No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES BURTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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SUBMITTED: **APRIL 28, 2020**

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0079n.06

No. 18-5737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 04, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES BURTON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: ROGERS, WHITE, and READLER, Circuit Judges.

ROGERS, Circuit Judge. Following a bench trial in 1999, Charles Burton was convicted of numerous federal drug and firearms offenses and sentenced to 562 months' imprisonment. After unsuccessfully seeking relief under § 2255, this court authorized Burton to pursue a successive § 2255 challenge to his Armed Career Criminal Act enhanced sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court granted Burton's successive habeas petition and resentenced Burton to 360 months in prison. Before doing so, the district court rejected a challenge by Burton to his underlying conviction based on the district court's original failure to announce its guilty findings to the defendant in open court, assertedly in violation of Federal Rule of Criminal Procedure 43 and the Fifth and Sixth Amendments. On appeal, Burton again raises his Rule 43 argument and also challenges the procedural and substantive reasonableness of his revised sentence. Because the Rule 43 violation in this case does not amount

to plain error, there is no basis to overturn the district court's denial of relief under § 2255. Further, Burton's challenges to his revised sentence are without merit.

I.

From November 1995 through February 1996, Charles Burton conspired with David Crozier and others to rob pharmacies of controlled substances and then sell the drugs for profit. Burton used a gun during the course of the robberies and carried a gun while selling the drugs. After a bench trial, the district court found Burton guilty of the following offenses: conspiring to distribute controlled substances in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C); armed pharmacy robbery in violation of 18 U.S.C. § 2118(a) and (c)(1); using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1); possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1); possessing with intent to distribute Schedule II, Schedule III, and Schedule IV controlled substances in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and (b)(1)(D); and using a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1). The district court did not initially announce the verdict in open court. Instead, it mailed the verdict to the parties in the form of General Findings. The court later stated the verdict in open court during Burton's sentencing hearing.

During the sentencing phase, Burton was found to be an armed career criminal under 18 U.S.C. § 924(e) based on his prior Kentucky convictions for kidnapping, first-degree burglary, second-degree escape, and first-degree robbery (twice). Under the Sentencing Guidelines, Burton's total offense level was 34 and his criminal history category was VI, yielding a range of 262 to 327 months' imprisonment for the drug-trafficking, robbery, and felon-in-possession offenses. In addition, Burton faced mandatory consecutive sentences of 60 months and 240 months respectively for the first and second § 924(c) offenses.

The district court sentenced Burton to a total of 562 months' imprisonment. The sentence consisted of concurrent terms of 262 months for the drug-trafficking conspiracy, armed robbery offense, felon-in-possession offense, and Schedule II drug trafficking offense; 120 months for the Schedule III drug trafficking offense; and 72 months for the Schedule IV drug trafficking offense, followed by consecutive terms of 60 months and 240 months for the two § 924(c) offenses. The district court also ordered that Burton's federal sentence run consecutively to his state sentence. The district court subsequently amended the judgment to award Burton credit for 650 days that he had spent in custody awaiting trial. We affirmed Burton's conviction on direct appeal, but remanded with the instruction to reinstate Burton's original sentence without credit for time served. *United States v. Crozier*, 259 F.3d 503, 520 (6th Cir. 2001). Burton's petition for writ of certiorari was denied, *Crozier v. United States*, 534 U.S. 1149 (2002), at which point his conviction and sentence became final.

In 2003, Burton filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The district court denied the motion. *See Burton v. United States*, Nos. 3:03-cv-124, 3:97-cr-154, 2007 WL 1541929, at *9 (E.D. Tenn. May 23, 2007). Burton did not appeal that ruling. In May 2016, Burton sought leave to file a second or successive § 2255 motion, arguing that he should be resentenced in light of *Johnson v. United States*, which invalidated the residual clause of the Armed Career Criminal Act ("ACCA"). 135 S. Ct. at 2563. This court permitted Burton to file a second or successive § 2255 motion, finding that Burton had "made a prima facie showing that his second-degree escape conviction may have been counted as a predicate offense under the ACCA's now-invalidated residual clause." *In re Burton*, No. 16-5745, R. 13-2, at 3 (6th Cir. Jan 25, 2017) (unpublished order).

In April 2017, the district court issued an opinion concluding that Burton no longer qualified as an armed career criminal under *Johnson* and ruling that Burton's successive § 2255 petitioner would be granted.[1] *Burton v. United States*, Nos. 3:97-cr-154, 3:17-cv-25, 2017 WL 1364968, at *5 (E.D. Tenn. Apr. 12, 2017). The court noted that it would wait to enter the judgment order granting the petition. *Id.* at *6. The court then appointed counsel for Burton and directed the parties to submit briefs regarding the appropriate corrected sentence. *Id.* at *5-6.

In May 2017, Burton filed a *pro se* "Motion for Relief from Order Pursuant to Federal Rule of Civil Procedure 60(b)(4)." In this motion, Burton argued that his original convictions were invalid because the trial court did not announce his guilt in open court, in violation of Federal Rule of Criminal Procedure 43 and the Fifth and Sixth Amendments to the Constitution.[2] Furthermore, Burton argued that his invalid convictions divested the district court of jurisdiction to resentence him. The district court construed Burton's motion for relief from judgment as a motion to amend his successive § 2255 petition and denied the amendment as futile. The court reasoned that it was only authorized to adjudicate Burton's successive habeas petition as it related to his *Johnson* claim and was therefore powerless to entertain Burton's Rule 43 challenge to his underlying conviction. Burton again raised the issue of the validity of his convictions in a "Supplemental Argument," which the district court construed as a renewed motion to amend and denied for the same reason as before.

At Burton's request, the district court conducted a full resentencing hearing. In his allocution during the hearing, Burton once again raised his Rule 43 and constitutional arguments. In response, the court reiterated its earlier finding that to rule on Burton's challenge to his

[1] By this time, Judge Leon Jordan had replaced Judge James Jarvis as the judge assigned to Burton's case.

[2] All references throughout this opinion to Burton's "Rule 43 argument" or "Rule 43 based motion" should be read to include Burton's related constitutional arguments.

underlying conviction would exceed the Sixth Circuit's grant of authority to consider Burton's successive habeas petition. The parties agreed during the hearing that Burton qualified as a career offender under the Sentencing Guidelines. The parties also agreed that Burton faced an advisory Guideline range of 262 to 327 months' imprisonment, plus a 300 month mandatory minimum for two § 924(c) counts, for a net effective range of 562 to 627 months' imprisonment.

The court went on to impose an aggregate sentence of 360 months' imprisonment, consisting of concurrent terms of 60 months for the drug trafficking, robbery, and felon-in-possession offenses, followed by consecutive terms of 60 months and 240 months for the two § 924(c) offenses. The court also ordered that its revised sentence run consecutively to Burton's Kentucky sentence, which he received when he violated his terms of parole. Burton's parole was revoked when he was arrested on the instant federal offenses. On July 12, 2018, the district court issued an amended judgment memorializing its revised sentence. The court also issued a judgment on the same day granting Burton's successive motion to vacate under § 2255 and directing the clerk's office to close the civil case. Burton filed a timely notice of appeal, in which he states that he is appealing the district court's amended criminal judgment. His notice of appeal does not mention or allude to the district court's judgment granting his § 2255 motion.

II. Jurisdictional Issues

The notice of appeal in this case was sufficient for Burton to challenge the denial of his Rule 43 based motions. The Government points out that Burton appealed only the amended judgment, which imposed a revised sentence of 360 months, and chose not to appeal the district court's judgment granting in part his § 2255 petition. The Government argues that a court of appeals "lacks jurisdiction to review rulings which a party has not appealed." Furthermore, the Government asserts that habeas proceedings are civil in nature and therefore independent of the

underlying criminal case. Therefore, in the Government's view, for the court to have appellate jurisdiction over Burton's Rule 43 based motions, Burton needed to have appealed the judgment granting his successive motion to vacate and not the amended judgment modifying the sentence in his criminal case. This argument is without merit.

The federal habeas statute grants district courts the authority to "vacate, set aside or correct" a prisoner's unlawful sentence. 28 U.S.C. § 2255(a). Upon a finding that a prisoner's sentence is unlawful, a district court may impose one of four possible remedies: (1) "discharge the prisoner," (2) "grant [the prisoner] a new trial," (3) "resentence [the prisoner]," or "correct the [prisoner's] sentence." *Id.* § 2255(b). An appeal may be taken . . . as from a "*final judgment* on application for a writ of habeas corpus." *Id.* § 2255(d) (emphasis added).

Contrary to the Government's assertion, Burton has properly appealed the amended criminal judgment, which serves as the final judgment for claims under § 2255. This result is compelled by *Andrews v. United States*, in which the Supreme Court held that a district court's order vacating a prisoner's sentence and ordering resentencing under § 2255 is not considered final and appealable until after the resentencing has occurred. 373 U.S. 334, 339-40 (1963); *see also United States v. Lawrence*, 555 F.3d 254, 258 (6th Cir. 2009). In *Andrews*, two prisoners brought motions under Federal Rule of Criminal Procedure 35, arguing that the district court had wrongfully deprived them of their right to allocute during sentencing. 373 U.S. at 337. The district court granted the motions and ordered that the prisoners be resentenced at a later date. *Id.* at 336. The government appealed, and the resentencings were stayed. *Id.* The Second Circuit construed the Rule 35 motions as claims for relief under § 2255 and reversed, holding that a district court's noncompliance with Rule 35 could not form the basis of a collateral attack. *Id.*

The Supreme Court agreed that the proper vehicle for the prisoners' claims was a motion under § 2255, but found that the Court of Appeals lacked jurisdiction over the appeals because they remained interlocutory until the prisoners received the remedy contemplated by the statute, i.e., resentencing. *Id.* at 338-39. In support of its holding, the Court pointed to the "long-established rule against piecemeal appeals in federal cases" and "the standards of finality to which the Court has adhered in habeas corpus proceedings." *Id.* at 340. This rule of finality, the Court stated, "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Id.* (quoting *Collins v. Miller*, 252 U.S. 364, 370 (1920)).

In accordance with the rule from *Andrews*, a petitioner such as Burton who has been resentenced under § 2255 must appeal the order that "either enters the result of a resentencing or corrects the prisoner's sentence." *United States v. Hadden*, 475 F.3d 652, 663 (4th Cir. 2007). A district court's order "contemplating, but not accomplishing, the prisoner's resentencing" is not final and appealable under § 2255. *Id.* at 662 (citing *Andrews*, 373 U.S. at 340). Here, as in *Hadden*, the amended criminal judgment is the "final judgment" for purposes of § 2255, as it enters the result of Burton's resentencing.

This remains true even though Burton appeals both his new sentence as well the district court's prior denial of relief under § 2255. Citing *Andrews*, the Fourth Circuit in *Hadden* concluded that an amended criminal judgment that resentenced a prisoner under § 2255 bore "traits of both a § 2255 proceeding and a criminal action" and was thus "a hybrid order that is both part of the petitioner's § 2255 proceeding and part of his criminal case." *Hadden*, 475 F.3d at 664. The Fourth Circuit explained that

> [t]o the extent the [order entering the result of a resentencing] formally completes the prisoner's § 2255 proceeding, it is part of that proceeding, and, accordingly, a

> prisoner's appeal of that aspect of the order is an appeal of a § 2255 proceeding .... To the extent the order vacates the original sentence and enters a new criminal sentence, by contrast, the order is part of the prisoner's criminal case, and, accordingly, a prisoner's appeal of that aspect of the order is part of the petitioner's criminal case.

Id.

Under the reasoning in *Hadden*, Burton's amended judgment setting forth his new sentence completed both his criminal case and his § 2255 proceeding and thus serves as a basis to appeal both the legality of his new sentence as well as the district court's denial of the motions to amend his successive habeas petition, which included the Rule 43 challenge to his convictions. To require Burton to file separate appeals of the amended criminal judgment and the judgment granting in part his habeas petition would contravene § 2255(d)'s requirement that a habeas petitioner appeal from a "final judgment" and would be contrary to the Supreme Court's admonition that courts should avoid "piecemeal appeals" in federal habeas cases. *Andrews*, 373 U.S. at 340.

The Eleventh Circuit reached a similar conclusion in *United States v. Futch*, 518 F.3d 887 (11th Cir. 2008). In that case, the petitioner was resentenced under § 2255 and appealed his amended criminal judgment. *Id.* at 890. The court held that on appeal, petitioner could challenge both his new sentence as well as a district court order entered months earlier which denied his other § 2255 claims challenging his conviction. *Id.* at 894. Relying on *Andrews* and *Hadden*, the court reasoned that the amended criminal judgment "conclude[d] the whole subject matter and all claims as to both the conviction and sentence in [the petitioner's] § 2255 proceedings." *Id.* The petitioner had thus "timely appealed both the new sentence and the district court's [earlier] order in the § 2255 proceedings denying his § 2255 conviction claims." *Id.*

We agree with out sister circuits' application of *Andrews* in *Hadden* and *Futch*. Burton therefore acted properly by appealing the amended criminal judgment rather than the judgment granting in part his motion to vacate.

Although Burton may appeal from the amended judgment, he may not pursue the Rule 43 issue in his appeal until he obtains a certificate of appealability ("COA"). The Government fails to raise the COA issue, but it must be addressed because a petitioner may not appeal a "final order in a proceeding under section 2255" unless a "circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). The issuance of a COA is a "jurisdictional prerequisite" under the statute. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see United States v. Hardin*, 481 F.3d 924, 926 n.1 (6th Cir. 2007); *see also* Fed. R. App. P. 22(b)(1); Fed. R. Governing § 2255 Proceedings 11(a).

Adopting the reasoning in *Hadden*, we have held that when a petitioner who is resentenced under § 2255 "seeks to 'challenge *the relief granted*,'" he is in actuality "'appealing a new criminal sentence and therefore need not obtain a COA.'" *Ajan v. United States*, 731 F.3d 629, 631 (6th Cir. 2013) (emphasis in original) (brackets omitted) (quoting *Hadden*, 475 F.3d at 664). Therefore, the court is free to hear Burton's appeal of the legality of his amended sentence without a COA.

In contrast, we have not previously decided the question of whether a petitioner who is resentenced under § 2255 and who appeals the amended judgment needs a COA in order to challenge the district court's decision *not to grant relief* on some of his § 2255 claims. However, the circuits that have considered this issue "have unanimously concluded that a [COA] is needed for the part of the case that challenges the denial of collateral relief." *United States v. Fleming*, 676 F.3d 621, 625 (7th Cir. 2012) (collecting cases); *accord Futch*, 518 F.3d at 894. We agree.

Therefore, to the extent Burton appeals the denial of habeas relief, including his Rule 43 based motions, he is appealing an aspect of his § 2255 proceeding and must obtain a COA. *See Hadden*, 475 F.3d at 664; *Futch*, 518 F.3d at 894.

We have held that an application for a COA must first be considered by the district court. *See Kincade v. Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *Wilson v. United States*, 287 F. App'x 490, 494 (6th Cir. 2008); *see also Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir. 1997); *Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997). Where, as here, a petitioner appeals without first applying for a COA from the district court, we customarily remand to the district court with the instruction to evaluate the petitioner's eligibility for a COA. *See, e.g.*, *Hardin*, 481 F.3d at 926; *Castro v. United States*, 310 F.3d 900, 903-04 (6th Cir. 2002); *Kincade*, 117 F.3d at 953.

However, a habeas petitioner's failure to apply for a COA first from the district court, while a "defect in procedure," is not jurisdictional. *United States v. Mitchell*, 216 F.3d 1126, 1130 (D.C. Cir. 2000). Accordingly, we have granted COAs in the first instance when remanding to the district court "would be wasteful of judicial resources." *United States v. Cruz*, 108 F. App'x 346, 348 (6th Cir. 2004); *see also Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010) (choosing to construe a notice of appeal as an application for a COA "rather than remand to enable petitioner to file an application for a COA").

Granting Burton a COA *sua sponte* is appropriate under the circumstances. The present case is unusual. The parties neither applied for, nor insist upon, a COA. The notice of appeal indicated that appeal was from the sentencing judgment rather than from the § 2255 judgment. Also, the issue to be resolved on appeal has changed entirely since the time of the district court's ruling. Asking the district court to decide whether to issue a COA when we would be inclined to

issue one regardless would be particularly pointless in these unusual circumstances. As the requirements for a COA have been satisfied, we hereby certify Burton's Rule 43 issue for appeal.

III. Second or Successive Authorization

The Government argues that Burton's Rule 43 motions were second or successive habeas petitions at the time they were filed in the district court. The Government concedes, however, that Burton no longer needs this court's permission to pursue claims attacking the validity of his conviction now that the district court has entered a new judgment resentencing him. "[A] habeas petitioner, after a full resentencing and the new judgment that goes with it, may challenge his undisturbed conviction without triggering the 'second or successive' requirements [of 28 U.S.C. § 2255(h)]." *King v. Morgan*, 807 F.3d 154, 156-57 (6th Cir. 2015).

IV. Procedural Default

Although the Government argues with considerable force that Burton's Rule 43 claim is procedurally defaulted, we need not resolve that issue. Despite having been aware that the trial court mailed the verdict before announcing it in open court, Burton did not raise this issue on direct appeal. However, we may address the merits of a procedurally defaulted habeas appeal and affirm on grounds other than procedural default. *See El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 900 (6th Cir. 2000). Doing so is appropriate in a case such as this one, where the petitioner's claim on appeal—that the district court's delivery of its guilt determination by mail caused prejudice—clearly lacks merit.

Furthermore, we proceed to consider Burton's Rule 43 argument on appeal notwithstanding that it was not reached by the district court. We may affirm on a ground not relied upon by the district court, *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 573 (6th Cir. 2008),

and it is appropriate to do so here, where both parties have asked us to decide the Rule 43 issue and the issue has been fully briefed and argued on the merits.

V. Rule 43 Argument

Burton's Rule 43 claim that the district court's guilt determination was improperly delivered by mail rather than in open court fails clearly for lack of prejudice. Burton's claim is reviewed for plain error, as he never raised it during the district court's sentencing proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Ford*, 761 F.3d 641, 655 (6th Cir. 2014). Plain error review is particularly appropriate here, where the court could have easily met the asserted requirement if the requirement had been drawn timely to the court's attention. To meet the plain error standard, Burton must demonstrate that (1) there was legal error (2) that was clear and (3) that affected the appellant's substantial rights and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Lawrence*, 735 F.3d 385, 401 (6th Cir. 2013). "Meeting all four prongs is difficult, 'as it should be.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Even assuming, without deciding, that Burton has established a clear Rule 43 violation, he has not demonstrated that the alleged error affected his substantial rights. The phrase "affects substantial rights" "in most cases means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States v. Ataya*, 884 F.3d 318, 323 (6th Cir. 2018) (internal ellipsis omitted) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

No such prejudice has been shown. Burton does not argue that, but for the alleged error, the outcome of the trial would have been different. Nor does he claim actual innocence. Burton asserts instead that as a result of the court's decision to mail the verdict, he was deprived of the

"opportunity to address the verdict, lodge objections, or preserve issues for direct appeal." This argument fails to account for the fact that Burton could have filed written objections to the verdict upon receiving it in the mail or lodged verbal objections when the verdict was announced at his sentencing.

The only specific example of prejudice Burton points to is the inability to object to the district court's failure to follow the procedural requirements in the Interstate Agreement on Detainers, which we then reviewed for plain error on direct appeal. *See Crozier*, 259 F.3d at 516. But it is not clear why Burton would have made such an objection during the hearing announcing the verdict as opposed to earlier during the substantive portion of the trial. Indeed, we noted on direct appeal that we were reviewing the claim for plain error due to "Burton's failure to object *at trial*." *Id.* (emphasis added). Burton has not established that the error in mailing the verdict affected his ability to make his Interstate Agreement on Detainers objection.

In arguing prejudice, Burton relies heavily on *United States v. Williams*, in which we held that a defendant's appearance at a sentencing hearing via video camera violated Rule 43 and was not harmless error. 641 F.3d 758, 765 (6th Cir. 2011). We observed that "[a]lthough the United States is correct that [the defendant] might have received the exact same sentence if he had been physically present, it has offered nothing to convince us that he certainly would have and, therefore, failed to meet its burden." *Id.*

Burton, however, faced a significantly lower risk of prejudice than did the defendant in *Williams*. The effect, if any, of a defendant's face-to-face interaction with a judge is likely to be much less pronounced in the announcement of factual findings than in the sentencing context, where the judge often has greater discretion and is able to choose from a range of outcomes.

Because Burton has not established that he was prejudiced by the asserted Rule 43 violation, he may not obtain relief under plain error review.

Burton seeks to avoid the issue of prejudice altogether by inviting the court to hold—as the Second Circuit in *United States v. Canady* did—that the Rule 43 violation amounts to "structural error." *See* 126 F.3d 352, 364 (2d Cir. 1997). The asserted Rule 43 violation in this case, however, did not rise to the level of structural error. The error was confined to the delivery of the verdict and did not undermine the outcome of the trial. Nor did it affect the quality or reliability of the evidence presented.

Structural errors "are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986). "[T]he defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Unlike trial errors, which may be found harmless, structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. Accordingly, the Supreme Court has found structural errors "only in 'a very limited class of cases, including: total deprivation of the right to counsel; judicial bias; the unlawful exclusion of grand jurors of defendant's race; denial of the right to self-representation at trial; the denial of the right to a public trial; and erroneous reasonable-doubt instruction to jury.'" *Lawrence*, 735 F.3d at 401 (quoting *Rosencrantz v. Lafler*, 568 F.3d 577, 589 (6th Cir. 2009)).

The trial judge's mailing of the verdict in this case does not fit within the narrow category of structural errors outlined by the Supreme Court. Indeed, the Ninth Circuit sitting en banc has held that even where the defendant was absent from the announcement of his death sentence, any constitutional violation that may have occurred was not structural and thus could be "quantitatively

assessed in order to determine whether or not it was harmless." *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996) (en banc) (citing *Rushen v. Spain*, 464 U.S. 114, 119 (1983)). The Ninth Circuit observed that "had [the defendant] been present, he couldn't have pleaded with the jury or spoken to the judge. He had no active role to play; he was there only to hear the jury announce its decision." *Id.* at 1141. The same is true in this case. Neither Burton nor his attorney could have had any impact on the judge's rendition of the verdict aside from their presence.

While the defendant's absence at the announcement of a verdict is not "of little significance," *Canady*, 126 F.3d at 364, that does not mean that is it automatically prejudicial. Consistent with this view, many circuits, including ours, have applied harmless error analysis to claims that the defendant was physically absent during either the return of a verdict or the announcement of a sentence. *See Williams*, 641 F.3d at 765 (announcement of sentence); *Rice*, 77 F.3d at 1142 (collecting cases); *United States v. Hadden*, 112 F. App'x 907, 908 (4th Cir. 2004) (per curiam); *United States v. Faulks*, 201 F.3d 208, 213 (3d Cir. 2000); *United States v. Huntley*, 535 F.2d 1400, 1404 (5th Cir. 1976) (announcement of guilt at bench trial); *but see United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018) (holding that conducting a combined plea and sentencing hearing by videoconference in violation of Rule 43(a) constitutes *per se* error, automatically warranting reversal); *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002) (sentencing).

It is true that the Second Circuit in *Canady* held that announcing a defendant's guilt by mail at the conclusion of a bench trial constitutes structural error. 126 F.3d at 364. In doing so, however, the Second Circuit required not a retrial or even a resentencing, but only the formality of a post-sentencing announcement of the court's finding of guilt in open court. *Id.* The Second Circuit at the same time recognized that "sending this case back for a public pronouncement of the

court's decision may be viewed by some as an unnecessary formality." *Id.* Harmless error analysis in such a case disposes of the need for such a technical formality, which further supports our conclusion that the asserted Rule 43 error in Burton's case does not amount to structural error.

VI. Procedural Reasonableness of Burton's New Sentence

Despite receiving a new sentence that is more than 200 months below the low-end of the Guidelines range, Burton contends that his sentence is procedurally unreasonable. The district court resentenced Burton to 360 months' imprisonment, consisting of concurrent terms of 60 months for the drug trafficking, robbery, and felon-in-possession offenses, followed by consecutive terms of 60 months and 240 months for the two § 924(c) offenses.

A. Firearm Enhancement

First, the district court did not abuse its discretion when it chose not to address Burton's objection to the 1999 presentence report's application of a four-point enhancement for use of a firearm. Burton conceded at his resentencing hearing that he was a career offender. As a result of his career-offender status, Burton's base offense level is 34, which is higher than the base offense level with or without the inclusion of the four-point enhancement. Under the Guidelines, "[t]he career offender offense level controls if it is 'greater than the offense level otherwise applicable.'" *United States v. Moody*, 634 F. App'x 531, 536 (6th Cir. 2015) (quoting U.S.S.G. 4B1.1(b)). Therefore, Burton's base offense level as a career offender would govern regardless of whether the district court had ruled on his objection. Accordingly, the district court did not err in declining to address this objection.

B. Reliance on the 1999 Presentence Report

Burton next argues that the district court failed to verify that he had had an opportunity to reexamine the presentence report prior to the resentencing. Burton did not raise this below and

concedes that plain error review applies. Burton's argument is without merit because there was sufficient evidence from which the district court could conclude that Burton had adequately reviewed the presentence report prior to his resentencing. During a resentencing hearing, the district court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." *United States v. Jeross*, 521 F.3d 562, 586 (6th Cir. 2008) (quoting Fed. R. Crim. P. 32(i)(1)(A)). But "[a] trial judge need not expressly ask the defendant if he and his counsel have read and discussed the report." *Id.* (alteration in original) (quoting *United States v. Osborne*, 291 F.3d 908, 910 (6th Cir. 2002)). Rather, the trial court "need only *somehow* determine that defendant and counsel have had an opportunity to read and discuss the [presentence report]." *Id.* (emphasis in original).

The district judge did not ask Burton or his attorney at resentencing whether they had reviewed the presentence report, but the court was not required to do so as long as it could "somehow determine" that Burton had been provided the opportunity to read and discuss the report. *Osborne*, 291 F.3d at 910. The record contains ample evidence on which the district court could rely to conclude that Burton adequately reviewed and discussed the presentence report with his attorney. Burton stated in his initial sentencing in 1999 that he had reviewed the presentence report and found it to be accurate. In addition, Burton's sentencing memorandum filed prior to his resentencing in 2018 frequently refers to the information contained in the presentence report. Further, Burton referred to the presentence report during his allocution at his resentencing. Finally, both parties agreed that Burton's effective Guideline range for resentencing was correct based on the 1999 presentence report. Therefore, the district court did not plainly err in concluding that Burton reviewed the presentence report prior to his resentencing. *See Jeross*, 521 F.3d at 586-87.

In any event, Burton has not suggested how the district court's alleged error prejudiced him and for this reason also he cannot prevail under plain error review.

C. Consecutive Sentences

Third, Burton argues that the district court erred when it ordered that he serve his federal sentence consecutively to his state sentence imposed for a parole violation. Burton's failure to raise this objection after the court announced its proposed sentence "undermine[d] his right to challenge the adequacy of the court's explanation for the sentence." *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc). Accordingly, as Burton appears to concede, this objection is subject to plain error review.

Burton contends that at the time of the original sentencing in 1999, the district court did not realize that it had authority to issue a sentence concurrent to the undischarged state sentence. But the district court's mistake, if it was one, is not relevant to this case, because the judge presiding over Burton's resentencing in 2018 expressly recognized the court's discretion to impose concurrent sentences. *See supra* at 4 n.1.

Burton secondly argues that the district court's imposition of consecutive sentences violated the court's own reasoning that sufficiently related cases would be made to run concurrently. During the resentencing hearing, the district court explained that

> This Court has consistently followed the recommendations, the Guidelines concerning when a sentence should be run concurrently, partially concurrent, or consecutive to any other sentences. And the Court, if the case is not related to the instant case, consistently will find that it must be consecutive. If it is sufficiently related, we make it run concurrent.

The Government argued at the resentencing hearing that the federal offense and the state parole violation caused "distinct harms" and the corresponding sentences for each should run consecutively. The district court appeared persuaded, and ultimately ordered that the federal

sentence run consecutively to the sentence imposed for the parole violation because "[the state offenses] are insufficiently related to the instant offense."

The district court's ruling is in line with the relevant statute and Sentencing Guidelines, which provide that a district court has discretion to impose a sentence consecutively to any "undischarged term of imprisonment." 18 U.S.C. § 3584(a); U.S.S.G. § 5G1.3(d); *see United States v. Johnson*, 640 F.3d 195, 208 (6th Cir. 2011). The comment to subsection (d) of the Guideline further notes that where, as here, the undischarged sentence results from a state parole violation, "the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation." U.S.S.G. § 5G1.3, cmt. n. 4(C).

It does not matter—as Burton contends—that his state parole violation and federal offenses stemmed from the same course of conduct. The Guideline policy contained in U.S.S.G. § 5G1.3, cmt. n. 4(C) recommends consecutive sentences for a federal offense and state parole violation notwithstanding that they both arise from the same conduct. The policy states that it is "[c]onsistent with the policy set forth in" U.S.S.G. § 7B1.3(f), which in turn requires any sentence imposed for a federal supervised release or probation violation to be served consecutively to any other term of imprisonment, "whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release." This policy makes sense given that penalties for revocation of state parole are considered "part of the sentence for the original crime of conviction, even where the facts underlying the revocation are precisely the same as those providing the basis for conviction in the instant [federal] case." *United States v. Wheeler*, 330 F.3d 407, 412 (6th Cir. 2003) (citing *Johnson v. United States*, 529 U.S. 693, 701 (2000)). Accordingly, although Burton's federal offenses formed the basis for his state parole

violation, the district court rightly concluded that his state and federal sentences address distinct harms.

