or prejudice for his failure to raise these grounds at the trial or appellate level, and that in any event, the claims lack merit. Based on the following, the court concludes that Clay's motion is due to be denied.

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Gaudet, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). Further, where a defendant failed to raise an error on his direct appeal, he may only

collaterally attack his conviction on that ground upon a showing of "cause" for the omission and "actual prejudice" resulting from the asserted error. A showing of ineffective assistance of counsel satisfies the cause and prejudice standard. See United States v. Kallestad, 236 F.3d 225, 227 (5th Cir. 2000). Furthermore, "there is no procedural default for failure to raise an ineffective assistance of counsel claim on direct appeal." Massaro v. United States, 538 U.S. 500, 503-04, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). Here, as set forth above, while Clay failed to raise Grounds One through Seven at trial or on appeal, he has broadly alleged that counsel's failure to raise the grounds at the trial level and/or on direct appeal amounted to ineffective assistance of counsel. Accordingly, the court will consider Grounds One through Seven as being brought within the context of an ineffective assistance of counsel claim.

In order to prevail on a claim for ineffective assistance of counsel, a defendant must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That is, he must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. Strickland,

466 U.S. at 687, 688. A defendant's failure to establish both prongs of the Strickland test warrants rejection of his claims.

Several of the grounds upon which Clay seeks relief center on the superseding indictment, which charged the following:

> That on or about February 2, 2006, in Hinds County in the Jackson Division of the Southern District of Mississippi, the defendant, **GLEN B. CLAY a/k/a GLENN B. CLAY,** having been convicted in the Circuit Court of Madison County and in the Circuit Court of the First Judicial District of Hinds County, Mississippi, of the following crimes which are punishable by imprisonment for a term exceeding one year and which were committed on occasions different from one another:
>
> (1) on or about January 10, 2000, in the Circuit Court of Madison County in Case Number 98-0044 of the crime of Business Burglary; . . .
>
> (9) on or about May 24, 1983, in the Circuit Court of the Fist Judicial District of Hinds County in Case Number U-860 of the crime of House Burglary;
>
> knowingly possessed in and affecting commerce a firearm in violation of Sections 922(g)(1) and 924(e), Title 18, United States Code.

As Grounds One and Two, Clay contends that because the indictment failed to set forth essential elements of the crime, it deprived the court of jurisdiction to try him. Liberally construing the motion, Clay may also be asserting that because the indictment failed to set forth essential elements, it failed to state an offense. Specifically, as Ground One, Clay contends that the indictment should have but did not recite the following language from § 922(g): “It shall be unlawful for any person.” As Ground Two, he maintains that the indictment should have but did not

recite the specific firearm that he possessed. Clay further reasons that because the indictment failed to contain this information, counsel was ineffective for failing to raise the issues at the trial or appellate level. However, it is clear counsel did not render ineffective assistance with regard to either ground.

Initially, the court easily concludes counsel was not ineffective for failing to raise a meritless challenge to the court's jurisdiction. See United States Jacquez-Beltran, 326 F.3d 661, 662 and n.1 (5th Cir. 2003) (noting that following United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002), defects in an indictment due to the failure to allege element of the offense are not jurisdictional but go only to merits of case); Paredes v. Quarterman, 574 F.3d 281, 291 (5th Cir. 2009) ("[Petitioner's] counsel did not act deficiently by failing to raise a meritless objection. Moreover, the failure to make a meritless objection could not have prejudiced [the petitioner].").

Further, Clay's assertion that counsel was ineffective for failing to challenge the indictment on the ground that it did not state an offense fares no better than his jurisdictional argument. "An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense."

United States v. Gordon, 780 F.2d 1165, 1169 (5th Cir. 1986). Moreover, "[t]he test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." Id. "It is generally sufficient that an indictment set forth the offense in the words of the statute itself as long as the statutory language unambiguously sets out all the elements necessary to constitute the offense." Id. at 1169–70. "To establish a violation of §922(g)(1), the government must prove three elements beyond a reasonable doubt: (1) that the defendant previously had been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce." United States v. Broadnax, 601 F. 3d 336, 341 (5th Cir.) (internal quotation marks and citation omitted), cert. denied, ––– U.S. ––––, 131 S. Ct. 207, 178 L. Ed. 2d 124 (2010).

Here, where the indictment clearly apprised Clay that the conduct alleged therein was "in violation of Sections 922(g)(1) and 924(e), Title 18, United States Code," the indictment need not have contained the language, "It shall be unlawful for any person." Further, contrary to defendant's contention otherwise, there is no requirement that the specific type of firearm be charged in the indictment.[3] See Broadnax, 601 F. 3d at 344

[3] United States v. O'Brien, ––– U.S. ––––, 130 S. Ct. 2169, 176 L. Ed. 2d 979 (2010), cited by Clay for the proposition that the type of gun is an essential element of the crime for which he

(defendant could be convicted upon proof that he possessed a "firearm" which fell within statutory definition (and proof that firearm had requisite nexus with interstate commerce) (citing United States v. Munoz, 150 F.3d 401, 417 (5th Cir. 1998)(stating that § 922(g)(1) "just requires the defendant to possess a 'firearm' to violate it")); United States v. Hamilton, 992 F.2d 1126, 1129-30 (10th Cir. 1993) (indicating that the type of firearm represents a non-essential element of § 922(g)(1)). As both Grounds One and Two are meritless, it follows that counsel was not ineffective and no relief may be granted thereon.

In Ground Seven, which also relates to the indictment, Clay takes the position that the jury instructions constructively amended the indictment in two respects. First, according to Clay, the court required as an element of the offense a finding that the defendant possessed the firearm in interstate commerce, when, in fact, he had not been charged with "violating interstate commerce." Secondly, he contends that the jury instructions allowed for conviction upon a finding that he constructively possessed the firearm when the record contained no evidentiary

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was convicted, is inapposite. O'Brien did not involve interpretation of § 922(g) (1), rather it was a statutory-interpretation case about the elements of an offense under 18 U.S.C. § 924(c)(1)(B)(ii) (providing for enhanced penalty where machine gun is used). Defendant's sentence was not enhanced by the type of gun that he illegally possessed.

support for this instruction. This ground also lacks merit and counsel was not ineffective for not raising it.

"A constructive amendment to the indictment occurs when the jury is permitted to convict the defendant on a factual basis that effectively modifies an essential element of the offense charged in the indictment." United States v. Millet, 123 F.3d 268, 272 (5th Cir. 1997), cert. denied, 523 U.S. 1023, 118 S. Ct. 1306, 140 L. Ed. 2d 471 (1998). The alteration can be implicit or explicit. Id. Either the evidence or a jury instruction can effectuate it. Id. Here, the superseding indictment clearly charged the requisite interstate commerce nexus and thus, the jury instructions worked no modification. Further, contrary to Clay's assertion otherwise, the government proceeded at trial under a constructive possession theory. It presented proof that police found the firearm charged in the indictment under the front seat of the car which Clay was operating and had recently purchased. On direct appeal, the Fifth Circuit concluded that the evidence was sufficient to support a conviction under this theory. United States of America v. Clay, No. 08-60554, slip. op. 3 (5th Cir. June 4, 2009). The court's instruction to the jury which defined "constructive possession" did not modify the indictment and was wholly supported by the government's proof. It follows that counsel did not render ineffective assistance as to this ground. The court now turns to the remaining grounds.

By Ground Three, Clay contends his rights under the Speedy Trial Act were violated. See 18 U.S.C. § 3161(b) ("Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."). Specifically, he urges that where he was arrested and arraigned on the original indictment on July 30, 2007, the September 12, 2007 superceding indictment was returned "well pass [sic] the 30 day statute of limitations period in which the government must indict following arrest" and because the superseding indictment violated the Act, dismissal was required. See 18 U.S.C. § 3162(a)(1) ("If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped."). Although it is not altogether clear, as the court appreciates it, Clay's position is that § 3161(b) requires the government to bring any and all charges against a defendant within thirty days of his initial arrest by federal authorities and acts as a statute of limitations, precluding the return of a superseding indictment more than thirty days following that

arrest. Clay's proposed interpretation of the Speedy Trial Act is incorrect.

As the Eleventh Circuit explained:

> A superseding indictment that issues more than 30 days after the arrest, but before the original indictment is dismissed, does not violate § 3161(b). United States v. Orbino, 981 F.2d 1035, 1037 (9th Cir. 1992), cert. denied, 510 U.S. 893, 114 S.Ct. 256, 126 L. Ed. 2d 208 (1993).
>
> > [T]he Speedy Trial Act does not guarantee that an arrested individual indicted within thirty days of his arrest must, in that thirty-day period, be indicted for every crime known to the government, failing which he may never be charged. In short, the Speedy Trial Act is not a statute of limitations.
> >
> > ... [The applicable statute of limitations] specifies the time within which an arrested indicted defendant may be charged with additional crimes by superseding indictment.
>
> United States v. Wilson, 762 F. Supp. 1501, 1502 (M.D. Ga. 1991).

