No._____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

DAMON WOODARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

APPENDIX

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INDEX OF APPENDICES

Appendix A

Amended Motion to Vacate, Set-Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, United States District Court for the Southern District of Florida Civ. Case No. 0:19-cv-62289-WPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Fort Lauderdale Division)

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 0:19-cv-62289-WPD
(0:18-cr-60065-WPD)

DAMON WOODARD,
Defendant.
_____/

Judge: DIMITROULEAS

AMENDED MOTION TO VACATE, SET-ASIDE OR CORRECT SENTENCE

COMES NOW the Defendant, DAMON WOODARD, by and through undersigned counsel and pursuant to 28 U.S.C. § 2255, and moves this Honorable Court for an Order vacating and setting-aside the sentence in the above-styled cause. In support, Defendant submits the following:

1. Defendant was charged by indictment with four (4) counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and four (4) counts of brandishing a firearm during and in relation to the Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

2. Attorney Herbert Erving Walker, III, 7601 E. Treasure Dr., Apt. 1907, Miami Beach, FL 33141, represented Defendant during all relevant stages of the proceedings.

3. On June 29, 2018, Defendant entered an open plea of guilty to the § 924(c) violations alleged in Count 2 (brandishing a firearm in relation to Count 1), and

Count 4 (brandishing a firearm in relation to Count 3). The government dismissed the remaining counts. Sentencing was deferred pending preparation of a presentence investigation report (PSI).

4. On September 10, 2018, in accordance with the requirements of § 924(c)(1)(C)(i) (2017), this Court imposed a mandatory minimum sentence totaling 32 years, which consisted of a 7-year term as to Count 2, followed by a consecutive term of 25 years as to Count 4.

5. Defendant did not take an appeal because the plea agreement contained an express appellate waiver.

6. This motion is timely filed in accordance with § 2255(f).

GROUND FOR RELIEF

DEFENDANT'S 25-YEAR CONSECUTIVE SENTENCE IS UNLAWFUL WHERE THE TERM "SECOND OR SUBSEQUENT CONVICTION" CONTAINED IN 18 U.S.C. § 924(c)(1)(C) (2017) IS VAGUE AND AMBIGUOUS AS TO WHETHER SAID TERM PERMITS AN ENHANCED SENTENCE FOR MULTIPLE COUNTS CONTAINED IN A SINGLE INDICTMENT. DUE PROCESS REQUIRES THE TERM BE CONSTRUED IN A LIGHT MOST FAVORABLY TO THE DEFENDANT. RECENT CONGRESSIONAL AMENDMENTS TO THE STATUTE "CLARIFIED" LEGISLATIVE INTENT THAT THE TERM ACTUALLY REFERS TO A VIOLATION WHICH OCCURS AFTER A PRIOR § 924(c) CONVICTION HAS BECOME FINAL.

ARGUMENT

Defendant argues his consecutive 25-year sentence, imposed for being a "second or subsequent conviction" for brandishing a firearm in relation to a crime

of violence pursuant to 18 U.S.C. § 924(c)(1)(C)(i) (2017), is unlawful and must be vacated, where Defendant is a first-time offender who has never been previously convicted of a § 924(c) offense.

Defendant entered an open plea to Counts 2 and 4 of the indictment, which charged him with possessing a firearm in relation to a crime of violence, contrary to § 924(c)(1)(A)(ii). That section provides for imposition of a mandatory minimum sentence of 7 years if the firearm was brandished. *Id*. However, because Defendant was to be sentenced for two counts of violating § 924(c), he was subject to consecutive, 7-year mandatory minimum terms totaling 14 years. § 924(c)(1)(D) ("Notwithstanding any other provision of law- (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person…).

Notwithstanding that Defendant was only subject to consecutive, 7-year mandatory minimum terms totaling 14 years, this Court on September 10, 2018, sentenced Defendant to a 7-year term as to Count 2, followed by a consecutive 25-year term as to Count 4, for a total mandatory minimum term of 32 years. Presumably, this Court imposed the consecutive 25-year term for Count 4 in accordance with § 924(c)(1)(C) which provided, *inter alia*:

> 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

Id. (emphasis added).