The district court's explanation of Burton's new sentence is more than sufficient under our caselaw. In *Johnson*, we held that the district court need not even provide a "specific reason" for a consecutive sentence, so long as it "makes *generally clear* the rationale under which it has imposed the consecutive sentence." 640 F.3d at 208-09 (emphasis in original) (quoting *United States v. Owens*, 159 F.3d 221, 230 (6th Cir. 1998)). Here, the district court provided a specific reason for its decision—that the state and federal offenses were "insufficiently related." The court also conducted an analysis under 18 U.S.C. § 3553(a), which it used to justify both the overall length of Burton's sentence as well as the imposition of consecutive state and federal sentences. We have held that a district court's discussion of the § 3553(a) factors in relation to the aggregate length of a defendant's sentence may be "'intertwined' with the determination that the terms of imprisonment should run consecutively." *United States v. King*, 914 F.3d 1021, 1026 (6th Cir. 2019) (internal punctuation omitted) (quoting *Johnson*, 640 F.3d at 208).

Because the district court properly exercised its discretion to impose consecutive sentences for Burton's state and federal offenses, it did not abuse its discretion, let alone commit plain error.

VII. Substantive Reasonableness of Burton's New Sentence

Burton also challenges the substantive reasonableness of his sentence. He argues that the district court erred by imposing consecutive sentences of 60 months and 240 months under 18 U.S.C. § 924(c), which provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, *shall*" be subject to additional and consecutive imprisonment. (emphasis added).

First, Burton waived his substantive reasonableness challenge when he conceded multiple times in the district court proceedings that his § 924(c) sentences should be imposed consecutively. "Waived claims—i.e., those claims intentionally relinquished by a defendant—are not reviewable." *United States v. Toney*, 591 F. App'x 327, 329 (6th Cir. 2014) (citing *United States v. Ward*, 506 F.3d 468, 477 (6th Cir. 2007)).

In his memorandum filed prior to the resentencing, Burton asserted that his Guideline range "is still 262 to 327 months incarceration, plus 300 months mandatory consecutive incarceration for § 924(c) violations." Later in the memo, he stated that "[t]he only portion of Mr. Burton's sentence that is still mandatory is the consecutive 300 months incarceration for his convictions under 18 U.S.C. § 924(c) (Counts 3 and 9)." Furthermore, during his resentencing, Burton's attorney asked Judge Jordan "to impose a sentence that would however it is constructed effectuate having the mandatory consecutive 300 months for the [§] 924(c) charges to start June 13, 2008."[3] Finally, when asked by the district court whether the net effective Guideline range was 562 to 627 months, which included sentences for consecutive § 924(c) convictions, Burton's attorney responded, "That is correct, Your Honor." Burton does not address the waiver issue in his reply brief, even though the Government presented it. Accordingly, Burton's claim is not preserved for appellate review.

Waiver aside, Burton's argument fails on the merits. Burton claims the district court's imposition of consecutive sentences under § 924(c) resulted from "one firearm [that] was used to simultaneously further two different criminal acts," in violation of the rule in *United States v. Vichitvongsa*, 819 F.3d 260, 269 (6th Cir. 2016). In *Vichitvongsa*, the defendant robbed a house

[3] Burton during his allocution contradicted his attorney and argued briefly that there was insufficient evidence to convict him on the second § 924(c) violation alleged in Count 9. However, this brief statement during allocution hardly negates his attorney's numerous statements to the court conceding that Burton should be given two consecutive § 924(c) sentences.

in order to steal drugs. *Id.* at 265. He was convicted of two § 924(c) violations: one for brandishing/discharging a firearm during a conspiracy to commit Hobbs Act robbery and another for brandishing/discharging a firearm while drug trafficking. *Id.* We reversed, holding that the defendant could not be convicted of two § 924(c) violations when he used a firearm only once to commit two simultaneous conspiracies. We contrasted the facts in that case with those in *United States v. Burnette*, 170 F.3d 567, 572 (6th Cir. 1999) and *United States v. Graham*, 275 F.3d 490, 519-20 (2001), where the predicate offenses involved distinct events that occurred over a significant period of time. *Vichitvongsa*, 819 F.3d at 267-68.

Unlike in *Vichitvongsa*, and similar to *Graham* and *Burnette*, Burton's consecutive § 924(c) convictions are linked to distinct events that occurred at separate times. The record indicates that Burton used a gun to rob a pharmacy on November 26, 1995 and then carried a firearm during the transport and sale of drugs, which occurred in the hours and days after the robbery. Although the § 924(c) issue was not raised on Burton's direct appeal, we took note of Burton's § 924(c) offense as it related to the later incidents of drug distribution:

> In late November or early December 1995, in Lexington, Kentucky, Clayton Hobbs arranged for Burton to sell some drugs to Christopher Tucker. Hobbs drove Burton and an unidentified third man in a small car to Tucker's shop where Burton sold Tucker two boxes of pharmaceutical drugs. Tucker gave Burton $1,800 in one-hundred dollar bills. Tucker was unable to identify Crozier as the third man.

United States v. Crozier, 259 F.3d at 508. The presentence report expressly states that Burton carried a gun during this drug transaction:

> Chris Tucker . . . testified at trial. . . . He received a call from Albert Clayton Hobbs, known as Clayton, who is a friend of Burton's. Tucker arranged to meet Clayton and Burton at Tucker's shop to buy drugs. Tucker said Clayton was driving. *Burton was in the front passenger seat with a gun on the dashboard in front of him*, and another man was in the back seat. Clayton got a box from the trunk of the car and brought it inside to show Tucker. The box contained Lortab, Xanax, and

> codeine or some kind of cough medicine. Tucker gave Clayton $1,800, and still owed him another $1,000.

(emphasis added).

As Burton's case does not fall within one of the "limited circumstances" described in *Vichitvongsa*, 819 F.3d at 266, the district court was required to impose consecutive sentences for each of Burton's § 924(c) violations.

Second, Burton argues in the alternative that his consecutive § 924(c) sentences are no longer valid because they are subject to the amendment to § 924(c) made by the recently-enacted First Step Act. Unfortunately for Burton, the First Step Act became law after he was sentenced and thus does not apply to his case. Prior to the enactment of the First Step Act, 18 U.S.C. § 924(c)(1)(C) provided that

> (C) In the case of a second or subsequent conviction under this subsection, the person shall—
> (i) be sentenced to a term of imprisonment of not less than 25 years.

Section 403(a) of the Act amends the statute to eliminate the 25-year mandatory minimum in § 924(c)(1)(C) unless the defendant had a prior § 924(c) conviction that became final before he committed his second § 924(c) violation. Pub. L. No. 115-391, 132 Stat. 5194, § 403(a). Accordingly, § 924(c) now reads as follows:

> (C) In the case of a *violation of this subsection that occurs after a prior conviction under this subsection has become final*, the person shall—
> (i) be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(1)(C) (emphasis added).

This change is applicable to "pending cases," that is, "any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (2018). Burton was

sentenced in July 2018, more than five months before the enactment of the First Step Act on December 21, 2018.

Burton contends that his sentence has not yet been "imposed" since it remains pending on direct appeal. Our precedent is to the contrary. In *United States v. Richardson*, we held that a sentence is "imposed" for purposes of § 403 of the First Step Act when it is announced by the district court, not when it becomes final on appeal. Nos. 17-2157, 17-2183, __ F.3d __, 2020 WL 413491, at *11-12 (6th Cir. Jan. 27, 2020). In so holding, we acknowledged that *Clark v. United States*, 110 F.3d 15 (6th Cir. 1997)—upon which Burton relies—provides some support for Burton's reading of the word "imposed." *Id.* at *13. We were asked in *Clark* "whether § 3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted." 110 F.3d at 17. The safety valve statute stated that it applied "to all sentences imposed on or after" the date of enactment. Pub. L. No. 103-322, § 8001(a), 108 Stat. 1796, 1985-86 (1994). We concluded that the "initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error." *Clark*, 110 F.3d at 17.

However, we determined in *Richardson* that *Clark* focused primarily on the remedial purpose of the 1994-safety-valve provision and therefore did not control the interpretation of the First Step Act. *Richardson*, 2020 WL 413491, at *14. We also questioned *Clark*'s continued viability in light of Supreme Court cases holding that a district court's sentence constitutes a final judgment. *Id.* (citing *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) and *Flanagan v. United States*, 465 U.S. 259, 263 (1984)). In sum, a defendant such as Burton who was sentenced before the enactment of the First Step Act but whose appeal remains pending after the law went into effect is not entitled to relief under § 403. *Id.* at *12.

The court in *Richardson* also rejected Burton's second argument: that § 403 of the First Step Act merely clarifies existing law and therefore applies retroactively. *Id.* at *9-11. Burton, as did the defendant in *Richardson*, supports his argument by pointing to § 403's title, which reads "Clarification of Section 924(c) of Title 18, United States Code." Yet, "a statute's title may not undo that which the statute itself makes plain." *United States v. Waters*, 158 F.3d 933, 938 (6th Cir. 1998). As we observed in *Richardson*, if Congress intended to make § 403 merely a clarifying amendment, it would not have included the language in § 403(b) pertaining to retroactivity. 2020 WL 413491, at *11. Furthermore, "even if Congress had intended to simply clarify § 924(c), we must still apply the plain language of section 403(b)," *id.* at *11 n.1, which, as discussed above, makes the § 924(c) amendment inapplicable to defendants like Burton who were sentenced prior to the enactment of the First Step Act. Accordingly, Burton is not eligible for relief under the First Step Act.

VIII.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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POTTER STEWART U.S. COURTHOUSE
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Filed: February 04, 2020

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Re: Case No. 18-5737, *USA v. Charles Burton*
Originating Case No. : 3:97-cr-00154-1 : 3:17-cv-00025

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. John L. Medearis

Enclosure

Mandate to issue

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

UNITED STATES OF AMERICA

v.

CHARLES W. BURTON
USM#14816-074
Date of Original Judgment: October 27, 1999
Reason for Amendment:

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: **3:97-CR-00154-RLJ(1)**

Laura E. Davis
Defendant's Attorney

- ☐ Correction of sentence on remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P.35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed.R.Crim.P.36)
- ☐ Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) top the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☒ Direct Motion to District Court Pursuant ☒ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s):
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on Counts 1,2,3,4,6,7,8,9 of the Second Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Violation Concluded	Count
21 U.S.C. § 846 & 21 U.S.C. § 841(b)(1)(C)	Conspiracy to Distributre and Possess with Intent to Distribute Schedule II, III, and IV Controlled Substances	February 12, 1996	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

- ☐ The defendant has been found not guilty on count(s) .
- ☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

July 9, 2018
Date of Imposition of Judgment

s/ Leon Jordan
Signature of Judicial Officer

R Leon Jordan , United States District Judge
Name & Title of Judicial Officer

July 12, 2018
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Violation Concluded	Count
18 U.S.C. §§ 2118(a) and (c)	Robbery of a Pharmacy by Use of Dangerous Weapon and Taking Controlled Substances Having a Replacement Cost of Over $500	November 26, 1995	2
18 U.S.C. §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Drug a Trafficking Crime or a Crime of Violence	November 26, 1995	3,9
18 U.S.C. §§ 922(g) & 924(c)	Felon in Possession of a Firearm	November 26, 1995	4
18 U.S.C. § 841(a)(1)	Possession with Intent to Distribute Schedule II Controlled Substances	November 26, 1995	6
18 U.S.C. § 841(a)(1)	Possession with Intent to Distribute Schedule III Controlled Substances	November 26, 1995	7
18 U.S.C. § 841(a)(1)	Possession with Intent to Distribute Schedule IV Controlled Substances	November 26, 1995	8

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of ***360 months**.

This sentence consists of terms of 60 months as to Counts 1, 2, 4, 6, 7 and 8 of the Second Superseding Indictment, such terms to be served concurrently; a term of 60 months as to Count 3 of the Second Superseding Indictment, to be served consecutively; and a term of 240 months as to Count 9 of the Second Superseding Indictment, to be served consecutively for a total effective term of 360 months. Additionally, this sentence shall be served consecutively to the revocation sentencings in the following cases:

- Docket numbers 75-95C, 75-96C, 75-97C, 76-85C, and 76-86C in the Boyle County Circuit Court, Danville, Kentucky;
- Docket numbers 70330A, 70331A, and 79-CR-238 in the Fayette County District Court, Lexington, Kentucky;
- Docket number 83-CR-034 in the Madison County Circuit Court, Richmond, Kentucky;
- Docket number 83-CR-0317 in the Jefferson County Circuit Court, Louisville, Kentucky; and
- Docket number 84-CR-044-002 in the Lyon County Circuit Court, Eddyville, Kentucky.

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

*The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. The court will further recommend the defendant undergo a complete physical health evaluation and receive appropriate treatment while serving his term of imprisonment. It is further recommended the defendant participate in educational classes and vocational training to learn a trade or marketable skills while incarcerated. Lastly, the court recommends the defendant be designated to FCI Manchester, KY.

☒ 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 2 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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **6 years**.

This term consists of 6 years as to each of Counts 1 and 6 of the Second Superseding Indictment; 5 years as to each of Counts 2, 3, and 9 of the Second Superseding Indictment; 4 years as to Count 7 of the Second Superseding Indictment; and 3 years as to Counts 4 and 8 of the Second Superseding Indictment. All terms to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. *(check if applicable)*
*5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as you are released from the program by the probation officer.

*2. You must provide the probation officer with access to any requested financial information.

*3. You must not incur new credit charges or apply for additional lines of credit without permission of the probation officer until restitution has been paid in full. In addition, you must not enter into any contractual agreements which obligate funds without permission of the probation officer.

*4. You must pay any financial penalty that is imposed by this judgment. Any amount that remains unpaid at the commencement of the term of supervised release shall be paid on a monthly basis at the amount of a least 10% of your net monthly income.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$400.00	$.00	$.00	$3,223.94

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* 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.

Restitution of $3,223.94 to:

RITE AID CORPORATION

☐ 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 under the Schedule of Payments sheet of this judgment 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:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** 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.

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of $ 3,623.94 due immediately, balance due
☐ not later than , or
☒ in accordance with ☐ 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:

The government may enforce the full amount of restitution ordered at any time, pursuant to 18 U.S.C. §§ 3612, 3613 and 3664(m).

The United States Bureau of Prisons, United States Probation Office and the United States Attorney's Office shall monitor the payment of restitution, and reassess and report to the Court any material change in the defendant's ability to pay.

The defendant shall make restitution payments from any wages he may earn in prion in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that in not paid in full at the time of his release from imprisonment shall become a condition of supervision.

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 **U.S. District Court, 800 Market Street, Suite 130, Howard H. Baker, Jr. United States Courthouse, Knoxville, TN, 37902**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ 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:

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) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

KeyCite Yellow Flag - Negative Treatment
Post-Conviction Relief Granted by Burton v. United States, E.D.Tenn., April 12, 2017

259 F.3d 503
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
David Earl CROZIER; Charles W. Burton, Defendants–Appellants.
United States of America, Plaintiff–Appellant,
v.
Charles W. Burton, Defendant–Appellee.

Nos. 99–6561, 99–6567, 99–6629.
|
Argued April 24, 2001.
|
Decided and Filed Aug. 2, 2001.

Synopsis

Defendants were convicted in the United States District Court for the Eastern District of Tennessee, James H. Jarvis, J., of conspiracy to distribute and conspiracy to possess with intent to distribute controlled substances, and one defendant was also convicted of possession with intent to distribute Schedule II, Schedule III, and Schedule IV controlled substances, robbery of a pharmacy, using firearm during commission of both drug conspiracy and robbery, and being felon in possession of firearm. Defendants appealed, and United States cross-appealed. The Court of Appeals, Boyce F. Martin, Jr., Chief Judge, held that: (1) identification of defendant as robber was sufficiently reliable; (2) district court's violation of Interstate Agreement on Detainers' speedy trial provision was not plain error; and (3) district court could not award credit for time served.

Convictions affirmed; sentence vacated and remanded.

O'Malley, District Judge, sitting by designation, concurred and filed opinion.

West Headnotes (30)

[1] Criminal Law ⚖ Review De Novo

Criminal Law ⚖ Evidence wrongfully obtained

Court of Appeals reviews district court's factual findings on motion to suppress for clear error, and its legal conclusions de novo.

10 Cases that cite this headnote

[2] Criminal Law ⚖ Prior impropriety in general

Identification is admissible if reliable, even if obtained through suggestive means.

28 Cases that cite this headnote

[3] Criminal Law ⚖ Prior impropriety in general

If identification procedure was suggestive, court must then determine whether, under totality of circumstances, identification was nonetheless reliable and therefore admissible.

46 Cases that cite this headnote

[4] Criminal Law ⚖ Prior impropriety in general

Criminal Law ⚖ Independent Basis; Opportunity for Observation

In determining reliability of suggestive identification procedure, court must consider: (1) opportunity of witness to view perpetrator during crime; (2) witness's degree of attention to perpetrator; (3) accuracy of witness's prior descriptions of perpetrator; (4) level of certainty demonstrated by witness when identifying suspect; and (5) length of time between crime and identification.

61 Cases that cite this headnote

[5] Criminal Law ⚖ Robbery

Identification of defendant as robber by store clerks was sufficiently reliable to warrant admission in robbery trial, even though defendant's mug shot was only color photograph in array used to initially identify robber, defendant was 60 pounds heavier than one clerk had described robber, other clerk did not give prior description of robber, and one month had passed between robbery and impermissibly

suggestive photographic line-up, where both clerks had extended opportunity to view robber, viewed robber with heightened degree of attention, immediately picked defendant in photo line-up, at live line-up, and in court, and were quite certain of their identification of defendant.

19 Cases that cite this headnote

[6] Criminal Law ⚖ Identity of Accused

In determining whether identification was reliable, it is material whether witness was familiar with defendant, because the more familiar the person, the more reliable the identification.

2 Cases that cite this headnote

[7] Extradition and Detainers ⚖ Jurisdictions, Proceedings, Persons, and Offenses Involved

United States need not file detainer in order to obtain custody over state's prisoner. Interstate Agreement on Detainers Act, § 2, Art. I et seq., 18 U.S.C.A.App.

3 Cases that cite this headnote

[8] Extradition and Detainers ⚖ Jurisdictions, Proceedings, Persons, and Offenses Involved

If United States chooses to file detainer to obtain custody over state prisoner, requirements of Interstate Agreement on Detainers attach. Interstate Agreement on Detainers Act, § 2, Art. I et seq., 18 U.S.C.A.App.

3 Cases that cite this headnote

[9] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

Waiver of "defense of a violation of the Interstate Agreement on Detainers in this case, as it relates to my return to State custody," signed by federal prisoner as condition of his return to face pending state charges, did not waive defendant's right under Interstate Agreement on Detainers to speedy trial on federal charges, but rather waived only defendant's rights under Agreement's "anti-shuttling" provision that could have arisen as result of his return to state custody. Interstate Agreement on Detainers Act, § 2, Art. IV(c, e), 18 U.S.C.A.App.

1 Cases that cite this headnote

[10] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

Defendant's agreement to trial date outside of Interstate Agreement on Detainers' time period does not automatically waive Agreement's continuance procedures. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

[11] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

When putative violation of speedy trial provision of Interstate Agreement on Detainers occurs, court has obligation to scrutinize each continuance request made by defendant to determine whether or not request amounted to waiver of procedural and substantive rights guaranteed by that provision. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

[12] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

Merely requesting continuance on behalf of defendant does not constitute per se waiver of all procedural and substantive "speedy trial" rights guaranteed by Interstate Agreement on Detainers. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

[13] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

If defendant affirmatively waives his or her speedy trial rights under Interstate Agreement on Detainers in motion for continuance, district court need not literally comply with procedures prescribed in Agreement. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

1 Cases that cite this headnote

[14] Criminal Law ⚖ Proceedings at Trial in General

If district court were to explicitly refer to defendant's "speedy trial" rights under Interstate Agreement on Detainers, either in its oral or written grant of defense's motion for continuance, and defendant took no action to preserve those rights, he could not then raise district court's failure to follow procedures as grounds for appeal. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

[15] Extradition and Detainers ⚖ Effect of delay or failure to prosecute; waiver; determination

Defendant's mere request for continuance did not amount to intentional abandonment of procedural safeguards or substantive rights under Interstate Agreement on Detainers speedy trial provision; counsel did not request specific date, continuance was neither requested nor granted in open court, and there was no showing that approximately three-month continuance was either "necessary" or "reasonable" for all parties. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

2 Cases that cite this headnote

[16] Criminal Law ⚖ Proceedings at Trial in General

District court's violation of Interstate Agreement on Detainers' speedy trial provision was not plain error, even though error was clear and obvious, where violation was result of defendant's request for continuance, defendant failed to object at trial, and delay had no effect on defendant's substantive rights or on fairness of proceedings. Interstate Agreement on Detainers Act, § 2, Art. IV(c), 18 U.S.C.A.App.

6 Cases that cite this headnote

[17] Criminal Law ⚖ Points and authorities

Defendant's general citation in initial appellate brief to statute prohibiting felons from possessing firearms was insufficient to permit him to argue in his reply brief that there was insufficient evidence to support his conviction as felon in possession of firearm, where defendant's arguments were heavily fact-based, and initial brief only raised argument regarding sufficiency of evidence to support robbery conviction. 18 U.S.C.A. § 922(g).

46 Cases that cite this headnote

[18] Conspiracy ⚖ Nature and Elements of Criminal Conspiracy in General

Essential elements of drug conspiracy are (1) agreement to violate drug laws, and (2) each conspirator's knowledge of, intent to join, and participation in conspiracy. 21 U.S.C.A. § 846.

13 Cases that cite this headnote

[19] Conspiracy ⚖ Nature and Elements of Criminal Conspiracy in General

Agreement need not be formal or actual to support conviction for drug conspiracy; tacit or material understanding among parties is sufficient. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[20] Conspiracy ⚖ Narcotics and dangerous drugs

Defendant's conviction for participating in drug conspiracy was supported by evidence that, although defendant was acquitted of substantive criminal acts, defendant and co-defendant asked their parole officer for permission to work together, defendant and co-defendant were caught on security tape casing one pharmacy not charged in indictment, ledger was found in defendant's house reflecting that co-defendant owed him one thousand dollars, large quantity of pharmaceutical drugs in wholesale bottles, consistent with some of drugs taken during robbery of another pharmacy, was found in defendant's wife's house, and defendant's brother-in-law's testified that defendant told

him that defendant and co-defendant had obtained number of pharmaceutical drugs during drugstore robbery. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[21] Indictments and Charging Instruments ⚖ Variance between allegations and proof

Defense counsel does not waive objection to variance by failing to raise it at trial.

[22] Indictments and Charging Instruments ⚖ Variance Between Allegations and Proof

To obtain reversal due to variance between indictment and evidence, defendant must show (1) variance itself, and (2) effect on substantial right.

[23] Conspiracy ⚖ Issues, proof, and variance

There was no fatal variance between indictment charging defendant with participating in single drug conspiracy with co-defendant and evidence at trial, even though evidence indicated that defendant did not participate in all of conspiracy's substantive criminal violations, where evidence indicated that defendant and co-defendant knew one another, cased pharmacy together, and robbed another drugstore together, defendant possessed pharmaceuticals consistent with robbery that co-defendant committed, and co-defendant and co-defendant's buyer owed defendant money. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

1 Cases that cite this headnote

[24] Criminal Law ⚖ Weight and effect of opposing affidavits or other evidence

United States must prove by preponderance of evidence that venue was proper as to each count.

6 Cases that cite this headnote

[25] Criminal Law ⚖ Locality of Offense in General

Venue is proper in state or district where offense was committed.

10 Cases that cite this headnote

[26] Criminal Law ⚖ Locality of Offense in General

For drug conspiracies, venue is proper in any district where conspiracy was formed or where overt act in furtherance of conspiracy was performed.

19 Cases that cite this headnote

[27] Criminal Law ⚖ Offenses against United States

Eastern District of Tennessee was proper venue for drug conspiracy prosecution, even though defendant was acquitted of participating in pharmacy robbery in Tennessee, where co-defendant was convicted of Tennessee robbery committed in furtherance of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

20 Cases that cite this headnote

[28] Criminal Law ⚖ Review De Novo

Whether district court has power to award credit for time served is question of law that is reviewed de novo on appeal.

30 Cases that cite this headnote

[29] Prisons ⚖ Good Conduct or Other Earned Credits Against Sentence

Power to grant credit for time served lies solely with Attorney General and Bureau of Prisons. 18 U.S.C.A. § 3585(b).

49 Cases that cite this headnote

[30] Sentencing and Punishment ⇐ Authority to Reconsider or Modify Sentence

District court's amendment of defendant's sentence to reflect credit for time served was not award of partially concurrent sentence, but rather was improper infringement on Bureau of Prisons' power to award credit for time served. 18 U.S.C.A. § 3585(b).

49 Cases that cite this headnote

Attorneys and Law Firms

***507** Steve H. Cook, Assistant United States Attorney (argued and briefed), Knoxville, TN, for Plaintiff.

Randall E. Reagan (argued and briefed), Law Offices of Peter G. Angelos, Knoxville, TN, Gary W. Lanker, Law Office of Gary W. Lanker, Memphis, TN, for Defendants.

Before: BOYCE F. MARTIN, Jr., Chief Judge; MOORE, Circuit Judge; O'MALLEY, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

Following a bench trial, the district court found David Earl Crozier and Charles W. Burton guilty of conspiracy to distribute and conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846. Additionally, the district court convicted Burton of possession with intent to distribute Schedule II, Schedule III, and Schedule IV controlled substances in violation of 21 U.S.C. § 841(a)(1); robbery of a pharmacy in violation of 18 U.S.C. §§ 2118(a) and (c); using a firearm during the commission of both the drug conspiracy and the robbery in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(e). Both defendants appeal their convictions on numerous grounds. The United States cross-appeals the district court's sentencing decision to credit Burton with six hundred fifty days time served. For the following reasons, we affirm both defendants' convictions, vacate Burton's sentence, and remand for resentencing.

I.

A.

Because both defendants challenge the sufficiency of the evidence for their convictions, we must present the facts in some detail. For clarity, we have divided the facts according to discrete criminal activities.

1. The Tennessee Rite–Aid Robbery

On November 26, 1995, two armed gunmen robbed the Rite–Aid Drug Store in ***508** Clinton, Tennessee, and absconded with numerous pharmaceutical drugs, including Schedule II, Schedule III, and Schedule IV controlled substances. During the robbery, one of the robbers (later identified as Burton) repeatedly asked Katrina DeBusk, the Rite–Aid pharmacist, about the location of several drugs, including Dilaudid pills and morphine. Several days after the robbery, DeBusk helped police prepare a composite sketch of the first suspect in about fifteen minutes. Police worked on a composite of the second suspect (again, later identified as Burton) for approximately three hours but failed to produce a sketch satisfactory to DeBusk.

Approximately one month later, DeBusk and Shelly Simonds, the only other Rite–Aid employee present during the robbery, separately identified Burton as one of the robbers from a photographic line-up. The Clinton Police Department, which uses black-and-white mug shots, had obtained Burton's photograph from the Lexington, Kentucky, Police Department, which uses color mug shots. Accordingly, Burton's photograph was the only color photograph shown to the witnesses. On March 6, 1998, both witnesses again identified Burton as the perpetrator, this time from a live line-up. Burton was the only person represented in both the photo line-up and the live line-up.

Although neither witness was able to identify Crozier as Burton's accomplice during the robbery, Crozier's brother-in-law, Richard Randolph, testified at trial that in early December, Crozier showed him a bag containing bottles of pharmaceutical drugs and told him that Crozier and Burton had obtained the drugs by robbing a Tennessee drugstore.

2. The Kentucky Drug Sales

In late November or early December 1995, in Lexington, Kentucky, Clayton Hobbs arranged for Burton to sell some drugs to Christopher Tucker. Hobbs drove Burton and an unidentified third man in a small car to Tucker's shop where Burton sold Tucker two boxes of pharmaceutical drugs. Tucker gave Burton $1,800 in one-hundred dollar bills. Tucker was unable to identify Crozier as the third man.

The next day, as previously agreed, Burton and Hobbs returned to Tucker's shop, where Tucker gave Burton an additional one thousand dollars in one-hundred dollar bills. Tucker testified that this time, Burton and Hobbs were in a Cadillac Eldorado. On December 1, Burton paid six hundred dollars cash to a pawn shop for his previously-pawned Cadillac Eldorado. The United States thus argues that although Tucker could not recall the exact date of the drug sale, the drugs must have been sold on November 30, with the follow-up payment occurring on December 1.

3. Casing the Lexington, Kentucky, Rite–Aid

At approximately 4 p.m. on December 1, security personnel for the Rite–Aid Drug Store in Lexington observed Burton and Crozier enter the store together, walk around separately, and eventually meet up at the pharmacy. Burton made a purchase and left the store, only to return a short time later, stay awhile, then leave. Burton again returned and after fifteen or twenty minutes, met up with Crozier. The two split up again, ultimately leaving the store separately. A short while later, Burton again returned, and spent approximately five minutes paying particular attention to the cash registers' and employees' locations. Crozier also re-entered the store but remained near the front. Burton finally ended this episode by placing a Tylenol bottle in his pocket. When confronted by security, a fight ensued, resulting ***509** in Burton's arrest and Crozier fleeing the scene. Police found syringes, $1,557 in cash (including fifteen one-hundred dollar bills), and a number of Dilaudid pills on Burton. Shortly after Burton's arrest, his girlfriend pawned two handguns, one of which matched the description DeBusk had given of the gun she saw during the Tennessee Rite–Aid robbery.

On December 6, police officers executed a parole violation warrant on Burton. It was while Burton was being held on that charge that the Lexington Police Department forwarded Burton's color mug shot to the Clinton Police Department in Tennessee. Burton remained incarcerated for parole violations for the remaining time relevant to this appeal.

4. The Somerset, Kentucky, Drugstore Burglary

On February 8, 1996, Randolph and Crozier's son, Brett, burglarized a Somerset, Kentucky, drugstore and brought the drugs to Crozier. Some of those drugs were then taken to Clayton Hobbs, while Crozier, Randolph, and a man named Charlie Henderson sold the morphine obtained in the burglary to someone in Georgetown, Kentucky, for one thousand dollars.