U.S. v. Mosquera, 95 F.3d 1012, 1013 (11th Cir. 1996). Clay was timely indicted within the applicable statute of limitations, see 18 U.S.C. § 3582 (setting forth five-year statute of limitations for non-capital offenses). It follows that counsel was not ineffective for failing to file a meritless motion to dismiss.

By Ground Four, Clay asserts that under 28 U.S.C. § 1455,[4] the court did not have jurisdiction over his case because he did not give his written consent, signed in open court, to remove his state firearm offense to federal court and that counsel was ineffective for failing to raise the issue. Specifically, he points to the following language in § 1455(a):

> A defendant ... desiring to remove any criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such prosecution is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

From this, Clay reasons that as he did not give his consent, the government's removal of the state criminal case was improper. Again, there is no merit to Clay's claim. The state prosecution was not removed to this court by the government. Rather, the United States commenced its own prosecution of Clay for violation of federal law and Clay's lack of consent thereto is wholly irrelevant. Counsel was not ineffective for failing to raise a frivolous argument.

In Ground Five, Clay maintains that the court lacked subject matter jurisdiction over the firearm offense because the case was

[4] Prior to its amendment in 2011, § 1446(c) set forth the procedure to be employed by a defendant seeking to remove his criminal prosecution from federal to state court. In 2011, the portions of § 1446 pertaining to removal of a criminal prosecution were recodified at § 1455.

not commenced by the filing of a criminal complaint, which he incorrectly maintains is jurisdictionally mandated under the Federal Rules of Criminal Procedure. He further complains that as there was no complaint, there was no ex parte review by the magistrate judge and therefore, there was no safeguard to ensure that probable cause existed. Clay again errs in his understanding of the law. Every criminal prosecution need not commence upon a criminal complaint, and where the grand jury has indicted a defendant, a magistrate judge need not perform an ex parte review of the complaint in order to issue an arrest warrant. Probable cause for the arrest is established by the grand jury's determination that probable cause to indict existed. See Giordenello v. United States, 357 U.S. 480, 487, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958) (holding that "[a] warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged."); Campbell v. City of San Antonio, 43 F.3d 973, 976 (5th Cir. 1995) (noting that arrest warrant may be based on a grand jury indictment which establishes probable cause). Here, the magistrate judge properly issued an arrest warrant based on the indictment and in so doing, did not violate Clay's rights. Counsel was not ineffective for failing to raise this argument.

Finally, by Ground Six, Clay charges that in light of his nolo contendere plea to the possession of a firearm offense in state court, his conviction in this court violates the Double Jeopardy Clause of the Fifth Amendment and counsel was ineffective for failing to raise the issue. While the state court's disposition of the state charge of possession of a firearm by a felon is not altogether clear, even had Clay been convicted (or acquitted) of the charge, the double jeopardy clause was not violated by his conviction on federal charges involving the same acts which gave rise to his state prosecution. See United States v. Patterson, 809 F.2d 244, 247 (5th Cir. 1987) (explaining that under the dual sovereignty doctrine, "an act of a defendant may be made a crime under both federal and state laws and the defendant may be punished by each sovereign for the same act without offending the Double Jeopardy Clause") (citing Abbate v. United States, 359 U.S. 187, 195 (1959), and United States v. Lanza, 260 U.S. 377, 382 (1922)); see also United States v. Angleton, 314 F.3d 767, 771-74 (5th Cir. 2002), cert. denied, 538 U.S. 946, 123 S. Ct. 1649, 155 L. Ed. 2d 488 (2003). Counsel was not ineffective for failing to raise this meritless claim.

Based on the foregoing, it is ordered that defendant's motion for relief pursuant to § 2255 is denied. It is further ordered that a certificate of appealability should not issue. Defendant has failed to show that "jurists of reason would find it debatable

whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Further, defendant has not made a substantial showing of the denial of a constitutional right.

A separate judgment will be entered in accordance with Rule 58 of the Rules of Civil Procedure.

SO ORDERED this the 24th day of January, 2013.

/s/Tom S. Lee
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60554

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GLEN B CLAY, also known as Glenn B Clay

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:07-CR-73-1

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Glen B. Clay appeals his conviction and 235-month sentence for possession of a firearm by a felon. We AFFIRM for the following reasons:

1. The district court did not err by assigning criminal history points for several burglary convictions from 1983. Under U.S.S.G. § 4A1.2, any portion of a sentence served within 15 years of the instant offense brings the prior offense within the criminal history computation. The presentence report summarized each of Clay's earlier convictions and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentences. It revealed that when Clay was paroled in 1990, approximately thirteen years of his prior consecutive sentences had not been served. The report also summarized his 1994 conviction of a new crime, which caused the Mississippi state court to revoke his 1990 parole. By statute, the revocation would have required Clay to serve the "remainder of the sentence originally imposed . . . ." Miss. Code Ann. § 47-7-27. According to the report relied upon by the district judge, the sentences from his 1983 convictions were to be served concurrently with the 1994 sentence. The district judge found that Clay served a portion of the 1983 sentences within 15 years of the instant offense. Because the finding is plausible in light of the record as a whole, there is no clear error. *See United States v. Martinez-Moncivais*, 14 F.3d 1030, 1038 (5th Cir. 1994).

2. Clay's guidelines minimum sentence is not substantively unreasonable. Clay argues that the nature of the offense and his distant criminal record do not justify the sentence. But the district court considered these same arguments and, after considering the factors under 18 U.S.C. § 3553(a), rejected Clay's request for a downward variance because of "the magnitude of [his] criminal history." We see no reason to disturb the presumptively reasonable sentence. *See United States v. Rodriguez*, 523 F.3d 519, 526 (5th Cir. 2008).

3. We see no reversible error in the admission of the ATF agent's testimony. Given the agent's significant qualifications, including his education and law enforcement training and experience, the agent likely would have been qualified to testify as an expert. *See United States v. Ollison*, 555 F.3d 152, 163 (5th Cir. 2009). Moreover, we agree with the Government that the testimony responded to Clay's cross-examination of the police officers on the issue of fingerprint evidence, *see United States v. Darland*, 659 F.2d 70, 72 (5th Cir. 1982), and was cumulative to Clay's

own expert witness, who also testified that fingerprints are not easily recovered from firearms. Even assuming error in the admission of the testimony, it was harmless. *See United States v. Hall*, 500 F.3d 439, 444 (5th Cir. 2007) ("The erroneous introduction of cumulative evidence was harmless error.").

4. The evidence was sufficient to support the conviction. The jury heard evidence that Clay purchased the car the day before his arrest and that police found the car's title in his wallet. The officer who searched the vehicle testified that he could see the butt of the firearm on the floorboard when he opened the car door. A reasonable juror could find beyond a reasonable doubt that Clay knowingly possessed the firearm. *See United States v. Patterson*, 431 F.3d 832, 837 (5th Cir. 2005); *United States v. Pennington*, 20 F.3d 593, 598 (5th Cir. 1998).

5. Finally, there was no error in the jury instructions. As we have already determined, the jury could infer that Clay knowingly possessed the firearm from his ownership or control of a car with a handgun visible underneath the driver's seat. The district court did not abuse its discretion. *See United States v. Redd*, 355 F.3d 866, 873–74 (5th Cir. 2003).

AFFIRMED.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

LCT:ms

UNITED STATES DISTRICT COURT
Southern District of Mississippi

UNITED STATES OF AMERICA
V.
GLEN B. CLAY

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:07cr73TSL-LRA-001

USM Number: 09299-043

Kathy Nester, FPD
200 S. Lamar St., Suite 100-S, Jackson, MS 39201 (601) 948-4284
Defendant's Attorney:

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) One and Three of Superceding Indictment after a plea of not guilty.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 12 2008
J.T. NOBLIN, CLERK
BY _____ DEPUTY

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	02/20/07	1
18 U.S.C. § 924(d)(1)	Forfeiture	N/A	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) 2 ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 5, 2008
Date of Imposition of Judgment

Signature of Judge

The Honorable Tom S. Lee Senior U.S. District Court Judge
Name and Title of Judge

6/11/08
Date

DEFENDANT: GLEN B. CLAY
CASE NUMBER: 3:07cr73TSL-LRA-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Two hundred thirty five (235) months

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant not be incarcerated at Yazoo City, MS

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GLEN B. CLAY
CASE NUMBER: 3:07cr73TSL-LRA-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GLEN B. CLAY
CASE NUMBER: 3:07cr73TSL-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

A. The defendant shall submit to random urinalysis testing and shall participate in a drug aftercare treatment program if deemed necessary by the supervising U. S. Probation Officer, to include inpatient treatment, if needed.

B. The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U. S. Probation Officer.

DEFENDANT: GLEN B. CLAY
CASE NUMBER: 3:07cr73TSL-LRA-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GLEN B. CLAY
CASE NUMBER: 3:07cr73TSL-LRA-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court P. O. Box 23552, Jackson, MS 39225-3552.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Hi-Point 9MM Handgun, Serial No. P1334136

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60538

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GLEN B. CLAY, also known as Glenn B. Clay,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion 4/18/19, 5 Cir., _____, _____ F.3d _____)

Before JONES, HO, and OLDHAM, Circuit Judges.

