

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RAY WEST,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 19-10676

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL RAY WEST,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-573
USDC No. 4:02-CR-97-1

ORDER:

In 2002, Michael Ray West pleaded guilty to one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). This court granted him authorization to file a successive 28 U.S.C. § 2255 motion relying upon *Johnson v. United States*, 576 U.S. 591 (2015), and the district court dismissed the motion for want of jurisdiction after concluding that West had not shown that his sentence was actually grounded in the residual clause of 18 U.S.C. § 924(e)(2)(B). Now, he moves this court for a certificate of appealability (COA) on claims concerning whether he needed to show that the residual clause was used to sentence him and whether a Texas burglary

No. 19-10676

conviction is an enumerated violent felony for purposes of the Armed Career Criminal Act.

A prisoner will receive a COA only if he “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). One “satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327. Because West has not met these standards, his COA motion is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10468



In re: MICHAEL WEST,

Movant

A True Copy
Certified order issued Aug 15, 2016

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

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Fort Worth to consider
a successive 28 U.S.C. § 2255 motion

Before JOLLY, DAVIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Michael West, federal prisoner # 28991-177, pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 180 months of imprisonment. West now moves for authorization to file a successive 28 U.S.C. § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the ACCA's residual clause definition of a violent felony was unconstitutionally vague.

We may authorize the filing of a second or successive § 2255 motion if West makes a *prima facie* showing that his motion contains either "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty" or "a new rule of constitutional law, made retroactive to cases on

collateral review by the Supreme Court, that was previously unavailable.” § 2255(h); *see Reyes-Quena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001). *Johnson* announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

West argues that his sentence was improperly enhanced under the ACCA because, after *Johnson*, his Texas burglary offenses no longer qualify as violent felonies to support his ACCA sentence. The available records do not rule out the possibility that West was invalidly sentenced under the residual clause of § 924(e)(2)(B)(ii). West has made “a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Reyes-Quena*, 243 F.3d at 899 (internal quotation marks and citation omitted).

Accordingly, IT IS ORDERED that the motion for authorization is GRANTED. This grant is tentative in the sense that if the district court concludes, after a thorough review, that West has not satisfied the requirements for filing a successive motion, the district court must dismiss the motion. *See Reyes-Quena*, 243 F.3d at 899. We express no opinion as to the merits of West’s claim. The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm’r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was received in this court, unless the district court determines that an earlier filing date should apply. *See Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998) (prisoner mailbox rule).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL RAY WEST §
VS. § ACTION NO. 4:16-CV-573-Y
UNITED STATES OF AMERICA § (Crim. No. 4:02-CR-097-Y (1))

ORDER OF DISMISSAL AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Michael West has filed a "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody." After review of the motion, related briefs, record in this cause, and applicable law, the Court concludes that it lacks jurisdiction to consider West's request.

West's motion is a successive one, inasmuch as his initial section 2255 motion was denied on August 25, 2006. In his pending successive motion, West contends that his sentence, which was imposed on December 2, 2002, was improperly enhanced under the Armed Career Criminal Act ("ACCA") because his Texas burglary convictions no longer qualify as violent felonies in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the residual clause of the ACCA was unconstitutionally vague and thus violated the Constitution's guarantee of due process. Later, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court concluded that the *Johnson* decision "is retroactive in cases on collateral review." *Id.* at 1268.

Because West's petition is successive, he sought and obtained the certification required by section 2255(h) (2) from the United

States Court of Appeals for the Fifth Circuit (Doc. 63.) That section requires that before a second or successive motion may be heard, the court of appeals must certify that it contains "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.A. § 2255(h) (2) (West 2019).

The Fifth Circuit's certification does not end the inquiry, however, because this Court is the "second gate" through which West must pass in determining whether his successive motion can be heard. *See Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001) (concluding that section 2244(b) (4) is incorporated into section 2255, thus making the district court "the second 'gate' through which the petition must pass before the merits of his or her [section 2255] motion are heard"). Indeed, the Fifth Circuit noted in its order granting West's motion for authorization to proceed on his successive petition that the authorization "is tentative in the sense that if the district court concludes, after a thorough review, that West has not satisfied the requirements for filing a successive motion, the district court must dismiss the motion." (Doc. 63 at 2.)