Defendant submits that he is a first-time offender who has never previously been convicted of a § 924(c) offense. Therefore, under the statutory framework, § 924(c)(1)(C) was *inapplicable* to Defendant and he should only have been subject to two, consecutive 7-year terms totaling 14 years. Consequently, Defendant's consecutive 25-year sentence for Count 4 is unlawful and he is entitled to be resentenced.

To the extent that the term "second or subsequent conviction" contained in § 924(c)(1)(C) could be interpreted to permit a consecutive 25-year sentence where multiple counts are contained in a single indictment, the Defendant submits that the statute is vague and ambiguous and must be construed in a manner which most favors him under the rule of lenity.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It is well established that the government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules

of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

Importantly, these principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

Moreover, the rule of lenity is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1972) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)). The Supreme Court's "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction," but rather "is rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979).

Sub judice, the term "second or subsequent conviction" contained in § 924(c)(1)(C) is susceptible of differing interpretations. Arguably, it could be interpreted to mean a second finding of guilt during a single proceeding issued from

a single indictment, or it could mean recidivism - a sequential conviction after an initial conviction has achieved finality.

Long ago, the 10th Circuit Court of Appeals sitting *en banc* construed § 924(c)(1)(C) and determined the phrase "second or subsequent conviction" was vague and ambiguous. The court applied the rule of lenity and concluded the statute should be interpreted to require sequential convictions:

> [W]e conclude that section 924(c) must be strictly construed. Moreover, because the text of the statute and its legislative history reveal an ambiguity concerning the construction Congress intended to give the words "second or subsequent conviction," we must apply the rule of lenity. Under this rule, the words "second or subsequent" mean events that are chronologically sequential, and "conviction" means judgment of conviction. Accordingly, we hold that a defendant may not receive an enhanced sentence under section 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. We believe this construction is mandated by the applicable rules of statutory construction, is consistent with the other subsequent-offense statutes enacted by Congress, and best effectuates the purpose underlying such statutes generally.

United States v. Abreu, 962 F. 2d 1447, 1453 (10th Cir. 1992).

As it turns out, however, the 10th Circuit's reasoning in *Abreu* was not popular among sister courts and the question eventually found its way to the Supreme Court in *Deal v. United States*, 508 U.S. 129, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993). The High Court rejected the recidivism-based interpretation extended by the 10th Circuit and held that the statute permitted enhanced, consecutive sentences - even

for first-time offenders - for multiple § 924(c) offenses brought in a single indictment.

Fast forward to December of 2018, when Congress passed the First Step Act. Included in this new legislation was a provision intended to clarify the draconian interpretation of § 924(c)(1)(C) handed down by the *Deal* Court:

> Sec. 403 *Clarification* of section 924(c) of title 18, United States Code
>
> (a) In general. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

Pub. L. 115-391, § 403(a), 132 Stat. 5221 (emphasis added).

As the title suggests, the new amendment serves to *clarify* what the legislative intent of the provision was all along - *i.e.*, that it serves to punish *recidivism*. This is further evidenced by the following commentary provided by the Senate Committee on the Judiciary:

> Reforming Federal Criminal Sentencing
>
> Clarification of 18 U.S.C. § 924(c) – S.1917 Section 104 applied prospectively: *This section clarifies* that the enhanced mandatory minimum sentence for using a firearm during a crime of violence or drug crime is limited to offenders who have previously been convicted and served a sentence for such an offense. *Previously the courts interpreted this law intended for repeat offenders as applying also to first-time offenders, sometimes requiring courts to impose overly harsh, decades-long sentences for charges brought in a single indictment*.

S. 3649 First Step Act Summary - As Introduced. (emphasis added).

In other words, the *Deal* Court got it wrong. Consequently, this misinterpretation of arguably the harshest sentencing provision in the entire body of law has resulted in numerous *de facto* life sentences imposed for first-time offenders. Congress has now clarified § 924(c)(1)(C) to be consistent with its original intent as a recidivist statute - the same conclusion reached earlier by the 10th Circuit in *Abreu*.