RER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith H Jones

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 18, 2019
Lyle W. Cayce
Clerk

No. 17-60538

D.C. Docket No. 3:16-CV-523

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GLEN B. CLAY, also known as Glenn B. Clay,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

Before JONES, HO, and OLDHAM, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

Relevant Statutory Provisions

18 U.S.C. § 924(e)
Armed Career Criminal Act

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

28 U.S.C. § 2244
Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application

makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * *

28 U.S.C. § 2255
Federal custody; remedies on motion attacking sentence

(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 conclusions of law with respect thereto. If the court finds that the judgment was rendered without 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 judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

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

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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

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

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IN the United States DisTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

GLEN B. CLAY
Petitioner

3:16cv523

Vs.

CASE No. 16-60244
CASE No. 3:07cr73TSL-LRA

UNITED STATES OF AMERICA
Respondent

MEMORANDUM OF LAW IN SUPPORT OF 28 U.S.C. 2255 Motion To VACATE, SET ASIDE, OR CORRECT SENTENCE

COMEN NOW, the Petitioner GLEN B. CLAY And respectfully submits to this HONORAble Court the foregoing Memorandum of LAW in support of his 28 U.S.C. 2255 HABEAS Corpus Motion, for Adjudication on the Merits herein.

Petitioner CLAY, further prays that this Court construe this pleading LiberAlly in light of HAines V. Kerner, 404 U.S. 519, 520-521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), holding that "pro se litigants Ar to be held to A lesser standard of revien than lawyers who Are formerly trained in the LAW, And Are ENTitled to LiberAl Costruction of their pleadings."

FACTUAL BACKGROUND

ON June 5, 2008, CLAY, Petitioner, WAS Convicted in the United States District Court At the Southern District of Mississippi for being A felon in possession of A fire Arm, in violation of 18 U.S.C. 922(g) And 924(e). CLAY WAS Sentence to A term of 235 Months without the benefit of A plea Agreement.

Petitioner Appealed his sentence And Conviction to the Fifth Circuit Court of Appeals. The Fifth Circuit Affirmed the district Court judgment on June 4, 2009.

CLAY, Appealed to the United States Supreme Court for A Writ of Certiorari which WAS denied on October 13, 2009.

Petitioner CLAY then filed A timely 2255 Motion to Vacate, Set Aside, or Correct Sentence on October 13, 2010. The District Court dismissed with prejudice on 1-24-2013.

Thereafter IN 2015, Some years well After the District Court dismissed CLAY's 2255 Motion to VACATE, the United States Supreme Court ruled the Armed Career Criminal Act, (ACCA'S) residual Clause unconstitutional vague in Every Application. Therefore, imposing AN increased Sentence under the ACCA's residual Clause violates the "Constitution's guarantee of dueprocess". See Johnson v. United States, 135 S. Ct. 2551 (2015). See Also Welch v. United States, 15-6418 (April 18, 2016), the Supreme Court Explicitly held

Johnson retroactive to cases on collateral review. Now comes, this present 28 U.S.C. 2255 Motion to vacate, Set Aside, or Correct sentence: Moreover, the district court never Applied the Modified Categorical Approach (Shepard Document), to neither of Petitioner's prior felony convictions that were use to enhance his sentence under the ACCA enhancement. All of Petitioner Clay, prior State Court Convictions were Under divisible State Statutes and thus was subject to the Modified Categorical Approach. There is nowhere in the record that the district Court consider Appropriate Adjudicative record, such as the charging documents, plea Agreements, transcripts of colloquies in which petitioner confirmed the factual basis, or other comparable judicial records, to determine whether the convictions necessarily rested on facts equating to the generic offense.

It is clear that the district Court only relied on the now invalid "residual Clause" to establish that Petitioner prior state Court Convictions Supported an enhanced sentence. This is because if a Statute encompasses/criminalizes conduct that the generic crime does not, then A Conviction is not A predicate offense under the categorical Approach. See Taylor v. United States, 495 U.S. 575, 598-99, 110 S. Ct. 2143, 2158, 109 L. Ed. 2d 607 (1990). See Also Descamps v. United States, 133 S. Ct. At 2283.

The instant record lacks the pertinent State-Court

documents relating to Petitioner CLAY's State Convictions because the issue was not litigated before. Accordingly, CLAY Ask that the Court to receive Appropriate Adjudicative records And Make A determination As to whether Any of ChAy's Convictions qualify As violent felonies under the ACCA.

STATEMENT OF THE CASE

Adefendant Convicted of being A felon in possession of A firearm is normally subject to A statutory maximum sentence of 10 years of imprisonment. 18 U.S.C. 924(A)(2). Pursuant to the ACCA, A defendant Convicted under 18 U.S.C. 922(g) who has three previous Coniclions for violent felonies or serious drug offenses occurring on different occasions Must be imprisoned for At least 15 years. 924(e)(1); U.S.S.G. 4B1.4(A). Burglary is one of the violent felonies Enumerated in the ACCA. 924(e)(2)(B)(ii). The Supreme Court has limited the use of State law burglary Convictions for sentence enhancements by holding that only "generic" burglary can support A 924(e) enhancement. Taylor V. United States, 495 U.S. 575, 598-99, 110 S.Ct. 2143, 2158, 109 L.Ed. 607 (1990). Specifically, the Taylor definition of A generic burglary requires that the State Statute Contain, At A minimum, the following elements: "An unlawful or unprivileged entry into, or remaining in, A building or other Structure, with intent to commit A crime." Id. At 598, 110 S.Ct. At 2158.

Here in the present case, there is no dispute that burglary as defined by Mississippi Statute Criminalizes conduct not covered by generic burglary. This is because in Addition to buildings And Structures, Mississippi burglary Statute proscribes breaking into A "water vessel, commerial or pleasure craft, Ship, Steamboat, flatboat, railroad car, Autombile, truck or trailer "with intent to steal or commit A felony. When State Statutes Are broader than generic burglary, Courts May employ what the Court has called the "Modified Categorical Approach". See Shepard v. United States, 544 U.S. 13, 26, 125 S. Ct. 1254, 1263, 161 L. Ed. 2d 205 (2005).

JUNE 20, 2016 CASE: NO. 16-60244

The reason for the Motion for An Order Anthorizing Successive, is because the Fifth Circuit court of Appeals. In New Orleans, Granted Me the Motion for Authorization, on 05-26-2016

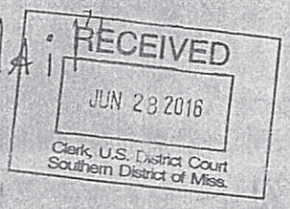
Thank you!

Mr. Glenn B. Clay #09299-043

Mr. Clay, Glenn B. #09299-043

Mr. Glenn D. Clay 09299-043
Federal Correctional Complex
P.O. Box 5888
Yazoo City, MS. 39194-5888

"Legal Mail"



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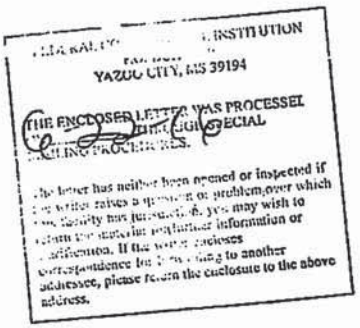
Clerk Us District Court
245 Capital ST.
Suite 316
Jackson, MS 39201
United States


INSTITUTION
YAZOO CITY, MS 39194
THE ENCLOSED LETTER WAS PROCESSED
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The letter has neither been opened or inspected if
the writer raises a question or problem over which
this facility has jurisdiction, you may wish to
return the letter for further information or
clarification. If the writer encloses
correspondence for forwarding to another
addressee, please return the enclosure to the above
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-60112

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GLEN B. CLAY, also known as Glenn B. Clay,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

CLERK'S OFFICE:

Under 5th Cir. R.42.3, the appeal is dismissed as of April 19, 2013, for want of prosecution. The appellant failed to timely comply with certificate of appealability requirements.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

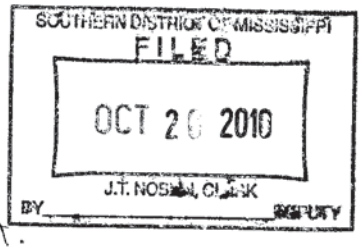
Misty Lisotta
APR 19 2013

By: _____
Misty L. Lisotta, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

THE UNITED STATES DISTRICT COURT
Southern District of Mississippi
Jackson Division

NO. 3:07-CR-73TSL-LRA



Glen B. Clay, Petitioner,

vs.

United States of America, Respondent.

Petitioner's Memorandum of Law In Support of His 28 U.S.C. § 2255 Motion To Vacate His Conviction And Sentence

Comes Now, Glen B. Clay, Pro se, who respectfully submits this Memorandum of law in support of his 28 U.S.C. § 2255 motion to vacate his Conviction and Sentence for Constitutional and jurisdictional error defects in the Court procedural process in case at bar. See Clay -v. U.S., 537 U.S. -, 155 L.Ed. 2d. 88, 123 S.Ct. - (2003).