During the time relevant to this appeal, Crozier was living on Limestone Street in Somerset, while Crozier's wife lived on White Street. Although Crozier often visited and occasionally stayed overnight at his wife's home, he maintained his own residence. On February 12, police officers executed search warrants at both the Limestone Street and White Street residences. The search of Crozier's Limestone Street residence revealed one bottle of pharmaceutical drugs and a ledger reflecting indebtedness to Crozier by Burton for one thousand dollars, and by "Clayton" for eight hundred dollars. The search of Crozier's wife's White Street residence revealed two bags containing a large number of pharmaceutical drugs in wholesale-sized bottles, and eight-hundred forty-five dollars in Crozier's wallet. Some of those bottles were traceable to the Somerset drugstore and others were consistent with drugs taken during the Tennessee Rite–Aid robbery. Although Crozier was present at the White Street address during the search, Crozier's fingerprints were not found on any of the seized booty.

B.

The grand jury in the Eastern District of Tennessee, in a second superseding indictment, charged Burton and Crozier with conspiracy to distribute and conspiracy to possess with intent to distribute controlled substances; possession with intent to distribute Schedule II, Schedule III, and Schedule IV controlled substances; robbery of a pharmacy; using a firearm during the commission of both the drug conspiracy and the robbery; and being felons in possession of firearms.

The United States initially brought Burton into Tennessee by serving a writ of *habeas corpus ad prosequendum* on the Kentucky prison where Burton was incarcerated. In April 1996, the United States agreed to return Burton to Kentucky pending trial. On September 10, the United States filed a detainer with the Kentucky prison, officially informing it that Burton had federal criminal charges pending in the Eastern

District of Tennessee. On November 20, Burton was returned to the Tennessee district by means of a second writ of *habeas corpus ad prosequendum*. [1]

***510** Following a three-day bench trial, the district court found Burton guilty on all counts and sentenced him to forty-six years and ten months imprisonment, plus six years supervised release, to be served following completion of Burton's previously imposed Kentucky prison sentence. Additionally, the district court granted Burton six hundred fifty days credit for the time he had spent in Tennessee awaiting trial. The district court found Crozier guilty of only the conspiracy charge and sentenced him to seventeen years and eleven months imprisonment, plus three years supervised release. Burton and Crozier timely appealed their convictions on numerous grounds. The United States timely cross-appealed Burton's award of credit for time served.

II.

[1] Burton first argues that the district court erred in failing to suppress DeBusk's and Simonds's pre-trial and in-court identifications of him as one of the Tennessee Rite–Aid robbers. We review a district court's factual findings on a motion to suppress for clear error, and its legal conclusions de novo. *See United States v. Freeman*, 209 F.3d 464, 466 (6th Cir.2000).

[2] Due process "prohibits the use of identifications which under the totality of the circumstances are impermissibly suggestive and present an unacceptable risk of irreparable misidentification." *Carter v. Bell*, 218 F.3d 581, 605 (6th Cir.2000). Therefore, a conviction based on identification testimony must be overturned "whenever the pretrial identification procedure is so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). An identification is admissible if reliable, even if obtained through suggestive means. *See Neil v. Biggers*, 409 U.S. 188, 196–97, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[3] [4] This Circuit follows a two-step analysis in determining whether an identification is admissible. *See Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir.1994). First, we consider whether the identification procedure was suggestive. *See id.* at 1071. If we find the procedure was suggestive, we then determine whether, under the totality of the circumstances, the identification was nonetheless reliable and therefore admissible. *See id.* The five factors to be weighed in determining reliability are: 1) the opportunity of the witness to view the perpetrator during the crime; 2) the witness's degree of attention to the perpetrator; 3) the accuracy of the witness's prior descriptions of the perpetrator; 4) the level of certainty demonstrated by the witness when identifying the suspect; and 5) the length of time between the crime and the identification. *See Biggers*, 409 U.S. at 199–200, 93 S.Ct. 375. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)

[5] We agree with the district court that including one color photograph of Burton with a group of black-and-white photos was suggestive. *See United States v. Ayendes*, 541 F.2d 601, 605 (6th Cir.1976) ("It is clear that the procedure of using a display composed of three typical black and white mug shots, a single color ***511** picture of each of the defendants ... and a color group photograph in which both of the defendants appeared was suggestive."); *see also O'Brien v. Wainwright*, 738 F.2d 1139, 1140 (11th Cir.1984) (holding that display of defendant's color photo with five other black-and-white mug shots was impermissibly suggestive). Applying the five *Biggers* factors, however, we conclude that, under the totality of the circumstances, the district court properly found that sufficient indicia of reliability existed to admit both witnesses' identification testimony.

[6] First, the district court found that both witnesses had an extended opportunity to view the robber later identified as Burton. The robbery took place during daylight hours in a well-lit building over a ten-minute period. Burton did not wear a hat, mask, or glasses, and did not have facial hair. Simonds testified that approximately one hour before the robbery, she helped Burton locate and purchase a box of cough drops. [2] She took note of Burton at the time because he was a stranger, and she was familiar with most of her customers. Burton returned to the store and approached Simonds for help locating a birthday card for his mother. When she turned to push a cart out of his way, Burton poked "something" into her back and forced her to the pharmacy area. DeBusk testified that while Burton's accomplice grabbed various drugs, Burton carried on an extended conversation with DeBusk regarding the locations of particular narcotics. Although DeBusk was bound and lying on the floor, she testified that she had a clear view of Burton when she raised her head to speak with him. We agree

with the district court that this factor presents an indicium of independent reliability.

Second, the district court found that both DeBusk and Simonds viewed Burton with a heightened degree of attention, as compared with "disinterested bystanders or casual observers." The court noted that Burton confronted both witnesses directly, and that as victims of the crime, both would have likely paid close attention to Burton and his accomplice, particularly because the presence of a gun indicated the potential for violence. Although Burton presented expert testimony to show that victims tend to be less reliable witnesses than disinterested parties, particularly when threatened with a weapon, the district court properly acted as fact-finder in choosing to credit DeBusk's and Simonds's testimony over, or in spite of, the expert's generalizations. We agree with the district court and find an indicium of reliability under this factor as well.

Third, the district court discussed the accuracy of the prior descriptions. DeBusk worked with police on a composite of the robber later identified as Burton which, although never completely satisfactory to DeBusk, is consistent with Burton in several respects, including wide-set eyes, thin lips, similar hair, and similarly shaped heads. DeBusk initially described the robber as approximately six feet tall and one hundred eighty pounds. Although Burton has a height of six feet and one inch, he weighs two hundred forty pounds—sixty pounds heavier than DeBusk's description. Nonetheless, the district court agreed with the magistrate that ***512** DeBusk's viewing Burton while lying on the floor could explain the weight discrepancy, and decided the discrepancy should go to the credibility of DeBusk's testimony, rather than warranting its outright exclusion. We agree with the district court that the sixty-pound weight discrepancy does not operate to bar DeBusk's testimony, but rather must be taken in conjunction with her entire description of the robber later identified as Burton.

We disagree, however, with the district court's application of this factor to Simonds. The district court noted that Simonds had not provided police with a description of the robber prior to viewing the suggestive photo line up, and found that therefore it "could not consider the third factor" with respect to Simonds. The purpose of looking to prior identifications is to find an indicium of reliability. If Simonds failed to describe Burton before being presented with his photo in a suggestive manner, that fact should not be ignored, but rather cuts in favor of Burton's argument that Simonds identified him merely because of the suggestive photo line up. Therefore, although the district court was correct in finding DeBusk's description taken as a whole provided an additional indicium of reliability, it should have found that Simonds's failure to describe Burton previously indicates a measure of unreliability in her identification.

Fourth, both DeBusk and Simonds picked Burton as the robber within five seconds of viewing the photo line-up. Moreover, both immediately identified Burton at a live line-up (albeit one that was held over two years after the robbery and three days before the suppression hearing) and in court. Finally, both testified that their live line-up and in-court identifications were based on what they saw during the robbery, not because of the photographic line-up. The district court noted that the magistrate found both DeBusk and Simonds "to be quite certain of their identification of defendant." This factor shows a further indicium of reliability.

Finally, the district court found the length of time between the crime and the identification to cut in favor of the defendant. One month had passed between the robbery and the impermissibly suggestive photographic line up. More than two years passed before the live line up occurred. *See, e.g., United States v. Hamilton*, 684 F.2d 380, 383 (6th Cir.1982) (finding eleven-day lapse between crime and identification acceptable). Nonetheless, the district court weighed all of the factors and found that the United States had shown that the suggestive nature of the photographic line up did not create a very substantial likelihood of misidentification. *See United States v. Hill*, 967 F.2d 226, 233 (6th Cir.1992) (finding lapse of five years did not operate to bar identification supported by other indicia of reliability). We agree with the district court that, taken as a whole, the facts do not show a "very substantial likelihood" that Burton was misidentified.

III.

Next, Burton argues that his right to be tried within one hundred twenty days of his arrival in Tennessee was violated and thus his indictment must be dismissed with prejudice under the Interstate Agreement on Detainers, 18 U.S.C.App. 2 (2000). The United States argues that the Interstate Agreement was not violated, and raises several procedural arguments that it claims preclude us from adjudicating this issue. We conclude that the district court erred by failing to comply literally with Article IV(c), but that the error did not prejudice Burton and thus does not require reversal.

date past the one hundred twenty day deadline, or failing to raise the argument before the district court.

*513 A. Interstate Agreement on Detainers

[7] [8] The Interstate Agreement is a compact entered into by forty-eight states, the United States, and the District of Columbia to establish procedures for resolution of one jurisdiction's outstanding charges against another jurisdiction's prisoner. *See New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). A detainer "is simply a notice to prison authorities that charges are pending against an inmate elsewhere, requesting the custodian to notify the sender before releasing the inmate." *Ridgeway v. United States*, 558 F.2d 357, 360 (6th Cir.1977). The United States need not file a detainer in order to obtain custody over a state's prisoner. *See United States v. Mauro*, 436 U.S. 340, 357–58, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978) (noting "the statutory authority of federal courts to issue writs of *habeas corpus ad prosequendum* to secure the presence, for purposes of trial, of defendants in federal criminal cases then in state custody, has never been doubted"). Thus, it is not necessarily bound by the Interstate Agreement on Detainers' requirements. *See id.* at 349, 98 S.Ct. 1834 (holding writs of *habeas corpus ad prosequendum* are not "detainers" within the meaning of the Agreement). If the United States chooses to file a detainer, however, the Agreement's requirements attach.

Once the United States has filed a detainer with another jurisdiction and has made a written request for temporary custody of the defendant, Article IV of the Agreement imposes two significant requirements: (1) trial on the charges must commence within one hundred twenty days of the arrival of the prisoner into federal custody (the "speedy trial" provision); and (2) disposition of the pending charges must precede the return of the prisoner from federal to state custody (the "anti-shuttling" provision). *See* Interstate Agreement on Detainers, § 2, Art. IV(c) and (e).

Burton argues that he arrived in the Eastern District of Tennessee on November 20, 1998, and was not tried until April 5, 1999, one hundred thirty-four days after he entered the jurisdiction. Therefore, Burton contends that his Article IV(c) right to trial within one hundred twenty days was violated, and that dismissal of the indictment with prejudice is the proper remedy. The United States responds that Burton waived his Article IV(c) rights by signing a written waiver in April 1998, requesting a continuance that extended the trial

B. Procedural Issues

[9] The United States contends that Burton signed a written waiver on April 20, 1998, that waived all future claims under the Interstate Agreement on Detainers. We find this argument meritless. On January 12, 1998, pursuant to a writ of *habeas corpus ad prosequendum,* Burton was brought to the Eastern District of Tennessee for his arraignment, and he later requested to be returned to Kentucky pending trial. As a condition of his return, the United States required Burton to sign a waiver of "the defense of a violation of the Interstate Agreement on Detainers in this case, *as it relates to my return to State custody.*" (emphasis added). Article IV(e) of the Interstate Agreement on Detainers, the "anti-shuttling" provision, requires dismissal of an indictment with prejudice whenever a prisoner is returned to the original place of imprisonment before being tried on the indictment in the new jurisdiction. We find the waiver's emphasized language strongly supports Burton's contention that he waived only those claims which could have arisen under *514 the anti-shuttling provision as a result of his pre-trial return to Kentucky.[3]

Alternatively, the United States argues that all claims under the Agreement "relate to" Burton's return to Kentucky, because the United States filed a detainer (and thus became bound by the Agreement's requirements) only as a result of Burton's return. We disagree. The United States could have chosen simply to procure Burton's presence for trial pursuant to a writ of *habeas corpus ad prosequendum,* as it had in April. It was the United States's decision to file the detainer, and not Burton's return to Kentucky, that brought it within the Agreement. Accordingly, we find that Burton's written waiver only waived any Article IV(e) anti-shuttling provision claims that could have arisen as a result of his return to state custody.

The United States makes two additional, closely related waiver arguments. First, it argues that the mere fact that Burton requested a continuance of indeterminate length should constitute a waiver of all procedural and substantive rights guaranteed by Article IV(c). Second, the United States argues that even though Burton did not affirmatively request a trial date outside of Article IV(c)'s one hundred twenty day period, his failure to object to such a trial date constitutes per se waiver. We have never decided whether either a

defendant's request for a continuance or a defendant's failure to object to a trial date outside of the Agreement's time period automatically waives his Article IV(c) speedy trial rights.

Article IV(c) guarantees that:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The Fifth Circuit has noted that this provision contains five requirements for obtaining a continuance: 1) the court must have competent jurisdiction; 2) the grant of the continuance must be in open court; 3) the defendant or his attorney must be present; 4) the movant must demonstrate good cause in open court; and 5) the length of the continuance must be reasonable or necessary. *See Birdwell v. Skeen*, 983 F.2d 1332, 1336 (5th Cir.1993). Here, the United States acknowledges that the district court granted the continuance in violation of the second, third, and fourth requirements of Article IV(c) by failing to grant the continuance for good cause shown in open court, with either Burton or his attorney present. Furthermore, although the United States argues that the district court complied with the fifth requirement, that the continuance was granted for a "necessary or reasonable" length of time for all parties within the meaning of the Agreement, it has failed to show any record evidence of that fact. Nonetheless, the United States contends that under *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) (holding defense counsel's agreement to a trial date outside the time period required by the Agreement may constitute waiver), either Burton's request for a continuance waived all of Article IV(c)'s required procedures, ***515** in addition to the substantive rights guaranteed by that provision, or alternatively, Burton's failure to object to the trial date, once assigned, waived all procedural and substantive rights under Article IV(c).

[10] We find that the United States's reliance on *Hill* is misplaced. First, *Hill* 's facts were markedly different than those we are faced with today. In *Hill,* defense counsel did not move for a continuance, but rather accepted an initial trial date outside of the statutory time period.[4] Therefore, Article IV(c)'s procedural requirements for granting a *continuance* arguably did not even apply. Even assuming the Agreement's procedural requirements attached to the initial trial date, those requirements were satisfied in *Hill,* where the trial date was both requested and granted in open court. *See id.* at 112–13, 120 S.Ct. 659. Unlike in *Hill,* Burton's continuance was neither requested nor granted in open court. More importantly, *Hill* expressly rejected the government's argument that agreement in open court to a trial date outside the allowable time period itself satisfies the Agreement's other procedural requirements. "It was suggested at oral argument that agreement in open court to a trial date outside the allowable time period can itself be viewed as a 'necessary or reasonable continuance' for 'good cause shown in open court.' Although an agreed-upon trial date might sometimes merit this description, it is far from clear that it always does so...." *Id.* at 116 n. 1, 120 S.Ct. 659. By leaving open the issue of when an agreed-upon trial date would satisfy the Agreement's procedural requirements, the Supreme Court implicitly rejected the United States's contention that agreeing to a date outside of the Agreement's time period automatically waives Article IV(c)'s continuance procedures. *See id.*

[11] **[12]** We hold that when a putative violation of Article IV(c) occurs, we have an obligation to scrutinize each continuance request made by a defendant to determine whether or not the request amounted to a waiver of the procedural and substantive rights guaranteed by that provision. Nothing in either *Hill* or the Agreement requires us to find as a matter of law that merely requesting a continuance on behalf of a defendant constitutes a per se waiver of all procedural and substantive "speedy trial" rights guaranteed by Article IV(c).

[13] **[14]** **[15]** This is not to say that the district court must always comply literally with every procedural requirement enunciated in Article IV(c) when the defendant requests a continuance, although literal compliance is clearly required for continuances requested by the prosecution. *See Hill,* 528 U.S. at 116, 120 S.Ct. 659. For instance, were the defendant to affirmatively waive his or her rights under Article IV(c) in a motion for a continuance, the district court need not literally comply with the procedures prescribed in Article IV(c). Alternatively, if the district court were to explicitly refer to the defendant's "speedy trial" rights under the Agreement, ***516** either in its oral or written grant of the defense's motion for

a continuance, and the defendant took no action to preserve those rights, he could not then raise the district court's failure to follow procedures as grounds for an appeal. In this case, however, the only evidence that Burton intended his request for a continuance to constitute a waiver of his "speedy trial" rights is the request itself. Because Burton's counsel did not request a specific date, because the continuance was neither requested nor granted in open court, and because there has been no showing that the approximately three-month continuance was either "necessary" or "reasonable" for all parties within the meaning of the Agreement, we cannot conclude that Burton's mere request for a continuance amounted to an intentional abandonment of either Article IV(c)'s procedural safeguards or its substantive rights. Were we to reach the opposite conclusion on these facts, we would effectively be reading into the statute a per se rule that all defense requests for a continuance automatically waive procedural and substantive Article IV(c) rights, a result contrary to the Supreme Court's reasoning in *Hill*. Accordingly, because Burton did not object to the district court's failure to follow the five requirements for obtaining a continuance, we will review his claim for plain error.

C. Substantive Issues

To establish plain error, a defendant must show "(1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir.1998).

[16] Because four of the five unambiguous procedural requirements were not met, Burton has shown both that an error occurred at the district court and that the error was clear and obvious, the first two prongs of the "plain error" test. Nonetheless, we find that Burton has failed to show that the error also affected his substantial rights and that it seriously affected the fairness of the proceedings (prongs three and four of the "plain error" test). In fact, Burton contends that he need not show prejudice at all. Although we read the Agreement as mandating reversal when the district court fails to literally comply with Article IV(c)'s procedural requirements in response to the *government's* request for a continuance, we see nothing arbitrary about requiring a showing of prejudice when the speedy trial violation arose as a result of the *defense's* motion for a continuance. In any event, Burton's failure to object at trial allows us to review only for plain error, and for Burton to meet that stringent test, he must articulate some effect on his substantial rights as well as on the fairness of the proceedings. He has failed to do so, and we therefore decline to dismiss his indictment based on the Interstate Agreement on Detainers.

IV.

Burton and Crozier both argue that the evidence was insufficient to support their convictions. In reviewing a conviction following a bench trial for sufficiency of the evidence, we decide "whether the evidence is sufficient to justify the trial judge, as trier of facts, in concluding beyond a reasonable doubt that the defendant was guilty." *United States v. Bashaw*, 982 F.2d 168, 171 (6th Cir.1992). "[C]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not 'remove every reasonable hypothesis except that of guilt.' " *United States v. Ferguson*, 23 F.3d 135, 140 (6th Cir.1994).

***517** Burton cites 18 U.S.C. § 922(g) in his "sufficiency of the evidence" heading in his initial brief to this Court, but that is the first and only time he refers to his conviction for being a felon in possession of a firearm in his initial argument. His brief instead argues that there is insufficient evidence to support the robbery conviction. The United States correctly responds that the district court properly acted as fact-finder in choosing to credit both eyewitnesses' identifications of Burton as the robber. *See United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir.1988). Nonetheless, in his reply brief, Burton goes into great detail about the paucity of evidence with respect to his "felon in possession of a firearm" conviction under 18 U.S.C. § 922(g).

We will generally not hear issues raised for the first time in a reply brief. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 820 F.2d 186, 189 (6th Cir.1987). "Court decisions have made it clear that the appellant cannot raise new issues in a reply brief; he can only respond to arguments raised for the first time in appellee's brief." *United States v. Jerkins*, 871 F.2d 598, 602 n. 3 (6th Cir.1989). In fact, "issues adverted to [on appeal] in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived...." *United States v. Layne*, 192 F.3d 556, 566 (6th Cir.1999) (citations and quotation marks omitted).

[17] We will not allow Burton to argue insufficient evidence as to the "possession of a firearm" charge in his reply brief, simply because he cited generally to 18 U.S.C. § 922 in his initial brief. This is particularly true where Burton's arguments are heavily fact-based. *See Wright*, 794 F.2d at 1156 (finding refusal to hear issue raised for first time in reply brief "particularly appropriate" when the issue "is based largely on the facts or circumstances of the case"). The only argument raised in his initial brief was whether there was sufficient evidence to convict him of robbing the Tennessee Rite–Aid, and we conclude there was.

[18] [19] Crozier also challenges his conviction on the drug conspiracy count. The essential elements of a drug conspiracy are 1) an agreement to violate the drug laws, and 2) each conspirator's knowledge of, intent to join, and participation in the conspiracy. *See United States v. Maliszewski*, 161 F.3d 992, 1006 (6th Cir.1998). The agreement need not be formal or actual; a tacit or material understanding among the parties is sufficient. *See id.* Further, the defendant "need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement." *United States v. Gibbs*, 182 F.3d 408, 421 (6th Cir.1999). However, "[a]lthough only slight evidence is needed to connect a defendant to a conspiracy, mere association with conspirators is not enough to establish participation in a conspiracy." *Id.* at 422.

[20] The United States presented the following facts as evidence that Crozier and Burton were involved in a drug conspiracy: 1) Crozier and Burton asked their parole officer for permission to work together; 2) Crozier and Burton were caught on security tape casing the Kentucky Rite–Aid; 3) a ledger was found in Crozier's house reflecting that Burton owed him one thousand dollars, and that "Clayton" (presumably Clayton Hobbs) owed him eight hundred dollars; 4) a large quantity of pharmaceutical drugs in wholesale bottles, consistent with some of the drugs taken during the Tennessee Rite–Aid robbery, were found in Crozier's wife's house; and 5) Richard Randolph, Crozier's brother-in-law, testified that Crozier told him that Crozier and Burton had obtained ***518** a number of pharmaceutical drugs during a Tennessee drugstore robbery. This evidence, though all of it circumstantial, was sufficient to allow the district court to find that Crozier was guilty of conspiracy beyond a reasonable doubt.

Crozier argues that the verdict, convicting him of conspiracy but acquitting him of the substantive criminal acts, was fatally inconsistent. Otherwise, Crozier contends, he should have been convicted for all of the other offenses, as they were committed by a co-conspirator during and in furtherance of the conspiracy. *See United States v. Odom*, 13 F.3d 949, 959 (6th Cir.1994). The United States counters that the verdicts are not necessarily inconsistent, because the district court could have found that Crozier supported the conspiracy in ways other than those charged. In fact, the district court specifically found that Crozier participated in the conspiracy by casing the Kentucky Rite–Aid and distributing drugs in Kentucky. The United States correctly notes that although those acts could fairly be considered for the conspiracy count, they were not charged as substantive offenses in the Eastern District of Tennessee, because they occurred wholly within Kentucky. Additionally, "inconsistent verdicts provide no basis for reversal ." *United States v. Gaitan–Acevedo*, 148 F.3d 577, 586 (6th Cir.1998) (citations omitted).[5]

Crozier next contends that the district court erred in "rely[ing] upon wrongfully admitted hearsay evidence" that he resided at his wife's White Street residence when it determined that Crozier possessed and had control over the drugs found in his wife's home. Even assuming that the district court admitted hearsay evidence on the issue, Crozier does not cite to anything in the record to show that the district court in fact relied on such evidence, and thus his assertion that *Moore v. United States*, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976), controls is incorrect. *See id.* at 21, 97 S.Ct. 29 (vacating conviction on grounds that trial judge "expressly relied on the hearsay declaration").

Moreover, even without the testimony that Crozier lived at his wife's White Street home, there was plenty of other evidence that Crozier frequented her house, often as an overnight guest. In fact, during the search, Crozier was found sleeping on the same side of the bed where police located the bag of drugs. One of the officers testified that he saw Crozier reach into the area where the drugs were found before police ordered him off the bed and secured him. Although Crozier presented testimony contradicting the officer's recollection, the district court could have chosen not to credit that testimony. Therefore, Crozier has failed to prove that the court relied on any inadmissible hearsay evidence to find that Crozier possessed and had control over the drugs recovered from his wife's home.

[21] [22] Finally, Crozier argues that his indictment must be dismissed because of a fatal variance between the indictment and the proof at trial.[6] Crozier argues

*519 that the evidence can be reasonably construed only as supporting a finding of two separate conspiracies (one involving Burton, Clayton Hobbs, and Christopher Tucker, and another involving Crozier, Richard Randolph, and Crozier's son, Brett) which is fatally inconsistent with the indictment charging only one conspiracy. To obtain a reversal due to a variance between the indictment and the evidence, Crozier must show 1) the variance itself, and 2) an effect on a substantial right. *See United States v. Kelley*, 849 F.2d 999, 1002 (6th Cir.1988). Whether one conspiracy or two conspiracies were shown is a question of fact, which we review in the light most favorable to the United States. *See id.*

[23] The United States introduced evidence that Burton and Crozier knew each other and cased a Rite–Aid together. Randolph testified that Crozier admitted robbing a drugstore in Tennessee with Burton. After Randolph and Brett burglarized the Somerset drugstore, they brought the drugs to Crozier, and some of those drugs were eventually sold to Clayton Hobbs. Crozier possessed pharmaceuticals consistent with some of the Tennessee robbery booty. Finally, a ledger reflected that Burton owed Crozier one thousand dollars and "Clayton" owed Crozier eight hundred dollars. Taking the evidence in the light most favorable to the government, we find that this proof was sufficient to show one conspiracy, as charged in the indictment.

V.

[24] [25] [26] Crozier also argues that his acquittal on the Tennessee Rite–Aid robbery count shows that the Eastern District of Tennessee was an improper venue in which to try him. The United States must prove by a preponderance of the evidence that venue was proper as to each count. *See United States v. Scaife*, 749 F.2d 338, 346 (6th Cir.1984). Venue is proper in the state or district where the offense was committed. *See id.* For drug conspiracies, venue is proper in any district where the conspiracy was formed or where an overt act in furtherance of the conspiracy was performed. *See id.* "A conspiracy defendant need not have entered the district so long as this standard is met." *Id.*

[27] The United States argues that Crozier failed to raise the venue issue prior to the district court's verdict and has thus waived it. In response, Crozier points to the trial transcript, where the United States responded to Crozier's Rule 29 motion to dismiss for insufficient proof at the end of the United States's case. The United States argued to the district court that it had to show only "by a preponderance of the evidence" an overt act committed in Tennessee, and Crozier now suggests that the United States could only have been arguing the propriety of venue. In light of the United States's arguments to the district court, we will assume that Crozier properly preserved the venue issue. Nonetheless, we find against him on the merits of his claim. Burton took an overt action in the Eastern District of Tennessee in furtherance of the drug conspiracy when he robbed the Clinton, Tennessee, Rite–Aid. Accordingly, venue in that district was proper as to all co-conspirators, including Crozier.

VI.

[28] The United States argues on cross-appeal that the district court erred in awarding Burton six hundred fifty days *520 credit for the time he spent awaiting trial on the instant charges. Whether a district court has the power to award credit for time served is a question of law which we review de novo. *See United States v. Wilson*, 916 F.2d 1115, 1117 (6th Cir.1990), *overruled on other grounds*, 503 U.S. 329, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992).

[29] The United States is correct in asserting that the power to grant credit for time served lies solely with the Attorney General and the Bureau of Prisons. *See* 18 U.S.C. § 3585(b); *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992). Nonetheless, Burton argues that the district court did not award him credit for time served under 18 U.S.C. § 3585(b). Rather, he claims it implicitly applied Section 5G1.3(c) of the Sentencing Guidelines and allowed Burton to serve six hundred fifty days of his federal sentence concurrent with his state prison term. *See United States v. Dorsey*, 166 F.3d 558, 560 (3d. Cir.1999) (interpreting district court's power to award partially concurrent sentence under § 5G1.3(b) as not conflicting with Bureau of Prison's authority under 18 U.S.C. § 3585(b) to award credit for time served).

[30] The sentencing hearing transcript belies Burton's assertion that the district court intended to award a partially concurrent sentence. The district court quite clearly imposed the sentences to run consecutively, but then responded to what it considered an inappropriate refusal by the United States to approve at the sentencing hearing six hundred fifty days credit on Burton's forty-six year and ten month prison sentence. Although the United States informed the district court that only the Bureau of Prisons has the power to award credit for time served, the district court responded that such a lengthy

sentence imposed on a man of Burton's age is effectively a sentence of life imprisonment, and expressed frustration at its inability to grant Burton even the Pyrrhic victory of six hundred fifty days credit for time served. Accordingly, it amended Burton's sentence to include credit for the time he spent awaiting trial in Tennessee. We sympathize with the district court's frustration, but the law is clear. Credit for time served may be awarded only by the Bureau of Prisons, and the district court erred in granting the credit itself. Accordingly, we vacate Burton's amended sentence and remand with instructions to reinstate his original sentence.

VII.

For the forgoing reasons, we AFFIRM the district court on all grounds except Burton's sentence. We VACATE Burton's amended sentence and REMAND with instructions to reinstate Burton's original sentence.

BOYCE F. MARTIN, Jr., Chief Judge, delivered the opinion of the court, in which MOORE, J., joined. O'MALLEY, D.J., delivered a separate concurring opinion.

O'MALLEY, District Judge, concurring.

CONCURRENCE

I concur with most of the reasoning in the majority opinion, and with the result reached. For the reasons stated below, however, I cannot agree with the reasoning contained in Part III of that opinion, where the majority concludes that "the district court erred by failing to comply literally with Article IV(c)" of the Interstate Agreement on Detainers Act ("IAD"). Op. at 512 – 513.