"Subsequent legislation declaring the intent of an earlier statute is entitled to great weight," and "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 1801-02, 23 L. Ed. 2d 371 (1969). To the extent that the original intent of § 924(c)(1)(C) has now been "clarified" by Congress in the First Step Act, Defendant respectfully suggests that the *Deal* decision should be revisited by the High Court.

CONCLUSION

This Court sentenced Defendant to serve 7 years in prison for Count 2, followed by an additional 25 years in Count 4, even though he was a first-time offender and both of the § 924(c) violations were brought in a single indictment. Because the term "second or subsequent conviction" is vague and ambiguous, due process requires that this Court apply the rule of lenity, vacate the unlawful 25-year sentence imposed in Count 4, and resentence Defendant to a consecutive 7-year mandatory minimum term for a total of 14 years.

Respectfully submitted,

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By: /s/ *Robert David Malove*
Robert David Malove, Esq.
Florida Bar No.: 407283

OATH

I HEREBY DECLARE under penalty of perjury that the facts stated herein are true and correct.

Robert David Malove (on behalf of:)
Damon Woodard, *Defendant*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was electronically filed with this Court's CM/ECF filing system on September 19, 2019, and that all parties were effectively served thereby.

/s/ *Robert David Malove*
Robert David Malove, Esq.

Appendix B

Order Denying Amended Motion to Vacate, Set-Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, United States District Court for the Southern District of Florida Civ. Case No. 0:19-cv-62289-WPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAMON N. WOODARD,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 19-62289-CIV-DIMITROULEAS
(18-60065-CR-DIMITROULEAS)

FINAL JUDGMENT AND ORDER DISMISSING AND DENYING MOTIONS TO VACATE

THIS CAUSE is before the Court on Movant Woodard's September 16, 2019 Motion to Vacate [DE-1], Memorandum [DE-3] and his September 19, 2019 Amended Complaint [DE-7]. The court has considered the Government's September 20, 2019 Response [DE-9], and Court file, and having presided over this case, finds as follows:

1. On March 15, 2018, Woodard and Suwayne Hylton were indicted. [CR-DE-8]. Woodard was charged with four (4) counts of Hobbs Act Robbery and four (4) counts of Brandishing a Firearm during a Crime of Violence.

2. On June 29, 2018, Woodard pled guilty to two (2) counts of Brandishing a Firearm during a Crime of Violence (Counts Two and Four) [CR-DE-34], pursuant to a Plea Agreement [CR-DE-35]. There was a Factual Proffer Statement [CR-DE-36]. Woodward understood that there was a consecutive mandatory minimum 32 year sentence involved [CR-DE-59, pp. 7-19, 22, 28, 37]; [CR-DE-35, p. 2]. He waived his right to an appeal. A Pre-Sentence Investigation Report was ordered. The PSIR indicated that a minimum sentence of 32 years was required. No objections to the PSIR were filed.

3. On September 7, 2018, Woodard was sentenced to 32 years in prison. [CR-DE-52].

4. The Government has conceded that the motion to vacate is timely filed. [DE-9, p. 3].

5. In the first motion to vacate, Woodward contended that counsel was ineffective for failing to file an appeal. Second, Woodard contended that the consecutive nature of the stacked mandatory minimum is illegal. Third, Woodard contended that the First Step Act applies to his sentencing. Fourth, Woodard contended that counsel was ineffective in allowing a second consecutive sentence of 25 years, instead of 20 years.

6. In the second motion to vacate, filed by separate counsel, Woodard contends that he should be resentenced to fourteen (14) years in prison.

7. The Court agrees with the Government that the First Step Act does not apply to stacked mandatory minimum sentences, imposed before December 21, 2018. *See U.S. v. Robinson*, 2019 WL 4463272 (E.D. Mich. 2019); *Brown v. Antonelli*, 2019 WL 2358977 (D.S.C. 2019); *Richmond v. Burnhart,* 2019 WL 2127304 (E.D. Ky. 2019).