Glen B. Clay
Reg. No. 09299-043
FCC-Yazoo (Med.)
P.O. Box 5888
Yazoo City, MS. 39194-5888

October 13, 2010

Brief Case History

On or about July 11, 2007, a federal grand jury returned a one count indictment charging that, on or about February 20, 2007, Petitioner knowingly possessed in and affecting Commerce a firearm, in violation of Sections 922(g)(1) and 924(e), Title 18, U.S.C.

On or about September 12, 2007, that same grand jury returned a first Superseding three Count indictment. Count One Charged that on February 2, 2006, Petitioner knowingly possessed in and affecting Commerce a firearm, in violation of Sections 922(g)(1) and 924(e), Title 18, U.S.C., Count two charged that on or about February 20, 2007, Petitioner knowingly possessed in and affecting Commerce a firearm, in violation of Sections 922(g)(1) and 924(e), Title 18, U.S.C., and Count three charged Petitioner with forfeiture of any property, real or personal involved in such offenses, or any property traceable to such property, all in violation of Section 924(d)(1), Title 18, U.S.C.

On or about December 10, 2007, the jury found Petitioner guilty of Counts 1 and 3, however, Count two of the indictment was dismissed by the Court before trial.

On or about June 5, 2008, this Court sentenced Petitioner to 235 months imprisonment and 3 years Supervised release. Petitioner timely appeal his Conviction and Sentence.

On on about June 4, 2009, the Court of Appeals for the Fifth Circuit affirmed. En banc was not filed.

On on about August 31, 2009, Certiorari to the Supreme Court was filed. On on about October 13, 2009, the Supreme Court denied Certiorari.

This timely 28 U.S.C. § 2255 motion to vacate is now submitted for filing with the Court.

Ground - One

Counts 1 and 2 of The Indictment Failed To Charge Petitioner With [A] Federal Gun Offense Against The Laws Of The United States In This Case

Petitioner assert that counts 1 and 2 of the indictment failed to charge him with [a] federal gun offense against the United States, pursuant to Title 18, U.S.C. Section 922(g)(1), Fed. Rules of Crim. P. (2007, ed.). First and foremost, § 922(g)(1) reads below in relevent parts:

§ 922. Unlawful acts

(g). It shall be unlawful for any person -

(1). who has been convicted in any Court of, a crime punishable by imprisonment for a term exceeding one year; - - -

To Ship or transport in inter-state or foreign Commerce, ammunition; or to receive any firearm or ammunition which has been Shipped or Transported in interstate or foreign Commerce. Id.

However, Counts 1 and 2 of the indictment charged Pititioner as shown below in relevant parts:

" - - - defendant, Glen B. Clay. a/k/a

Glenn B. Clay, having been convicted in the Circuit Court of Madison County and in the Circuit Court of the First Judicial District of Hinds County, Mississippi, of the following Crimes which are punishable by imprisonment for a term exceeding one year and which were committed on occasions different from one another --- knowingly possessed in and affecting Commerce a firearm, in violation of Sections 922(g)(1), and 924(e), Title 18 United States Code." Id. Counts 1 and 2.

The indictment as indicated above clearly failed to charge all the essential Constitutional, Statutorial, and jurisdictional elements pursuant to § 922(g)(1), all for the establishment of a federal gun offense against the United States. Here, Count 1 and 2 failed to charge a federal gun offense and inform Petitioner of the nature and cause of the accusation. See Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury---"); Const. amend. VI ("In all Criminal prosecutions, the accused shall enjoy the right --- to be informed of the nature and cause of the accusation"). That is, the indictment failed to charge: (1) Petitioner's conduct was [un]lawful; (2) he received the firearm which had been shipped or transported in interstate Commerce; and (3) it failed to name the firearm involved.

Accordingly, the indictment was constitutionally defective by lacking mens rea elements, Counts 1 and 2 did not state an offense. "Unlawfulness" is an essential element necessary to state an offense under 18 U.S.C. § 922 (g)(1). Middlebrooks -v- United States, 23 F.2d. 244, 245 (5th Cir. 1928)("where an act may be either lawful or unlawful - - - the indictment must allege that it was done unlawfully."). "[E]very essential element of an offense must be charged in the body of an indictment, and the inclusion of a reference to the statute will not cure the failure to do so - - - [A] statutory citation does not ensure that the grand jury has considered and found all essential elements of the offense charged. It Therefore fails to satisfy the Fifth Amendment guarantee that no person be held to answer for an infamous crime unless on indictment of a grand jury." United States -v- Daniels, 973 F.2d. 272, 274 (4th Cir. 1992).

To be sure, Counts 1 and 2 of the indictment tracks the language of only a portion of § 922(g)(1), the Counts under attack omits elements essential to the difinition of the offense it purport to charge this petitioner. That is, Counts 1 and 2 omits the entire first clause of Subsection (g) of § 922 from the indictment. That section reads in relevant parts:

> "It shall be unlawful for any person."

Consequently, if 18 U.S.C. § 922(g) does not set forth elements of an offense, what does it do? What was Congress doing when it put

the above Subsection in the statute?. Congress rather plainly told this Court. In other words, by the language and Structure of the statute, the requirements of § 922(g) are clearly elements of the offense of being a convicted felon in possession of a firearm. Thus, elements of an offense "must be Charge in the indictment, submitted to a jury, and proven by the government beyond a reasonable doubt." Jones -v- United States, 526 U.S. 227, 232, 119 S.Ct. 1215, 1218-19, 143 L.Ed.2d. 311 (1999). The federal indictment against Petitioner, did not charge [a]ll the essential elements of the offense. Therefore, this Court cannot eliminate §(g) as an element, a provision of the Statute, "[a] Clear violation of a fundamental canon of construction." Investment Company Institute -v- FDIC, 815 F.2d. 1540, 1547 (D.C. Cir. 1987).

Accordingly, the failure of Counts 1 and 2 of the indictment to include the essential elements of "It shall be unlawful for any person," by charging Petitioner with violating 18 U.S.C. §922(g)(1), renders the indictment Constitutionally and 'jurisdictionally defective for failing to charge a federal gun offens. "[B]ecause an indictment is 'jurisdictional, defendants at any time may raise an objection to the indictment based on failure to charge an offense, and the defect is not waived ---" United States -v- Cabrera-Teran, 168 F.3d. 141, 143 (5th Cir. 1999). "[C]hallenge to indictment's failure to charge an

offense was not waived by failure to raise the argument in initial appeal brief. "To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. This requirement stems directly from one of the central purposes of an indictment: to ensure that the grand jury finds probable cause that the defendant has committed each element of the offense, hence justifying a trial, as required by the Fifth Amendment." United States-v-White, 258 F.3d. 374, 381 (5th Cir. 2001)(quoting Cabrera-Teran 168 F.3d. at 143).

Nevertheless, [e]ven though (Petitioner) did not raise his argument that Count One fails to charge an offense in the prior appeal, this argument has not been waived. If an indictment does not charge a cognizable federal offense, then a federal Court lacks jurisdiction to try a defendant for violation of the offense. See United States-v-Armstrong, 951 F.2d. 626, 628 (5th Cir. 1992). and Rule 7(c)(1) Fed. Rules of Crim. Proc. reads: ("The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged --- Shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated"). "[T]he vice of these indictments, rather, is that they failed to satisfy the first

essential criterian by which the sufficiency of an indictment is to be tested, i.e., that they failed to sufficiently apprise the defendant of what he must be prepared to meet --- It must state the species - it must descend the particulars --- An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him --- is defective, although it may follow the language of the statute." Russell -v- United States, 369 U.S. 749, 765, 8 L.Ed.2d. 240, 251, 82 S.Ct. 1038 (1962).

Here, Petitioner's conviction and sentence must be vacated as a void judgment. Neither instruction nor a petit jury verdict can satisfy after the fact the Fifth Amendment right to be tried upon charges found by the grand jury. The omission of the entire Statutory language of § 922(g) from the indictment, i.e., a complete omitted essential elements, if the element was not presented to the grand jury which returned the instant indictment, there is nothing for a petit jury to ratify. "To be sufficient, an indictment must 'contain the elements of the offense charged.'" United States -v- Olson, 262 F.3d. 795, 799 (8th Cir. 2001) (quoting Hamling -v- United States, 418 U.S. 87, 117, 94 S.Ct. 2887 (1974)).

Ground-Two

Count's 1 and 2 Failed To Allege The Type Of Firearm Petitioner Possessed

Petitioner assert that Count's 1 and 2 Failed to allege the type of firearm he Possessed in this case at bar. See e.g., Castillo -v- United States, 530 U.S. 120, 147 L.Ed.2d.94 (2000)(The Supreme Court held the distinction between the types of firearms possessed were elements of Separate Crime and not just Sentencing facts. That is, "[T]he indictment must identify the firearm type and a jury must find that element Proved beyond a reasonable doubt."); U.S.-v-D'Brien, 176 L.Ed.2d 979 (2010)(same).