In my view, this case is clearly controlled by *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000), and, as such, Burton's counsel's affirmative request for a continuance *did* constitute a ***521** waiver of the IAD's time limits. In *Hill,* counsel for the defendant "agree[d] to a specified delay in trial." *Id.* at 115, 120 S.Ct. 659. This agreed-to delay caused the defendant's trial to begin after the speedy trial time limit set out in the IAD. The Supreme Court unanimously concluded that defense counsel's agreement to the late trial date bound his client, because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Id.* The high Court expressly *rejected* the view that a defendant's waiver of IAD speedy trial rights must be done "explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights," *id.* at 118, 120 S.Ct. 659, holding instead that mere "assent to delay" is sufficient, *id.* at 114, 120 S.Ct. 659. Justice Scalia's reasoning applies squarely to this case:

> We agree with the State that this [a requirement that a defendant must explicitly ask for treatment inconsistent with his rights under the IAD before waiver may be found] makes dismissal of the indictment turn on a hypertechnical distinction that should play no part. As illustrated by this case, such an approach would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting later on. Nothing in the IAD requires or even suggests a distinction between waiver proposed and waiver agreed to.

Id.

Notably, in *Hill,* it was the *prosecutor* who asked for a continuance; the trial court then asked defense counsel if he objected, and defense counsel said "that will be fine." *Id.* at 113, 120 S.Ct. 659. This case presents facts supporting Justice Scalia's reasoning even more strongly—defendant Burton's counsel asked for the continuance himself. Burton's counsel made this request, moreover, close to the trial date and relatively close to the running of the IAD's 120–day time clock. Now, having received what he asked for, Burton argues the trial court erred by failing to comply with the IAD, and the majority agrees with him. I cannot join that reasoning, concluding that to do so would be contrary to the letter and spirit of *Hill.See also United States v. Eaddy*, 595 F.2d 341, 344 (6th Cir.1979) ("the substantive rights accorded to a prisoner under Article IV [of the IAD] may be waived, even though the prisoner is not aware of those rights, where there is an affirmative request to be treated in a manner contrary to the procedures prescribed in Article IV(c) or (e)").

I believe, moreover, that the majority opinion has the effect of setting a potential trap for district court judges who respond

sympathetically to a defendant's request for a continuance. If a defendant seeking a continuance does *not* want to waive his IAD speedy trial rights, the onus should be on the defendant to make this clear, not on the district court to ensure that the continuance is only for that narrow window of time after the originally scheduled trial date and before the 120–day period expires. Indeed, the ultimate effect of the majority opinion is to urge district court judges to deny even the most well-taken motion for continuance filed by any defendant whose presence is procured via detainer.

The majority opinion is correct, of course, that *Hill* addresses Article III of the IAD, and not Article IV, which controls this case. But, as the majority notes, "the procedural requirements are the same." Op. at [515 n. 4]. Thus, the majority's assessment of whether the request for continuance by Burton's counsel meets the five requirements iterated in *Birdwell* v. ***522** *Skeen*, 983 F.2d 1332, 1336 (5th Cir.1993), *see* op. at [514 – 515], is essentially irrelevant, in light of the Supreme Court's unanimous statement that the IAD's " 'necessary or reasonable' continuance provision is ... directed primarily, if not exclusively, to *prosecution* requests that have not explicitly been agreed to by the defense." *Hill*, 528 U.S. at 116, 120 S.Ct. 659 (emphasis added). That is not what happened in this case. On this point, moreover, I also must disagree with the conclusions reached by the majority regarding the meaning of footnote one in *Hill*. This footnote left open the question of whether, when the procedural requirements for a continuance under the IAD apply—such as when the prosecution requests the continuance—those requirements can be satisfied by an agreement in open court to a trial date outside the IAD's time limits. The language in this footnote did *not* reject, implicitly or otherwise, the conclusion that such an agreement *would* constitute a waiver where the prosecution has made no request for a continuance. Indeed, the very holding of *Hill* is that a waiver does occur in precisely those circumstances.

In sum, I believe Burton affirmatively and knowingly waived his right to a speedy trial within the time limits set out in the IAD when he asked for a continuance. Accordingly, I can agree only with the result reached by the majority in Part III of its opinion, and not with their reasoning.

All Citations

259 F.3d 503, 2001 Fed.App. 0252P

Footnotes

* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

1 The record does not reflect when Burton actually arrived in the Eastern District of Tennessee. Burton contends that he arrived on November 20, 1998, while the United States argues that his earliest documented appearance was in January, 1999, and neither party conceded the issue at oral argument. Because we reject Burton's argument that his trial violated the Interstate Agreement on Detainers on other grounds, we will construe any ambiguity as to Burton's arrival date in his favor for purposes of this appeal.

2 Without citing any case law, Burton contends that *Biggers* requires us to consider Simonds's opportunity to view Burton only during the robbery. Burton's argument presents an overly narrow view of the reliability test. In determining whether an identification was reliable, it is material whether the witness was familiar with the defendant, because the more familiar the person, the more reliable the identification. Therefore, we find that the district court properly considered Simonds's pre-robbery opportunities to view Burton.

3 In fact, the United States did not become bound by the Interstate Agreement on Detainers in this case until it filed a detainer with the Kentucky prison on September 10, 1998. Therefore, even without the waiver's limiting language, it is questionable whether Burton could fairly be found to have waived rights that he did not even possess until five months after signing the waiver.

4 Indeed, *Hill* discussed not Article IV(c), but Article III(a). Although the procedural requirements of the two provisions are the same, they are triggered very differently. Article III(a)'s one hundred eighty day time limit for disposing of pending claims is triggered by a written request from the prisoner for a disposition of the charges after the charging jurisdiction has filed a detainer. In contrast, Article IV(c)'s one hundred twenty day time period is triggered by the charging jurisdiction's decision to take custody of the defendant. Because Article IV(c) is triggered by the unilateral action of the charging jurisdiction, it does not contemplate the same degree of "party control" that the Supreme Court found in Article III(a). *See Hill*, 528 U.S. at 117–18, 120 S.Ct. 659.

5 Crozier acknowledges this rule applies to inconsistent jury verdicts, but urges this Court to follow the Second Circuit in adopting a different rule for bench trials. *See United States v. Maybury*, 274 F.2d 899, 903 (2d Cir.1960). Whatever

the merits in Crozier's argument, the district court's verdict was not necessarily inconsistent, as demonstrated above. Therefore, we decline to decide this issue today.

6 The United States argues that Crozier failed to raise this at the district court, and thus has waived the issue. We have previously noted, however, that defense counsel does not waive objection to a variance by failing to raise it at trial. *See United States v. Beeler*, 587 F.2d 340, 343 (6th Cir.1978) (quoting the Supreme Court's statement that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him").

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AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

GINS

FILED

United States District Court

Eastern District of Tennessee at Knoxville

Nov 8 5 29 PM '99

U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY [illegible] CLERK

UNITED STATES OF AMERICA
v.
CHARLES WILLIAM BURTON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:97CR00154-001

GERALD GULLEY
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)

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

[X] was found guilty on count(s) 1 through 4 and 6 through 9 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to Distribute and Possess with Intent to Distribute Schedule II, III, and IV Controlled Substances in violation of 21 U.S.C. Section 846 and 841(b)(1)(B)	02/12/1996	1
18 U.S.C. § 2118 (a) and (c)	Robbery of a Pharmacy by Use of a Dangerous Weapon and Taking Controlled Substances Having a Replacement Cost of Over $500 in violation of 18 U.S.C. 2118(a) and (c) and 18 U.S.C. Section 2	11/26/1995	2
8 U.S.C. § 924 (c) and 2	Using and Carrying a Firearm During and in Relation to a Drug Trafficking Crime or a Crime of Violence	11/26/1995	3,9

See Additional Counts of Conviction - Page 2

The defendant is sentenced as provided in pages 2 through 9 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) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall 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.

Defendant's Soc. Sec. No.: 407-62-1647
Defendant's Date of Birth: 10/18/1949
Defendant's USM No.: 14816-074
Defendant's Residence Address:
Luther Luckett Correctional Facility
P.O. Box 6
LaGrange, KY 40031

Defendant's Mailing Address:
Luther Luckett Correctional Facility
P.O. Box 6
LaGrange, KY 40031

10/27/1999
Date of Imposition of Judgment

Signature of Judicial Officer

JAMES H. JARVIS
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

November 8, 1999
Date

Date

Order Book 175 Page 14

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DEFENDANT: CHARLES WILLIAM BURTON

CASE NUMBER: 3:97CR00154-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 922 (g) and 924(e)	Felon in Possession of a Firarm	11/26/1995	4
21 U.S.C. § 841 (a)(1)	Possession with Intent to Distribute Schedule II Controlled Substances in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2	11/26/1995	6
21 U.S.C. § 841 (a)(1)	Possession with Intent to Distribute Schedule III Controlled Substances in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2	11/26/1995	7
21 U.S.C. § 841 (a)(1)	Possession with Intent to Distribute Schedule IV Controlled Substances in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2	11/26/1995	8

DEFENDANT: CHARLES WILLIAM BURTON

CASE NUMBER: 3:97CR00154-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 562 month(s).

See Additional Imprisonment Terms - Page 4

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

That the defendant be placed in a facility in Kentucky.

☒ 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 2 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 U.S. Marshal

DEFENDANT: CHARLES WILLIAM BURTON

ASE NUMBER: 3:97CR00154-001

ADDITIONAL IMPRISONMENT TERMS

consisting of 262 months as to counts 1, 4 & 6 concurrent to 262 months as to count 2, concurrent; 60 months as to count 3, consecutive; 120 months as to count 7, concurrent; 72 months as to count 8, concurrent; 240 months as to count 9; consecutive. The terms of imprisonment imposed shall be served consecutively to Boyle Co. Circuit Court, Danville, KY Docket Nos. 75-95C, 75-96C, 75-97C, 76-86C, 76-85C; Fayette Co. District Court, Lexington, KY Docket Nos. 70330A, 70331A, 79-CR-238; Madison Co. Circuit Court, Richmond, KY Docket No. 83-CR-034; Jefferson Co. Circuit Court, Louisville, KY Docket No. 83-CR-0317, Lyon County Circuit Court, Eddyville, KY Docket No. 84-CR-044-002

DEFENDANT: CHARLES WILLIAM BURTON

CASE NUMBER: 3:97CR00154-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 6 year(s).

as to count s 1 and 6; 5 years as to each of counts 2, 3, 4 and 9; 4 years as to count 7 and 3 years as to count 8 with all such terms to run concurrently.

The defendant shall 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 illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

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 directed by the probation officer.

☐ 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 as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 6

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 ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
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;
2) 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;
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: CHARLES WILLIAM BURTON

ASE NUMBER: 3:97CR00154-001

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, defendant shall not commit another federal, state or local crime, shall comply with the standard conditions that have been adopted by this court in Local Rule 83.10, and shall not illegally possess a controlled substance.

Defendant shall not possess a firearm as defined in 18 U.S.C. Section 921.

Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as released from the program by the probation officer.

Defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release, in equal monthly installments, commencing 30 days after release.

DEFENDANT: CHARLES WILLIAM BURTON

CASE NUMBER: 3:97CR00154-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 400.00	$	$ 3,223.94

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency 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.

☐ The interest requirement is modified as follows:

RESTITUTION

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

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Rite Aid Corporation	$3,223.94	$3,223.94	
Totals:	$ 3,223.94	$ 3,223.94	

* 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: CHARLES WILLIAM BURTON

CASE NUMBER: 3:97CR00154-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

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

Special instructions regarding the payment of criminal monetary penalties:

Special assessment ordered pursuant to 18 U.S.C. Section 3013. Payments should be made to the U.S. District Court Clerk, 800 Market Street, Knoxville, TN 37902. Payments should be in the form of a money order or a cashier's check with a notation of case number 3:97-cr-154-001/Restitution.

☐ The defendant shall pay the cost of prosecution.

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

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

No. 16-5745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 25, 2017
DEBORAH S. HUNT, Clerk

In re: CHARLES W. BURTON,

Movant.

ORDER

Before: GILMAN and GIBBONS, Circuit Judges; HOOD, District Judge.*

Charles W. Burton, a federal prisoner proceeding through counsel, moves for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h). Relying on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), in which the Supreme Court invalidated the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), as unconstitutionally vague, Burton argues that he is entitled to relief from his designation as an armed career criminal. Burton has filed a motion to file a supplemental reply brief and a motion to expedite.

In 1999, following a bench trial, Burton was found guilty of conspiring to distribute and conspiring to possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846; possessing with intent to distribute Schedule II, Schedule III, and Schedule IV controlled substances, in violation of 21 U.S.C. § 841(a)(1); robbing a pharmacy, in violation of 18 U.S.C. § 2118(a) and (c); using a firearm during the commission of the drug conspiracy and the robbery, in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm, in violation of 18

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

U.S.C. §§ 922(g) and 924(e). *See United States v. Crozier*, 259 F.3d 503, 507 (6th Cir. 2001). The district court sentenced him to 46 years and 10 months of imprisonment. *Id.* at 510. It subsequently amended the judgment to award Burton credit for 650 days that he had spent in Tennessee state custody awaiting trial. *See id.* at 510, 520. We affirmed Burton's convictions but vacated his sentence and remanded for resentencing, concluding that the district court had erred in awarding Burton credit for time served. *Id.* at 507, 520. The district court then reinstated its initial judgment, which did not reflect the credit for time served. In 2003, Burton filed a § 2255 motion, which the district court denied as meritless. Burton did not appeal.

Burton now seeks permission to file a second or successive § 2255 motion in order to argue that he is entitled to resentencing because, in light of *Johnson*, his prior Kentucky conviction for second-degree escape no longer qualifies as a violent felony for purposes of the ACCA enhancement.

We may authorize the filing of a second or successive § 2255 motion when the applicant makes a prima facie showing that his proposed claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Supreme Court has held that *Johnson* announced a new, "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

Burton contends that he was sentenced as an armed career criminal based on the following prior Kentucky convictions: (1) 1975 convictions for kidnaping, first-degree burglary, and first-degree robbery (which were counted as a single offense); (2) a 1976 conviction for second-degree escape; and (3) a 1983 conviction for first-degree robbery. The government contends that he was sentenced as an armed career criminal based on prior Kentucky convictions for first-degree burglary and kidnaping and two prior Kentucky convictions for first-degree robbery. In a supplemental reply brief, Burton reiterates his argument that his 1975 kidnaping, first-degree burglary, and first-degree robbery convictions were counted as a single offense, and he attaches an excerpt from the presentence report that supports this contention.

Even before *Johnson* was decided, we held that a Kentucky conviction for a second-degree "walkaway" escape does not qualify as a crime of violence for purposes of USSG § 4B1.1's career-offender sentencing enhancement. *United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009). But prior to *Ford*, we had held that a Kentucky conviction for second-degree escape qualified as a violent felony under the ACCA's residual clause. *United States v. Lancaster*, 501 F.3d 673, 676-81 (6th Cir. 2007), *vacated by Lancaster v. United States*, 555 U.S. 1132 (2009). Thus, Burton has made a prima facie showing that his second-degree escape conviction may have been counted as a predicate offense under the ACCA's now-invalidated residual clause. Because it appears that Burton's 1975 kidnaping, first-degree burglary, and first-degree robbery convictions were counted as a single offense for purposes of the ACCA enhancement, Burton may no longer qualify as an armed career criminal if his second-degree escape conviction no longer constitutes a violent felony.

Accordingly, we **DENY** as moot Burton's motion to expedite, **GRANT** his motion for leave to file a supplemental reply brief, **GRANT** his motion for leave to file a second or successive § 2255 motion, and **TRANSFER** the case to the United States District Court for the Eastern District of Tennessee for further proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
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POTTER STEWART U.S. COURTHOUSE
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Filed: January 25, 2017

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Re: Case No. 16-5745, *In re: Charles Burton*
Originating Case No. : 3:03-cv-00124 : 3:97-cr-00154-1

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Renee M. Jefferies
Case Manager
Direct Dial No. 513-564-7021

cc: Ms. Debra Poplin

Enclosure

No mandate to issue

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED
2017 MAY 12 P 1:37
U.S. DISTRICT COURT
EASTERN DIST. TENN.

CHARLES W. BURTON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Nos. 3:97-CR-154-RLJ-CCS-1
3:17-CV-25-RLJ

MOTION FOR RELIEF FROM ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(4)

Come now Charles W. Burton, pro se, and hereby submit and rely upon this pleading for relief under Federal Rule of Civil Procedure (FRCP) 60(b) of the Memorandum Opinion issued by the Court on April 11, 2017. Because Movant takes issue with the Court's jurisdiction to hear this case, as will be more fully explained below, an order is necessary establishing this Court's "jurisdiction" prior to deciding the merits of the underlying [issue]- i.e., ["correcting ... " sentence based on Johnson v. United States, 135 S.Ct. 2251 (2015)]. As the Court is well aware, it was put on notice in Movant's reply to United States' response id. page 1 of 12, wherein he alleged that his "conviction" was infirm as a result of this Court's prior practice under the Honorable James H. Jarvis, Judge, to mail bench trial verdicts to a defendant, in lieu of announcing same in open court as mandated by Federal Rule of Criminal Procedure 43(a). In support of this Motion, Movant would state as follows:

I. Federal Rule of Civil Procedure 60(b)(4):

As this Court is aware, Rule 60(b) provides that civil litigants may seek relief from final judgments and orders in instances of six (6) categories: among those six provisions, where as here, Movant asserts that his underlying Judgment is "void" he may move this Court under Rule 60(b) for relief as provided by the Rule.

II. Relief Under Federal Rule of Civil Procedure 60(d)

While Rule 60(b) is generally a party's exclusive avenue when seeking relief from a final judgment or order, see United States v. Beggerly, 524 U.S. 38, 46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998), Rule 60(d) provides a "savings clause, preserving the law before its enactment in 1946, that allows judgments to be attacked without regard to the passage of time[.]" Computer Leasco, Inc. v. NTP, Inc., 194 F. App'x 328, 334 (6th Cir. 2006). Specifically, the section states:

> (d) Other Powers to Grant Relief. This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
>
> (2) grant relief under 28 U.S.C. [§ 2255] to a defendant ...; or
>
> (3) set aside a judgment for fraud on the court. Fed.R.Civ.P. 60(d). Independent actions for relief under this section "must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustice which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." Beggerly, 524 U.S. at 46 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 234, 244, 64 S.Ct. 997, 88 L.Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944))

The Sixth Circuit has set forth the elements of such an independent cause of action as:

(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment

is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law. Barrett v. Sec'y of Health & Human Servs., 840 F.2d 1259, 1263 (6th Cir. 1987) (citations omitted)). Relief through an independent action is available only in cases "of unusual and exceptional circumstances." Rader v. Cliburn, 476 F.2d 182, 184 (6th Cir. 1973).

Here, it is Movant's assertion that his case is one of the "unusual and exceptional" circumstance[] which require relief under Rules 60(b) or (d) as will be explained below and an order is needed addressing this matter prior to the Court pushing forward of these § 2255 matters.

III. Ancillary Jurisdiction

To be clear, this Court has ancillary jurisdiction of this habeas corpus proceeding. But, because Movant believe his conviction is and always has been infirm, the Court lacks jurisdiction of this matter and only after establishing jurisdiction (standing to decide this instant pleading), the Court should enter an order vacating Movant's conviction or providing other remedy as explained below.

A. Lack of Standing

To be clear, this Court has jurisdiction to determine jurisdiction. See e.g., In re Taylor, 884 F.2d 478, 480-82 (9th Cir. 1989) (where one bankruptcy judge purported to lift the automatic stay after another had dismissed the bankruptcy proceeding, if it is not egregious, the courts say that one court that issued the judgment in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack.... Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377, 84 L.Ed.2d 329, 60 S.Ct. 317

(1940); Treinies v. Sunshine Mining Co., 308 U.S. 66, 78, 84 L.Ed. 85, 60 S.Ct. 44 (1939); Soll v. Gotlieb, 305 U.S. 165, 83 L.Ed. 104, 59 S.Ct. 134 (1938); Disher v. Information Resources, Inc., 873 F.2d 136, 140 (7th Cir. 1989); Kock v. Government of Virgin Islands, 811 F.2d 240, 243 (3d Cir. 1987); Memaizer v. Baker, 793 F.2d 58, 64-66 (7th Cir. 1986).

The constitutional minimum for jurisdiction is a dispute presenting a justiciable "case or controversy." U.S. Const. art. III, § 2; Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Several doctrines have developed to elaborate the "case or controversy" requirement. Id. These doctrines include, among others, standing, mootness, ripeness, and political question. Id. Among these doctrines, "[t]he Article III doctrine that requires a litigant to have standing is perhaps the most important." Id. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." Id. To satisfy the standing requirement, "a plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

In this case, and as will be more fully developed and argued below, it is Petitioner's assertion that this Court lacks jurisdiction to address the 28 U.S.C. § 2255 proceedings, but may as a result -- of ancillary jurisdiction enter an order (1) determing it has jurisdiction to determine jurisdiction; (2) enter an order vacating the conviction and release Petitioner or (3) in the alternative set this matter for a new trial. As will be explained below, 28 U.S.C. § 2243 evince that a court "shall" summarily hear and determine the facts, and dispose of the matter as ["law and justice require."]. [1]

---

1. Because the presiding judge of this case is deceased, and the "deceased" judge failed to adhere to Fed.R.Crim.P. 43 (a), there is no remedy for this egregious violation [ ], thus, these proceedings must begin anew.

B. Violation of Federal Rule of Criminal Procedure 43(a)

Rule 43(a) requires that a criminal defendant be present at certain stages of his or her proceedings, including reading of the verdict. Fed.R.Crim. P. 43(a)(2). This requirement comports with the general view adopted by other circuits and the Supreme Court of the United States. See for example, United States v. Behrens, 375 U.S. 162, 11 L.Ed.2d 224, 84 S.Ct. 295 (1963); United States v. DeMott, 513 F.3d 55, 58 (2d Cir. 2008); United States v. Sepulveda-Contreras, 466 F.3d 166, 169 (1st Cir. 2006); United States v. Bigelow, 462 F.3d 378, 381 (5th Cir. 2006); United States v. Agostino, 132 F.3d 1183, 1199 n.7 (7th Cir. 1997).

Because it is Petitioner's assertion that when he was found guilty by the presiding judge in this Court and this Court failed to announce the verdict in open court as provided by Fed.R.Crim.P. 43(a), that [Rule] and his Fifth and Sixth Amendment rights were violated. Here, at the conclusion of the bench trial on April 8, 1999, the record reflects that the Court initially indicated that the parties would be required to file post-trial briefs [see DE#s 168 and 179]; however, the Court and the parties subsequently discussed the fact that no party had made a request to find the facts specifically. See Fed.R.Crim.P. 23(c). Consequently, the parties were then allowed, as opposed to required, to submit post-trial briefs. Ultimately, no further briefing was done by either party in an attempt to expedite a ruling by the Court and on May 26, 1999 the Court issued a "General Findings, finding Petitioner guilty of all counts of the Indictment. But, because the Court failed to read the General Findings in open court as required by Rule 43(a), his conviction was and is unconstitutional. See U.S. v. Canady, 126 F.3d 352;1997 U.S.App.Lexis 26400 (2nd Cir.1997) The court held that the failure to publically announce in open court the decision

following a criminal bench trial was an error of constitutional dimension that affected the framework of the trial itself and was not subject to harmless error review.

Simply put, the Court did not reconvene to announce the verdict, instead, the Court mailed it's decision and General Order (DE# 181), convicting Petitioner on all counts to prior counsel of record (James H. Bell), whom later brought the General Findings to Petitioner at the Knox County jail to show that he'd been convicted. Id. Petitioner did not appear before the Court again until his sentencing proceeding of October 27, 1999 (DE #194). The Court should find that the record supports Petitioner's contention.

As this Court is well aware, a waiver of a constitutional right must be voluntary, knowing and intelligent, that is, the act of waiver must be shown to have been done with awareness of its consequences. United States v. Gagnon, 470 U.S. 522, 529, 84 L.Ed.2d 486, 105 S.Ct. 1482 (1985)(per curiam). Because Petitioner did not waive his right to have the verdict announced in open court as provided by Rule 43(a), this Court must find that his conviction is infirm and that because the verdict was never announced in open court the time has come to remedy this egregious violation. A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. Lewis v. United States, 146 U.S. 370, 372, 36 L.Ed. 1011, 13 S.Ct. 136 (1892); see Rushen v. Spain, 464 U.S. 114, 117-18, 78 L.Ed.2d 267, 104 S.Ct. 453 (1983)(per curiam)(right to personal appearance at all critical stages of the trial is a "fundamental right[] of each criminal defendant"); Diaz v. United States, 223 U.S. 442, 456 56 L.Ed. 500, 32 S.Ct. 250 (1912)("it is the right of the defendant in cases of felony ... to be present at all stages of the trial -- especially at the rendition of the verdict....")(internal quotation marks omitted). The defendant's

right to be present at every stage of trial is "scarcely less important to the accused than the right to trial itself," id. at 455, and is rooted in both the Sixth Amendment Confrontation Clause, see Illinois v. Allen, 397 U.S. 337, 338, 25 L.Ed.2d 353, 90 S.Ct. 1057 (1970)("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."). The right extends to all stages of trial, Gagnon, 470 U.S. at 526; United States v. Mackey, 915 F.2d 69, 72 (2d Cir. 1990); United States v. Reiter, 897 F.2d 639, 642 (2d Cir. 1990), including the return of the verdict, see Rogers v. United States, 422 U.S. 35, 38-39, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975), "to the extent that a fair and just hearing would be thwarted by [the defendant's] absence," Snyder v. Massachussetts, 291 U.S. 97, 107-108, 78 L.Ed. 674, 54 S.Ct. 330 (1934).

The constitutional right has been codified in Fed.R.Crim.P. 43(a), which provides:

> "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict...." Id.

There is a distinctly useful purpose in ensuring that the pronouncement of the defendant's guilt or innocence by the court is both face-to-face and public. It assures that the trial court is "keenly alive to a sense of [its] responsibility and to the importance of [its] functions." Waller v. Georgia, 467 U.S. 39, 46, 81 L.Ed.2d 31, 104 S.Ct. 2210 91984)(internal quotation marks omitted). When sentence is orally imposed, courts have consistently held that it is "critical that the defendant be present." United States v. Agard, 77 F.3d 22, 24 (2d Cir. 1996)(right of defendant to be present at sentencing is one of "constitutional dimension"); United States v. Lastra, 297 U.S. App. D.C. 380, 973 F.2d 952, 955 (D.C. Cir. 1992); United States v. Johnson, 315 F.2d

714, 716 (2d Cir. 1963). It is Mr. Burton's assertion that there is no reason why his presence is less than critical when the Court, instead of a jury, rendered its decision as to the ultimate issue of guilt or innocence.

C. Right to a Public Trial

In addition to violating Mr. Burton's right to be present at all critical stages of his trial, the Court's failure to announce its verdict in open court violated his Sixth Amendment right to an open public trial. As this Court is aware, "the right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 7, 92 L.Ed.2d 1, 106 S.Ct. 2735 (1986) ("Press-Enterprise II"); see also Press-Enterprise Co., v. Superior Court of Cal., 464 U.S. 501, 508, 78 L.Ed.2d 629, 104 S.Ct. 819 (1984)("Press-Enterprise I")(The sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.") The public trial is "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 270, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The accused is entitled to a public trial so that "the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to their responsibility and to importance of their functions." Id. at 270 n.25 (quoting 1 Cooley, Constitutional Limitations 647 (8th ed. 1927))(internal quotation marks omitted). The requirement that verdicts be announced in open court "vindicates the judicial system's symbolic interest in maintaining the appearance of justice and its pragmatic interest in giving the finder of fact a final

opportunity to change its decision." United States v. Curtis, 173 U.S. App. D.C. 185, 523 F.2d 1134, 1135 (D.C. Cir. 1975). "People in an open society do not demand infallibility from their institutions, b ut it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 572, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980). In sum, the failure to announce in open court the verdict "'strikes at the fundamenatal values of our judicial system and our society as a whole.'" Vasquez v. Hillery, 474 U.S. 254, 262, 88 L.Ed.2d 598, 106 S.Ct. 617 (1986)(discussing discrimination on basis of race in jury selection)(quoting Rose v. Mitchell, 443 U.S. 545, 556, 61 L.Ed.2d 739, 99 S.Ct. 2993 (1979)).

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet.... One need not wholly agree with a statement made on the subject by Jeremy Bentham ... to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: "... suppose the proceedings to be completely secret, and the court, on occasion, to consist of no more than a single judge, -- that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." In re Oliver, 333 U.S. at 268-71 (footnotes omitted)(quoting Jeremy Bentham, 1 Rationale of Judicial Evidence 524 (1827)).

Thus, a trial court may not circumvent the public trial right by holding no proceedings at all. By mailing its verdict (as occurred in this case), rather than announcing it in open court, a district court, (here, this Court), undercuts the legitimacy of the criminal justice process. While the presiding judge's decision to mail the verdict to Petitioner may not equate to the actions as explained above, this Court should not hesitate to find that by mailing the verdict to Mr. Burton was a violation of his right to a public trial in violation of Rule 43. The constitutional violation is perhaps more easily understood in a situation where the accused is mailed a decision acquitting him of all charges after being publicly charged and tried. In such a case, the public announcement serves to vindicate the defendant's innocence and, at least to some extent, alleviate the damage to his reputation wrought in the earlier public proceedings. See generally Ahkil Reed Ammar, Foreword, Sixth Amendment First Principles, 84 Geo. L.J. 641, 677 (Apr. 1996) (discussing importance of public proclamation of innocence to defendant who "wants only to clear his name in open court, with the bracing sunshine of publicity helping to dry off the mud on his name.").

In this case, when the presiding judge mailed the verdict in lieu of announcing [it] in open court Petitioner's Sixth Amendment right was violated and he had no opportunity to state [any] objections on record as to why the verict was infirm. This is why this Court must find that it lacks jurisdiction (Petitioner's conviction is unconstitutional), and without authority to make any rulings of this present matter; but, must set this matter for a new trial or in the alternative find that violation is so egregious that Mr. Burton's release is the only remedy.