Since the filing of the parties' initial briefs, the Fifth Circuit has issued two opinions that adversely impact West's successive motion. Specifically, in *United States v. Clay*, No. 17-605438, 2019 WL 1745854 (5th Cir. Apr. 18, 2019), the Fifth Circuit concluded that a successive petitioner relying on the Supreme Court's decision in *Johnson* to satisfy the requirements of section 2255(h) (2) must demonstrate that it is "more likely than not that he was

sentenced under the [ACCA's] residual clause." *Id.* at *6. Thus, West must demonstrate that it is more likely than not that his 2002 sentence was enhanced under the ACCA's residual clause, rather than the enumerated-offense clause.

The second case that adversely impacts West's motion is *United States v. Wiese*, 896 F.3d 720, 725 (5th Cir. 2018). In *Wiese*, the Fifth Circuit noted that "[i]n determining potential reliance on the residual clause by the sentencing court, we may look to (1) the sentencing record for direct evidence of a sentence, and (2) the relevant background legal environment that existed at the time of the defendant's sentencing and the presentence report ("PSR") and other relevant materials before the district court." *Id.* at 725 (quotations and citations omitted). The *Wiese* court noted that "the PSR and other documents before the sentencing court clearly indicate that the sentencing judge would have relied on the enumerated offenses clause in sentencing *Wiese*." *Id.* at 726. The court further noted that, when *Wiese* was sentenced in 2003, "all of § 30.02(a) [Texas Penal Code's burglary-of-a-habitation-or-building offense] was considered generic burglary under the enumerated[-]offenses clause of the ACCA." *Id.* "Thus, at the time of sentencing, there was absolutely nothing to put the residual clause on the sentencing court's radar." *Id.* Consequently, the court in *Wiese* concluded that the district court was without jurisdiction to consider a successive 2255 petition based on the Supreme Court's invalidation of the ACCA's residual clause in *Johnson* and dismissed the petition for lack of jurisdiction.

The result here is the same. Although West's PSR is silent as to which of his listed prior offenses qualified him for the ACCA enhancement, it is clear from the sentencing transcript that his three burglary-of-a-building offenses were the ACCA predicates.¹ West's own sentencing counsel mentioned the "series of three burglaries" as the ACCA predicate offenses. (Sentencing Tr. (doc. 39) at 7.) Burglary is one of the enumerated offenses under the ACCA. And West was sentenced in 2002, at a time when, as the *Wiese* court noted, "all of § 30.02(a) [Texas Penal Code's burglary offense] was considered generic burglary under the enumerated[-]offenses clause of the ACCA." *Wiese*, 896 F.3d at 726. Consequently, this Court cannot conclude that it is more likely than not that West was sentenced under the ACCA's residual clause.

West's reply brief, which was filed after the *Wiese* decision was announced, contends that the *Wiese* decision should be disregarded to the extent it conflicts with a prior panel's decision in *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017). This Court does not believe, however, that the two opinions conflict. In *Taylor*, the Fifth Circuit reversed a district court's denial of a successive 2255 petition based on *Johnson*, concluding that at the time Taylor was sentenced, "there was precedent suggesting that [his] third predicate conviction [of the offense of injury to a child] could have applied only under the residual clause." *Id.* at 482. But as the Fifth Circuit noted in *Wiese*, no such precedent regarding West's three burglary

¹Indeed, the burglary offenses appear to be the only possible violent felonies listed in the PSR as having been previously committed by West.

offenses existed at the time West was sentenced.

Consequently, West's successive petition fails at the second gate and is DISMISSED for lack of jurisdiction. Furthermore, the Court concludes that jurists of reason could not disagree with this Court's resolution of West's constitutional claims or that the issues presented deserve encouragement to proceed further; thus, a certificate of appealability shall not issue.

SIGNED May 2, 2019.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX D

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2244

§ 2244. Finality of determination

Effective: April 24, 1996
Currentness

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

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

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

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

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

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

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

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

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection.

