

United States Court of Appeals
for the Fifth Circuit

No. 19-10125
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

September 18, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

XAVIER LISTER,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas

USDC No. 3:15-CV-3523
USDC No. 3:12-CR-215-1

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

The Government appeals the district court's grant of the 28 U.S.C. § 2255 motion filed by Xavier Lister, former federal prisoner # 44947-177, challenging his 180-month prison sentence for possession of a firearm by a

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

APPENDIX A
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No. 19-10125

felon, in violation of 18 U.S.C. § 922(g)(1). The sentence was enhanced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on Lister's prior convictions for Texas burglary of a building. The district court found that the enhancement was improper as Lister's burglary offenses did not constitute "burglary" under the ACCA, § 924(e)(2)(B)(ii), in light of our prior en banc decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018). The district court entered an amended criminal judgment, sentencing Lister to time served. *See* 18 U.S.C. § 924(a)(2).

Now, the law has changed. The Supreme Court vacated our en banc ruling, *see United States v. Herrold*, 139 S. Ct. 2712 (2019), and our court issued a new en banc decision on remand, holding that the Texas burglary statute created one indivisible offense that constituted generic burglary. *United States v. Herrold*, 941 F.3d 173, 175-77, 182 (5th Cir. 2019) (en banc), *petition for cert. filed* (U.S. Feb. 18, 2020) (No. 19-7731). Thus, Lister concedes that his § 2255 claim is now foreclosed although he continues to challenge our most recent en banc ruling, to preserve the issue for further review.

Accordingly, the district court's decision is VACATED, and this case is REMANDED to the district court for further consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

XAVIER LISTER,)	
)	
Movant,)	No. 3:15-CV-3523-K
vs.)	No. 3:12-CR-215-K (1)
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Before the Court is Xavier Lister's (Movant) motion to vacate, set-aside, or correct sentence pursuant 28 U.S.C. § 2255. The motion is **GRANTED**.

I. BACKGROUND

Movant was charged by indictment with conspiracy to possess with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Doc. 1.) Movant pleaded not guilty and waived his right to a jury. He was subject to a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because he had four convictions for Texas burglary. (Doc. 31-1 at 5, ¶ 22; doc. 40-1 at 2-3.) The Court found him guilty and sentenced him to 180 months in prison. (Doc. 44 at 2.) The judgment was affirmed on appeal. (Doc. 68); *United States v. Lister*, No. 13-10535 (5th Cir. July 31, 2014).

Movant raises the following grounds in his second amended motion to vacate:

Prior convictions under Texas Penal Code § 30.02 cannot support

the sentencing enhancement under which he was previously sentenced.

Movant filed a *pro se* motion to vacate and an amended motion to vacate. This case was stayed on October 26, 2017, pending the Fifth Circuit's consideration of Texas burglary under the Armed Career Criminal Act in *United States v. Herrold*, No. 14-11317. The case was reopened on March 12, 2018, on Movant's motion after *Herrold* was decided. The government filed a response based on *Herrold* on May 11, 2018, and Movant filed a reply on June 12, 2018. Counsel was appointed, and Movant filed the second amended motion to vacate through counsel that supersedes the previous motions to vacate.

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that "a collateral challenge may not do service for an appeal." *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

III. ARMED CAREER CRIMINAL ACT

Movant contends that his sentence should not have been enhanced under the Armed Career Criminal Act (ACCA) for his prior Texas burglary convictions.

Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," [Section 924 of] the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows"

any crime punishable by imprisonment for a term exceeding one year ... 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*. § 924(e)(2)(B) (emphasis added).

Johnson v. United States, 135 S.Ct. 2551, 2555-56 (2015). Subsection (i) is known either as the force clause, *United States v. Lerma*, 877 F.3d 628, 630 (5th Cir. 2017), or as the elements clause, *United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017). The four offenses listed in subsection (ii) are referred to as the "enumerated offenses," see *United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007), or as the "enumerated offenses clause," *Taylor*, 873 F.3d at 477 n.1. The remainder of the subsection is known as the "residual clause," *Johnson*, 135 S.Ct. 2555-56.