Here in this case, the Superseding indictment under attack never named the type of firearm Petitioner allegedly, "knowingly possessed" in no count. However, the government erroneously amended the indictment during its evidence at trial as to the type of firearm involved and the government must prove beyond a reasonable doubt before They can find Petitioner guilty of that offense as charged. Stirone -v- United States, 361 U.S. 212, 216-17, 4 L.Ed.2d.252, 80 S.Ct. 270 (1960)("after the indictment was charged it was no longer the indictment of the grand jury who presented it---[a] federal Court cannot permit a defendant to be tried on charges that are not made in the indictment against him.") United States -v- Leichtnam, 948 F.2d.370 (7th Cir. 1991)(evidence introduced and instruction given constituted constructive amendment of indictment--- indictment may not be amended except by resubmission to grand jury---Only a Mossberg rifle was charged, the Court instructed the jury on two handguns along with rifle).

Accordingly, Petitioner's conviction and Sentence must be vacated as a void judgment. "[I]n an indictment upon a statute, it is not sufficient to set forth the offense in the words of the Statute (as here), unless those words of themselves fully, directly, and expressly without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished." United States -v- Carll, 105 U.S. 611-12, 26 L.Ed. 1135 (1881). "[F]ailure of the indictment to allege all the essential elements of an offense --- is a jurisdictional defect requiring dismissal --- The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment." United States -v- Brown, 995 F.2d. 1493, 1505 (10th Cir. 1993).

Here, the record before this Court does not show that Petitioner waived his right to be tried and convicted only upon charges presented by a grand jury. The failure of the Superseding indictment to allege all the elements of a federal gun offense cannot be cured by proof at Trial by any means. In Sum, unless the right to be charged by an indictment containing all of the material elements of an offense is voluntarily, intelligently, and knowingly waived by Petitioner, the indictment as returned limits the scope of this Courts jurisdiction to the offense charged. This Court must notice the errors in the indictment and act accordingly to correct it.

Accordingly, in order Counts 1 and 2 of the first Superseding Indictment to sufficiently charge Petitioner with being a Convicted felon in possession of a firearm, to comport with the Grand Jury Indictment and Notice Clause of the Fifth and Sixth Amendments. Those Counts read as shown below in the homely illustration:

> On or about February 2, 2006, in Hinds County, in the Jackson Division of the Southern District of Mississippi, the defendant, Glen B. Clay, having previously been Convicted of three or more Crimes punishable by a term exceeding one year by imprisonment and which were committed on occasions different from one another, that is, he unlawfully and knowingly possess in and affecting interstate Commerce, a Bryco .380 Semi-automatic pistal, a firearm which is a federal gun offense against the laws of the United States, all in violation of Title 18, U.S.C. Sections 922(g)(1) and 924(e)(1), Fed. R. Crim. P. (2006, ed.).

The above illustration clearly and unambiguously demonstrate a Constitutionally Sufficient indictment. Compare with Exhibit (A). The Grand Jury Clause of the United States Constitu-

Tion provides that "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. United States -v- Santeramo, 45 F.3d. 622, 624 (2nd Cir. 1995) (Said that, "to comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecution for the same offense."); United States -v- Deisch, 20 F.3d. 139 (5th Cir. 1994) ("To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense."); United States -v- Morales- Rosales, 838 F.2d. 1359 (5th Cir. 1988); United States -v- Elbaneyton, 726 F.2d. 1029 (5th Cir. 1984); United States -v- Meacham, 626 F.2d. 503 (5th Cir. 1980), and United States -v- Cabrera - Teran, 168 F.3d. 141 (5th Cir. 1999).

The Fifth Circuit holds, that the failure of a federal indictment to charge each and every essential element of an offense is a serious Constitutional violation, requiring dismissal, because an indictment is jurisdictional the defect is not waived. Here, Petitioner's convictions must be vacated.

"[t]apply, the rule that the indictment, to be sufficient, must contain all the elements of a crime - - - is still a vital part of our federal criminal jurisprudence." United States -v- Wander, 601 F.2d. 1251, 1259 (3rd Cir. 1979). Focusing on the issue disputed in this case at bar, "[a] criminal conviction will not be upheld if the indictment upon which it is based does not (as here) set forth the essential elements of the offense." United States -v- Gayle, 967 F.2d. 483, 485 (11th Cir. 1992)(en banc). Accordingly, the essential jurisdictional element omitted from the Superseding Indictment is the "Model .380 pistal," in which Petitioner was convicted. That is, the word "firearm" standing alone in each count under attack, is not sufficient to charge that offense. In sum, § 922(g)(1) cannot be accurately and clearly described if the type and name of the alleged firearm is omitted, the rules of good pleading require that an indictment to be sufficient, under a federal firearm offense. - - - Must allege the type and name of the firearm.

This is true, to avoid the government from introducing any firearm other than the one set forth in the indictment returned and presented by the Grand Jury. This Court cannot allow the government to make an end-run around the Grand Jury Indictment Clause.

Ground - Three

The Superseding Indictment was Obtained In Violation of The 30-Day Speedy Indictment Clause Limitation Period, Under 18 U.S.C. § 3161(b) Fed. R. Crim. P.

Petitioner assert that the superseding indictment in this case was obtained in violation of the 30-day speedy indictment clause limitation period, under 18 U.S.C. § 3161(b), Fed. Rules of Crim. Proc. (2007, ed.). The Superseding indictment was filed against Petitioner well passed the 30-day jurisdictional speedy indictment limitation period as provided pursuant to § 3161(b) reads:

> "Any information or indictment charging an individual with the commission of an offense Shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges - - - - " Id.

However, "[t]he word Shall does not convey discretion. It is not a leeway word. The Supreme Court has said that the term Shall normally creates an obligation impervious to judicial discretion - - - That is, where Congress uses the word Shall to describe a party's obligation, Congress intends to command rather than suggest - - - The word Shall is ordinarily the language of command - - - The one commanded must follow the command - - - It is well settle that Shall means must - - - Shall

defined as has a duty to, more broadly, is required to." United States -v- Aviancte, 486 F.3d. 1273, 1275 (11th Cir. 2007).

Here in this case, the federal government took the case from the State on on about February of 2007, The original indictment was filed on July 11, 2007, the Superseding indictment was filed on September 12, 2007, more than 30-days after Petitioner's arrest and more than 30-days after he was served with notice of the instant federal prosecution. United States-v- Berry, 90 F.3d. 148, 151 (5th Cir. 1996) (stating that the "[p]urpose of the thirty-day rule is to ensure that the defendant is not held under an arrest warrant for an excessive period without receiving formal notice of the charge against which he must prepare to defend himself."). "[P]eriods of time which are excludable for speedy trial calculations are not [e]xtentions or [e]nlargements of the thirty day period in which the government must indict defendant following his arrest." United States -v- Godoy, 821 F.2d. 1498, 1550 (11th Cir. 1987).

See also, United States -v- Woolfolk, 399 F.3d. 590, 596 (4th Cir. 2005) (held, "for this thirty-day time limit to commence, a person must be held for the purpose of answering to a federal charge. Thus, if one is held by State officers on a State charge and subsequently turned over to federal authorities for federal prosecution, the starting date of the time period

is the date that the defendant is delivered into federal custody. However, if the person is held (as here) in State custody at the request of federal authorities, the date of arrest by the State officers is controlling."). Dismissal of the Superseding indictment and Petitioner's conviction thereunder, is mandatory when the indictment was filed more than 30-days after his arrest and detention to answer to federal charges, Petitioner was under "federal arrest" or in "federal custody" for purposes of triggering the 30-day limitation period for filing a federal indictment under the Speedy indictment clause, pursuant to §3161(b).

Finally, the fault lies entirely with the attorney's for the Government in this case, this factor alone favors this Court to agree with Petitioner, to vacate his conviction and dismiss the Superseding indictment with prejudice. Because the Superseding indictment violates the STA, it must be dismissed and the conviction thereunder, i.e., the burden of protecting Petitioner's Speedy indictment rights falls on the Court and the government, not on Petitioner.

Ground-Four

Petitioner Did Not Give His Written Consent, Signed In Open Court To Remove His State Firearm Offense To Federal Prosecutorial Jurisdiction As Mandated By 28 U.S.C. § 1446.

Petitioner assert that he did not give his written consent, signed in open court to remove his State firearm offense to federal subject matter prosecutorial jurisdiction as mandated by Title 28, U.S.C. Sections 1446(a), (c)(1), (2), (3), (4) and (5), Fed. Rules of Civ. Proc. (2006, ed.). To be sure, § 1446(a), (c)(1), ect., reads below in relevant parts:

> "[A] defendant --- desiring to remove any --- Criminal prosecution from a state court shall file in the district court of the United States --- within which such action is pending a notice of removal signed --- [A] notice of removal of a Criminal prosecution shall be filed not later than thirty days ----" Id.

However, the "[w]ord shall [as set forth in § 1446] does not convey discretion. It is not a leeway word. The Supreme Court has said that the term shall normally creates an obligation impervious to judicial discretion --- The word shall is ordinarily the language of command. The one commanded must follow the command --- It is well settled that shall means must ----" United States -v- Rivinaute, 486 F.3d 1273, 1275 (11th Cir. 2007) (emphasis supplied in the brackets). That is, only a defendant can

jurisdictionally remove his State firearm criminal prosecution to a federal district court, pursuant to §1446. Here in this case, no such notice of removal was written nor signed by Petitioner to be prosecuted in federal court.