D. Prejudice Following Violation of Rule 43

While there are some errors to which harmless error analysis does not apply, "they are the exception and not the rule. Accordingly, if the defendant

had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 578-79, 92 L.Ed.2d 460, 106 S.Ct. 3101 (1986)(citation omitted). Nonetheless, there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Arizona v. Fulminaate, 499 U.S. 279, 308, 113 L.Ed.2d 302, 111 S.Ct. 1246 (1991)(plurality opinion). These so-called "structural errors" are "defects in the constitution of the trial mechanism" which affect the "entire conduct of the trial from beginning to end," and include, inter alia, "the absence of counsel for a criminal defendant," "the presence on the bench of a judge who is not impartial," and "the right to a public trial." Id. at 309-10. This Court's prior practice to mail verdicts following a bench trial, in a criminal case (as happened in this case), is indeed a "structural error," which "indeed" "affected the entire bench trial of this case."

The announcement of the decision to convict or acquit is neither "of litle significance" nor "trivial;" it is the focal point of the entire criminal trial. To exclude the public, the defendant, the prosecution, and defense counsel from such a proceeding -- indeed not to have a proceeding at all -- affects the integrity and legitimacy of the entire judicial process. Accord Guzman v. Scully, 80 F.3d 772, 776 (2d Cir. 1996) ("it is well-settled that a defendant whose right to a public trial has been violated need not show that he suffered any prejudice, and the doctrine of harmless error does not apply."). "While the benefits of a public trial are infrequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." Waller, 467 U.S. at 49 & n.9 ("defendant should not be required to prove specific prejudice in order to obtain relief" for violation of public trial right).

In view of the long history of open public trials, it is Petitioner's assertion that the failure of the presiding judge to publicly announce in open court the decision following the criminal bench trial is an error of constitutional dimension that affected the framework of the trial itself and is not subject to harmless error review. Thus, this Court must find that it lacks jurisdiction to proceed with the matter currently before this Court, but, enter an order stating same, and thereafter direct the United States to show cause why Petitioner should not be released from custody, or why a new trial is not warranted of this case.

E. Propriety of Relief under § 2255

A prisoner who moves to vacate his sentence under § 2255 must demonstrate that the sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose the sentence ... or that it is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). In considering a petition under § 2255, the district court is required to grant an evidentiary hearing to determine the issues and make findings of fact and conclusions of law "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Id. § 2255(b).

In this case, Petitioner has shown (1) that his conviction is in violation of the Constitution and laws of the United States, and (2) that this Court is divested of jurisdiction to entertain these current section 2255 issues until which time it established [juris]diction of this case by way of a subsequent conviction following a retrial.

This Court pursuant to 28 U.S.C. § 2243 may "dispose of" an application for a writ of habeas corpus "as law and justice require." Further, the Supreme

Court has advised that "remedies should be tailored to the injury suffered [by a criminal defendant] from the constitutional violation." United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). "[F]ederal courts have wide latitude in structuring the terms of habeas relief." Dennis v. Sniezek, 558 F.3d 508, 515 (6th Cir. 2009) (citing Hilton v. Braunskill, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)); cf. Glenn v. Dallman, 686 F.2d 418, 423 (6th Cir. 1982)(noting that federal courts in habeas cases are "to fashion relief as justice requires"). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." Morrison. 449 U.S. 361, at 364.

As explained above, this case is sui generis. This is so, because (1) the presiding judge who failed to reconvene in the first instance, and announce the guilty[] verdict is deceased (hence, no remedy to have a different judge to re-announce the veridct a second time in "open court"), as [his] basis for doing so would only be in accordance with the General Order issued by Judge Jarvis. Since Judge Jarvis never reconvened to announce the verdict in open court it is akin to "no proceeding at all." Simply put, Judge Jarvis's General Order cannot now be announced in open court because the General Order, minus [i]t being read in open court invalidated the entire criminal bench trial. Thus, the only remedy available to Petitioner is a new trial or an order releasing him.

Because this is unique, Petitioner will show how the Sixth Circuit (in plea bargaining cases), evince that the appropriate remedy for a constitutional violation is to restore the person deprived of his constitutional right to the position in which he would have been had the deprivation not occurred. Because restoring[] Petitioner to the position in which he would have been had the

deprivation not occurred (no finding of guilt or innocence), a new trial is warranted to establish a new finding of "guilt or innocence."

Section 2243 permits this Court to "order relief as law and justice require." Morrison, 449 U.S. at 364. In cases of plea agreements the Sixth Circuit has been clear that the appropriate remedy is to permit the defendant to accept the plea offer that was withheld or not sufficiently communicated to him or her, recognizing that "[t]he only way to effectively repair the constitutional deprivation [the petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred. Lewandowski v. Makel, 949 F.2d 884, 889 (6th Cir. 1991). That court has further recognized that "the properly tailored remedy is to give the defendant the opportunity to accept the offer, because simply retrying the petitioner without making the plea offer would not remedy the constitutional violation...." United States v. Satterlee. 453 F.3d at 370 n.7 (citations omitted). In fact, the Sixth Circuit has affirmed a defendant's release upon finding that the defendant had served more time than he would have served under an uncommunicated plea agreement. Lewandowski v. Makel, 949 F.2d at 889.

By contrast, the Supreme Court has not expressly held what remedy is appropriate in Petitioner's circumstance. In its March 21, 2012 decision in Lafler v. Cooper, the Court recognized that a habeas court can, among other things, grant the petitioner the opportunity to accept a plea offer where a greater sentence is received at trial. But, as Lafler made clear, the particular remedy is left "open to the trial court how best to excercise that discretion in all the circumstances of the case. Id.

Under the circumstances of this case, the appropriate remedy is to enter an order finding Petitioner's conviction is in violation of the Constitution and laws of the United States, and order his release from custody, or, in the

alternative set this matter for a new trial. Petitioner would admit however, that by setting this case for a new trial will likely further prejudice his person because evidence is now lost and any persons he may have to recall as a witness may be deceased or unable to be located for the purpose of a new trial. This Court should take each of these matters into consideration prior to it "tailoring" a remedy to the deprivation Petitioner suffered.

C O N C L U S I O N

Because this Court must first determine that it has jurisdiction of Petitoner's underlying conviction as explained above, the Memorandum Opinion issued by the Court on April 11, 2017, is without force. Thus, the matters of "briefing" [sentencing positions] in which to aid the Court to determine a proper sentence is placing the cart before the horse and can only be briefed at which time jurisdiction has been established through a subsequent trial where a new finding of guilt is based[.] When the Court establishes that it has jurisdiction albeit Petitioner would argue that it cannot, the habeas proceedings may begin anew with regard to a new sentence, among other things the Court may want to consider.

Respectfully submitted,

Charles W. Burton

Charles W. Burton, Pro-se
Reg. No. 14816-074
Federal Correctional Institution
P.O. Box 4000, Unit Clay B
Manchester, Kentucky 40962-4000

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Motion For Relief From Order Pursuant To Federal Rule Of Civil Procedure 60 (b) (4) was placed in the Federal Correctional Institution at Manchester, Kentucky Institutional Mail Room postage pre-paid to the Honorable Judge Jordan, United States District Court Judge For The Eastern District Court Of Tennessee At Knoxville, 800 Market Street, Knoxville, Tennessee 37902, Honorable Nancy Harr, U.S. Attorney For Eastern District Court Of Tennessee At Knxville, 800 Market Street, Knoxville, Tennessee 37902, and United States District Court Clerk,'s Office Of The U.S. Eastern District Court, 800 Market Street, Suite 130, Knoxville, Tennessee 37902 and The Honorable Chief Judge Cole, 100 East Fifth Street, Room 540, Potter Stewart U.S. Courthouse, Cincinnati, Ohio 45202-3988 on this 10th day of May, 2017.

Charles W. Burton

Charles W. Burton
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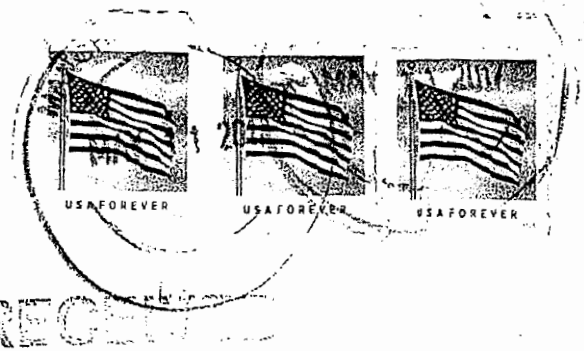

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MAY 12 2017

Clerk, U. S. District Court
Eastern District of Tennessee
At Knoxville

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES W. BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 3:97-CR-154-RLJ-CCS-1
	)	3:17-CV-25-RLJ
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Before this Court are three motions: two pro se filings—one terminating retained counsel [Doc. 259], and another seeking "relief . . . pursuant to federal rule of civil procedure 60(b)(4)" [Doc. 261]—and one filing from retained counsel requesting leave to withdraw [Doc. 260].

I. BACKGROUND

On January 25, 2017, Petitioner, through retained counsel, filed an authorized successive motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 252]. The motion challenged Petitioner's armed career criminal enhancement based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*]. The United States responded in opposition on March 1, 2017 [Doc. 254]; Petitioner, through counsel, replied in turn on March 28, 2017 [Doc. 255]. Pursuant to Local Rule 7.1(d), Petitioner filed two supplemental briefs, one on March 30, 2017 [Doc. 256], and another on April 4, 2017 [Doc. 257].

In a Memorandum Opinion entered on April 12, 2017, this Court agreed that Petitioner no longer qualified as an armed career criminal after *Johnson* and concluded that, given the aggregate nature of his sentence, additional briefing was required to determine the appropriate revised term

of incarceration [Doc. 258]. In accordance with that determination, this Court set the following schedule for the parties to submit briefs about the proper corrected term of incarceration:

> The briefing schedule is as follows: appointed counsel is **DIRECTED** to submit a brief communicating to the Court what Petitioner believes to be the appropriate corrected sentence in his case on or before May 1, 2017; should it want to respond, the United States is **DIRECTED** to file that response on or before May 31, 2017. To the extent that the parties are able to agree on a corrected term of incarceration, they are **DIRECTED** to file a joint stipulation to that effect.
>
> . . . .
>
> For the reasons discussed, Petitioner's successive § 2255 motion [Doc. 252] will be **GRANTED**. Because the Court currently lacks sufficient information to determine what the appropriate corrected sentence would be, it will wait to enter the Judgement Order granting the 2255 petition, correcting the sentence, and closing the associated civil case until the parties have complied with the briefing schedule set forth in this Memorandum Opinion.

[*Id.* at 10 (granting relief because Petitioner's Kentucky conviction for escape no longer qualified as a violent felony and he lacked sufficient predicates for enhancement without that offense)].

Instead of complying with the May 1, 2017 briefing deadline, Petitioner filed a courtesy copy of a letter terminating retained counsel [Doc. 259 ("After much prayer and meditation I have decided it is no longer in my best interest to have you further represent me. . . . [and] please accept this letter as notification of your being terminated.")]. The following day, retained counsel filed a "motion to withdraw" from his representation of Petitioner based on that same termination letter [Doc. 260]. Two days after counsel's motion to withdraw and three days after Petitioner's termination letter, Petitioner submitted a pro se motion for Rule 60(b) "relief" from this Court's April 12, 2017 Memorandum Opinion [Doc. 261 ("Come[s] now [Petitioner], pro se, . . . pleading for relief under Federal Rule of Civil Procedure . . . 60(b) [from] the Memorandum Opinion.")].

II. RELIEF FROM APRIL 12, 2017 MEMORANDUM OPINION

Petitioner styles his pro se motion as a request for relief from judgment under Rule 60(b), but the content of his arguments suggest that the motion is actually requesting leave to amend the petition. Instead of asking for reconsideration of specific aspects or portions of the Memorandum Opinion, Petitioner asserts novel grounds for vacating, setting aside, or correcting his sentence: (1) lack of jurisdiction; (2) failure to announce his conviction in open court pursuant to Federal Rule of Criminal Procedure 43(a); and (3) failure to conduct a public trial [Doc. 261 pp. 5–12, 14 (requesting "a new trial . . . to establish a new finding of 'guilty or innocence'")].

A. Relief From Final Judgment Under Rule 60(b)

To the extent that Petitioner asks that this Court award him relief from its final judgment in the § 2255 proceeding, that request must be denied as premature. As explained in its Memorandum Opinion, this Court has not yet entered judgment in Petitioner's case because it "lacks sufficient information to determine what the appropriate corrected sentence would be" [Doc. 258 p. 10]. This Court cannot grant relief from a judgment not yet entered.

B. Motion for Leave to Amend

To the extent that Petitioner seeks leave to amend his petition to include a new ground for relief, i.e., challenge this Court's subject matter jurisdiction over his criminal case and obtain collateral relief based on that absence of jurisdiction, that request will be denied because of futility.

While it is true that Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend should "be freely given when justice so requires," Fed. R. Civ. P. 15(a), relevant factors include "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing

party, and futility of amendment." *Anderson v. Young Touchstone Co.*, 735 F. Supp. 2d 831, 833 (W.D. Tenn. 2010) (quoting *Forman v. Davis*, 371 U.S. 178, 182 (1965)).

Because the instant petition is a successive petition, this Court's authority and jurisdiction to entertain the case is limited to those claims that the Sixth Circuit has authorized it to consider.

Under the "Antiterrorism and Effective Death Penalty Act of 1996," a petitioner cannot file a second or successive claim under § 2255 in the district court until he has moved in the United States Court of Appeals for an order authorizing the district court to consider that theory of collateral relief. 28 U.S.C. § 2255(h); *see also In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) ("[W]hen a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from [the appellate] court, the district court shall transfer the document."). The Sixth Circuit said the following in its Order authorizing the instant petition:

> Burton now seeks permission to file a second or successive § 2255 motion in order to argue that he is entitled to resentencing because, in light of *Johnson*, his prior Kentucky conviction for second-degree escape no longer qualifies as a violent felony for purposes of the ACCA enhancement.
>
> We may authorize the filing of a second or successive § 2255 motion when the applicant makes a prima facie showing that his proposed claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Supreme Court has held that *Johnson* announced a new, "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).
>
> Burton contends that he was sentenced as an armed career criminal based on the following prior Kentucky convictions: (1) 1975 convictions for kidnaping, first-degree burglary, and first-degree robbery (which were counted as a single offense); (2) a 1976 conviction for second-degree escape; and (3) a 1983 conviction for first-degree robbery. The government contends that he was sentenced as an armed career criminal based on prior Kentucky convictions for first-degree burglary and kidnaping and two prior Kentucky convictions for first-degree robbery. In a supplemental reply brief, Burton reiterates his argument that his 1975 kidnaping, first-degree burglary, and first-degree robbery convictions were counted as a single

> offense, and he attaches an excerpt from the presentence report that supports this contention.
>
> Even before *Johnson* was decided, we held that a Kentucky conviction for a second-degree "walkaway" escape does not qualify as a crime of violence for purposes of USSG § 4B1.1's career-offender sentencing enhancement. *United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009). But prior to Ford, we had held that a Kentucky conviction for second-degree escape qualified as a violent felony under the ACCA's residual clause. *United States v. Lancaster*, 501 F.3d 673, 676-81 (6th Cir. 2007), *vacated by Lancaster v. United States*, 555 U.S. 1132 (2009). Thus, *Burton* has made a prima facie showing that his second-degree escape conviction may have been counted as a predicate offense under the ACCA's now-invalidated residual clause. Because it appears that Burton's 1975 kidnaping, first-degree burglary, and first-degree robbery convictions were counted as a single offense for purposes of the ACCA enhancement, Burton may no longer qualify as an armed career criminal if his second-degree escape conviction no longer constitutes a violent felony.
>
> Accordingly, we **DENY** as moot Burton's motion to expedite, **GRANT** his motion for leave to file a supplemental reply brief, **GRANT** his motion for leave to file a second or successive § 2255 motion, and **TRANSFER** the case to the United States District Court for the Eastern District of Tennessee for further proceedings.

[Doc. 251 pp. 3–4]. Because the Sixth Circuit based its reasoning on the novelty and retroactive nature of *Johnson*'s holding, this Court interprets the grant of authorization as limited to those claims in Petitioner's § 2255 motion which either assert or rely on the "newly recognized" right from *Johnson*. *Accord Ziglar v. United States*, 201 F. Supp. 3d 1315, 1320–21 (M.D. Ala. 2016) (rejecting Petitioner's attempt to raise a claim based on *Descamps v. United States*, 133 S. Ct. 2276 (2013), where Eleventh Circuit granted authorization for successive petition based on *Johnson*). To the extent that Petitioner would like to amend his petition to include and for this Court to consider alternative grounds for relief that are unrelated to *Johnson*, he must first seek individual authorization for those theories of collateral attack in accordance with § 2255(h)(2).

Because it would be futile to allow Petitioner to amend his petition with novel claims that this Court lacks authority to consider, the pro se request to make that amendment will be denied.

III. MOTIONS TO WITHDRAW AND TERMINATE COUNSEL

In light of the letter terminating counsel and for good cause shown, counsel's motion to withdraw and Petitioner's motion to terminate representation [Docs. 259, 260] will be granted.

By Standing Order on February 11, 2016, this Court appointed Federal Defender Services of Eastern Tennessee (FDSET) for the limited purpose of assisting unrepresented prisoners who are entitled to collateral relief based on *Johnson*. E.D. Tenn. S.O. 16-02 (Feb. 11, 2016). In light of his termination of retained counsel and this Court's earlier Memorandum Opinion finding that he is entitled to collateral relief based on *Johnson*, Petitioner qualifies for the limited scope of representation outlined in the Standing Order. Accordingly, this Court will **APPOINT** Laura Davis with FDSET's Knoxville Office to assist Petitioner with the submission of a brief addressing the appropriate corrected term of imprisonment after vacatur of Petitioner's ACCA designation.

Further, the parties are **ORDERED** to adhere to the following revised briefing schedule: Petitioner, through newly appointed counsel, is **DIRECTED** to submit a brief communicating to this Court what Petitioner believes to be the appropriate corrected sentence in his case on or before August 18, 2017; should it want to respond, the United States is **DIRECTED** to file that response on or before September 22, 2017. To the extent that the parties are able to agree on an appropriate corrected term of incarceration, they are **DIRECTED** to file a joint stipulation to that effect.

IV. CONCLUSION

For the reasons discussed, Petitioner's pro se request for relief [Doc. 261] is **DENIED** as premature or, in the alternative, futile. His motion to terminate retained counsel and retained counsel's request to withdraw [Docs. 259, 260] are **GRANTED**. In accordance with the Standing Order, Laura Davis is **APPOINTED** to assist Petitioner with the preparation and submission of a brief addressing the appropriate corrected term of incarceration. As before, this Court will wait to

enter judgment granting Petitioner's § 2255 motion, correcting his sentence, and closing the associated civil case until the parties have complied with the revised briefing schedule.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge

UNITED STATES DISTRICT COURT
EATSERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

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U.S. DISTRICT COURT
EASTERN DIST. TN

CHARLES W. BURTON,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT

NO. 3:97-CR-154-RLJ
& 3:17-CV-25 -RLJ

MOTION FOR RESENTENCING/SENTENCING BRIEF

Comes now the Petitioner, Charles W. Burton, pro-se and respectfully petitions this Honorable Court to consider a Full Sentencing Hearing in this matter in the interest of justice.

In support of this Motion, Petitioner states as follows: With all due respect, Petitioner understands this Honorable Court has inherited this unique complicated case due to the Honorable Judge, James H. Jarvis being deceased now for approximately ten years.

It should be noted, Petitioner's appointed counsel has advised him pursuant to a letter dated, May 26, 2017, "You will still be able to litigate non-Johnson matters on your own. I will be sure to remind the Court in anything I file that you do have other non-Johnson matters pending that I cannot work on and that the Court will still need to resolve." (Please see a copy of said letter as the first letter in "ATTACHMENTS" enclosed?)

It is Petitioner's assertion pursuant to Honorable Judge Leon Jordan's MEMORANDUM OPINION/ORDER on 4/11/17, on page 10, under CONCLUSION beginning in line 1, "For the reasons discussed, Petitioner's Successive § 2255 motion

[Doc.252] will be GRANTED.", that the Armed Career Criminal Act or Johnson V. United States matter has been decided in this Memorandum Opinion and all other matters are non-Johnson matters pending that the Petitioner may litigate.

Therefore, it is Petitioner's assertion that he was illegally or unconstitutionally sentenced due to a violation of Petitioner's Sixth Amendment right to a public trial for the Honorable Judge Jarvis failing to reconvene and announce Petitioner's verdict in Open Court publicly that also violated Petitioner's right to due process.

It is Petitioner's position since he has been serving this illegal, unconstitutional sentence for nearly 18 years now that any new sentence imposed would be, just if not more, unconstitutional.

However, should this Honorable Court elect not to rectify these constitutional violations at this stage of these proceedings, Petitioner would respectfully request this Honorable Court to consider the following:

1. At the time Petitioner was originally sentenced in 1999, under mandatory guidelines which have subsequently been declared unconstitutional. See United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005).

2. On April 11, 2017, this Court issued an Order stating it's intentions to grant Petitioner's Successive §2255 Motion. In that Order the Court directed Petitoner to submit a sentencing brief communicating to the Court what Petitioner believes to be the appropriate sentence.

3. The plain language of 28 U.S.C.S. §2255 authorizes the Court to act as may appear appropriate. The Statute confers upon the district court broad a flexible power in it's actions following a successful § 2255 motion.

4. Once a judgment is vacated, the district court must proceed to grant one of the four remedies: (1.) "Discharge the petitioner (2.) "resentence the petitioner" (3.) "grant a new trial" or (4.) "correct" the sentence. Petitioner submits that a full resentencing is the appropriate remedy in this case and that he is entitled to be resentenced under the advisory guideline scheme since this is a Statute that has been declared unconstitutional by the United States Supreme Court and not merely a technicality or typographical error nor falls under Rule 35 or 18 U.S.C. § 3582 (c).

5. Petitioner's sentences on Count 1 (Conspiracy) Count 2 (Robbery) Count 4 (Felon In Possession Of a Firearm) and Count 6 (Possession with the intent to distribute) were all driven by the Court's determination that Petitioner was an Armed Career Criminal, applying 4B1.4 provision of the guidelines. On each of these counts Petitioner was sentenced to concurrent terms of 262 months under a Mandatory Sentencing regime prior to Booker.

6. The multiple concurrent terms of 262 months Petitioner received on multiple counts, reflect the likelihood the sentencing judge "packaged" Petitioner's sentence in an attempt to adhere to the madatory punishment prescribed by the guidelines when the Petitioner was originally sentenced in 1999.

7. According to Johnson v. United States, Petitioner is no longer an Armed Career Criminal. In addition to Petitioner's assertion that he should be resentenced on Count 4, he further asserts he should be resentenced without the Armed Career Offender's provision on the remaining counts as well.

8. When one part of the sentence is set aside as illegal, the package is unbundled. The district court is free to put together a new package

reflecting an appropriate sentence considering §3553 (a) factors.

9. In the recent ruling in Dean v. United States 137 S.Ct. 1170 (2017) the Court determined sentencing judges have a wide range of discretion and are authorized to consider the mandatory minimums being imposed when calculating an appropriate sentence. The Court re-emphasized the broad descretion a sentencing judge has in selecting a sentence that is sufficient, but not greater than necessary.

The Court unanimously held: that, section 924 (c) does not prevent a sentencing court from considering a mandatory minimum under the provision when calculating an appropriate sentence for the predicate offense, wrote Chief Justice Roberts, especially when the original sentencing judge clearly infers he was not certain he was authorized to do so but certainly indicates he had a desire to consider a lesser sentence.

Here the sentencing judge, James H. Jarvis, during the final sentencing transcript makes no bones about being specific about his desire to sentence Petitioner to a lesser amount of sentence, where sentencing counsel of record, Gerald Gulley, Jr., on page 6, beginning in line 20, second word, "It deals with paragraph 102 which is the impact of section 5G1.3 of the U.S. Sentencing Guidelines with respect to Mr Burton. That deals with the question of whether the sentence imposed by this court should be consecutive to or concurrent with the sentence Mr. Burton will be serving when he is returned to Kentucky in the state system there. As the court knows, assuming our objections regarding Mr. Burton's status as an armed career criminal are not well taken by the court and this court determines that he is properly sentenced at an offense level of 34 with a criminal history of 6 before any mandatory minimums for use of a gun in relation to a drug trafficking offense, before these mandatory sentences of 25 years he is looking

at a range of roughly 21 to 26 years. If you add the mandatory minimum 25 years to that he is looking at 46 to 51 years minimum, in addition possibly whatever else he serves in Kentucky, Mr. Burton just turned 50, I believe the 18th--"

Mr. Gulley goes onto to state, "--of this month. As a practical matter, even if the sentences are run consecutive, excuse me, concurrent with his time to be served in Kentucky, at a very minimum, Mr. Burton is going to be 96 years old when the federal sentences are complete. Could possibly be even more. You Honor, we respectfully suggest there is no penological interest or purpose in sentencing Mr. Burton consecutively to the time he will have to go back and serve in state court."

"The Court: How much time does he have to serve in the state court?"
"Mr. Gulley: 12, 13 years, at least."
"The Court: That is because you escaped, wasn't it?"
"Mr. Burton: No, I served that sentence out. That was 1976, sir."
"The Court: You lost all of that time?"
"Mr. Burton: No, sir."
"The Court: What is the conviction in Kentucky for? When was the conviction renderd? What year was it?"
"Mr. Burton: It is three different sentences, sir, 1976, '83, 1976, '78 and '83, sir."
"The Court: You are still serving the time on the '76 conviction?"
"Mr. Burton: Yes sir."
"The Court: What was that for, kidnapping?"
" Mr. Burton: Kidnapping, robbery, bruglary, escape and bond jumping."
"The Court: Escape?"
"Mr. Burton: Yes sir."
"Mr. Gulley: I think that escape may have been subsequent conviction ordered to be served."
"The Court: That is what I was thinking. That jumped it up, I am pretty sure. How much time you got, you say you got, 2012?"
"Mr. Burton: 2011, sir."

"Mr. Gulley: That is an addition 12 years."
"Mr. Burton: That is the minimum expiration. Maximum is 2025."
"Mr. Gulley: Again, we respectfully suggest, Your Honor, to impose the federal sentences concurrent to the time Mr. Burton has to serve in state court,there is no penological interest or purpose in doing that considering that he is going to be at the youngest, 96 years old when he finishes serving, assuming you give him the absolute minimum at the lower end of the sentencing range, 96 years old without any additional state time."
"The Court: He will be 61 years old when he gets out of the state penitentiary."
"Mr. Gulley: That is right, Your Honor. At the earliest."
"Mr. Cook: May I be heard?"
"The Court: Yes, sir."
"Mr. Cook: Thank you, Your Honor."
"The Court: Are you through? He wants to be heard right now. He has stood up. He wants to be heard."
"Mr. Cook: Mrs. Gregory as correctly noted the provision 5.31.A which says it is to be consecutive--"
"The Court: Who says?"
"Mr.Cook: Section 5G1.3 set out at pargraph 103 of the presentence report."
"The Court: What about it?"
"Mr. Cook: He is arguing it should be run concurrent. The guideline provision and the presentence report correctly notes it says it is to be run consecutive."
"The Court: I have no discretion about it?"
"Mr. Cook: It says it shall be imposed."
"The Court: I am certainly familiar with that one. I don't know how in the world I can get around that. I know that is the law. You get in trouble, while you are out, escape or out on probation or however, you got to do it consecutive. Thank you. You got anything else you want to say?"
"The Court: All right. Anything else, counsel, you would like to say?"
"Mr. Gulley: Yes, Your Honor. With respect to the fact Mr. Burton has been in custody some 650 days here, it has been over 200 days since the trial, we would respectfully request that he be given credit for the time served."
"The Court: I don't know why we could'nt do that. What do you say about that, Mr. Cook?"

"Mr. Cook: I am sorry. My understanding of that--"
"The Court: Don't give him anything. He is not entitled to any credit anywhere?"
"Mr. Cook: Judge, I am not making the rules. I am just trying to advise you of what they are. The law on that, as I understand it, is that the bureau of prisons is statutorily mandated to and given the authority to in the first instance decide the application of whether the time that he has been in custody is to be credited to him or not. It is going to be a question of whether he is in state custody, federal custody whether in custody on this charge or the state charge. I honestly don't know."
"The Court: He has been down here in Knoxville, right? He is supposed to be serving time in Kentucky. He would rather be in Kentucky. He wants to go back to Kentucky, as I understand it, as soon as he can get back there. I think he has been down because of these federal charges, has he not?"
"Mr. Cook: Absolutely."
"The Court: I will give him credit. You can appeal it. He will still be 95 years old, if he lives that long, when he gets out of prison. It don't make a wits worth. I think he has been down here because he was charged here on a federal charge. I think he has been in federal custody."
"Mr. Cook: He has been down here, Your Honor."
"The Court: He has been in jail 600 days. He is entitled to credit because he is in jail."
"Mr. Cook: He is in jail because he has committed crimes he hasn't served time on. He hasn't begun to serve the term for the crime you have convicted him of and won't until 2014. He is in custody because he has done state crimes in custody."
"The Court: He would have been here in custody here whether he had done anything in Kentucky or not."
"Mr. Cook: I don't know. We didn't have a dentention hearing."
"The Court: You wouldn't have let him out. No judge would have let him out under these circumstances. Look me in the eye and tell me."
"Mr. Cook: I would like to think you are right. That isn't why he was in custody. He would have been in custody for that reason."
"The Court: Its a matter of how you want to look at it. In this case, this time this man has got, I will look at it his way once, you know. It is just, maybe next time I won't, see. In this case where he is looking at, we send

him to jail for life is what we are doing no matter what." (Please see copy of pages 6 through 12 of sentencing transcript as the second exhibit in " ATTACHMENTS " enclosed?)