Johnson held that the imposition of an increased sentence under ACCA's residual clause violates the Constitution's guarantee of due process because the residual

clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. This holding is retroactively available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016). After *Johnson*, a crime is a violent felony under ACCA only if it is one of the enumerated offenses, or if it qualifies under the force clause. *United States v. Moore*, 711 F. App'x 757, 759 (5th Cir. 2017) (per curiam).

A. Texas Burglary Statute

Here, the Texas burglary statute under which Movant was convicted provided in part:

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.

Tex. Penal Code § 30.02(a).

B. Generic Burglary

Burglary is an offense that is listed in the enumerated offenses clause as a violent felony. The type of burglary that is listed in the enumerated offenses clause is the "usual" version of that offense, and it does not include every variation of burglary. *See*

Mathis v. United States, 136 S.Ct. 2243, 2248 (2016). The usual burglary offense that is listed in the enumerated offenses clause is called “generic burglary.” *See Mathis*, 136 S.Ct. at 2248. A generic burglary under the enumerated offenses clause is the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *See United States v. Constante*, 544 F.3d 584, 585 (5th Cir. 2008) (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)). For a Texas burglary to be a violent felony as an enumerated offense of burglary, it must include those elements of a generic burglary. *See id.*

C. **Herrold**

When Movant was sentenced, the Fifth Circuit had held that Texas burglary under all subsections of § 30.02(a) was a violent felony as the equivalent of generic burglary under the enumerated offenses clause. *See United States v. Weise*, 896 F.3d 720, 725 (5th Cir. 2018); *United States v. Stone*, 72 F. App’x 149, 150 (5th Cir. 2003); *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992). However, the Fifth Circuit reconsidered this issue en banc in *Herrold* after the Supreme Court vacated the prior judgment affirming Herrold’s sentence and remanded for “renewed consideration” in light of the Supreme Court’s opinion in *Mathis*. *United States v. Herrold*, 838 F.3d 517 (2018)(en banc).

In *Herrold*, the Fifth Circuit stated that to decide whether a Texas conviction for

burglary qualifies as a conviction for a violent felony under the enumerated offense clause, it must first determine whether the three subsections of the Texas burglary statute “sets forth alternative means of committing a single substantive crime, or separate elements, effectively defining distinct offenses.” *Id.* at 521. Among the ways a federal court can determine whether multiple subsections of a state statute set out alternative means of committing a single crime or separate elements and, therefore, distinct crimes, is to review state court decisions to determine whether a jury must unanimously agree on the subsection that the defendant violated. *See id.* at 522. If a jury does not need to unanimously agree on the subsection that was violated, then the subsections of the statute set out alternative means of committing a single offense. *See id.* Such a statute is called an indivisible statute. *See id.*

Applying that analysis to the Texas burglary statute, the Fifth Circuit determined that in order to convict, a jury is not required to agree on the subsection of the Texas burglary statute that a defendant violated. *See id.* at 523 (citing *Martinez v. State*, 269 S.W.3d 777, 783 (Tex. App. – Austin 2008, no pet.)). The Texas burglary statute, therefore, sets out one offense, with separate means of committing burglary, and is indivisible. *See id.* at 529-30.

When a statute is indivisible, each subsection is compared to the generic offense. If any of the subsections is broader than generic burglary, then the state offense is not a violent felony and a conviction for that offense cannot be used for enhancement

under the ACCA. *Id.* at 521-22, 530-31. This analytical comparison is known as the categorical approach. *See id.* at 521-22, 530-31.