Petitioner was originally arrested by the State of Mississippi for "possession of firearm by Convicted felon," inter alia, On or about February 2nd, 2006. On or about April 26, 2006, Petitioner entered a "Nolo Contendre" plea to possessing a Bryco .380 handgun by a Convicted felon and Driving without a license, and guilty to all the remaining Charges. However, the State Judge entered a judgment to Bond over the felon in possession offense to the grand jury. State Docket No. M06-001049, Case No. 06002439.

Accordingly, Petitioner's "State Convicted felon in possession of a firearm" offense was not properly removed from State to federal court as jurisdictionally mandated by §1446. Thus, The State of Mississippi Convicted felon firearm criminal offense-violations, are not preempted by federal law pursuant to Title 18, Sections 922(g)(1) and 924(e)(1). This is true, because the offenses are clearly identical to each other. Nevertheless, Petitioner's State Criminal Case should not have been re-

moved without his written-signed consent, divesting the State of prosecutorial subject matter jurisdiction over his firearm offense.

This Court need only read Brecht-v-Abrahamson, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed. 387 (1993)("[W]e have spoken in comity and federalism. The State possess primary authority for defining and [e]nforcing the criminal law. In Criminal Trials the also hold the initial responsibility for vindicating Constitutional rights. Federal intrusion into State Criminal Trials frustrate both the State Sovereign Power to punish offenders and their good faith attempts to honor Constitutional rights."). Here, this court is respectfully request to take Judicial Notice, to sua Sponte to determine any ambiguity to § 1446 application to case at bar. If there is, the Rule of Lenity must be applied in Petitioner's favor.

Ground-Five

This Court Lacked Subject Matter Jurisdiction To Proceed Against Petitioner ON The Firearm Offense

Petitioner assert this Court lacked Subject matter jurisdiction to proceed against him on the felon in possession of a firearm offense in case

at bar. First and foremost, before a federal criminal proceeding can begin, it must start with a federal "Complaint" which is jurisdictionally mandated under Fed. Rules of Crim. Proc., Rules 3; 4.(a),(b); (c)(1); (d)(4); 5.(a); and 5.1.(a),(b). The filing of a federal Complaint is a necessary essential element to initiate and establish probable cause, if supported by sufficient incriminating information therein, That a defendant has committed the allege crime charged, then and only then can the attorney for the government move the Magistrate judge to issue a Search or an arrest warrant, or both for the named defendant. Accordingly, this "Preliminary Proceeding" is jurisdictionally a prerequisite before the attorney for the government can be allowed to obtain an information or an indictment to replace the complaint as the charging instrument.

Here in this case, the government Clearly failed to obtain and file a federal criminal complaint against Petitioner as jurisdictionally mandated by "Federal Rules of Criminal Procedure." Consequently, there's NO record before this Court that a federal magistrate judge conducted an ex parte review of a complaint, because none exist in this case. Here this Court must agree as it should, that the purpose of the Complaint and the

review of the same by a Magistrate judge, is To ensure that there is sufficient incriminating information that the defendant has committed the crime alleged therein, establishing probable cause that a has been committed against the laws of the United States. That was Congress Sole purpose for establishing the "Preliminary Proceedings" process as set forth in the rules. The federal Complaint is a necessary essential element in [a]ll federal cases, which must include a brief description of the offense and Statutes allegedly violated, and it must be made under oath before a Magistrate judge. See Rule 3. Fed. R. Crim. P., below:

> The Complaint is a written Statement of the essential facts constituting the offense charged. It Shall be made upon oath before a Magistrate judge. Id.

"The word Shall does not convey discretion. It is not a leeway word - - - The term Shall - - - Creates an obligation impervious to judicial discretion - - - It is well settled that Shall means must - - - Shall defined as has a duty to; more broadly, is required to." United States -v- Quinonte, 486 F.3d. at 1275 (11th Cir. 2007). Moreover, Petitioner was never before a magistrate to answer to a federal Complaint upon an arrest warrant thereunder.

See also, Rule 4.(a); (c)(1), and 5(a), below in relevant parts:

4.(a) (If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue - - - -).

4.(c)(1) (The warrant shall be signed by the magistrate judge - - - It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge).

5.(a) (Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge - - - If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause require-

ments of Rule 4(a), Shall be promptly filed).

Accordingly Rule 4.(c)(1) makes clear that Petitioner (who did not waive his right to a jury trial), was jurisdictionally entitled to a preliminary hearing to determine if probable cause exist for the crime charged in the complaint. Likewise, Rule 5.1.(b) makes clear that the magistrate judge (United States), may not only discharge Petitioner but may also dismiss the complaint against him as well. See e.g., Giordenello -v- United States, 357 U.S. 480, 2 L.Ed. 2d. 1503, 78 S.Ct. 1245 (1958)(held, an adequate basis for a finding of probable cause must appear on the face of the complaint pursuant to which the arrest warrant is issued --- Criminal Rule 3 and 4 provides, that an arrest warrant shall be issued only upon a written and sworn complaint (1) Setting forth the essential facts constituting the offense charged, and (2) Showing that there is probable cause to believe that such an offense has been committed and that the defendant has committed it --- The provision of these Rules must be read in light of the [C]onstitutional requirement they implement. The language of the Fourth Amendment that "--- No warrant Shall issue, but upon probable Cause, Supported by Oath or affirmation, and particularly describing --- The

person or thing to be seized, of course applies to [a]rrest as well as search warrants.'" (Quoting The Fourth Amendment).

See also, Overton -v- Ohio, 534 U.S. 982, 151 L.Ed. 2d. 317, 122 S.Ct. 389 (2001)(Officers when seizing drugs, were acting pursuant to an arrest warrant that was not based on probable cause. The Fourth Amendment provides that 'No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the - - - person or thing to be seized.'). Here, Petitioner did not waive his right to any "probable cause hearing" under Rule 4 as constitutionally required. There was no determination made by a Magistrate judge whether Petitioner committed a federal firearm violation, when he was in fact arrested by the State of Mississippi for "being a Convicted felon in possession of a firearm," in violation of its Criminal Code.

Accordingly, Petitioner's conviction and sentence must be vacated with prejudice, because there was no federal Criminal Complaint filed in federal court, therefore, his federal arrest warrant was Constitutionally invalid.

Ground-Six

Petitioner's Convicted Felon In Possession Of Firearm Offense, Violates Double Jeopardy Clause of The Fifth Amendment

Petitioner assert that his federal (convicted felon in possession of a firearm offense), violates the Double Jeopardy Clause of the Fifth Amendment of the constitution. This is True, because he clearly entered a "Nolo Contendre Plea" to the same criminal offense in State Court on or about April 26, 2006, at the advice of counsel. Moreover, Petitioner entered "Nolo Contendre Pleas," to (1) having no drivers license, (2) having No Tag, (3) DUI first offense, and (4) Possession of Marijuana - less than one ounce, all before the Honorable Darren Lamanca, Municiple Court Judge, in case No. 06002439, Docket Nos., M06-001045, M06-001047, M06-001048, M06-001049, and M06-001050.

The Supreme Court of the United States has made it clear that Double Jeopardy Clause of the Fifth Amendment "[P]rotects against multiple punishments for the same offense --- and '[I]f a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it also violates --- the constitutional principle of Separation of powers.'" North Carolina -v- Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d. 656 (1969) and Whalen -v- United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d. 715 (1980). See also, United States -v- Blockburger, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.

306 (1932), under the Blockburger test, is "whether there are two offenses or only one, by whether each provision (State or federal) requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. 180. Also when applying the Blockburger test, the Supreme Court has "Often concluded that two different statutes define the same offense - - - -" Rutledge -v- United States, 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d. 419 (1996).

Accordingly, the Supreme Court has concluded that multiple convictions are banned where separate statutes amounted to the same offense in the proof. Ball -v- United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d. 740 (1985). Here, Petitioner's federal conviction required no proof beyond that which was required for his State Nolo Contendere Plea and Conviction thereunder. That is, Petitioner plea was for "Convicted felon in possession of a firearm, one Bryco .380 Semi-automatic handgun." Thus, for the purpose of applying the Fifth Amendment Double Jeopardy Clause. The Constitution do not allow "[t]wo convictions for the same conduct, even if sentenced under only one." Ball 470 U.S. at 861, 105 S.Ct. 1668. To be sure, in a non-jury trial, jeopardy attaches when the State Court begins to hear evidence. U.S. Const. Amend. 5.

Petitioner's federal conviction must be vacated with prejudice in violation of Double

Jeopardy Clause of the Fifth Amendment.