There is no question from the above debate and dialogue that sentencing judge, James H. Jarvis, certainly had a desire to give Petitioner a lesser amount of sentence, however was in question as to whether he was authorized to do so by law. As far as the concurrent and consecutive sentence, we now know based upon the Dean Court, that he certainly could have applied this provision by sentencing Petitioner to the mandatory minimums of 25 years and 1 day on the remaining convictions which would have been similar with running the federal sentences concurrent with the state sentence Petitioner was serving at the time. As far as the 650 days credit for jail time, the sentencing judge could have granted Petitioner these days by applying it to the end of his sentence pursuant to § 3584 (a) and simply reducing his sentence by 2 years. This would have resulted in a sentence sufficient but not greater than necessary.

Now with the Armed Career Criminal Act being invalid in Petitioner's sentence, the only remaining mandatory minimum sentence are the two remaining 924 (C's), of 25 years and any other sentences are "advisory" only, and should this Honorable Court elect to consider all the enclosed mitigating circumstances, such as Petitioner's age, past addiction, medical issues, Spirituality and Post-Sentence Rehabilitation, as well as Petitioner's Extra-ordinary Rehabilitation, Petitioner prays this Court will "correct" his sentence to the 25 years on the mandatory minimum 924 (C's) and 1 day on the remaining convictions especially in light of the fact that this will amount to a total of 420 months Petitioner would have to serve on this sentence and he will have already been incarcerated 22 years since this offense occurred. Petitioner would be 83 years old upon completing the remainder of his sentence should he be blessed to live that long.

10. The Sentencing Reform Act specifically provides that no limitation shall be place on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence pursuant to 18 U.S.C.S § 3661. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every

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convicted person as an individual and every case as unique study in the human failings that sometimes mitigate, or sometimes magnify, the crime and the punishment to ensue. Thus, courts impose the punishment that fits the offender not merely the crime. Therefore, essential to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

11. The offenses this court found to convict Petitioner of were very serious, yet not the kind that Congress has determined requires a mandatory sentence. Petitioner's nine count indictment stem from a single drug story robbery for which he was arrested for shortly thereafter. (In the robbery no one was physically injured.) This was not some elaborate or complex offense as the drug conspiracy Petitioner was convicted of in this case obviously did not involve a large quanity of drugs nor large somes of money or existed for a extended period of time.

12. Petitioner has extensive history of drug abuse dated back nearly 50 years as evident by all of Petitioner's prior record being repleté with drug related offenses. By definition Petitioner was an opiate addict. His habitual use of narcotics contributed criminal conduct.

13. Petitioner's life-long addiction is relevant and should be considered a mitigating factor to his culpability if he were resentenced today. Recently, Judge Mark W. Bennett, summarized the current scientific evidence on adiiction and how it physically changes the brain, concluding: "While the initial decision to take drugs is mostly voluntary...when drug abuse takes over, a person's ability to exert self control can become seriously impaired...stated plainly, addiction biologically robs drugs abusers of their judgment, causing them to act impulsively and ignore the future consequences of their actions." United States v. Hendrickson, 25 Fed. Supp. 3rd 1166, 1172-73 (N.D.Iowa 2014), quoting" Nora D. Volkow, Preface to National Institute on Drug Abuse, Drugs, Brains, and Behavior: The Science Of Addiction 1 (2010)" He went onto explain: "By physically hijacking the brain addiction deminishes the addict's capacity to evaluate and control his or her behaviors. Rather than rationally assessing the cost of their actions, addicts are prone to act impulsively, without accurately weighing future consequences."

14. The Petitioner has spent the past 22 years incarcerated as a result of being convicted of these offenses. While Petitioner certainly

understands the seriousness of the offense of robbery and even the gravity of the impact it could have on victims, 22 years of imprisonment drastically exceeds the average sentence for robbery.

15. In Gall, the Supreme Court recognized that where cases present unusual or unique post-sentence conduct, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."

16. The need to deter Petitioner and others the Court exemplary Post-Sentencing conduct maybe taken as the most accurate indicator of a defendant's present purposes and tendencies and significantly suggest the period of restraint and the kind of discipline that should be imposed upon him.

17. Petitioner's 22 years of being incarcerated on these offenses certainly is a deterant far more sufficient than necessary. Petition is now 68 years old, to further incarcerate Petitioner would undermine the the deterance and diminish the significance of his rehabilitative efforts. Sending a strong message to the public, the inmate population and those responsible for maintaing order over this segment, that good behavior during confinement matters little in fulfilling retributive purposes.

18. Studies reviewed by the Office Of Justice Programs at the National Institute Of Justice, concludes that age is a powerful factor in deterring crime and that criminals naturally age out of crime. (See Office Of Justice Programs, National Institute Of Justice, Five Things About Deterrence, United States Department Of Justice (May 20016). The Sentencing Commission's research shows that the older the age of the offender, the lower his or her recidivism rate. (9.5% rearrest rate for individuals age 50 and over) See U.S.S.C., Residivism Among Federal Offenders: A Comprehensive Overview, Parts II and IV (March 2016).

19. Additionally, Petitioner's improved familial relationships and relationships with his community also support the lack of any need to further deter Petitioner at this point. Studies show that family supported connections predict reduced recidivism rates. Courts have considered family ties important to sentencing decisions. In the Commission's 2010 survey of

United States District Judges, 62% said that family ties are "ordinally relevant" to the consideration of a departure or variance. U.S.S.C., results of survey of United States District Judges January 2010 through March 2010, Table 13 (June 2010). (See "ATTACHMENTS" of support letters?)

20. As noted above, Petitioner is in that catagory of those least likely to reoffend. This is supported by Petitioner's 22 years of clear conduct since being incarcerated. Further incapcitation in this case is not necessary, as Petitioner has demonstrated that he can refrain from committing future crimes.

21. Petitioner has made exceptional rehabilitation after a lifetime of drug and alcohol addiction. For the past 22 years Petitioner has been clean and sober. He is subjected to numerous random drug test, cell searches and breathalyzer test-all of which have resulted in being negative.

22. Petitioner has been involved in many faith based programs over the years which has helped him to overcome his addictions. The Spiritual foundation that Petitioner has built his life upon has attributed to the drastic transformation he has undergone. This is not an attempt to promote Petitioner's beliefs, only a testament to the facts of the up to date evidence that demonstrates that Petitioner is a wholly different man than his criminal history suggests.

23. Since Petitioner's incarceration he has achieved an Associate Of Arts Degree from Jefferson Community College in Louisville, Kentucky. He has been awarded many program certificates for completion of programs, such as: Plumbing, Basic Auto Maintenance, Residentual Wiring, Parenting One and Two, Discipleship Spiritual Growth One and Two and many others. (See "ATTACHMENTS" and certificates).

24. Petitioner has maintained employment throughout his incarceration as a clerk for the Supervisory Chaplain at USP Cannan, Orderly, Recreation, Health Services, Unicor Federal Prison Industries where he operated an Embroidery machine, as well as a belt loop machine preparing military pants for the United States Armed Services until he began experiencing some medical issues which is listed below.

25. Petitioner suffers from several chronic medical conditions. These conditions include a degenerative disc disease in his lower spine, swollen

prostate, plantary and posterior calcaneal exostosis, (bone spirs in both heels) meneres disease, relating to vertigo, glaucoma, hardening of the arteries, torn rotary cuff in his left shoulder, as well as exposure to heptitus C. Petitioner has undergone many medical procedures. Cateract lens implants in both eyes, as well as detached retina surgery on his left eye.

26. Petitioner has consistantly paid restition to Rite Aide Drug Company for the cost of the medication taken through the FRP Program never missing a payment nor being tardy.

27. Petitioner has included letters from clergy, family, friends, even a Warden of a prison Petitioner was incarcerated at for 12 years of these past 22 years. Warden Tom Dailey offers first hand knowledge of his professional assessment of Petitioner, drawing for over 25 years of his personal experience in corrections and concludes, in his opinion Petitoner would never reoffend.

28. These mitigating circumstance were not lawful for the Court to consider at Petitioner's original sentencing. Resentencing the Petitioner would allow the Court to take into consideration his history of drug abuse as well as his past opiate addiction.

29. In resentencing Petitioner the Court has a myriad of sentences legally to choose from. As noted above, Congress did not impose a mandatory minimum sentence for Conspiracy To Distribute And Possess With Intent to Distribute Schedule II, III, and IV. (Count 1) Robbery Of A Pharmacy (Count 2) Felon In Possession Of A Firearm (Count 4) And Possesion With Intent To Distribute (Count 6). See 21 U.S.C. § 846 and 841 (b) (1) (C), 18 U.S.C. § 2118 (a) and (c), 18 U.S.C. § 922 (g), 21 U.S.C. §841 (a) (1). This would give the Court an opportunity to consider those facts that were available to the Court when Petitioner was originally sentenced as well as his Post-Sentencing conduct. Evidence of Post-Conviction conduct provides the most up to date picture of the Petitioner's history and characteristics. Exemplary Post-Sentencing conduct should be taken as the most accurate indicator of an offender's present purposes and tendencies which should significantly impact the kind of sentence imposed upon him. Pepper, 562 U.S. at 492-93.

30. Your Honor, with all the due respect that I know how to express, it is Petitioner's assertion that this Honorable Court is being asked to perform the impossible of sentencing Petitioner on the remaining "Sentencing package" offenses, when Your Honor was not afforded the opportunity to personally preside over this four (4) day Bench Trial eighteen (18) years ago to be aware of all the evidence presented, and or lack thereof, to personally review and hear the two dozen witnesses, including two crucial expert witness of a Daubert Hearing, nor see the facial expressions, and body language of these two dozen witnesses, especially considering there was no physical evidence in this case but was only circumstantial. Therefore, this Honorable Court is being asked to become a mind-reader of what these two dozen witnesses, as well as Bench Trial Judge, James H. Jarvis, was thinking at any given time, since Judge Jarvis has been deceased now for some ten (10) years.

This is why Petitioner asserts that in the interest of justice and fairness of the proceedings that this Court should conduct a Full Resentencing Hearing in light of Booker, Gall, Pepper and Dean. Giving this Court the opportunity to consider 18 U.S.C. § 3553(a) factors in crafting a sentence for Petitioner that is sufficient, but not greater than necessary to serve the purpose of sentencing.

In conclusion, I would like to add before stating the below listed mitigating factors, that these are in no way meant to excuse any past behavior, as it is no one's fault, but my own and I accept full responsibility for those actions. Nevertheless, they are fact and I would ask this Court to take these into consideration upon imposing a sentence that is appropriate.

I lost my Dad when I was nine years old, as a result of him committing suicide. My Mom was left with six children to raise on her own and she did the absolute best she could possibly do under the circumstances. I was

extremely angry with my Dad for many years afterwards for this act, and it was not until I surrendered my life to Christ, and introduced to the greatest gift known to mankind, which is in fact the gift of forgiveness, that I learned to forgive him and was healed of harboring the anger and resentment I had suppressed.

I was always an athlete and took pride in taking care of my health, however, like many "baby-boomers" of my era, I experimented with "recreational drugs" while playing College football. I eventually developed an opiate addiction in 1970, and was an addict until December 8, 1995 and have been clean and drug free for nearly 22 years now for the first time since I was probably 15 years old.

More importantly, mine has not been as a result of any 12 Step Program. It was a result of me taking ONE STEP in January 1996, when I entered into covenant with the Creator of this Universe, The Living God, and have been delivered and set free ever since.

Your Honor, my record is not impressive to say the least, however I am unable to erase the mistakes and poor decisions I have made in my past as all of us are. Nevertheless, based upon the authority of God's Word, I have been forgiven and pardoned by the Highest Court in existence, The Master Himself, and I am no longer the person I once was nor that my record reflects.

In the interest of not appearing biased, nor boasting, as if this is my opinion only, please find attached several letters from clergy,

business people, school teachers, an attorney, and even a Warden of a prison where I was incarcerated for 12 of these past 22 years, who himself offers his professional opinion from his 25 years of experience in Corrections of me never reoffending again.

Unfortunately, none of us have a window available to our souls for others to view, and I am well aware of the ole cliche' of, "jail-house religion", so I understand the grave responsibility many in your profession have concerning those of us in prison in relation to safety of the public. Oftentimes this can result in sterotyping of one size fits all when it is based solely on one's record, and you do not have daily interactions to personally witness the progress one has made , especially after having so many negative dealings with every deviant known to mankind. In light of this, I have to trust with your many years of experience in this field, that over the years you have developed a keen sense of discernment and are able to detect genuineness from imitation and recognize the depth of my sincerety.

Once again I would ask you to be mindful of my being 68 years old shortly? I have finally obtained some wisdom, have a much different perspective today and a greater value for this journey we are all on called life than I did prior to this incarecration in 1995.

I pray this has been revealed to you upon your review, and will move upon your inner man and will assist you in extending mercy and grace to me, as I do not want justice per se, because if any of us get what we deserve we are doomed, as it is only by mercy and grace I am before you today.

Respectfully Submitted,

Charles W. Burton

Charles W. Burton
Reg. No. 14816-074, Unit Clay B
Federal Correctional Institution
P.O. Box 4000
Manchester, Kentucky 40962-4000

CERTIFICATE OF SERVICE

I hereby cetify that the foregoing Petitioner's Sentencing Brief was placed in the Federal Correctional Institution at Manchester, Kentucky Institutional Mail Room, postage pre-paid to the Honorable Judge Jordan, U.S. District Court Judge, Eastern District Court Of Tennessee At Knoxville, 800 Market Street, Knoxville, Tennessee 37902, Honorable Luke McLauren, Assistant U.S. Attorney For The Eastern District Of Tennessee At Knoxville, 800 Market Street, Knoxville, Tennessee 37902, Clerk Of The Court, United States Eastern District Court Clerk For The Eastern District Court of Tennessee At Knoxville, 800 Market Street, Suite 130, Knoxville, Tennessee 37902 and The Honorable Chief Judge Cole For The United States Court Of Appeals For The Sixth Circuit, 100 East Fifth Street, Room 540, Potter Stewart U.S. Courthouse, Cincinnati, Ohio 45202-3988 and Laura L. Davis, Assistant Federal Defender, 800 S. Gay Street, Suite 2400, Knoxville, Tennessee 37929-9714 on this 15th day of August, 2017.

Charles W. Burton

Charles W. Burton, pro-se
Reg. No 14816-074, Unit Clay B
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Manchester, Kentucky 40962-4000

A T T A C H M E N T S

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

2018 JAN 31 P 12:28

U.S. DISTRICT COURT
EASTERN DIST. TENN.
DEPT. CLERK

CHARLES W. BURTON,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

Case No. 3:97-CR-154-RLJ
& 3:17-CV-25- RLJ

MOTION FOR LEAVE TO FILE PRO-SE SUPPLEMENTAL MOTION
FOR RESENTENCING/SENTENCING BRIEF

Comes now Petitioner, Charles W. Burton, pro-se, and respectfully petitions this Honorable Court to consider this Motion For Leave To File Pro-se Supplemental Motion For Resentencing/Sentencing Brief for the following reasons.

In support of this Motion, Petitioner asserts this said Motion in this matter is in the interest of justice. Again, Petitioner understands this Honorable Court has inherited this unique, complicated case due to the Honorable Judge James H. Jarvis being deceased now for approximately 10 years.

On May 24, 2017, this Honorable Court issued a Memorandum And Order Directing Petitioner to submit a Brief communitcating to this Court what Petitioner believes to be the appropriate corrected sentence in his case on or before August 18, 2017. Petitioner has complied with this Court's Order and filed this Motion For Resentencing/ Sentencing Brief, pro-se, on August 15, 2017, see DE #265. Pursuant to this Court's Order newly appointed counsel, Laura E. Davis of the Federal Defender Services filed a Brief Regarding Corrected Sentence on October 13, 2017. Furthermore, AUSA Luke A. McLaurin filed his, "Response To Petitioner's Brief Regarding Corrected Sentence."

It should be noted Petitioner's Motion For Resentencing/Sentencing Brief filed, August 15, 2017, DE #265, opens his Motion in the first paragraph, "respectfully

Petitions this Honorable Court to consider a Full Sentencing Hearing in this matter in the interest of justice."

To further support Petitioner's assertion in this matter, a recent Eleventh Circuit Opinion in United States v. Brown, Nos. 16-14267 and 16-14284, the Court Of Appeals vacated and remanded Brown's sentence after declaring that modifying the sentence without the defendant's presence was an abuse of discretion.

In light of the above referenced case being similar to Petitioner's case, and the Court holding: "After reviewing their case law, the Court came to the conclusion that a sentence modification qualifies as a critical stage, and requires the defendant to be present if the following things are true:

"First, did the errors requiring the grant of habeas relief undermine the sentence as a whole? Second, will the sentencing court exercise significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentence?"

"If both of those things are true the defendant must be brought back for a resentencing."

The record is clear herein, Petitioner's case at bar that the answers to these two questions are unequivocally, Yes! This will be eloraborated on more fully in Petitoner's attached Memorandum Of Law In Support Of Motion To Supplemental Motion For Resentencing/Sentencing Brief.

Petitioner would ask this Court to note Fed. R. Crim.P. 43. Defendant's Presence, (a) When Required. Unless this rule, Rule 5, or Rule 10, provides otherwise, defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing. (b) When Not Required. A defendant need not be present under any of the following circumstances; (1) Organizational Defendant. (2) Misdemeanor Offense. (3) Conference or Hearing on a Legal Question. (4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35, or 18 U.S.C. § 3582 (c).

Neither Rule 5, Rule 10, Rule 35, nor 18 U.S.C. § 3582 (c), apply to Petitoner's case at bar, therefore, requiring his presence.

Respectfully Submitted,

Charles W. Burton

Charles W. Burton, Pro-se
Reg. No. 14816-074, Unit Clay B
Federal Correctional Institution
P.O. Box 4000
Manchester, Kentucky 40962-4000

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy to the best of my knowledge of the Petitioner's Motion For Leave To File Pro-se Supplemental Motion For Resentencing/Sentencing Brief, was mailed postage prepaid to the Clerk Of The Court for The United States Eastern District at Knoxville, Tennessee, 800 Market Street, Knoxville, Tennessee 37902, AUSA Luke A. McLaurin, 800 Market Street, Suite 211, Knoxville, Tennessee 37902, and Laura E. Davis. Federal Defender Services of Eastern Tennessee, 800 South Gay Street, Suite 2400, Knoxville, Tennessee 37929-9714 on this 29th day of January, 2018.

Charles W. Burton

Charles W. Burton, Pro-se

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Clerk Of The Court
800 Market ST
Knoxville, TN 37902
United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

2018 JAN 31 P 12:28

U.S. DISTRICT COURT
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DEPT. CLERK

CHARLES W. BURTON,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

CASE NO. 3:97-CR-154 RLJ
& 3:17-CV-25- RLJ

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
PRO-SE SUPPLEMENTAL MOTION FOR RESENTENCING/SENTENCING BRIEF

Comes now Petitioner, Charles W. Burton, Pro-se and in support of Petitioner's Motion For Leave To File Pro-se Supplemental Motion For Resentencing/Sentencing Brief, states the following;

In Petitioner's original Motion For Resentencing/Sentencing Brief, on page one (1), and paragraph one (1), Petitioner, "respectfully Petitions this Honorable Court to consider a Full Sentencing Hearing in this matter in the interest of justice."

Also, on page three (3), and in the first paragraph of Petitioner's original Motion under 4., Petitioner asserts, "that a full resentencing is the appropriate remedy in this case and that he is entitled to be resentenced under the advisory guideline scheme since this is a United States Statute that has been declared unconstitutional by the United States Supreme Court, and not merely a technicality or typographical error, nor falls under Rule 35 or 18 U.S.C. § 3582 (c)."

To further support this assertion, Petitioner would refer to Fed. R. Crim.P. 43 (a), "When Required. Unless this rule, Rule 5 or Rule 10, provides otherwise, the defendant must be present at: (1) The initial appearance, the initial arraignment, and the plea; (2) Every trial stage, including jury impanelment, and the return of the verdict; and (3) Sentencing." (Please see Exhibit #1 Attached herein?)

Since Rule 5, or Rule 10, does not apply to Petitioner, Petitioner asserts, 1,2 and 3 above does in fact apply to Petitioner and because this is a sentencing, resentencing, a corrected sentence or any other term this Court wishes to label it, Fed.R.Crim.P. 43 mandates prisoner is to be present.

Fed.R.Crim.P. (b), "When Not Required. (A) Defendant need not be present under any of the following circumstances: (1) Organizational Defendant. (2) Misdemeanor Offense. (3) Conference or Hearing on a Legal Question. And (4) Sentence Correction. The proceeding involves the correction or reduction of a sentence under Rule 35, or 18 U.S.C. § 3582 (c)." Which neither Rule 35 or § 3582 (c) apply to Petitioner.

Also in Petitioner's original Motion, on page three (3), under number 8., Petitioner references, "When one part of the sentence is set aside as illegal the package is unbundled. The district court is free to put together a new package reflecting an appropriate sentence considering § 3553 (a) factors."

Finally, in Petitioner's original Motion on page thirteen (13), under 30., in the second paragraph, "This is why Petitioner asserts that in the interest of justice and fairness of the proceedings this Court should conduct a Full Resentencing Hearing, in light of Booker, Gall, Pepper and Dean. Giving this court the opportunity to conisder 18 U.S.C.§ 3553 (a) factors in crafting a sentence for Petitioner that is sufficient, but not greater than necessary to serve the purpose of sentencing."

In this Court's Memorandum Opinion, entered on April 11, 2017, under 3, on page nine (9), reads in part; "Appropriate Form Of Collateral Relief, Here, the court finds as "persuasive authority", correction of sentence, not a full sentencing hearing is the appropriate form of relief". See United States v. Torres-Otero, 232 F.3d 24, 30 (1st Cir.2000).

("[I]n cases where the sentence (but not the conviction) is infirm, only the 'resentenc[ing]' or 'correct[ing]the sentence' options are open to the district court, since a prisoner should never be, 'discharge[d]' or 'grant[ed]' a new trial" based soley on a defective sentence."

However, in footnote 3, of page nine (9) here the court, pursuant to controlling authority in Pasquarille v. United States, 130 F.3d 1220, 1222 (6th Cir.1997); It is well established that court's have "jurisdiction and authority to reevaluate the entire[ty] [of a petitioner's] aggregate sentence" when he or she was convicted of multiple counts, has one of those counts modified on collateral review, and his or her original sentence consisted of a unified, "package" or interdependent, "components of a single comprehensive sentencing plan."; see also United States v. Gordils, 117 F.3d 99, 102 (2nd Cir. 1997)(explaining the district court's power extends not just to the conviction attacked by the defendant, but to an aggregate...term of imprisonment.)

Furthermore, pursuant to United States v. Brown, Nos. 16-14267, and 16-14284, where the Court of Appeals vacated and remanded Brown's sentence after declaring that modifying Brown's sentence without the defendant's presence was an abuse of discretion on the district court.

Petitioner's case at bar is extremely similar to Brown's in that Petitioner, like Brown, was convicted of the Armed Career Criminal Act (hereafter ACCA) where the district court used one of Petitioner's three prior convictions of a second degree escape as a "violent felony" to enhance Petitioner to an ACCA. Petitioner, like Brown, challenged his sentence in a § 2255 Motion in light of Johnson v. United States, stating that his second degree escape no longer qualified as a, "violent felony" so Petitioner's ACCA was invalid and can no longer stand.

Upon reveiewing case law the Court came to the conclusion that a sentence modification qualifies as a critical stage and requires the defendant to be present if the following things are true; "First, did the errors requiring the grant of habeas relief undermine the sentence as a whole? Second, will the sentencing court exercise significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentencing?" If both of these things are true then the defendant must be brought back for a full resentencing hearing. In Petitioner's case at bar the record clearly reflects the answer to these two questions

is unequivocally, Yes!

The Court Of Appeals noted that prior precedent showed that when an "entire sentencing package," has been vacated then the court must revisit every part of the sentencing package which requires the defendant to be present.

Petitioner asserts this is exactly what occurred when this Honorable court opined on April 11, 2017, in his Memorandum Opinion, on page one, paragraph one, last sentence states, "For the reasons stated below, Petitioner's Successive § 2255 Petition will be granted." Thus upon a new judgment being entered the ACCA will be removed from Petitioner's present judgment and therefore the "sentencing package" is "unbundled".

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant Petitioner's Memorandum Of Law In Support Of Petitioner's Pro-se Supplemental Motion For Resentencing/Sentencing Brief, and issue an Order scheduling a Full Resentencing Hearing and arrange to have Petitioner transportated by the United States Marshal's to the Eastern District Of Tennesee At Knoxville for said Resentencing Hearing, as this resulted from a United States Statute that Petitioner was convicted of and sentenced to, when Petitioner was not even eligible for this conviction, or sentence and he even apprised this Court of same during his Objections And Statements Regarding Presentence Investigation Report as well as arguing same during Final Sentence, see DE#193 & 194 and therefore is serving an illegal sentence and has been for some eighteen (18) years now.

Respectfully Submitted,

Charles W. Burton

Charles W. Burton, Pro-se
Reg. No 14816-074, Unit Clay B
Federal Correctional Institution
P.O. Box 4000
Manchester, Kentucky 40962-4000

Neither Rule 5, Rule 10, Rule 35, nor 18 U.S.C. § 3582 (c), apply to Petitoner's case at bar, therefore, requiring his presence.

Respectfully Submitted,

Charles W. Burton

Charles W. Burton, Pro-se
Reg. No. 14816-074, Unit Clay B
Federal Correctional Institution
P.O. Box 4000
Manchester, Kentucky 40962-4000

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy to the best of my knowledge of the Petitioner's Motion For Leave To File Pro-se Supplemental Motion For Resentencing/Sentencing Brief, was mailed postage prepaid to the Clerk Of The Court for The United States Eastern District at Knoxville, Tennessee, 800 Market Street, Knoxville, Tennessee 37902, AUSA Luke A. McLaurin, 800 Market Street, Suite 211, Knoxville, Tennessee 37902, and Laura E. Davis. Federal Defender Services of Eastern Tennessee, 800 South Gay Street, Suite 2400, Knoxville, Tennessee 37929-9714 on this 29th day of January, 2018.

Charles W. Burton

Charles W. Burton, Pro-se

Exhibit # 1.

Rule 43. Defendant's Presence

(a) **When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) **When Not Required.** A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence.**

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(Dec. 26, 1944, eff. March 21, 1946, as amended April 22, 1974, eff. Dec. 1, 1975; Act July 31, 1975, P. L. 94-64, §§ 2, 3(35), 89 Stat. 370, 376, eff. Dec. 1, 1975; March 9, 1987, eff. Aug. 1, 1987; April 27, 1995, eff. Dec. 1, 1995; April 24, 1998, eff. Dec. 1, 1998; April 29, 2002, eff. Dec. 1, 2002; April 26, 2011, eff. Dec. 1, 2011 .)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES W. BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 3:97-CR-154-RLJ-CCS-1
	)	3:17-CV-25-RLJ
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Pro se, Petitioner has filed a "Motion for Leave to File Pro-Se Supplemental Motion for Resentencing / Sentencing Brief." [Doc. 273]. Petitioner is represented by an attorney and therefore may not "appear or act in his . . . own behalf in the action or proceeding[.]" *See* E.D. Tenn. L.R. 83.4(c). Petitioner's *pro se* motion [doc. 273] is accordingly **DENIED**.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES BURTON	)	
Petitioner,	)	**No. 3:97-CR-154-1**
v.	)	**No. 3:17-CV-25**
	)	**JUDGE JORDAN**
UNITED STATES,	)	
Respondent	)	

SUPPLEMENTAL ARGUMENT

Charles Burton, through counsel, respectfully submits the following supplemental arguments for this Honorable Court's consideration.

Consecutive/Concurrent

The sentence for Mr. Burton's convictions, other than those for violating 18 U.S.C. § 924(c), can run concurrent or partially concurrent to his state parole violation sentence. However, the earliest his 300-month sentence for the § 924(c) convictions can start is June 13, 2008, the date Mr. Burton was paroled from his state sentence.

This Court cannot sentence Mr. Burton on an invalid conviction

Mr. Burton respectfully argues that this Court does not have jurisdiction to resentence Mr. Burton, when his conviction is invalid under the Fifth and Sixth Amendments to the Constitution and Federal Rules of Criminal Procedure, Rule 43.

Mr. Burton was tried in a bench trial in front of Judge Jarvis. *United States v. Crozier*,[1] 259 F.3d 503, 507 (6th Cir. 2001). The evidence against him included identifications via photographic line-up in which Mr. Burton's picture was the only color photograph among black-and-white filler photographs. *Id.* at 508. Later, the witnesses identified Mr. Burton in a live line-

[1] The Sixth Circuit case is captioned after Mr. Burton's co-defendant, David Crozier.

up, however he was the only person who appeared in both the photo arrays and the live line-up. *Id.* Mr. Burton's trial included testimony by cooperating witnesses. *Id.*

Judge Jarvis found Mr. Burton guilty of all charges. Judge Jarvis did not announce his verdict in open court, but rather mailed it to counsel. R. 181.

Rule 43 requires that a defendant be present at the "return of verdict." Fed. R. Crim. P. 43(a)(2). Rule 43's mandates require such "strict compliance," that they cannot be waived by the defendant. *See United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018); *Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1276, 1281 (9th Cir. 1990).

In addition to Rule 43, defendants have a Fifth Amendment and Sixth Amendment right to be present in the courtroom for the announcement of their verdict. Under the Sixth Amendment, defendants have the right to an open public trial. *United States v. Canady*, 126 F.3d 352, 362 (2d Cir. 1997). The right to be present for "every stage of trial"

> is rooted in both the Sixth Amendment Confrontation Clause, *see Illinois v. Allen,* 397 U.S. 337, 338, 90 S.Ct. 1057 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *Arizona v. Levato,* 924 P.2d 445, 448 (Ariz. 1996) (in banc) (recognizing Sixth Amendment guarantee to be "physically present for the return of jury verdicts" absent exceptional circumstances), and the Fifth Amendment Due Process Clause, *see Kentucky v. Stincer,* 482 U.S. 730, 745 (1987); *Snyder v. Massachusetts,* 291 U.S. 97, 107-108 (1934); *Hopt v. Utah,* 110 U.S. 574 (1884) ("If [a defendant] be deprived of his life or liberty without being ... present, such deprivation would be without that due process of law required by the constitution.").