8. By filing the Amended Complaint, Woodard has waived his other previously filed objections. *See Pintando v. Miami-Dade Housing Authority*, 501 F. 3d 1241, 1243 (11th Cir. 2007).

Wherefore, Woodward's Motions to Vacate [DE-1] and [DE-7] are Dismissed and Denied, respectively.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 8th day of October, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

Appendix C

Motion for Clarification, United States District Court for the Southern District of Florida Civ. Case No. 0:19-cv-62289-WPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Fort Lauderdale)

DAMON N. WOODARD,
Movant,

v.

Case No. 0:19-cv-62289-WPD
(0:18-cr-60065-WPD)

UNITED STATES OF AMERICA,
Respondent.
_____/

MOTION FOR CLARIFICATION

COMES NOW the Movant, DAMON N. WOODARD, by and through undersigned counsel and pursuant to Local Rule 7.1, and moves this Honorable Court for clarification of its Final Judgment and Order Dismissing and Denying Motions to Vacate (DE. 11), entered on October 8, 2010. In support, the Movant submits the following:

1. This cause is before the Court on Movant's amended motion to vacate, set-aside or correct sentence (DE. 7), filed pursuant to 28 U.S.C. § 2255. The amended § 2255 motion raises a single claim arguing that the version of 18 U.S.C. § 924(c)(1)(C) which the Movant was sentenced under is vague and overbroad in violation of due process.

2. Although the Movant made reference to the changes brought to § 924(c)(1)(C) by passage of the First Step Act of 2018 ("Act"), the Movant was *not*

actually seeking retroactive application of the Act to his case. Rather, the Movant argued that passage of the Act as a self-titled "Clarification of section 924(c)" gave credence to his position that the version of the statute he was sentenced under was vague and has been misinterpreted from its inception.

3. In its Final Judgment and Order Dismissing and Denying Motions to Vacate, this Court concluded in paragraph 7:

> The Court agrees with the Government that the First Step Act does not apply to stacked mandatory minimum sentences, imposed before December 21, 2018. *See U.S. v. Robinson*, 2019 WL 4463272 (E.D. Mich. 2019); *Brown v. Antonelli*, 2019 WL 2358977 (D.S.C. 2019); *Richmond v. Burnhart*, 2019 WL 2127304 (E.D. Ky. 2019).

4. To the extent it appears that this Court may have misinterpreted the Movant's § 2255 claim as one seeking retroactive application of the Act, the Movant asks this Court for clarification of its Order denying relief. Specifically, the Movant asks that the Court address the due process component of the § 2255 claim so as to provide clarity for appellate purposes.

WHEREFORE, the Movant respectfully asks for clarification of its October 8, 2019, Final Judgment and Order Dismissing and Denying Motions to Vacate.

Respectfully submitted,

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(954) 861-0384

By: */s/ Robert David Malove*
Robert David Malove, Esq.
Florida Bar No.: 407283

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was electronically filed with this Court's CM/ECF system on October 8, 2019, and that all parties were effectively served thereby.

/s/ Robert David Malove
Robert David Malove, Esq.

Appendix D

Order Denying Motion for Clarification, United States District Court for the Southern District of Florida Civ. Case No. 0:19-cv-62289-WPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTIRCT OF FLORIDA

DAMON N. WOODARD,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 19-62289-CIV-DIMITROULEAS
(18-60065-CR-DIMITROULEAS)

ORDER

THIS CAUSE is before the Court on Defendant Woodard's October 8, 2019 Motion For Clarification. [DE-12]. Congress does not declare statutes to be vague. They can repeal them. They can enact new statutes and give them retroactivity. The Court finds no due process violation. The Motion [DE-12] is Denied. The Court denies a Certificate of Appealabilty.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of October, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Robert David Malone, Esquire

Alicia Shick, AUSA

Appendix E

Application for COA, United States Court of Appeals for the Eleventh Circuit, Case No. 19-14896-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APP. CASE NO. 19-14896-B

LT. CASE NO. 0:19-cv-62289-WPD

DAMON WOODARD,

Petitioner/Appellant,

Vs.