In *Herrold*, the Fifth Circuit compared the burglary statute to generic burglary. To be guilty of a generic burglary, a person must have the intent to commit a crime when he makes the unauthorized entry or remains in the building without authorization. *See id.* at 531. Subsection 30.02(a)(3) is broader than generic burglary, because it makes it a crime to enter a building or habitation and thereafter commit or attempt to commit a felony, theft, or assault. *See id.* That subsection does not require that the person have the intent to commit a crime contemporaneously with the unauthorized entry or unauthorized remaining in the building. *See id.* at 531-32. Because subsection 30.02(a)(3) is broader than generic burglary, and because the Texas burglary statute is indivisible, a conviction under the Texas burglary statute is not for a violent felony and cannot be used for enhancement under the ACCA. *See id.* at 537; *see also United States v. Castro*, — F. App'x —, No. 17-50447, 2018 WL 4870859, at *1 (5th Cir. Oct. 8, 2018) (§ 2255 movant's "ACCA sentence cannot stand under the enumerated offenses clause" where the ACCA predicate convictions were for Texas burglary). The Fifth Circuit has also held that Texas burglary does not qualify as a violent felony under ACCA's force clause because it does not have as an element the use, attempted use, or threatened use of physical force. *See United States v. Islas-Saucedo*,

903 F.3d 512, 519 (5th Cir. 2018); *United States v. Castaneda*, 740 F.3d 169, 172 (5th Cir. 2013).

The Government argues that *Herrold* conflicts with a Sixth Circuit case, *United States v. Quarles*, 850 F.3d 836 (6th Cir. 2017). This Court is bound by *Herrold*.

D. Procedural Bar

The Government asserts that the claim is procedurally barred, because it was not raised on appeal. A failure to raise a claim on direct appeal may procedurally bar an individual from raising the claim on collateral review. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Defendants may only collaterally attack their convictions on grounds of error omitted from their direct appeals upon showing “cause” for the omission and “actual prejudice” resulting from the error. *Shaid*, 937 F.2d at 232.

Cause is not shown simply by the fact that an attempt to raise a claim may have futile. “[F]utility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotations omitted). Cause may be shown, however, if the claim “is so novel that its legal basis [was] not reasonably available to counsel.” *Id.* at 622 (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)).

Prejudice requires a movant to show “not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United*

States v. Frady, 456 U.S. 152, 170 (1982). The Government focuses on cause and asserts that without a showing of cause, the court need not reach prejudice. *See United States v. Scruggs*, 714 F.3d 358, 265-65 (5th Cir. 2013).

As previously discussed, prior to *Herrold* the Fifth Circuit had held that Texas burglary under all subsections of § 30.02(a) was a violent felony as the equivalent of generic burglary under the enumerated offenses clause. *See Weise*, 896 F.3d at 725; *Stone*, 72 F. App'x at 150; *Silva*, 957 F.2d at 162. The Fifth Circuit reconsidered the issue in *Herrold*.

In *Herrold*, the Fifth Circuit stated that after it upheld the movant's sentence on direct appeal, "*Mathis v. United States* provided a more fine-grained trace between statutory means and elements. In doing so, it also offered a typology of the authorities that federal courts may look to in determining whether a statute is divisible or indivisible." *Herrold*, 883 F.3d at 522. Primarily, in determining whether a state statute is divisible or indivisible, under *Mathis* a federal court can resort to state court decisions on whether a jury must agree on statutory alternatives. *See id.* The Fifth Circuit noted in *Herrold* that Texas courts had repeatedly answered that a jury is not required to unanimously agree on a statutory alternative, so the Fifth Circuit concluded en banc that the burglary statute was held to be indivisible. *See id.* at 523.