Id. at 360. The district court's failure to announce its verdict in open court "strikes at the fundamental values of our judicial system and our society as a whole." *Id.* at 362 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (internal quotation marks omitted).

In the single other instance (that counsel could find) of a mailed verdict, the "appropriate remedy" was to vacate the conviction "and remand to the district court to announce its decision in open court." *Canady*, 126 F.3d at 364. This way,

> the court's announcement of the outcome of its deliberations, that is, whether the defendant is guilty or not guilty on each of the counts charged, together with the contemporaneous issuance of any written findings and conclusions pursuant to Fed. R. Crim. P. 23(c), fully vindicate the public trial guarantee and the defendant's right to be present at all stages of the trial.

Id. *Canady* recognized it was possible that the decision announced orally in open court might differ from "that mailed to the parties." *See id.*

Because the district court here mailed its verdict rather than announcing it in open court, Mr. Burton's conviction is invalid. In Mr. Burton's case, the *Canady* remedy cannot address the violation of Constitution and Rule, because the trier of fact is not available to announce its verdict. This Honorable Court cannot announce it in the former judge's stead, because it would not be announcing the outcome of its own deliberations. *See Canady*, 126 F.3d at 364. This Court did not see and hear the evidence against Mr. Burton. It did not observe the demeanor of witnesses to evaluate the veracity of their statements. It did not hear the arguments of trial counsel.

Without a valid conviction, this Honorable Court cannot resentence Mr. Burton.

Respectfully submitted this 21st day of June, 2018.

RESPECTFULLY SUBMITTED:

FEDERAL DEFENDER SERVICES OF
EASTERN TENNESSEE, INC.

BY: *s/ Laura E. Davis*
Laura E. Davis
Assistant Federal Public Defender

Federal Defender Services of Eastern Tennessee
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018, a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/ Laura E. Davis
Laura E. Davis
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES W. BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 3:97-CR-154
	)	3:17-CV-025
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Petitioner is presently scheduled for a resentencing hearing on July 9, 2018. Now before the court is Petitioner's June 21, 2018 "Supplemental Argument," filed by counsel. [Doc. 282].

Despite its caption, Petitioner's "Supplemental Argument" is in substance a renewed motion for leave to amend his § 2255 petition. The United States has filed a response in opposition to the motion. [Doc. 283].

Petitioner's first motion for leave to amend his petition [doc. 261] was denied by this court on May 24, 2017. [Doc. 262]. For the same reasons articulated in that prior order [doc. 262], Petitioner's renewed motion to amend [doc. 282] is also **DENIED**.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No.: 3:97-CR-154
CHARLES W. BURTON,	)	
Defendant.	)	

RESENTENCING PROCEEDINGS
BEFORE THE HONORABLE R. LEON JORDAN

July 9, 2018
1:25 p.m. to 2:34 p.m.

APPEARANCES:

FOR THE PLAINTIFF:
LUKE A. MCLAURIN, ESQUIRE
Assistant United States Attorney
United States Department of Justice
Office of the United States Attorney
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FOR THE DEFENDANT:
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REPORTED BY:
Rebekah M. Lockwood, RPR, CRR
Official Court Reporter
(865) 210-6698
P.O. Box 1823
Knoxville, Tennessee 37901-1823

(Call to Order of the Court)

THE COURTROOM DEPUTY: This is Criminal Action 3:97-CR-154-1, United States of America versus Charles W. Burton.

Is the government present and ready to proceed?

MR. McLAURIN: Present and ready, Your Honor.

THE COURTROOM DEPUTY: Is the defendant present and ready to proceed?

MS. DAVIS: Present and ready, Your Honor.

THE COURT: Good afternoon and welcome.

We're here this afternoon for the resentencing of Charles William Burton.

First of all, the Court wants to thank both parties, particularly Mr. McLaurin and Ms. Davis, for writing well-written briefs addressing the issues in this case. The Court has carefully read them and considered them.

First of all, we must address the presentence report of the record. And except as to Count 4, the sentencing numbers remain as they were when Judge Jarvis imposed sentence in 1999.

The defendant's total offense level, as reported from the probation office, is 34. He is a career offender. His criminal history category is VI. The advisory Guideline range is 262 to 327 months, plus there is a 60-month consecutive mandatory minimum as to Count 3 and a 240-month consecutive

mandatory minimum as to Count 9, giving us an effective Guideline range of 262 to 627 months.

Are we in agreement, Mr. McLaurin?

MR. McLAURIN: Your Honor, we believe that the bottom of the Guidelines range would have to be at least 300 months.

THE COURT: I can't hear you.

MR. McLAURIN: Your Honor, we would submit that the bottom of the -- any range that would be applied today would have to be at least 300 months imprisonment, 240 months imprisonment plus the 60 months that are required by statute for the --

THE COURT: Did I misspeak? The net effective range is 562 to 627.

MR. McLAURIN: That's correct, Your Honor.

THE COURT: All right.

Ms. Davis?

MS. DAVIS: That is correct, Your Honor.

THE COURT: Thank you.

As we all know, we're here for resentencing, and that was pursuant to the Johnson case wherein the defendant was an armed career criminal, and because of Johnson, he is no longer labeled as such. But he is entitled to a resentencing hearing.

At this time, Mr. McLaurin, do you have anything new to add? If you would, come up to the lectern so I can hear you.

MR. McLAURIN: Yes, Your Honor. We're requesting a sentence at the bottom of the advisory Guideline range in this case, which would be a total aggregate sentence of 527 months imprisonment.

If you look at the defendant in this case, and you look at his particular conduct in this case, this is one of the more egregious kinds of offense conduct that we tend to see in federal court.

The defendant in this case robbed a pharmacy. But he didn't just rob a pharmacy, he did so at gunpoint. And he didn't just use a gun, he actually used it to threaten the pharmacy employees that were there. He shoved a gun into the back of one of the pharmacy employees. Other pharmacy employees were tied up.

This wasn't just a one-off pharmacy robbery. This was part of a grand conspiracy to rob pharmacies and then sell controlled substances as part of a drug trafficking organization.

And, sadly, what the PSR demonstrates is that Mr. Burton, when he committed his offense in this case, this was a pattern of conduct that he had done throughout his life. If you look at the PSR, and particularly in Paragraphs 57 and 61 and 60, you see that Mr. Burton has a history of using violence to obtain narcotics.

I think the conduct that was at issue in Paragraph 57

is particularly revealing. There, Mr. Burton went into a hospital with other individuals; they pulled out guns while in a hospital. Their whole point in going into the hospital was to steal drugs, the same kind of conduct involved in this case. Inside the hospital, they pulled out guns.

They actually took one of the hospital employees hostage when they realized they were on the wrong floor and couldn't get the drugs that they wanted, and they had to flee out, and they actually took that woman with them.

His history shows he has a pattern of violent conduct that harms other individuals.

We acknowledge that -- and think it's very commendable that since being incarcerated, Mr. Burton has made several steps to rehabilitate himself. That is commendable. We hope to see all defendants do that. But when this Court is considering a sentence, it has to consider not just the need for rehabilitation, but 3553(a) also requires this Court to consider a sentence that will reflect the seriousness of the offense and promote respect for the law and provide just punishment.

Now, while Mr. Burton may have taken several steps recently to reform his life, that can't undo the harm that he has done to the victims in this case, the victims in the prior cases.

Because of his efforts at rehabilitation, we are only

requesting a sentence at the bottom of the advisory Guidelines range. We think that that sentence sufficiently accounts for all the 3553(a) factors in this case and would achieve a result that is consistent with the purpose of Section 2255.

Mr. Burton is here for this resentencing because he was erroneously designated as an armed career criminal the first time around. But that doesn't make his history or the conduct that he committed in this case any less egregious.

And so we're simply asking that the Court put Mr. Burton back in the position he would have been at at his original resentencing. And at his original resentencing, he would have faced an advisory Guidelines range that is the same as today. And we're asking that he be sentenced to the bottom of that advisory Guidelines range.

I'd also like to just briefly address Mr. Burton's request that his sentence be run concurrent with the sentences that were imposed in Kentucky. The Guidelines actually recommend against doing that, and we think so for good reason.

When he -- the sentences he received in Kentucky were for different harms that he committed by violating the terms of his parole. And he violated the terms of his parole in a particularly egregious way, by committing the federal offenses involved in this case.

And the Guidelines recognize that when that happens, it is really appropriate that the federal sentence be treated

as separate from the state sentence, and that there should be distinct punishments imposed for the distinct harms caused. We think that's appropriate in this case, and the Court should follow the advisory Guidelines recommendation.

Thank you, Your Honor.

THE COURT: Thank you, sir.

Ms. Davis.

MS. DAVIS: Your Honor, we would ask you to impose a sentence that would however it is constructed effectuate having the mandatory consecutive 300 months for the 924(c) charges to start June 13th, 2008. That's the soonest they can start, no matter what Your Honor -- even if you just gave him one day on the other charges, the Bureau of Prisons and by law is not going to start that 924(c) or the two 924(c) sentences until he was finished with the state sentence, which was June 13, 2008.

Your Honor, I'm going to briefly recognize some of the people who came down from Kentucky today in support of Mr. Burton. I have been very impressed with the number of people, not just family, but community members who reached out to me, who wrote letters to the Court, who are here today, to say that this is a reformed man in front of you.

Your Honor, I'd ask that when I say somebody's name, if they would please stand.

Lynn Carter is Mr. Burton's sister. She is one of the people who have offered her home as a place he could stay

upon release. She was actually asked, she believes, at trial to come down to court and his -- for his benefit, and she called the judge. She called Judge Jarvis to say, "I don't know if I want to come down here to support him." But here she is today in support of him.

Mary Ann Flynn is a childhood friend. She stopped being friends with Mr. Burton when he started using drugs heavily. But, again, she started seeing him again about eight years ago, because she recognized that he was free and clear of the horrible addiction that had bedeviled him.

Brother Larry Coleman is a minister who first met Mr. Burton when both were inmates, and at that time, reached out to him, witnessed to him, and Mr. Burton just wasn't ready yet but Mr. Burton since then has found his faith. The two have been in regular contact. And Brother Coleman is here in support of him today.

Julie Burton Smith is a daughter, is Mr. Coleman's daughter. He's -- excuse me, Mr. Burton's daughter. He's been in some form of custody most of her life. And despise that, she's maintained contact in him. She has maintained her faith in him, that he could do better and would do better.

Larry Nichols, is a friend from 50 years ago. He is a retired minister and schoolteacher and visits Mr. Burton regularly for the past eight years.

Dr. David Carr, they knew each other in school.

Again, when Mr. Burton's drug use led him astray, you know, they cut contact. However, since Mr. Burton has maintained his sobriety and his connection to the church, Dr. Carr has been visiting him regularly.

Sheila Young, Mr. Burton's oldest sister is also here in support of him.

All of these people, Your Honor, many of them brothers and sisters who knew him when he was -- obviously knew him when he was a child, knew the impact that their father's death had on him when he was nine years old, who lost contact or cut contact when he started using Dilaudid.

And Mr. Burton will openly admit he did awful things trying to get more Dilaudid. This was an awful, awful addiction, and that was his sole focus for 20 years.

But then he had a moment when he realized, finally, this is not for me, and he stopped using and he started reforming his life. He started trying to live a life behind bars that was exemplary. And friends, when they've gone to visit him, the federal prison have been approached by guards to say this is a guy who does not --

THE COURT: Invite your guests to sit down. Thank you.

MS. DAVIS: Oh, I'm sorry. Thank you, Your Honor.

But even, you know, people working at the institution recognize that Mr. Burton's reformation is a legitimate

reformation, that he does not pose a risk to the community, that he's a good example for the community of what you need to do to turn your life around and to stay out of trouble. Because Your Honor knows and the government's recognized this, if he's been getting write-ups, either at state prison or federal prison, Your Honor would have heard about it.

And Your Honor knows that drug addiction doesn't stop at the prison gate. If you want drugs, you can get them. If you want to start trouble, you can start trouble.

And Mr. Burton has not wanted to do that. He's leading a faith-filled life. He has hope and plans for his future.

And I would ask Your Honor to give him a sentence that would allow him to continue to have such hope.

THE COURT: Thank you.

Marshal, bring Mr. Burton to the lectern, please.

Good afternoon, Mr. Burton. This is your opportunity to speak to the Court in mitigation of your sentence. Do you have anything you wish to tell the Court?

THE DEFENDANT: I do, sir. I have several things I'd like to address about this case, if I may, Your Honor. With all due respect, I'd like to say some things in mitigation towards me, about this situation, and if it pleases the Court, I'd like to start out, because it wouldn't be practical for me to memorize this, so I've made a few notes if that's all right,

sir.

THE COURT: Certainly.

THE DEFENDANT: I would like to, first of all, Your Honor, if it please the Court, I wish to begin by apologizing profusely to this honorable Court, first of all, the United States, State of Tennessee, any victims, as well as my family and loved ones for any and all past behaviors, lifestyles, and associations that I may have contributed to my standing before you today.

With the utmost respect that I know how to exhibit, I understand this honorable Court has inherited this unique case due to Judge Jarvis being deceased now for some ten years.

Thank you.

And I understand this is a very complex case. It was a four-day trial, some 22-odd witnesses, several expert witnesses, so in considering that and Judge Jarvis now being deceased for ten years, that's why I'd like to explain a couple of circumstances, if I could, please.

THE COURT: Very well.

THE DEFENDANT: All right, sir.

With that said, I wish to point out, as you well know, Your Honor, Title 16 U.S. 3661 mandates that no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense, which a court of the United States may receive and

consider for the purpose of imposing appropriate sentence.

Due to no fault of anyone here today, I'd like to mention, Your Honor, Counsel, Ms. Davis, USA Mr. McLaurin had -- did not have the opportunity to be present during the bench trial of this case or had opportunity to observe the demeanor of 24 witnesses, two expert witnesses, body language, or facial expressions, and they didn't get to hear the testimony of these witnesses.

Now, I'm sure Your Honor is very familiar, I could tell by what you said to begin with with this case. With that, I'd like to go on with one of the reasons for the defense's recent supplemental argument that Ms. Davis filed on my behalf pursuant to Federal Rule 43(a) where Judge Jarvis failed to reconvene and had me present in open court.

And my only reason I want to mention that, Your Honor, is that has been forever lost to me. As you well know, the main reason for that is for us to come into court with trial counsel in front of Judge Jarvis and either try to convince him to change his mind or preserve certain issues of error trials, and I didn't get that. And it's forever lost now with him deceased.

So I'd like to, if I may -- pardon me, my hands are a little tied up here right now.

Let me pick up with I trust Your Honor will understand why I'm compelled to go into such detail, to raise

and explain these issues, as I was penalized on direct appeal by the Court of Appeals of the Sixth Circuit on direct review for failure to object and preserve these issues. And that's the only reason I'm bringing them to the Court's attention today. You wasn't there then, so I wanted to do that now, if I may.

Furthermore, Your Honor did not get the opportunity to hear or rule on the Congressional act of an IAD violation that the court made that the Sixth Circuit held on direct appeal that the government violated four of the five provisions, didn't offer proof that they didn't violate the fifth. However, due to Burton's failure to object is what the court held, they held me for plain error. I don't want to make that mistake again, so please understand that's my only reason for that.

I would also draw Your Honor's attention, one of the other matters I wish to redress and respectfully request Your Honor to consider is that I was found guilty in Count 9. And this never was addressed, just like to ask you to consider it, which was a 924(c) in the furtherance of a drug trafficking crime. And said it was the same gun that was used in this drugstore robbery.

However, the only evidence ever presented of that, Your Honor, was a one Chris Tucker's testimony that they were sitting there when I pulled up, talking about the driver of the

car, Clayton, he said, always was known to carry a gun and Jeep had one laying on the dash.

And, Your Honor, in all actuality, I don't know how that constitutes enough evidence for such a severe crime for a 20-year mandatory minimum sentence. So I did want to bring that to the Court's attention, if I may.

I would also draw Your Honor's attention to the presentence investigation report of October 14th, 1999 at Paragraph 44, the base offense level. I was assessed a base level of 24, the base level was. Then at Paragraph 45, under specific offense characteristics where it states, pursuant to U.S. 52G -- or 52K.1B5, if the firearm was used in connection with another felony offense, increases by four levels.

And then it was -- I'm quoting here, "the firearm was used in connection with a felony offense of robbery and possession with intent to distribute a controlled substance."

As a result of this, I was assessed additional four points. However, there is nothing in the record that supports this was fact, the firearm question. So I just wanted to ask Your Honor, you had mentioned the PSR earlier, I'd like to draw your attention to that, if I may.

In sentencing me today, this Court has a myriad of sentences that you can consider and choose from that I will briefly just touch on one or two, if I may, and respectfully request Your Honor consider some facts that were not available

nor lawful for the Court upon the original sentencing nearly 20 years ago, especially my past sentence -- my post-sentence rehabilitation that by the Sixth Circuit case law could actually be considered as extraordinary rehabilitation.

In light of one of warden -- the prison that I've been in for 12 of the last 23 years, who wrote a letter in my behalf stating, among many other exemplary conduct, that in his 25 years of professional experience in corrections, it is his opinion I would never reoffend, and if given the opportunity, I would be an asset to society or any community I would reside in.

Warden Daily's letter, as well as a dozen other letters of recommendation, in my behalf from family members, loved ones, clergy, schoolteachers, businessmen and women, pursuant to Pepper vs. United States were submitted to this Court for the Court's convenience and consideration in Ms. Davis' sentencing brief.

Several of these offer home placement, meaningful employment, and Your Honor has seen these precious ones who have come all this way in my behalf, and I'm so very grateful for that, and I'd like to thank them personally to take off from their work, spend their own money, some coming five and six hours away.

I've been doing this now, Your Honor, for around 41 years, and I can honestly say with true conviction, I can count

this a blessing. I promise you I would have never gotten where I am in the relationship I am today on the road I was traveling out there.

I'm not sure how many letters of recommendation Your Honor has received over your distinguished years on the bench, from a warden of a prison in behalf of a defendant standing before him. If any, however, I cannot imagine one being as powerful or more detailing of one's rehabilitation and life-changing experience that Warden Dailey wrote. He has now deceased this last January or he would be here today as well.

I have a letter that he wrote me, because I received a letter from him after I left this institution. And I -- he wrote me this letter of recommendation. I didn't ask him to do that, but I did tell him if I ever planned on using it, I would ask his permission first. And I have a handwritten letter from him in 2014, said you asked me if I could use the memorandum I wrote for you in 2008, and he said, of course you may.

So I also would like to mention recently Judge Mark W. Bennett summarized the current scientific evidence on addiction and how it physically changes the brain, concluding while the initial decision to take drugs is mostly voluntary, when drug addiction takes over, a person's ability to exert self-control can become seriously impaired. Stated plainly, addiction biologically robs drug addicts from their judgment, causing them to act impulsively and ignore the future

consequence of their actions. And that's in United States vs. Hendrickson.

Quoting Nora D. Volkow, Preface, National Institution on Drug Abuse, "Drugs, Brains and Behavior: The Science of Addiction," he went on to explain, by physically hijacking the brain, addiction diminishes the addict's capacity to evaluate and control his or her behaviors rather than rationally assert -- assessing the cost of their actions. Addicts are prone to act impulsively rather than accurately weighing future consequences.

And the only reason I bring that up, Your Honor, is judge recognized this, as you had mentioned and referred to earlier about the drug situation and what Ms. Davis said in reference to that.

With that said, there comes a point in time when I told you that I count this a blessing today. There does come a point in time, I believe, because I'm experiencing that, that I believe that further incarceration benefits no party at hand, and I think that time has arrived for me. I'm convinced of that in my mind as well as my spirit.

Nevertheless, with that said, I would like to -- although under the Guidelines, age was not normally relevant to sentencing, post-Booker district courts thereafter began considering age as a factor.

For example, in U.S. vs. Carvajal, a drug case, the

career offender Guideline of 262 months was considered too great, as the defender would have been 48 years old when he emerged from prison. The court opined that the legal -- that the goal of rehabilitation cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind, for we are all created in the image of God, a judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment.

During the past 23 years of incarceration, I've maintained clear conduct with absolutely no disciplinary reports, actions whatsoever, which Your Honor, I'm sure, is very well aware with the many years of experience on the bench, and all the convicted offenders who have stood before you, that this is virtually unheard of in a prison setting.

I have worked my way from a maximum high security United States penitentiary at USP Canaan in Pennsylvania and USP McCreary in Kentucky to having the Federal Bureau of Prisons removing the public safety factor from my record and transferring me to a medium security federal correctional institute at Manchester, Kentucky within the first five years of being in the Bureau of Prisons, and that is a remarkable feat in and of itself in this environment. And I have been there now five years.

I have been awarded certificates for numerous programs completed in the Parenting Class I, Parenting Class II, Release Prep on Finances, Beginner Instruments, Basic Auto Maintenance, Introductory Diploma, Overview of Residential Wiring, Communication 101. I was assigned as a supervisory chaplain clerk for two years before transferring to USP Canaan. I have successfully completed both Discipleship Spiritual Growth I, Disciple Spiritual Growth II while at McCreary, as well as release preparation program, spinning class, crochet at FC Manchester before becoming employed at UNICOR Industries. And I remain there where I operated a 20-head embroidery machine, as well as belt loop machine, making military fatigues for our armed forces troops before recently experiencing some medical issues due to chronic aging.

The Sixth Circuit, Your Honor, in U.S. vs. Ferguson noted that the Sixth Circuit had previously highlighted that the parsimony provision or judicial economy is the guidepost for sentencing decision post-Booker. And noted later in U.S. vs. Yopp, many times we have -- we have emphasized that a district court's mandate is to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in 3553(a)(2).

Your Honor, subsequent to the holdings in Booker, Ferguson, and Yopp, the extenuating circumstances regarding sentencing that I said were not lawful to consider at my

original hearing, such as drug addiction, age, medical condition, post-sentencing rehabilitation, et cetera, are now both relevant and lawful to consider for the purpose of imposing an appropriate sentence, as you well know.

In conclusion, I would like to add before stating the below-listed mitigating factors -- and these are in no way meant to excuse my past behavior, as it is no one's fault but my own, and I take -- accept full responsibility for those actions, nevertheless, they are a fact. I would ask Your Honor to take them into consideration upon imposing a sentence that is appropriate.

I lost my dad, as you heard Ms. Davis say, when I was nine years old as a result of his committing suicide. He left my mom with six children and to raise in the best of her -- she did the best -- absolute best that she could under the circumstances.

I was extremely angry for many years about this, that my father did this. I thought this was a easy way out that anybody could choose to do. Left my mother in a heck of a position. And up until I entered into a relationship in covenant with the Creator of this universe, where He showed me how to release this bitterness that I had and this anger towards him, and I've come today, Your Honor, to understand that anybody who commits an act like that, I believe is just a result of some -- allowing the enemy to sit on your shoulder

and whisper in your ear, "This is as good as it gets and there is no hope." And you show me a man with no hope, and I'll show you a man who has nothing to live for.

So I've come to understand a lot of things today through that revelation. I was always an athlete and took pride in taking care of my health. However, like many baby boomers of my era, I experimented with recreational drugs while playing college football. I eventually developed an opiate addiction in 1970 and was an addict until December the 8th, 1995, and have been clean and drug-free for nearly 23 years now for the first time since I was probably 15 years old.

More importantly, mine has not been as a result of a 12-step program. It was a result of me taking one step in January 1999 -- or 1996 when I entered into covenant with the Creator of the universe, the living God, and have been delivered and set free ever since.

Your Honor, my record is not impressive, to say the least. However, I'm able to -- I'm unable to erase the mistakes and poor decisions I have made in my past, as all of us are. Nevertheless, based upon the authority of God's word, I've been forgiven and pardoned by the highest court in this existence, the Master Himself. And I'm no longer the person I once was, nor my record reflects.

Unfortunately, none of us have a window available to our souls for others to review. And I'm well aware of the old

cliche of jailhouse religion. I've heard it most of my incarcerated years. So I understand the grave responsibility that many in your profession have concerning those of us in prison in relation to the safety of the public.

Oftentimes, this can result in stereotyping of one size fits all, though, when it's based solely on one's record, and you do not have a daily interaction to personally witness the progress one has made, especially after having so many negative dealings with every deviant known to mankind.

In light of this, I have to assume with your many years on this bench and in this field, that over the years you have developed a keen sense of discernment and are able to detect genuineness from imitation and recognize the depth of my sincerity.

Once again, I would ask you to be mindful of me being 69 years old shortly. I have finally obtained some wisdom, have much different perspectives today, and a greater value for this journey we are all on called life than I did prior to this incarceration in 1995.

I pray this has been revealed to you upon your review, and I will move upon your -- and it will move upon your inner man and will assist you in extending mercy and grace to me, as I do not want justice per se, because if I get what I deserve, I'm doomed, as it is only by mercy and grace that I stand before you today.

UNITED STATES DISTRICT COURT

Thank you, Your Honor, for listening and hearing me out, and know that you will remain in my prayers.

THE COURT: Thank you.

Marshal, let him be seated.

First of all, Mr. Burton has raised some issues during his allocution, Mrs. Davis, that this Court has addressed previously. I have issued two orders advising him that he must obtain Sixth Circuit Court of Appeals' approval to raise these issues, and they must be done in a successive Section 2255. So I'll not address them further.

This Court is required to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. Section 3553(a). The first thing we consider is the history and characteristics of the defendant, including his age, his physical and mental condition, and his prior criminal history. We consider everything about a person's life.

Concerning these crimes, the Court has issued a memorandum of opinion granting this hearing, which recited the facts of the case, and I'll read them from the Court's memorandum opinion.

"Petitioner robbed a pharmacy at gunpoint and then sold the various stolen drugs. He was subsequently convicted of conspiring to distribute controlled substances in violation of 21 U.S.C. Section 846 and 841(a)(1), (b)(1)(c), robbing a

pharmacy in violation of 18 U.S.C. Section 2118(a), using a firearm during the commission of both the drug conspiracy and the robbery in violation of 18 U.S.C. Section 924(c), and possessing a firearm as a felon in violation of 18 U.S.C. 922(g)(1).

"Petitioner had several prior Kentucky convictions at the time of his conviction for the instant offense, including an October 31st, 1975 kidnapping and October 31st, 1975 first-degree burglary and October 31, 1975 first-degree robbery, a 1976 escape, a 1983 first-degree robbery.

"Based on three of those offenses, Judge Jarvis, the presiding district judge at the time, determined that all the 1975 offenses arose out of one occasion, and that only one of those convictions could serve as a predicate as a violent felony."

The rest of that addresses what has become known as a Johnson issue.

So we learn quickly, and from the record, the nature and circumstances of the offense. The presentence report details the fear, confusion, shock that these victims endured during these robberies. Obviously, this defendant was a strong, able-bodied man when he committed these offenses. But he was addicted, as he admits.

But the sentence to be imposed needs to reflect the seriousness of the offense, and this was several very serious

offenses involving guns and violence and drugs.

It is to promote respect for the law. All these crimes were against the law, and the defendant knew they were against the law.

And the sentence must provide just punishment. We need to send a message to others, if you participate in criminal -- crimes, conduct, if you do the crime, you'll do the time.

Another reason is to protect the public from other further crimes by this defendant. Obviously, since he was sentenced, he has not committed any further crimes that we know of.

We also must consider the applicable Guideline range. And this Court recognizes the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

And this Court must also order restitution to any victims of this offense.

But we may consider post-offense rehabilitation since Pepper vs. U.S. in the Supreme Court 2011. We also may consider a total sentencing package and may consider the length of a mandatory minimum sentence when determining the appropriate sentence for the remaining counts. As we all know, the Guidelines are now advisory, whereas they were mandatory when Judge Jarvis imposed sentence.

Mr. Burton mentions a letter from Warden Tom daily. I have a copy of the letter from the Kentucky Department of Corrections, Luther Luckett Correctional Complex, La Grange, Kentucky. A memorandum To Whom It May Concern from Tom Dailey, Warden, July 8, 2008, In Re: Charles W. Burton with Social Security number. "I am writing concerning Mr. Charles William Burton, who I have known since 1997, as his Unit Director" --

THE DEFENDANT: Yes, sir.

THE COURT: -- "and the past five years as Warden of the institution he is -- was incarcerated in.

"However, it is even more important to point out here, that four of these past five years, it has been my pleasure to call this gentleman, whom I believe to be a genuine appointed man of God, a Warrior for the Word, and a Brother in Christ Jesus.

"Not often does a Warden get the opportunity to come to know many of the inmates in his institution on a personal basis for obvious reasons, other than their institutional record reflects.

"Nevertheless, this man had once developed an infamous reputation among staff, as a sophisticated inmate, who had allured them for years by being involved in a number of illegal activities within the prison system.

"Once had him placed on Administrative Segregation for investigation, where I had the opportunity to witness and

pray with him.

"Afterwards, I found him to be a man of his word, of character, honor and of integrity. He went from having the most infamous reputation to being the most positive influence of any inmate in my institution, witnessing to inmates on the compound, a lot of whom who were considered 'Old Timers,' and sophisticated themselves, he conducted prayer groups in the yard, was a peacemaker, and promoted the gospel of Jesus Christ, even leading several staff members to confessions of faith.

"I cannot speak as to his -- this man's past guilt or innocence, other than to say I believe he has been pardoned by the Most High Court, by the Master Himself; however, I can attest to the person I once knew him to be to the man that I personally witnessed him to grow into today.

"In my personal, and over twenty-five years of professional experience in criminal justice, it is my belief that this man would never re-offend, and if given the opportunity, I am convinced he would not only be an asset to whatever community he resides in, but would also be extremely effective in prison ministry, offering many others hope, especially considering he has been incarcerated for 30 years himself.

"I have placed trust and confidence in this man, and if I can be of further assistance, or provide any more

information concerning him, and my belief as to his readiness to re-enter society, please do not hesitate to contact me at the above address and telephone number.

"Sincerely, Tom Dailey, Warden."