UNITED STATES OF AMERICA,

Respondent/Appellee.

AMENDED APPLICATION FOR A CERTIFICATE OF APPEALABILITY FROM AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DENYING APPELLANT'S 28 U.S.C. § 2255 MOTION

Robert David Malove, Esq.
Counsel for Appellant
The Law Office of
ROBERT DAVID MALOVE, P.A.
200 S. Andrews Avenue, Suite 100
Ft. Lauderdale, FL. 33301

CERTIFICATE OF INTERESTED PERSONS (CIP)

Damon Woodard v. United States of America, Appeal No. 19-14896-B

Anton, Jodi

Dimitrouleas, William P.

Gomez, Kathryn

Hunt, Patrick M.

Shick, Alicia

Walker, Herbert E.

White, Charles G.

INTRODUCTION

The Appellant, DAMON WOODARD, by and through undersigned counsel and pursuant to Federal Rule of Appellate Procedure 22(b), applies to this Court for issuance a Certificate of Appealability (COA). The order sought to be reviewed is an order from the United States District Court for the Southern District of Florida (Fort Lauderdale), denying Appellant's motion to vacate, set-aside or correct sentence filed under 28 U.S.C. § 2255. This Court has jurisdiction to issue a COA pursuant to 28 U.S.C. § 2253(a), (c).

STATEMENT OF CASE AND FACTS

Appellant was charged by indictment with four (4) counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and four (4) counts of brandishing a firearm during and in relation to the Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Crim. Doc. 8)

On June 29, 2018, Appellant entered an open plea of guilty to the § 924(c) violations alleged in Count 2 (brandishing a firearm in relation to Count 1), and Count 4 (brandishing a firearm in relation to Count 3). The government dismissed the remaining counts. Sentencing was deferred pending preparation of a presentence investigation report (PSI).

On September 10, 2018, in accordance with the requirements of § 924(c)(1)(C)(i) (2017), the district court imposed a mandatory minimum sentence

totaling 32 years, which consisted of a 7-year term as to Count 2, followed by a consecutive term of 25 years as to Count 4 (Crim. Doc. 52). Appellant did not take an appeal because the plea agreement contained an express appellate waiver.

In December of 2018, Congress passed the First Step Act ("the Act"). Section 403(a) of the Act, titled "Clarification of section 924(c) of title 18, United States Code," provides, *inter alia*:

> (a) In general. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

Pub. L. 115-391, § 403(a), 132 Stat. 5221.

Appellant thereafter filed an amended[1] motion to vacate, set-aside and correct sentence pursuant to 28 U.S.C. § 2255 on September 18, 2019 (Civ. Doc. 1). In that motion, Appellant raised a single claim alleging that his 25-year consecutive sentence imposed as to Count 4 is unlawful, where the term "second or subsequent conviction" contained in the version of § 924(c)(1)(C) applicable to him is vague and ambiguous as to whether said term permits an enhanced sentence for multiple counts contained in a single indictment. Appellant argued that passage of the Act, wherein Congress amended § 924(c) to "clarify" legislative intent, supports his

[1] Appellant initially filed a motion to vacate, set-aside and correct sentence pursuant to 28 U.S.C. § 2255 on September 15, 2019. Appellant subsequently retained new counsel, who prepared and filed an amended § 2255 motion on Appellant's behalf.

position that the previous version of the statute is vague and ambiguous. Appellant acknowledged that the United States Supreme Court's decision in *Deal* had previously foreclosed his argument. Nevertheless, Appellant proposed that *Deal* should be revisited in light of the new legislation, which suggests that the *Deal* Court misinterpreted legislative intent.

The government filed a response to the amended § 2255 motion on September 26, 2019 (Civ. Doc. 9). The government argued that the changes to § 924(c) brought by the Act do not apply retroactively and that Appellant was attempting to apply the Act in a way Congress did not intend.