Similarly, in another case, the Fifth Circuit relied on *Mathis* and revisited the

issue of whether a Texas possession with intent to deliver a controlled substance was a controlled substance offense under the Armed Career Criminal Act. *See United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017), *supplemented by* 854 F.3d 284 (5th Cir. 2017). The Fifth Circuit reviewed state court decisions on jury unanimity, determined that the Texas statute was indivisible, and overruled precedent and held that the Texas offense was not a basis for enhancement as a career offender. *See id.* That Fifth Circuit observed that “the issue that has divided courts [prior to *Mathis*], and with great respect to the Supreme Court, confused courts, ... is how to determine if a statute is ‘divisible.’” *United States v. Howell*, 838 F.3d 489, 497 (5th Cir. 2016). *Mathis* “provided needed guidance on when a statute of conviction is divisible” and how to “distinguish means from elements” by reviewing state court decisions to determine if a jury must agree on the statutory alternatives. *See id.* Rather than prior Supreme Court decisions, the Supreme Court in *Mathis* instructed courts of the method for determining whether statutory alternatives are elements or means. *See id.* In *Tanksley*, the Fifth Circuit overruled controlling precedent. *United States v. Tanksley*, 848 F.3d 347, 352 (holding that controlling precedent “cannot stand” in light of *Mathis*). “[P]rior to *Mathis*, [the state statute’s] status as a divisible statute subject to a modified categorical approach was firmly established.” *Id.* at 351. The Fifth Circuit stated that the reason for holding that *Mathis* abrogated precedent was the Supreme Court’s instruction on how to identify whether a statute is divisible by reviewing state court decisions. *Id.*; *see United*

States v. Elizalde-Perez, 727 F. App'x 806, 809 n.3 (5th Cir. 2018) (*Tanksley* abrogated prior precedent "in light of the Supreme Court's guidance in *Mathis*"). The Fifth Circuit stated in *Tanksley* that "*Mathis* is 'more than merely illuminating with respect to the case before us; it unequivocally resolves the question in favor of *Tanksley*.'" *Tanksley*, 848 F.3d at 352. If not for the instruction in *Mathis* to review state court decisions, prior precedent would have remained the law in this Circuit. *See Villa-Sanchez v. United States*, No. 3:17-CV-3457-D, 2018 WL 2299057, at *1 (N.D. Tex. May 21, 2018) (*Mathis*, and not other cases, was the Supreme Court decision that caused the Fifth Circuit to reconsider and abrogate precedent in *Tanksley*).

As in *Tanksley*, the ultimate result and holding in *Herrold* regarding Texas burglary and generic burglary was dependent on the determination that the statute was indivisible, which in turn was dependent on the guidance provided by *Mathis*. Prior to *Herrold*, defendants argued that Texas burglary was broader than generic burglary. *See e.g.*, *United States v. Joslin*, 487 F. App'x 139 (5th Cir. 2012). It does not appear that such argument was based on argument that the statute was indivisible in light of state court decisions on jury unanimity. *See id.* Based on the overruling of precedent in light of *Mathis*, which provided the analytical tool of examining state court decisions on jury unanimity, this Court concludes that a claim and argument based on the guidance of the Supreme Court in *Mathis*, and that was adopted by the Fifth Circuit in *Herrold*,

would have been sufficiently novel prior to *Herrold* so as to provide cause for the failure to raise it on appeal.

Because Movant was sentenced under enhancements that, as it turns out in light of *Herrold*, do not apply to him, this Court concludes that he has shown prejudice to excuse the failure to raise the claim on appeal.

E. Request for Stay

The Government also asks for a stay pending the petition for writ of certiorari filed in *Herrold*. (See Doc. 36 at 5-6.) Even where the Supreme Court has granted certiorari in a Fifth Circuit case, the Fifth Circuit's decision is binding. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986). The Fifth Circuit has denied the Government's motions to stay other cases controlled by *Herrold*. *See Castro*, 2018 WL 4870859, at *2; *United States v. Maldonado-Flores*, 734 F. App'x 285, 286 (5th Cir. 2018); *United States v. Valle-Jaimes*, 733 F. App'x 200, 201 (5th Cir. 2018); *United States v. Stewart*, 732 F. App'x 314, 316 (5th Cir. 2018). In *Stewart*, the Court noted that it had denied the Government's request to stay the mandate in *Herrold* pending certiorari review by the Supreme Court. *See Stewart*, 732 F. App'x at 316. The Court DENIES the Government's request for a stay pending Supreme Court action on the petition for writ of certiorari in *Herrold*.