Ground - Seven

The Trial Court Constructively Amended The Superseding Indictment During It's Final Jury Instructions

Petitioner asset, the trial court constructively amended the superseding indictment during it's final jury instructions. That is, Counts 1 and 2 charged Petitioner "having been convicted - - - of the following crimes which are punishable by imprisonment for a term exceeding one year and which were committed on occasions different from one another - - - knowingly possessed in and affecting commerce a firearm, in violation of Sections 922(g)(1) and 924(e), Title 18, U.S.C." Id. Here in this case, The Trial court constructively amended the above relavant parts quoted from the superseding indictment of conviction as shown below:

> " For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt. First, that the defendant, Glen Clay, knowing possessed a firearm - - - Third, that the possession was in interstate commerce; That is, that before

the defendant possessed the firearm, it had traveled at some time from one state to another. - - - Interstate commerce means commerce or travel from one State of the United States into another. Possession, as that term is used in this case, and there are two kinds - actual possession and constructive possession. - - - You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had the actual or constructive possession." T.T. at 154, par. (15-25) and T.T. at 154, par. (1-25).

First and foremost, Petitioner was not charged with violating (interstate) commerce nor was he charged with (constructive) possessing a firearm, as the jury was erroneously instructed by the trial Court in this case at bar. Thus, "[a] fundamental principle stemming from this amendment is that a defendant can only be convicted for a crime charged in the indictment. It would be fundamentally unfair to convict a defendant on - charges of which he had no notice. Two types of problems can arise as a result of a trial court's deviation from an indictment. When a defendant (as here) is convicted of charges not included in the indictment, an amendment of the indictment has occurred." United

States-v-Keller, 916 F.2d. 628, 633 (11th Cir. 1990).

This is true, because The Fifth Amendment Indictment Clause to the federal Constitution provides that "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. See Stirone -v- United States, 361 U.S. 212, 4 L.Ed.2d. 252, 80 S.Ct. 270 (1960) (held, "After an indictment has been returned its charges may not be broadened through amendment, except by the Grand Jury itself---[A] federal Court cannot permit a defendant to be tried on charges that are not made in the indictment against him."); United States -v- Nunez, 180 F.3d. 227, 230-31 (5th Cir. 1999) ("[W]e have consistently followed Stirone and have reversed convictions where 'the jury might have convicted [a] defendant on new elements to the offense not charged by the Grand Jury--- This Court has further held that '[a] constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged.'") (quoting U.S. -v- Bizzard, 615 F.2d. 1080, 1082 (5th Cir. 1980); U.S. -v- Salinas, 601 F.2d. 1279, 1290 (5th Cir. 1979)).

See also, United States -v- James, 819 F.2d. 674, 675 (6th Cir. 1987) ("Because the trial Court committed reversible error in instructing jury

on [C]onstructive possession when the government had presented no evidence to support such a verdict. --- A grand jury returned a one-count indictment charging defendant, a convicted felon, did knowingly possess a revolver on May 1, 1985."). In describing the elements of the offense during opening arguments in this case, the government told the jury:

> "I expect the evidence will show that the defendant, Glen Clay--- He was in that vehicle, and he was also in possession of a firearm while in that vehicle--- what we have to prove to you today are three things. (1) that the defendant possessed a firearm--- and (3) that the firearm traveled in and affected interstate commerce, meaning if it was transported over state lines. I submit to you the evidence will show and we will prove all three elements. That the defendant did possess that Bryco .380 caliber pistol, and it was in his possession while he was in the vehicle that day on February 2nd, 2006." T.T. 52, par. (21-25); T.T. at 53, par. (18-25); and T.T. at 54, par. (1,2).

Like the James case, the government's sole

theory here, was that Petitioner (actually) possessed the Bayco .380 firearm and that it had traveled in and affected (interstate) commerce, all of which was constructively amended to the charge as set forth in the Superseding indictment of conviction. However, by the Trial court through it's final jury instructions and the government evidence in chief, both broadens the possible bases for his conviction. The indictment was constructively amended.

Conclusion

Petitioner assert, That in light of the above this Court will vacate his conviction and Sentence in case at bar. Also, defense and appellate counsel failed to argue and raise each and every ground in this Memorandum of law for relief on her Clients behalf, thus, She was constitutionally ineffective at all critical stages of the Courts proceedings.

Respectfully
Clay, Glenn B.
Glen B. Clay
Reg. No. 09299-043
FCC- Yazoo (Med.)
P.O. Box 5888
Yazoo City, MS. 39194-5888

October 13, 2010

Glen B. Clay, #09299-043
Federal Correction Complex - Yazoo
(Med.), P.O. Box 5888
Yazoo City, MS. 39194-5888

3:07 cr 73 TSL

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⇔09299-043⇔
Clerk Us District Court
245 E. Capital St
Suite 316
Jackson, MS - 39201
United States

X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. 3:07-CR-73TSL-LRA

GLEN B. CLAY,
A/K/A GLENN B. CLAY

SENTENCING HEARING
CONTINUED FROM 2/29/08

BEFORE THE HONORABLE TOM S. LEE
UNITED STATES DISTRICT JUDGE
JUNE 5TH, 2008
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE GOVERNMENT: MS. ERIN O. CHALK

FOR THE DEFENDANT: MS. KATHRYN N. NESTER

REPORTED BY: CHERIE GALLASPY BOND, RMR, FCRR

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245 East Capitol Street
Jackson, MS 39201
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THE COURT: I had set some cases before the case of Glen B. Clay, but I am advised that Ms. Nester has other commitments and would like for the court to take this case up next, which I will do. *United States v. Glen B. Clay*, Number 3:07-73 set today for sentencing.

MS. NESTER: Thank you, Your Honor. I appreciate that.

THE COURT: Perhaps there hasn't been prepared a transcript, but this case came on for sentencing previously, and I'm just going to maybe repeat a little bit. I am pretty sure that I confirmed, Mr. Clay, that you had read the presentence report with your attorney and Ms. Nester verified that. Correct?

THE DEFENDANT: Yes, sir.

THE COURT: And the objections relate to the criminal history. Correct, Ms. Nester?

MS. NESTER: That is correct, Your Honor.

THE COURT: And you made an argument and submitted a brief. I received a brief also from the government on that, and I'm going to rule on that issue now.

The probation officer calculated a total of 22 points, placing Mr. Clay in a criminal history category VI, which means 13 or more points. Ms. Nester, I understood you agreed to 10 of these points, which would put your client in criminal history category V, which is 10 to 12 points. In the

presentence report there was an assessment of nine points for convictions in Hinds County Circuit Court occurring in 1983 and three points for a 1987 conviction in Yazoo County.

This recommendation to assess points for the more-than-20-year-old conviction was based on the fact that in 1994 the parole -- Mr. Clay's parole was revoked simultaneously with being sentenced in the Hinds County Circuit Court for a 1992 armed robbery. The Hinds County Circuit judge's order for the 1992 armed robbery conviction provided that the 20-year sentence, five to serve and 15 suspended, should run concurrently with the sentences imposed for the 1983 convictions in Hinds County.

Thus, in the view of the probation officer, Mr. Clay had within the 15-year period been serving his sentence on the older convictions such that points should be assessed on account of them. And Section 4A1.2(c) provides that in computing criminal history the court may count, quote, any prior sentence of imprisonment exceeding one year and one month whenever imposed that resulted in the defendant being incarcerated during any such part of the 15-year period.

The argument of the defense is that the defendant should not be assessed any points for any of his state court convictions which were more than 15 years old. Ms. Nester has urged that the court should make a, quote, purely factual, unquote, determination that because the defendant had received

a consecutive sentence for the multiple 1983 convictions, he necessarily had to have done all of his time for the 1983 convictions before he could begin serving the sentence for the 1987 conviction. This business burglary was committed after escape from prison.

Ms. Nester further posits that because he had necessarily done all of his time on the 1983 convictions when he was paroled in 1990, the parole was necessarily only as to the 1987 conviction. From this it's reasoned that when Clay's parole was revoked in 1994, he could have only resumed service of the sentence for the 1987 conviction and was not serving time on any of the 1983 charges.

First it appears that this is not really a purely factual matter. The defense basically asked the court to interpret Mississippi law on sentencing in the face of a Hinds County Circuit Court's order holding that the defendant's sentence for the 1992 armed robbery run concurrent to the sentences imposed in the 1983 convictions.

Obviously, the Hinds County Circuit Court considered that he had completed -- that he had not completed the sentences on these 1983 charges, and this is not the place to attack the state court judgment. So the court concludes that the 12 points for the 1983 and 1987 sentences were proper, as the defendant has been incarcerated on these sentences within 15 years prior to the conviction in this case on December 10th,

2007.

I say further that even if the court were to follow the defendant's line of reasoning, it would appear that he still should be assessed three points for the 1987 conviction for which he received a seven-year sentence. The defense has argued that his 1990 parole could have necessarily only been for this 1997 (sic) conviction. Parole was revoked in 1994 simultaneously with a conviction for a 1992 armed robbery. There was a recommendation to serve time on this 1987 sentence being discharged on April 10, 1998.

As the 1994 revocation and recommencement to the sentence is within the 15-year window, the three-point assessment for the 1987 conviction is proper even under the court's understanding as to the defendant's interpretation as to how service of the state court sentences should be viewed.