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 965; [Pub.L. 89-711](#), § 1, Nov. 2, 1966, 80 Stat. 1104; [Pub.L. 104-132, Title I, §§ 101](#), 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

Notes of Decisions (2130)

28 U.S.C.A. § 2244, 28 USCA § 2244

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

Effective: January 7, 2008
Currentness

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; [Pub.L. 104-132, Title I, § 105](#), Apr. 24, 1996, 110 Stat. 1220; [Pub.L. 110-177, Title V, § 511](#), Jan. 7, 2008, 121 Stat. 2545.)

[Notes of Decisions \(5613\)](#)

28 U.S.C.A. § 2255, 28 USCA § 2255

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

-  KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Held Unconstitutional by [United States v. Davis](#), U.S., June 24, 2019
-  KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: December 21, 2018
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in [section 929](#), whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates [subsection \(a\)\(4\), \(f\), \(k\), or \(q\) of section 922](#);

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of [section 922\(l\)](#); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates [subsection \(a\)\(6\), \(d\), \(g\), \(h\), \(i\), \(j\), or \(o\) of section 922](#) shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates [subsection \(m\) of section 922](#),

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates [section 922\(q\)](#) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of [section 922\(q\)](#) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates [subsection \(s\)](#) or [\(t\) of section 922](#) shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates [section 922\(x\)](#) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of [section 922\(x\)\(2\)](#); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under [section 922\(x\)](#) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates [section 922\(x\)](#)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates [section 931](#) shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(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; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(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, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in [section 1111](#)), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in [section 1112](#)), be punished as provided in [section 1112](#).

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of [subsection \(a\)\(4\), \(a\)\(6\), \(f\), \(g\), \(h\), \(i\), \(j\), or \(k\) of section 922](#), or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of [section 922\(l\)](#), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition

shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)) or the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#));

(C) any offense described in [section 922\(a\)\(1\)](#), [922\(a\)\(3\)](#), [922\(a\)\(5\)](#), or [922\(b\)\(3\)](#) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in [section 922\(a\)\(1\)](#), [922\(a\)\(3\)](#), [922\(a\)\(5\)](#), or [922\(b\)\(3\)](#) of this title;

(D) any offense described in [section 922\(d\)](#) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in [section 922\(i\)](#), [922\(j\)](#), [922\(l\)](#), [922\(n\)](#), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates [section 922\(g\)](#) of this title and has three previous convictions by any court referred to in [section 922\(g\)\(1\)](#) of this title for a violent felony or a serious drug offense, or both, committed on occasions different

from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under [section 922\(g\)](#).

(2) As used in this subsection--

(A) the term “serious drug offense” means--

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

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

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

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

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

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

(f) In the case of a person who knowingly violates [section 922\(p\)](#), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in [section 1961\(1\)](#),

(2) is punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)), the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#)), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act ([21 U.S.C. 802\(6\)](#))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates [section 922\(u\)](#) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in [section 1111](#)), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in [section 1112](#)), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)), the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#)), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, [21 U.S.C. 802](#)); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of [section 922\(a\)\(1\)\(A\)](#), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of [section 922\(z\)\(1\)](#) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

- (i)** suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or
- (ii)** subject the licensee to a civil penalty in an amount equal to not more than \$2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under [section 923\(f\)](#).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added [Pub.L. 90-351](#), Title IV, § 902, June 19, 1968, 82 Stat. 233; amended [Pub.L. 90-618](#), Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; [Pub.L. 91-644](#), Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; [Pub.L. 98-473](#), Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; [Pub.L. 99-308](#), § 104(a), May 19, 1986, 100 Stat. 456; [Pub.L. 99-514](#), § 2, Oct. 22, 1986, 100 Stat. 2095; [Pub.L. 99-570](#), Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; [Pub.L. 100-649](#), § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; [Pub.L. 100-690](#), Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373, 4374, 4402, 4403; [Pub.L. 101-647](#), Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526 to 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; [Pub.L. 103-159](#), Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; [Pub.L. 103-322](#), Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; [Pub.L. 104-294](#), Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; [Pub.L. 105-386](#), § 1(a), Nov. 13, 1998, 112 Stat. 3469; [Pub.L. 107-273](#), Div. B, Title IV,

§ 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; [Pub.L. 109-92](#), §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; [Pub.L. 109-304](#), § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707; [Pub.L. 115-391](#), Title IV, § 403(a), Dec. 21, 2018, 132 Stat. 5221.)