In conclusion, because Texas burglary is no longer a violent felony, the enhancement of Movant's sentence under the ACCA based on his burglary convictions

does not survive. *See Herrold*, 883 F.3d at 530-31, 541.

VI. CONCLUSION

For the foregoing reasons, the § 2255 second amended motion is **GRANTED**, the Government's request for a stay is **DENIED**, the Movant's sentence in No. 3:12-CR-215-K will be **VACATED** by separate judgment, and Movant will be resentenced. **This opinion shall also be docketed in the criminal case.**

SO ORDERED.

December 12th, 2018.


ED KINKEADE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

2018 DEC 12 PM 3:18

Northern District of Texas - Dallas Division

UNITED STATES OF AMERICA

V.

XAVIER LISTER

* AMENDED JUDGMENT IN A CRIMINAL CASE

Pursuant to the Order filed on December 12, 2018, granting Defendant's
28 U.S.C. § 2255 Motion to Vacate Sentence.

Case Number: 3:12-CR-215-K (01)

USM Number: 44947-177

Camille Knight

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded guilty to count(s) before a U.S. _____
Magistrate Judge, which was accepted
by the court.

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

was found guilty on count(s) One Count Indictment filed on July 24, 2012
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1) and 924(e)	Felon in Possession of a Firearm	February 21, 2012	1

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

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

_____ is are dismissed on the motion of the United States.

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

December 12, 2018

Date of Imposition of Judgment

Signature of Judge

ED KINKEADE
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

Date

DEFENDANT: XAVIER LISTER
CASE NUMBER: 3:12-CR-215-K (01)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ***TIME SERVED. This sentence shall run concurrently with any**

sentence imposed in Cases: F-1240615 and F-1240618 (Assault with a Deadly Weapon); and F-1240617 (Unlawful Possession of a Firearm by a Felon); F-1240616 (Injury to a Child) all out of the 282nd Judicial District Court of Dallas County; and Case No. MB1240360 (Driving with License Suspended), out of Dallas County Court 2. The defendant shall receive credit for time served in federal custody prior to sentencing.

The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated at FCI Seagoville, Seagoville, Texas.

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 _____ 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 _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **XAVIER LISTER**
CASE NUMBER: **3:12-CR-215-K (01)****SUPERVISED RELEASE**Upon release from imprisonment, the defendant shall be on supervised release for a term of: **TWO (2) years.**

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

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

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: XAVIER LISTER
CASE NUMBER: 3:12-CR-215-K (01)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

The defendant shall participate in workforce development programs and services involving activities relating to occupational and career development, including but not limited to assessments and testing, educational instruction, training classes, career guidance, counseling, case management, and job search and retention services, as directed by the probation officer until successfully discharged from the program.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment.

The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month.

The defendant shall participate in a domestic violence treatment program (i.e. batterer's intervention program and anger management program) as directed by the probation officer until successfully discharged. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month.

The defendant shall also receive a mental health evaluation upon release from imprisonment.

DEFENDANT: XAVIER LISTER**CASE NUMBER: 3:12-CR-215-K (01)****CRIMINAL MONETARY PENALTIES**

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

<u>Assessment</u>	<u>Fine</u>	<u>Reimbursement</u>
TOTALS	\$ 100.00	\$ N/A

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) 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.

<u>Name of Payee</u>	<u>Reimbursement</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

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

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

the interest requirement is waived for the fine restitution.

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

DEFENDANT: **XAVIER LISTER**
CASE NUMBER: **3:12-CR-215-K (01)**

SCHEDULE OF PAYMENTS

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

- A Lump sum payment of \$ _____ 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:

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

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 Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

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

Joint and Several

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

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.
Pursuant to 18 U.S.C. 924(d) and 28 U.S.C. 2461(c), the defendant forfeits a FEG, Model P9R, 9 millimeter pistol, bearing serial number R28929, and any ammunition recovered with the weapon.

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