When the three points for this 1987 sentence are added to the 10 to which it has been agreed is proper, he ends up with 13 points which places him in criminal history category VI. That's an alternative, but my ruling was previously stated. So the ruling of the court is that the defendant has a criminal history category of VI.

Is there anything further for the court to resolve before we proceed with sentencing so far as the presentence report is concerned?

MS. NESTER: Not as far as the presentence report is

concerned, Your Honor.

THE COURT: All right.

MS. CHALK: No, Your Honor.

THE COURT: The court adopts the presentence report in its totality, including proposed factual findings and guideline sentence application.

Mr. Clay, you have the right of allocution. That is, you may tell me anything that you think I should hear in arriving at the appropriate sentence in your case, particularly as to matters in mitigation of punishment. You can speak, your lawyer may do so, or both of you may.

MS. NESTER: Your Honor, on behalf of Mr. Clay, I think especially in light of this court's ruling -- Mr. Clay stands before the court. As you'll recall, we went to trial on the facts of this case. So Your Honor is very familiar with them.

But, basically, Mr. Clay was found intoxicated in a vehicle and had committed no felony, wasn't believed to have committed any felony. He was under suspicion of DUI and vis-a-vis got pulled over -- or pulled out of the vehicle, and in a subsequent search of the vehicle a weapon was located.

There has been no evidence that any crime was ever committed or intended to be committed with this weapon. There's been no evidence that Mr. Clay ever had the weapon in his hand, threatened any law enforcement officers. It is

simply a matter of a man who was intoxicated and a gun was found in his vehicle. And simply based on the calculations under the sentencing guidelines range for his prior criminal history which, as Your Honor knows based on our lengthy argument, there's some dispute on -- we're pulling -- we're now pulling convictions back that were more than 15 years ago; and based on the application of the guidelines that the court has found proper, this man is facing a 293-month top of the range for a crime that does not even involve a scintilla of violence.

And, certainly, under 18 U.S.C. 3553(a), such an incredibly lengthy sentence far exceeds what is necessary and reasonable and if not more than is necessary to meet the factors under the 3553(a) section. I mean, the length of this sentence is extremely harsh compared to the actual crime that was committed -- that the jury believed was committed in this case. And it is solely based on the byzantine explanation and connection of a criminal history that was more than 15 years ago.

So this is a case that cries out for a variant sentence under 3553(a). It's just being unreasonably harsh, not reasonably related to the factors in the case involving the seriousness of the offense, involving potential for this client, to rehabilitate this man. If he -- as Your Honor knows, he's facing the 15 automatically under the statute. At the time that Mr. Clay gets out of prison after 15 years for

having a gun in his car that he's not accused of using, Mr. Clay is going to be --

(Counsel and Defendant Conferred)

MS. NESTER: He's going to be almost 60 years old, Your Honor. So the deterrence issue at this point becomes extremely overstated with such a lengthy sentence.

And I understand that everyone's job here is to interpret the guidelines to the best of our ability and try to apply them; but I certainly don't believe that the guidelines would ever intend a sentence exceeding 20 years for a gun being found in the vehicle, especially when it's being based on conduct that preceded this offense by more than a decade.

And we simply ask the court, while I recognize you're restricted by the statutory minimum, which, again, is extremely harsh in this case, to go above that based on this ancient criminal history appears to me to fly in the face of all the factors under 3553(a). Your Honor knows that we have sentenced in this courtroom much more serious offenses involving bank robbery where people held guns to clerk's heads and are serving a fraction of the time that this man is serving because a gun was located in his vehicle while he was intoxicated. It just seems to not at all meet what our goals of sentencing are.

We would ask that the court recognize that and restrain this sentence to the 15-year statutory minimum, which is more than sufficient to accomplish the goals of sentencing in this

case.

THE COURT: What position does the government take?

MS. CHALK: Your Honor, in this case the defendant did put the government to its burden of proof. We did meet that burden by the jury returning a guilty verdict of this defendant. As the court has found that he fits in a category -- criminal history category of VI, he was also less than two years after release from imprisonment when he committed this instant offense; and since this defendant did put the government to its burden of proof, we would ask that this court sentence this defendant at the top of the guideline range and would object to any type of variance in this case.

MS. NESTER: If I could respond to that. It's wholly improper to ask the court to increase his sentence because of the fact that he elected to go to trial which is his constitutional right. While I recognize they don't have to make a recommendation in the sentencing range, to stand before the court and say "Because he put us to our burden of proof, we think he should be sentenced to a greater amount" is improper; and we would object to that, Your Honor.

THE COURT: Of course, putting the government to the burden of proof does not directly militate against the defendant's -- the severity of the sentence. Of course, it's to the benefit of a defendant who does not put the government to proof in admitting accountability to it. But I don't -- I

understand that the -- what the guideline range is.

But the situation here is, yes, some older crimes, but the magnitude of this criminal history that causes Mr. Clay to be in this guideline range, four house burglary convictions, three business burglaries, armed robbery, aggravated assault, escape; and the court is not convinced that a sentence below the guideline range is in order.

I have considered the advisory guideline computations and the sentencing factors under Section 3553(a) of Title 18; and it's the judgment of the court, Mr. Clay, that you serve a term of 235 months imprisonment in the custody of the U.S. Bureau of Prisons, which is at the bottom of the applicable guideline range.

This term will be immediately followed by a three-year term of supervised release subject to the standard and mandatory conditions as listed on the judgment order in addition to some special conditions as follows.

The first one is that you submit to random urinalysis testing and participate in a drug aftercare treatment program if deemed necessary by the probation officer, to include inpatient treatment if needed; and, secondly, that you submit to a search of your person or property conducted in a reasonable manner and at a reasonable time by the probation officer.

You don't have the ability to pay a fine within the

guideline range; and considering the period of incarceration, the court has concluded that a fine not be imposed. You are ordered to pay a special assessment fee of $100 which will been due immediately.

You're remanded to the custody of the Marshal Service to begin service of the sentence. Of course, you'll be given credit for the time you've been in custody for this offense.

MS. NESTER: Your Honor, I do think out of an abundance of caution -- I know there's a new case that came down recently. Our appellate attorney is instructing us on cases such as these that we do preserve the record at the time of sentencing that we believe that sentence to be unreasonable and that we make that record so that we can proceed with that issue on appeal.

THE COURT: All right.

MS. NESTER: Also, Your Honor, as far as the time that he is to serve, he did serve some portion of this time, about a year I believe, in state custody; but it was on this offense. So we're specifically asking that that is considered in part of the calculation of his time. I think that is the fact and BOP --

THE COURT: Have there been -- oh, excuse me.

MS. NESTER: I just want to make sure we make a record that we're requesting that.

THE COURT: Have there been any separate charges that

have been prosecuted by the state arising from this event that --

MS. NESTER: Hold on just a minute.

THE COURT: Of course, the Bureau of Prisons generally makes that determination; but if it was just a technicality that he was in state custody when, in fact, he was arrested for this crime, it would seem to me that he should get credit for that time.

MS. NESTER: Also one other thing, Your Honor. I know this is unusual also, Your Honor. A lot of times we request that clients be sent close to Mississippi, which would initially result in them going to Yazoo. This defendant has some concern for his safety. There are some people that are at Yazoo. He's specifically asking that he not be sentenced to Yazoo.

I think we would need to point that out because I think normally they try to send them close to home as a help to the defendant. And in this case we're actually seeking the opposite. He feels he's in some danger if he goes to Yazoo.

THE COURT: All right. The court makes the recommendation that he not be incarcerated in Yazoo County.

MS. CHALK: Your Honor, if I may, we just have one issue that is still remaining before the court. That's the forfeiture count included in the indictment. The government filed a motion to bifurcate those two proceedings. And I

believe we need a ruling from the court as to the forfeiture of the firearm that was allegedly -- or that the jury found to be possessed by this defendant in that case.

THE COURT: All right. Do you have any comment about that?

MS. NESTER: Honestly, Your Honor, I had not recalled that she had filed that. She brought that up when I was in court. I'm really not up to speed on exactly what his -- I mean, obviously, he's asserting his innocence and intends to proceed with an appeal. So we can't agree to any forfeiture that would confess possession of that weapon.

THE COURT: But with there being a conviction --

MS. NESTER: He's not entitled to a gun anyway. I don't understand really --

THE COURT: Does the government contend that there's any proceeding necessary other than the acknowledgment of the conviction and the consequence then of forfeiture? Is that your position?

MS. CHALK: That's all, Your Honor.

THE COURT: All right. That's what the court will rule.

MS. CHALK: Thank you.

MS. NESTER: Thank you, your Honor.

MS. CHALK: And with that, the remaining counts -- we would request that the remaining counts of the indictment be

dismissed --

THE COURT: All right. That motion is sustained.

MS. CHALK: Thank you.

(Hearing Concluded)

CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 10th day of July, 2008.

s/Cherie G. Bond
Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

V. CRIMINAL NO. 3:07CR73TSL-LRA

GLEN CLAY

JURY VERDICT

X We, the jury, find the defendant, Glen Clay, guilty as charged in the indictment.

_____ We, the jury, find the defendant, Glen Clay, not guilty.

THIS the 10 day of December, 2007.