AMENDMENT OF SECTION

<[Pub.L. 100-649](#), § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended [Pub.L. 101-647](#), Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; [Pub.L. 105-277](#), Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; [Pub.L. 108-174](#), § 1, Dec. 9, 2003, 117 Stat. 2481; [Pub.L. 113-57](#), § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of [Pub.L. 100-649](#), set out as a note under [18 U.S.C.A. § 922](#)], subsec. (a)(1) of this section is amended by striking “this subsection, subsection (b), (c), or (f) of this section, or in section 929” and inserting “this chapter”; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesignated as subsecs. (f) through (n), respectively.>

VALIDITY

<The United States Supreme Court has held that the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (c)(3)(B)), is unconstitutionally vague under due process and separation of powers principles, see [United States v. Davis, June 24, 2019, 139 S.Ct. 2319, 204 L.Ed.2d 757](#).>

<The United States Supreme Court has held that the imposition of an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (e)(2)(B)(ii)), violates the Constitution's guarantee of due process, see [Johnson v. U.S., U.S.2015, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569](#).>

[Notes of Decisions \(4278\)](#)

18 U.S.C.A. § 924, 18 USCA § 924

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

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Vernon's Texas Statutes and Codes Annotated
Penal Code (Refs & Annos)
Title 7. Offenses Against Property (Refs & Annos)
Chapter 30. Burglary and Criminal Trespass (Refs & Annos)

V.T.C.A., Penal Code § 30.01

§ 30.01. Definitions

Effective: September 1, 2017
Currentness

In this chapter:

- (1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:
 - (A) each separately secured or occupied portion of the structure or vehicle; and
 - (B) each structure appurtenant to or connected with the structure or vehicle.
- (2) "Building" means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.
- (3) "Vehicle" includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as "habitation."
- (4) "Controlled substance" has the meaning assigned by [Section 481.002, Health and Safety Code](#).
- (5) "Wholesale distributor of prescription drugs" means a wholesale distributor, as defined by [Section 431.401, Health and Safety Code](#).

Credits

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by [Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994](#); [Acts 2017, 85th Leg., ch. 338 \(H.B. 1178\), § 1, eff. Sept. 1, 2017](#).

Notes of Decisions (55)

V. T. C. A., Penal Code § 30.01, TX PENAL § 30.01
Current through the end of the 2019 Regular Session of the 86th Legislature

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Vernon's Texas Statutes and Codes Annotated
Penal Code (Refs & Annos)
Title 7. Offenses Against Property (Refs & Annos)
Chapter 30. Burglary and Criminal Trespass (Refs & Annos)

V.T.C.A., Penal Code § 30.02

§ 30.02. Burglary

Effective: September 1, 2017
Currentness

(a) A person commits an offense if, without the effective consent of the owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

(b) For purposes of this section, "enter" means to intrude:

- (1) any part of the body; or
- (2) any physical object connected with the body.

(c) Except as provided in Subsection (c-1) or (d), an offense under this section is a:

- (1) state jail felony if committed in a building other than a habitation; or
- (2) felony of the second degree if committed in a habitation.

(c-1) An offense under this section is a felony of the third degree if:

- (1) the premises are a commercial building in which a controlled substance is generally stored, including a pharmacy, clinic, hospital, nursing facility, or warehouse; and
- (2) the person entered or remained concealed in that building with intent to commit a theft of a controlled substance.

(d) An offense under this section is a felony of the first degree if:

(1) the premises are a habitation; and

(2) any party to the offense entered the habitation with intent to commit a felony other than felony theft or committed or attempted to commit a felony other than felony theft.

Credits

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by [Acts 1993, 73rd Leg., ch. 900, § 1.01](#), eff. Sept. 1, 1994; [Acts 1995, 74th Leg., ch. 318, § 8](#), eff. Sept. 1, 1995; [Acts 1999, 76th Leg., ch. 727, § 1](#), eff. Sept. 1, 1999; [Acts 2017, 85th Leg., ch. 338 \(H.B. 1178\), § 2](#), eff. Sept. 1, 2017.

[Notes of Decisions \(927\)](#)

V. T. C. A., Penal Code § 30.02, TX PENAL § 30.02

Current through the end of the 2019 Regular Session of the 86th Legislature

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