I got a letter from an attorney, David Nunery. Mr. Nunery is a civil practitioner in Campbellsville, Kentucky, the law firm of Nunery & Call. He says he met with Mr. Burton, began when he visited Mr. Burton at the Luther Luckett facility in Kentucky at the invitation of Mr. Burton's brother, who's a member of the Sunday school class, which I have taught for nearly 20 years in Campbellsville Baptist Church. Starts talking about his relationship with Mr. Burton.

He says, "In my professional life and public life, I've been a member of the Campbellsville City Council for nearly 20 years, I have been active in leadership roles at Campbellsville University for many years, I currently sit on the Board of Trustees of the Kentucky Baptist Foundation. I believe I have become a good judge of character, particularly those who profess to have life-changing relationships with Jesus Christ.

"I am fully convinced that Mr. Burton will be a credit to society and to any church and community where he chooses to live if he's granted the privilege of clemency and I therefore strongly support his efforts to be released from his incarceration."

UNITED STATES DISTRICT COURT

He goes on. We have letters from other ministers, other church facilities, family.

One I found to be real interesting was a letter from Joe Neal, owner of Neal Brothers Plumbing, Incorporated.

Says, "Please be advised I'm writing in reference to Mr. Charles Burton who has been a friend of my family for nearly 50 years. We have remained in touch with Mr. Burton throughout his incarceration. My brother has visited Mr. Burton numerous times over the years. My sister recently visited him at FCI Manchester.

"Neal Plumbing -- Brothers Plumbing, Inc. is a third generation business with my grandfather and my father after him and now myself and my brother. Each generation went out to begin their own company and all have made -- our self-made men, living in Lexington and Nicholasville, Paris, and other surrounding communities in Kentucky for nearly 130 years.

"We are very well aware of Mr. Burton's past substance addiction problems, and have come to understand it does not discriminate but touches all walks of life.

"We also have firsthand knowledge that Mr. Burton is not in fact the same individual he was 21 years ago before this present offense he is now serving. He has been clean and substance free for over two decades due to his maturation and his Spiritual walk and Biblical faith.

"It's my observation over the years knowing

Mr. Burton that he possesses a tremendous amount of interpersonal skills and excelled in the field of sales. He's achieved an Associates Degree in 2006 with a GPA of 3.5, as well as completed and received a certificate in 2009 for Introduction to Plumbing Class.

"I believe Mr. Burton would be an asset not only in the community he resides in, but any employer he would be employed by. With that said, I would like to take this opportunity to inform whomever's hands this falls into that Mr. Burton has meaningful employment at Neal's Plumbing, Inc. upon his release from incarceration, will also provide a home placement as well."

It goes on with salutatory closings and signed Jim [sic] Neal.

There are other letters, family and friends. There are a number of certificates he had received from the Bureau of Prisons for completion of assignments and classes.

When I consider the crimes this defendant has committed, the change he's made in his life and where he is today, I believe this to be one of the most outstanding post-offense rehabilitation that I've seen.

This Court has been blessed lately. I've had a number of defendants that I have sentenced to see the light, to change substantially their way of living, moved on to greater and better things. They have written me many letters thanking

me for my recommendations on their conduct once I sentenced them.

There's an issue that's been brought to my attention, and that is the Kentucky sentences. This Court has consistently followed the recommendations, the Guidelines concerning when a sentence should be run concurrently, partially concurrent, or consecutive to any other sentences. And the Court, if the case is not related to the instant case, consistently will find that it must be consecutive. If it is sufficiently related, we make it run concurrent. So we'll address that shortly.

So for the record, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, the advisory Guideline range, as well as the other factors listed in Title 18 U.S.C. Section 3553(a).

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court on Counts 1 through 4, 6 through 9 of the second superseding indictment that the defendant, Charles William Burton, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 360 months.

This term consists of terms of 60 months as to Counts 1, 2, 4, 6, 7, and 8 to run concurrently, 60 months as to Count 3 to run consecutively, and 240 months as to Count 9 to run consecutively.

The term of imprisonment imposed by this Court are to be served consecutively to the revocation sentences in the following cases: Boyle County Circuit Court, Danville, Kentucky, Docket No. 75-95C, 75-96C, 75-97C, 76-85C, and 76-86C; Fayette County District Court Lexington, Kentucky, Dockets No. 70330A, 70331A, and 79-CR-238; Madison County Circuit Court, Richmond, Kentucky, Docket No. 83-CR-034; Jefferson County Circuit Court, Louisville, Kentucky, Docket No. 83-CR-0317; and Lyon County Circuit Court, Eddyville, Kentucky, Docket No. 84-CR-0440002, as these cases are insufficiently related to the instant offense.

It is felt that this sentence will afford adequate deterrence and will provide just punishment.

It is further ordered that you shall make restitution in the following amount, $3,223.94 to Rite Aid Corporation, 2025-B, Leestown Road, Lexington, Kentucky 40511 in accordance with 18 U.S.C. Sections 3663 and 3663A or any other statute authorizing a sentence of restitution.

The restitution shall be paid in full immediately. The government may enforce full payment of restitution ordered at any time, pursuant to Title 18 U.S.C. Section 3612, 3613, and 3664(m).

The United States Bureau of Prisons, United States Probation Office, the United States Attorney's Office shall monitor the payment of restitution, and reassess and report to

the Court any material change in your ability to pay.

You shall make restitution payment from any wages that you may earn in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of your release from imprisonment shall become a condition of supervision.

The Court finds that you do not have the ability to pay interest on the restitution ordered, and the interest is hereby waived.

Upon release from imprisonment, you shall be placed on supervised release for a term of six years. This term consists of six years as to each of Counts 1 and 6; terms of five years as to each Counts of 2, 3, 9; a term of four years as to Count 7; and terms of three years as to Counts 4 and 8.

While on supervised release, you shall not commit another federal, state, or local crime. And you must not unlawfully possess and must refrain from the use of a controlled substance.

You must comply with the standard conditions that have been adopted by this Court in Local Rule 83.10. In particular, you must not own, possess, or have access to a firearm, ammunition, a destructive device, or any other dangerous weapon.

You shall cooperate with the collection of DNA, as

directed by the probation officer.

In addition, you shall comply with the following special conditions: You shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as you are released from the program by the probation officer.

You shall provide the probation officer with access to any requested financial information. You shall not incur any credit charges on existing accounts or apply for additional lines of credit without permission from the probation officer until restitution has been paid in full. In addition, you shall not enter into any contractual agreements which obligates funds without permission by the probation officer.

You shall pay any financial penalty that's been imposed by this judgment. Any amount that remains unpaid at the commencement of the term of supervised release shall be paid on a monthly basis at an amount of at least ten percent of your net monthly income.

It is further ordered that you pay to the United States a special assessment of $400, pursuant to Title 18 U.S.C. Section 3013, which is due and payable immediately.

The Court finds that you do not have the ability to pay a fine, and the Court will waive the fine in this case.

Advise you that Title 18 U.S.C. Section 3565(b) and 3583(g) require mandatory revocation of supervised release for

possession of controlled substance or of a firearm or for refusal to comply with drug testing.

Now, pursuant to Rule 32(j)(1)(B) of the Federal Rules of Criminal Procedure, the Court advises you that you may have a right to appeal the sentence imposed in this case.

A notice of appeal must be filed within 14 days of judgment. If you request and so desire, the clerk of the court can prepare and file the notice of appeal for you.

It is further ordered that you be remanded to the custody of the Attorney General pending designation by the Bureau of Prisons.

The Court will recommend that you receive 500 hours of substance abuse treatment from the Bureau of Prisons Institution Residential Drug Abuse Treatment Program.

It is further recommended that you participate in educational classes and vocational training to learn a trade or other marketable skills while incarcerated.

Additionally, the Court will recommend that you undergo a physical evaluation and receive needed treatment while in the custody of the Bureau of Prisons.

Does either party have any objection to the sentence just pronounced by the Court that have not previously been raised?

MR. McLAURIN: No, Your Honor.

MS. DAVIS: No, Your Honor, we don't.

THE COURT: Thank you.

Ms. Davis, this Court has carefully considered your case. The Court has tried to be fair with you, concerning all the factors we have to consider considering your record. I want you to know that I'm impressed by the number of witnesses who have come in your support. They believe in you. I believe in you. Good luck.

THE DEFENDANT: Thank you.

THE COURT: Mr. Clerk, nothing further, Court will stand adjourned.

THE COURTROOM DEPUTY: All rise. This honorable court stands adjourned.

(Proceedings adjourned at 2:34 p.m.)

CERTIFICATE OF REPORTER

STATE OF TENNESSEE

COUNTY OF KNOX

I, Rebekah M. Lockwood, RPR, CRR, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings; and that the foregoing pages constitute a true and complete computer-aided transcription of my original stenographic notes to the best of my knowledge, skill, and ability.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand at Knoxville, Knox County, Tennessee this 22nd day of August, 2018.

Rebekah Lockwood

REBEKAH M. LOCKWOOD, RPR, CRR
Official Court Reporter
United States District Court
Eastern District of Tennessee

(E)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

1997 AUG 23 A 8:55
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY DEP. CLERK

UNITED STATES OF AMERICA,
PLAINTIFF

VS. 3:97-cr-154

CHARLES WILLIAM BURTON,
DEFENDANT

MOTION FOR LEAVE TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c)

* * * * *

Comes now the Defendant, CHARLES WILLIAM BURTON, pro-se, in his own behalf and hereby moves this Honorable Court and respectfully requests this Court to consider hearing defendant pursuant to Local Rule 83.4(c). In support of his Motion defendant states the following.

1. Defendant is presently represented by Mr. James A.H. Bell and Mr. Jackson L. Case II, however upon discussing several of the issues defendant wishes to be addressed in this Motion, counsels for the record has refused to put these issues before this Honorable Court on behalf of the defendant which defendant will use counsels letter stating as much as an exhibit in his MEMORANDUM IN SUPPORT OF MOTION TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c). (Exhibit 2) (184)

2. Defendant was denied by counsel for the record without legal reasoning and as such the burden now

[D.E. 184]

has shifted for need from the defendant to attempt to protect his Constitutional Rights as a pro-se litigant

3. Defendant does not give his consent to his Appointed counsel nor this Honorable Court to waive his Constitutional Rights to have viable issues presented before this Court or any other Court of lawful Jurisdiction nor is defendant waiving his rights to the assistance of counsel at any phase in this case.

4. In the case at bar, defendant is left without the assistance of counsel to present these particular issues before this Honorable Court for consideration of his Constitutional Rights of his questions of law and as such would be without the right to raise and present such issues on Appeal without review from the District Court.

5. Defendant took Judicial notice from this Honorable Court in the United States Magistrate Judge, Robert P. Murrian's Order filed August 31, 1998 where he cites Local Rule 83.4(c) that provides as follows:

> Representation pro-se after Appearance by counsel. Whenever a party has appeared by attorney, that party may not there after appear or act in his or her own behalf in the action or proceeding unless an Order of substitution shall first have been made by the Court, after notice by the party to the attorney and to the opposing party. "However, the Court may, in it's descretion, hear

A party in open court, notwithstanding the fact that the party is represented by an Attorney".

6. It is on these basis that defendant moves this Honorable Court and respectfully requests that this court consider hearing defendant and the substance of these issues in open court during or upon completion of the Finial Sentencing phase pursuant to Local Rule 83.4(c)

7. Defendant realizes how extremely busy this Honorable Court is, and it is not defendant's motive nor intent to delay or take up any unnecessary time of this Court's, which is why defendant is presenting the substance of these issues in the form of a pro-se motion, where the Court will have an opportunity prior to Finial Sentencing at the Court's convenience to consider these issues, as well as making a determination to hear defendant in open court, not withstanding the fact that the party is represented by an attorney pursuant to Local Rule 83.4(c)

8. Defendant's understanding is that some of these viable issues are cause for mistrial in this case, that defendant's Constitutional Right to due process of law was not protected and that some of these matters occured without Your Honor's knowledge and this Court should be made aware of same.

CONCLUSION

WHEREFORE, the defendant respectfully request: this Honorable Court to grant his pro-se MOTION

4.

FOR LEAVE TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c).

Charles William Burton

CHARLES WILLIAM BURTON,
DEFENDANT PRO-SE
KNOX COUNTY JAIL
400 MAIN STREET
KNOXVILLE, TENNESSEE 37902

NOTICE

Please take notice that a copy of the foregoing MOTION FOR LEAVE TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c) has been mailed, postage prepaid to the Clerk of the Court of The United States District Court, Eastern District of Tennessee at Knoxville, United States Courthouse, Market Street, Knoxville, Tennessee 37902 on this 19 day of August, 1999.

Charles William Burton
CHARLES WILLIAM BURTON
Defendant, pro-se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c) has been mailed, postage prepaid to Honorable Steven H. Cook Assistant United States Attorney, 800 Market Street, Suite 211, Knoxville, Tennessee, and Honorable James A. H. Bell, P.C., 110 W. Summit Hill Drive, Knoxville, Tennessee 37902 on this 19 day of August, 1999.

Charles William Burton
CHARLES WILLIAM BURTON
Defendant, pro-se

(F)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

1999 AUG 23 A 8:55

U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY: DEP. CLERK

UNITED STATES OF AMERICA,
PLAINTIFF

VS. 3:97-CR-154

CHARLES WILLIAM BURTON,
DEFENDANT

MEMORANDUM IN SUPPORT OF THE MOTION TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c)

* * * * *

Comes now the DEFENDANT, CHARLES WILLIAM BURTON PRO-SE IN his own behalf, and hereby moves this HONORABLE Court to hear this DEFENDANT pursuant to Local Rule 83.4(c) and in support of his MOTION TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c) would show this Court the Following:

1. On December 17, 1997 defendant was indicted on the above-styled indictment number. On December 22, 1997 this court issued a Writ of Habeas Corpus Ad Prosequendum On January 12, 1998, less than 30 days later the United States Marshals took custody of defendant at Luther Luckett Correctional Complex in LaGrange, Kentucky and transported defendant to the Knox County Jail in Knoxville, Tennessee where he was lodged.

Pursuant to the Speedy Trial 18 § 3161 of the

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[DE 185]

Tennesee Federal Criminal Rules of the Court (j)(4) states, "When the person having custody of the prisoner receives from the Attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that Attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery)." Defendant was not afforded this opportunity.

Since defendant was arraigned on the above-styled indictment number on January 20, 1998 defendant's trial has been continued approximately five times. The first time for 112 days, the second time for 50 days, the third time for 63 days, the fourth time for 68 days and the fifth time for 76 days All in violation of 18§ 3161(c)(1) and (h)(1)(I)

On April 23, 1998, defendant was transported from the Knox County Jail in Knoxville, Tennessee back to Luther Luckett Correctional Complex in LaGrange, Kentucky, by way of the United States Federal Penitentiary in Atlanta, Georgia, where he was given an institutional number and incarcerated for ten days prior to returning to Luther Luckett on May 4, 1998.

On September 4, 1998, the United States Marshal's Service placed a detainer on the defendant at Luther Luckett Correctional Complex. On October 21, 1998 this court issued another Writ of Habeas Corpus Ad Prosequendum, and the United States Marshal's took custody of defendant on November 20, 1998, transported him to the Laurel County Jail in London, Kentucky where defendant remained until November 23, 1998, where the United States Marshals transported defendant to the Knox County Jail in Knoxville, Tennessee and lodged there

Prior to this however, the government issued a Writ of Habeas Corpus Ad Prosequendum on October 16, 1998, to have defendant in the United States District Court, Eastern District of Tennessee at Knoxville on October 20, 1998, but Authorities required more notice than was given, and accordingly, Mr. Burton was not present. This is what is stated in the Memorandum and Order and revised order on Discovery and Scheduling filed October 21, 1998.

Once again after defendant's delivery on November 23, 1998, defendant was not afforded the opportunity of contesting the legality of his delivery pursuant to 18 § 3161(j)(4) It should be noted that counsel for the record failed to move for dismissal prior to trial pursuant to 18 § 3162(a)(2), except under the provisions of the Interstate Agreement on Detainers Act Article III(a) which this Court previously overruled.

2. During the trial phase of the above-styled indictment one Chris Tucker, who was a witness for the government testified against the defendant. Upon conclusion of his testimony Chris Tucker made a statement to this Court, that he had called home and was informed, that since he was testifying against the defendant, when he returned home his tongue would be cut out and stuck up his butt.

Not only was defendant not involved in any such alleged threats, if in fact there were any made, however defendant was extremely prejudiced by this statement of this witness, which was evident by how upset this Court became in its response in open court. The defendant was just as upset, as he knew there was no validity to this witnesses state-

ment, however defendant was not afforded an opportunity to rebut this statement, and had a jury heard such a statement the defendant would have been extremely prejudiced, and this Court would have more than likely instructed the jury to strike said statement and not consider same, however this was a bench trial and the record itself will reflect that this Court took issue with this statement by its response and it was inevitable for defendant to be prejudiced by such.

3. Upon the government and the defense both resting their case, counsel for all parties went into the Judge's Chambers, and upon returning counsel for the record for the defendant, Mr. James A.H. Bell advised defendant that Mr. Steven H. Cook, Assistant United States Attorney had made the statement that counsel for defendant had pulled the oldest prosecutorial trick ever on him by not calling defendant's Father-in-law to testify, who was one of defendant's Alibi witnesses and that Judge Jarvis had gotten a big kick out of it and indicated as much by laughing.

Once again had this been a jury trial, and the jury had heard this encounter between defendant's counsel, and the Assistant United States Attorney the jury would have had to consider, whether counsel for the government had some damaging evidence against this Alibi witness, that was detremental to the defendant and this too would have prejudiced the defendant. Defendant thinks it is impossible for this not to have stuck out in this Court's mind, when considering the totality of evidence presented and in reaching a verdict.

4. Upon conclusion of closing arguments during the trial phase of these proceedings the record will reflect that this Court Ordered or required all parties to file post-trial briefs [Docs. 168 and 179, p. 256] and set dates for same to be due. Defendant does not have a copy of the trial transcript, however to the best of defendant's knowledge it is his understanding, Mr. Steven H. Cook, Assistant United States Attorney's brief was due on April 22 or April 29, 1999, which the record will reflect, however the government did not file his post-trial brief in a timely manner as ordered or required by this Court nor did the government file a Motion for Extension of Time stating any reasons why he failed to do so. Defendant then notified counsel for the record afterwards and advised him if the government failed to file his post-trial brief in a timely manner as ordered or required by the Court, and obviously never filed a Motion For Extension of Time since defendant had never received a copy of such then defendant wanted his counsel to file a Motion in Default on the government.

On May 10, 1999, Mr. Jackson L. Case IV, one of the counsel's for defendant came to the Knox County Jail and informed defendant, that he had talked to Clifford A. Rodgers, law clerk to this Court, and Clifford A. Rodgers said, that since no party had requested finding of facts, then post-trial briefs were not necessary, that the Judge had reached a decision, his mind was made up and it would not do any good to file briefs. He went on to say he received a positive feedback from Clifford A. Rodgers, which he felt he could detect if it was a negative decision since Cliff would have encouraged him to file a brief for

Appeal purposes. Mr. Case went onto say he would talk to Mr. Micheal P. McGovern, counsel of record for co-defendant Crozier to see what his position was and would get back with me to inform me when I would be going before the Court for the Court's verdict.

However, it was later discovered that this Court would render the decision in writing, and upon defendant receiving a copy of the Court's General Findings footnote #2 at the bottom of page 2 states, "The record reflects that the Court initially indicated that the parties would be required to file post-trial briefs [See Docs. 168 and 179, p. 256]; however, the court and the parties subsequently discussed the fact that no party had made a request to "Find the facts specially." See Rule 23(c), Federal Rules of Criminal Procedure. Consequently, the parties were then allowed, as opposed to required, to submit post-trial briefs. On May 13, 1999, Jackson L. Case, IV, one of the Attorneys of record for defendant Burton, advised Clifford A. Rodgers, Law Clerk to the undersigned, by telephone, that his client wished to file no further briefs in this matter. Likewise, the Law Office of Micheal P. McGovern, Attorney of record for defendant Crozier, advised Mr. Rodgers by telephone on May 17, 1999, that, in order to expedite the court's issuance of its general findings, his client did not wish to file a brief. Finally, AUSA Steven H. Cook, advised Mr. Rodgers by telephone on May 18, 1999, that the government did not wish to file a post-trial brief. Thus, this matter is now ripe for adjudication." (Exhibit 1)

First, defendant would point out that the court,

Clifford A. Rodgers, and the parties never subsequently discussed the fact that no party had made a request to "Find the facts specially" until after the government's post-trial brief was not filed in a timely manner on April 22, or April 29, 1999, and him failing to file a Motion For Extension of Time, since it was not determined that defendant would not be filing his post-trial brief until May 13, 1999, and Micheal P. McGovern told co-defendant Crozier on May 4, 1999, that the government's post-trial brief had not yet been filed nor was the trial transcripts completed. Therefore, it was not until after this time that the parties were then allowed, as opposed to required to submit post-trial briefs.

Next, Assistant United States Attorney Steven H. Cook never advised Mr. Rodgers that the government did not wish to file a post-trial brief until May 18, 1999 some three or four weeks after the government's brief was due, and he failed to file same in a timely manner.

Finally, defendant took judicial notice during trial, when this Court verbally reprimanded Mr. James R.H. Bell, Counsel for the defendant for advising or notifying Mr. Clifford A. Rodgers, law clerk for this Court concerning him not wishing to subpoena Mrs. DeBusk's psychiatrist or his medical records rather than advising Your Honor personally. The record will reflect that Your Honor eluded to the fact that his law clerk was not this Court and Mr. Bell should advise the Court personally, however during this very important phase of these proceedings ALL parties constantly was advising Mr. Clifford A. Rodgers by telephone as to what their intentions were, which is why I wished to

make this Court aware of the statements both the defendant as well as the co-defendant's attorneys informed them of, that Clifford A. Rodgers stated, "it would not do any good to file briefs as the Judge's mind was made up." Therefore, either both defendant's or this Court has been misinformed. This violates due process of law, is not Fundamental fairness, was conducted by telephone with this Court's law clerk rather than in open court with defendant's and ALL parties present including Your Honor.

Defendant wrote his attorney's explaining this matter, that defendant intended on correcting the record at Final Sentencing where it would be accurate as to the statement Mr. Case, one of the counsel's for defendant, told defendant Mr. Clifford A. Rodgers made. Defendant received a letter from Mr. Bell, counsel for the record and on page 2 of Mr. Bell's letter in the fourth paragraph under "Fourth," Mr. Bell states, "it is not an issue that we will raise on appeal or at sentencing." (Exhibit 2)

5. Jackson L. Case IV, one of the counsels for defendant, addressed and even cites Article IV (c) in his MOTION TO DISMISS on violation of the Interstate Agreement on Detainer, hereafter IAD, which he filed March 29, 1999, and it states in part, "trial shall commence within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

However, Mr. Case IV refused to argue this issue in his MOTION TO DISMISS, nor did he demand a Dismissal

with prejudice as a result of a violation of Article IV (c), as set out in the IAD, and what the United States Supreme Court held in, United States v. Mauro, 436 U.S. 340, 362 (1978), as I requested and even insisted on which I would like to make a part of the record now.

The reason I refer to Mr. Case's Motion to Dismiss rather than defendant's is it should be apparant to this court, since it is to the defendant, that Counsel was even reluctant to file his motion, which is indicative by Counsel's Introduction and Conclusion of his Motion, where he states, "under the express direction and instructions of defendant. Of course, had counsel followed the express directions and instructions of defendant then he would have included Article IV (c) in said Motion as defendant insisted on.

This court overruled Counsel's Motion to Dismiss, and since no findings of facts were given nor any reason stated, defendant can only assume the basis for that ruling was as a result of Assistant United States Attorney's HARR's Response To Defendant Burton's Motion To Dismiss, where she cited U.S. v. Eaddy 595 F. 2d. 341 (6th Cir. 1979), which held the rights of a prisoner under the IAD maybe KNOWINGLY waived.

The government attached a copy of a waiver signed by myself, Beth Ford, Federal Defenders Service, Assistant U.S. Attorney, Steven H. Cook, and Ed Baker of the Marshals Service, however, it should be pointed out, that when Ms. Ford came to the Knox County Jail to have me sign said waiver, there was only one place on the form she had for a signature which was mine. Ms. Ford never at any time

Advised me of ANY right I was giving up, nor did ANYONE else for that matter and Ms. Ford obviously had the other signatures placed on the form after she received mine and left the jail.

At no time was defendant ever advised by ANYONE of any rights he would be giving up under the IAD, and even if this court gives any validity to the government's argument to this being a KNOWINGLY waiver, which there was no reason for defendant to have KNOWN any rights he may have at that time under the IAD, as he was not in the Eastern District of Tennessee at Knoxville under the IAD, but rather a Writ of Habeas Corpus Ad Prosequendum, then pages 80 beginning with line 17 through page 86 ending at line 19 of the Suppression Hearing transcript will show this was not a KNOWINGLY waiver, and the ONLY right defendant was ever advised he was waiving was defendant's right to be present at the Daubert Hearing. It was defendant's understanding he was signing the waiver to be present at the Daubert Hearing, as U.S. Magistrate Judge, Robert P. Murrian, had told defendant while he was under oath waiving his right to be present at said Daubert Hearing. (Exhibit 3)

IF the record itself is not proof enough, then the waiver itself states, "By signing this waiver, I agree and understand that I may not subsequently raise the defense of a violation of the Interstate Agreement on Detainers in this case, INSOFAR as it relates to my return to state custody." (Emphasis added) (Exhibit 4).

Defendant arrived in the receiving state, Eastern District

of Tennessee at Knoxville on November 23, 1998, after the government lodged A detainer on defendant at Luther Luckett Correctional Complex in LaGrange, Kentucky on September 4, 1998, then requested temporary custody of defendant by presenting A Writ of Habeas Corpus Ad Prosequendum on November 20, 1998, which the government then became bound by the Agreement As the United States Supreme Court held in U.S. v. Mauro 436 U.S. 340, 362 (1978)

The date defendant arrived in the receiving state on November 23, 1998 until defendant's trial date of this indictment on April 5, 1999, is A total of one hundred thirty three (133) days. That exceeds the 120 day provision set out in Article IV (c) by thirteen (13) days.

Article IV (c) Further states, "but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." It is this defendant's position that the provisions set out in Article IV (c) of the IAD were violated

Article V (c) of the IAD, which states in part "in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the Appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and the detainer based therefor shall cease to be of any force or effect".

6. On May 25, 1999, Judge Jarvis rendered his verdict in his GENERAL FINDINGS. On May 26, 1999, counsel for defendant, James A.H. Bell came to the Knox County Jail to discuss these GENERAL FINDINGS with defendant and to give him a copy of same.

On May 28, 1999, Mr. Jackson L. Case IV, another counsel of record for defendant, and Mrs. Lori Gregory of the Probation and Parole OFFICE came to the Knox County Jail to see defendant. Mrs. Gregory obtained some information from defendant concerning her pre-sentencing investigation report. (HEREAFTER P.S.I.)

Mrs. Gregory informed defendant, that she had thirty-five days in which to complete her P.S.I. report, and turn it over to my Attorneys, then they had ten days to file any objections and Mr. Case confirmed this. Mrs. Gregory went on to advise me, that Judge Jarvis had instructed her to complete the P.S.I. in time to have defendant final sentenced before Judge Jarvis leaves for vacation on August 15, 1999.

On June 7, 1999, defendant received a letter from Mr. Bell, counsel of record for defendant, which was dated June 4, 1999, and in the third paragraph of page 2 Mr. Bell states, "Lori Gregory with the probation office has forty-five days to do her report; we have

On July 30, 1999, after sixty-seven days had passed, since Judge Jarvis rendered his verdict and, without defendant hearing from his Attorneys, nor Mrs. Gregory, defendant wrote Mrs. Gregory A letter inquiring about the P.S.I. report, however as of todays date defendant has not received A response to that letter. (Exhibit-5)

Due to the fact Judge Jarvis is on vacation, and if he is only off one week, and defendant was to be final sentenced upon the date Judge Jarvis returns from vacation, which defendant is assuming will be August 23, 1999, and that is extremely unlikely, since no date has been set, however if that was to occur then that would be some eighty-eight days from the time Judge Jarvis rendered his verdict.

The fact of the matter is defendant has been illadvised of the inter office guideline time limits concerning the P.S.I. by Mrs. Lori Gregory of probation and parole as well as both of counsels of record for defendant. It is defendant's position this violates his rights to due process of law.

CONCLUSION

requesting this Honorable Court to consider this Motion, as an Oral Motion, that defendant intends to respectfully request the Court to hear him in open court during final sentencing pursuant to Local Rule 83.4(c), Defendant only wishes to present same in advance for the Court's convenience, and consideration, as to not take up this Court's valuable time during final sentencing, since defendant is aware from his trial, that this Court sometimes uses time in between trials to final sentence other defendants, and after doing so, defendant respectfully requests this Honorable Court to enter an appropriate Order dismissing this case with prejudice, declare a mis-trial and or any other relief this Court deems the defendant is entitled to.

Respectfully Submitted,

Charles William Burton

CHARLES WILLIAM BURTON,
Defendant, pro-se
Knox County Jail
400 Main Street
Knoxville, Tennessee
37902

NOTICE

Please take notice that a copy of the foregoing MEMORANDUM IN SUPPORT OF THE MOTION TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c) has been mailed, postage prepaid to the Clerk of the Court of the United States District Court, Eastern District of Tennessee at Knoxville, United States Courthouse, Market Street, Knoxville, Tennessee 37902 on this 19 day of August, 1999.

Charles William Burton
CHARLES WILLIAM BURTON,
Defendant, pro-se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF THE MOTION TO FILE MOTION PRO-SE TO BE HEARD PURSUANT TO LOCAL RULE 83.4(c) has been mailed, postage prepaid to Honorable Steven H. Cook, Assistant United States Attorney, 800 Market Street, Suite 211, Knoxville, Tennessee 37902, and Honorable James A.H. Bell, P.C., 110 W. Summit Hill Drive, Knoxville, Tennessee 37902 on this 19 day of August, 1999.

Charles William Burton
CHARLES WILLIAM BURTON
Defendant pro-se