On October 8, 2019, the district court entered its final judgment and order dismissing and denying motions to vacate (Civ. Doc. 11). The district court made the following finding:

> The Court agrees with the Government that the First Step Act does not apply to stacked mandatory minimum sentences, imposed before December 21, 2018. *See U.S. v. Robinson*, 2019 WL 4463272 (E.D. Mich. 2019); *Brown v. Antonelli*, 2019 WL 2358977 (D.S.C. 2019); *Richmond v. Burnhart*, 2019 WL 2127304 (E.D. Ky. 2019).

Appellant thereafter filed a motion (Civ. Doc. 12) seeking to clarify that he was not seeking retroactive application of the Act. Rather, Appellant was directly attacking the prior version of § 924(c) which he was sentenced under as being vague and ambiguous.

The district court issued an order denying the motion for clarification on October 9, 2019. The district court found:

> THIS CAUSE is before the Court on Defendant Woodard's October 8, 2019 Motion For Clarification. [DE-12]. Congress does not declare statutes to be vague. They can repeal them. They can enact new statutes and give them retroactivity. The Court finds no due process violation. The Motion [DE-12] is Denied. The Court denies a Certificate of Appealabilty.

This appeal timely follows.

STANDARD OF REVIEW

A court will issue a certificate of appealability (COA) "only if the applicant has made a substantial showing of the denial of a constitutional right." *See*, 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must show that it is debatable among reasonable jurists that the district court's assessment of the claim was wrong. *See*, *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). A claim can be "debatable" even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *See*, *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1041, 154 L.Ed.2d 931 (2003).

ARGUMENT

> REASONABLE JURISTS COULD DEBATE WHETHER DUE PROCESS REQUIRES COURTS TO APPLY THE RULE OF LENITY AND CONSTRUE 18 U.S.C. § 924(c)(1)(C) (2017) IN THE MANNER MOST FAVORABLY TO THE ACCUSED.

Title 18 U.S.C. § 924(c) (2017) provides for mandatory minimum sentencing when a defendant carries or brandishes a firearm during the commission of a drug crime or a crime of violence. The punishment becomes increasingly more severe in the event of a "second or subsequent" such conviction. Section 924(c)(1)(C) provides, *inter alia*:

> 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

Id. (emphasis added).

Appellant argued in his amended § 2255 motion that the term "second or subsequent conviction" contained in the statute could reasonably be interpreted two ways: (1) to permit a consecutive 25-year sentence where multiple counts are contained in a single indictment; or (2) recidivism - a *sequential* § 924(c) conviction after an initial such conviction has already achieved finality. Because the statute is susceptible of differing interpretations, Appellant argued the statute is vague and ambiguous and must be construed in a manner which most favors him under the rule of lenity.

Appellant has never previously been convicted of a § 924(c) offense. Accordingly, a favorable interpretation of § 924(c)(1)(C) so as to require sequential § 924(c) convictions would render that subsection inapplicable to him as a first-time offender. Under this scenario, Appellant would be subject to two consecutive 7-year

terms totaling 14 years, rather than the aggregate 32-year term (7-years followed by a 25-years) he ultimately received.

In support of his argument, Appellant referenced Congress' recent passage of the First Step Act, which included legislation intended to "clarify" § 924(c)(1)(C). The relevant provision reads:

> Sec. 403 *Clarification* of section 924(c) of title 18, United States Code
>
> (a) In general. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

Pub. L. 115-391, § 403(a), 132 Stat. 5221 (emphasis added).

Appellant further referenced the following commentary to the amendment provided by the Senate Committee on the Judiciary:

> Reforming Federal Criminal Sentencing
>
> Clarification of 18 U.S.C. § 924(c) – S.1917 Section 104 applied prospectively: *This section clarifies* that the enhanced mandatory minimum sentence for using a firearm during a crime of violence or drug crime is limited to offenders who have previously been convicted and served a sentence for such an offense. *Previously the courts interpreted this law intended for repeat offenders as applying also to first-time offenders, sometimes requiring courts to impose overly harsh, decades-long sentences for charges brought in a single indictment*.

S. 3649 First Step Act Summary - As Introduced. (emphasis added).

Appellant argued that the changes brought by the Act indicates that Congress has determined the construction given to § 924(c)(1)(C) by the Supreme Court in

Deal v. United States, 508 U.S. 129, 113 S. Ct. 1993, 124 L.Ed.2d 44 (1993), does not accurately reflect legislative intent. *See e.g.*, *United States v. Robinson*, 2019 WL 4463272, at *1 (E.D. Mich. Sept. 18, 2019) (The First Step Act reversed *Deal*'s requirement that courts stack a defendant's sentence where the defendant is convicted of two § 924(c) convictions that are charged in the same indictment). Accordingly, Appellant reasoned that Congress has now clarified § 924(c)(1)(C) to be consistent with its true intent as a recidivist statute and suggested that *Deal* is ripe to be revisited by the High Court.

In denying the amended § 2255 motion and the motion for clarification, the district court merely stated that, "Congress does not declare statutes to be vague. They can repeal them. They can enact new statutes and give them retroactivity. The Court finds no due process violation." (Civ. Doc. 13).

Reasonable jurists can debate whether the district court wrongly decided the claim. The district court conducted no analysis to determine whether § 924(c)(1)(C) was ambiguous and, if so, whether Appellant was entitled to the rule of lenity.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It is well established that the government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.

Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

Importantly, these principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

The rule of lenity is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1972) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)). The Supreme Court's "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction," but rather "is rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979).

Sub judice, the term "second or subsequent conviction" contained in § 924(c)(1)(C) is susceptible of differing interpretations. Arguably, it could be interpreted to mean a second finding of guilt during a single proceeding issued from a single indictment, or it could mean *recidivism* - a sequential conviction after an initial conviction has achieved finality. Congress has recently clarified that it means the latter.

Consequently, that means the (rather draconian) interpretation of § 924(c)(1)(C) handed down by the *Deal* Court was incorrect. Yet, for the numerous defendants like Appellant who were sentenced before passage of the Act, there appears to be no recourse but to have the High Court revisit the question of whether the prior version of § 924(c)(1)(C) is vague and ambiguous, and whether due process requires the statute be interpreted most favorably to the accused. *See Patterson v. McLean Credit Union*, 485 U.S. 617, 99 L. Ed. 2d 879, 108 S. Ct. 1419 (1988) ("It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled.").

The prior version of § 924(c)(1)(C) is vague and ambiguous, as evidenced by Congress' need to "clarify" legislative intent through passage of the Act. "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight," and "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion*

Broadcasting Co. v. F.C.C., 395 U.S. 367, 380-81, 89 S. Ct. 1794, 1801-02, 23 L. Ed. 2d 371 (1969).

Here, the district court at minimum should have examined the prior version of § 924(c)(1)(C) and determined whether the recent amendments to the statute and the commentary to the passage of the Act present "compelling indications" that the statute has been misinterpreted all along. The district court should have further determined whether due process requires the statute be construed in a light most favorably to Appellant. The district court did neither.

Accordingly, reasonable jurists could debate whether the district court's assessment of the issue was wrong and this Court should grant a COA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the type-volume requirements as set-forth in Federal Rule of Appellate Procedure 32(a). The length of this document is 2,489 words.

/s/ *Robert David Malove*
Robert David Malove, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed with this Court's CM/ECF filing system on January 13, 2020, and that all parties were effectively served thereby.

/s/ *Robert David Malove*
Robert David Malove, Esq.

Appendix F

Order Denying Application for COA, United States Court of Appeals for the Eleventh Circuit, Case No. 19-14896-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 17, 2020

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 19-14896-B
Case Style: Damon Woodard v. USA
District Court Docket No: 0:19-cv-62289-WPD
Secondary Case Number: 0:18-cr-60065-WPD-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Craig Stephen Gantt, B
Phone #: 404-335-6170

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14896-B

DAMON WOODARD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Damon Woodard moves for a certificate of appealability in order to appeal the denial of his motion to vacate his sentence, 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE