APPENDIX A

Pages A1 - A2

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. THOMAS CREIGHTON SHRADER, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
822 Fed. Appx. 241; 2020 U.S. App. LEXIS 30660
No. 20-6728
September 25, 2020, Decided
September 22, 2020, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield. (1:09-cr-00270-1; 1:16-cv-05559). Irene C. Berger, District Judge.United States v. Shrader, 2020 U.S. Dist. LEXIS 78922 (S.D. W. Va., May 5, 2020)

Disposition:
AFFIRMED.

Counsel Thomas Creighton Shrader, Appellant, Pro se.
Judges: Before NIEMEYER, KEENAN, and FLOYD, Circuit Judges.

Opinion

{822 Fed. Appx. 241} PER CURIAM:

Thomas Creighton Shrader appeals the district court's order construing his Fed. R. Civ. P. 60(b) motion for relief from judgment as an unauthorized, successive 28 U.S.C. § 2255 motion and denying it on that basis.1 Our review of the record confirms that the district court properly construed Shrader's Rule 60(b) motion as a successive § 2255 motion over which it lacked jurisdiction because he failed to obtain prefiling authorization from this court. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h); *United States v. McRae*, 793 F.3d 392, 397-400 (4th Cir. 2015). Accordingly, we affirm the district court's order on that ground.2 *See McRae*, 793 F.3d at 400 (holding that certificate of appealability is not required to appeal district court's categorization of Rule 60(b) motion as unauthorized, successive § 2255 motion).

{822 Fed. Appx. 242} Consistent with our decision in *United States v. Winestock*, 340 F.3d 200, 208 (4th Cir. 2003), we construe Shrader's notice of appeal and informal brief as an application to file a second or successive § 2255 motion. Upon review, we conclude that Shrader's claim does not meet the relevant standard. *See* 28 U.S.C. § 2255(h). We therefore deny authorization to file a successive**{2020 U.S. App. LEXIS 2}** § 2255 motion.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

A1 A-1 08691088

Footnotes

1

The district court also found that, to the extent Shrader was seeking to reopen his 2010 conviction for possession of a firearm by a convicted felon, he could not do so because Rule 60(b) applies to civil cases only. Shrader clarifies on appeal that he is not seeking to reopen his conviction but to reopen the § 2255 motion that the district court dismissed in 2016.

2

The district court, however, incorrectly concluded that Shrader's Rule 60(b)(6) motion is barred by the one-year filing deadline. *See* Fed. R. Civ. P. 60(c)(1) (providing that Rule 60(b)(1)-(3) motions must be made "no more than a year after the entry of the judgment or order of the date of the proceeding"). We take no position as to whether Shrader's motion was "made within a reasonable time." *Id.*

APPENDIX B

Pages B1 - B4

UNITED STATES OF AMERICA, Plaintiff, v. THOMAS CREIGHTON SHRADER, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, BLUEFIELD DIVISION
2020 U.S. Dist. LEXIS 78922
CRIMINAL ACTION NO. 1:09-cr-00270
May 5, 2020, Decided
May 5, 2020, Filed

Editorial Information: Prior History

United States v. Shrader, 2010 U.S. Dist. LEXIS 6213 (S.D. W. Va., Jan. 26, 2010)

Counsel **{2020 U.S. Dist. LEXIS 1}**For D.S., Interested Party: Christopher Quasebarth, LEAD ATTORNEY, MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., Upper Marlboro, MD; Russell P. Butler, LEAD ATTORNEY, PRO HAC VICE, MARYLAND CRIME VICTIMS' RESOURCE CENTER, Upper Marlboro, MD; Robert M. Bastress, III, DITRAPANO BARRETT & DIPIERO, Charleston, WV.

For United States of America, Plaintiff: John L. File, LEAD ATTORNEY, UNITED STATES ATTORNEY'S OFFICE, United States Courthouse & IRS Complex, Beckley, WV; Thomas C. Ryan, LEAD ATTORNEY, Betty A. Pullin, UNITED STATES ATTORNEY'S OFFICE, Charleston, WV.

Judges: IRENE C. BERGER, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: IRENE C. BERGER

Opinion

MEMORANDUM OPINION AND ORDER

The Court has reviewed the Defendant's motion for *Relief from a Judgment or Order Rule 60(b)(6)* (Document 533), wherein the Defendant requests immediate release and that his conviction under 18 U.S.C. § 922(g)(1) for Felon in Possession of a Firearm be vacated. For the reasons stated herein, the Court finds that the Defendant's motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant filed the instant motion on April 13, 2020, arguing that his conviction under 18 U.S.C. § 922(g)(1) should be vacated because an Official Certificate of Discharge, issued after a prior conviction, restored**{2020 U.S. Dist. LEXIS 2}** "any and all" of his civil rights. (Document 533 at 1.) As such, the Defendant argues that pursuant to 18 U.S.C. § 921(a)(20), his conviction should be vacated.

On June 8, 2010, the Defendant was charged in a Second Superseding Indictment with two counts of Stalking by Use of Interstate Facility in violation of 18 U.S.C. § 2261A(2) (Counts 1 and 2) and one count of being a Felon in Possession of a Firearm (Count 3). (Documents 123 and 124.) This Court granted the Defendant's motion to sever counts. (Document 82.) On July 14, 2010, a jury found the Defendant guilty of being a Felon in Possession of a Firearm. (Document 219-222 and 224.) On

August 20, 2010, a second jury found the Defendant guilty of two counts of Stalking by Use of Interstate Facility. (Documents 293-294 and 297.) On November 18, 2010, this Court sentenced the Defendant to 235 months of imprisonment to be followed by a period of five years supervised release. (Documents 337 and 341.)

On November 24, 2010, the Defendant, by counsel, filed a Notice of Appeal. (Document 343.) On April 4, 2012, the Fourth Circuit Court of Appeals affirmed the Defendant's conviction and sentence. *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012). The Defendant then filed a petition for certiorari in the United States Supreme Court,**{2020 U.S. Dist. LEXIS 3}** which was denied on December 3, 2012. *Shrader v. United States*, 568 U.S. 1188, 133 S. Ct. 1320, 185 L. Ed. 2d 236 (2012).

On December 17, 2012, the Defendant filed a motion for a new trial-making the same argument as the Defendant makes in the current motion-arguing that his firearm rights were restored because the Official Certificate of Discharge from parole states that "any or all civil rights heretofore forfeited are restored, unless otherwise provided by law." (Document 369 at 2, 10.) The Defendant argued that his conviction must be overturned because a violation of § 922(g)(1) cannot rest upon a conviction for possession of a firearm when a person's civil rights have been restored. (*Id.* at 2-3) (citing 18 U.S.C. § 921(a)(20)). This Court denied the Defendant's motion for a new trial on June 4, 2013, finding that the Defendant stipulated to the prior felony conviction and that the Official Certificate of Discharge was not adequate to restore the Defendant's firearm rights. (Document 376.)

On May 23, 2013, the Defendant filed a *Petition for Writ of Habeas Corpus By a Person in Federal Custody*, pursuant to 28 U.S.C. § 2241. (Document 372.) The Defendant later filed a motion to withdraw the Section 2241 Petition, which was granted, and this Court dismissed the Petition accordingly. (Document 390.)

On December 24, 2013, the Defendant**{2020 U.S. Dist. LEXIS 4}** filed a *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.* (Document 406.) In that motion, the Defendant put forth another rendition of the argument presented in the current motion, arguing that West Virginia had restored his civil rights, so he was entitled under West Virginia law to possess a firearm, and the failure of his counsel to present this evidence violated the Sixth Amendment. (Document 449 at 21.) On January 25, 2016, the Court issued a Memorandum Opinion and Order again rejecting this argument, finding that "there was no evidence showing that the State of West Virginia had restored all of the Defendant's civil rights, including, specifically, his right to possess a firearm," and also noted that "under West Virginia law, violent felons are ineligible for restoration of the right to own a firearm," ultimately denying the Defendant's motion. *Id.*

On June 21, 2016, the Fourth Circuit granted the Defendant authorization to file a second or successive 2255 motion. (Document 462.) That same day, the Defendant filed a successive *Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255*, arguing that he did not qualify for the Armed Career Criminal Act sentence**{2020 U.S. Dist. LEXIS 5}** enhancement applied by the Court. (Document 463.) The Defendant further requested permission to amend his § 2255 motion "to preserve any relief available to him" resulting from the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019).

By Memorandum Opinion and Order entered August 27, 2019, this Court denied the Defendant's § 2255 motion, and further denied the request to amend the § 2255 motion in light of *Rehaif*, finding that "[n]othing in Mr. Shrader's objections or in the record of his case suggests that he would be entitled to relief under *Rehaif*, should that decision be made retroactive." (Document 523 at 8.) In that opinion, this Court further noted that "[t]he instant motion was filed as a second § 2255 motion with leave from the Fourth Circuit specifically to permit the claim arising from the new rule of

constitutional law stated in Johnson, and the Court finds that permitting him to amend his claim in attempt to piggyback a new theory for relief onto this motion is not warranted and would be contrary to the procedures established in 28 U.S.C. § 2255(h)." *Id.*

DISCUSSION

"Rule 60 of the Federal Rules of Civil Procedure provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Ziegler v. Clay Cty. Sheriff*, No. 2:19-cv-00410, 2020 U.S. Dist. LEXIS 68310, 2020 WL 1917768, at *2 (S.D. W. Va. Apr. 20, 2020)**{2020 U.S. Dist. LEXIS 6}** (quoting *United States Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)) (internal quotation marks omitted). The Court may allow for relief from a final judgment for: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or any other reason that justifies relief." (Fed. R. Civ. P. 60(b).)

In order to qualify for relief under Rule 60(b)(6) for "any other reason that justifies relief," extraordinary circumstances must be demonstrated. *Ziegler*, No. 2:19-cv-00410, 2020 U.S. Dist. LEXIS 68310, [WL] at * 2. "Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue." *United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982). "Where the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)." *Id.* at 312-13. Moreover, a motion pursuant to Rule 60(b) "must be made within a reasonable time" and "no more than a year after the entry**{2020 U.S. Dist. LEXIS 7}** of the judgment or order." Fed. R. Civ. P. 60(c).

Because the Defendant has filed this motion pursuant to Rule 60(b) almost ten years after he was convicted by a jury and sentenced-well after the one-year filing deadline-his motion is barred even if it were applicable. Fed. R. Civ. P. 60(c). Importantly, Rule 60(b) is generally only available in civil cases. Moreover, to the extent that the Defendant's motion should be construed as a successive § 2255 motion, it is additionally barred because the Defendant did not apply to the Fourth Circuit for authorization to file a successive 2255 motion, in contravention of the procedures outlined in 28 U.S.C. § 2255(h). Such application, however, would likely prove futile because the Fourth Circuit has previously denied the Defendant's motion under 28 U.S.C. § 2244 for an order authorizing this Court to consider a successive application for relief under 28 U.S.C. § 2255 (Document 521) and because this Court has given consideration to the Defendant's argument in prior rulings. (Documents 376 and 449.)

CONCLUSION

WHEREFORE, after careful consideration, the Court **ORDERS** that the motion for *Relief from a Judgment or Order Rule 60(b)(6)* (Document 533) be **DENIED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to the Defendant and counsel, to the United States Attorney, to**{2020 U.S. Dist. LEXIS 8}** the United States Probation Office, and to the Office of the United States Marshal.

ENTER: May 5, 2020

/s/ Irene C. Berger

IRENE C. BERGER

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX C

Pages C1 - C9

In The United States District Court
For The Southern District of West Virginia

United States of America,
Plaintiff,

v.

Thomas Creighton Shrader,
Defendant/Petitioner,

Civil Case No. _____

RE: 1:09-CR-00270

Relief From A Judgement or Order
Rule 60(b)(6)

Now comes Petitioner, Thomas Creighton Shrader, hereinafter known as Shrader, and moves this court to ORDER Shrader's immediate release and vacate Shrader's Felon In Possession conviction under 18 U.S.C. §922(g)(1), due to a change in the law.

By law, "when the conduct for which defendant was convicted is 'no longer criminal' due to an intervening change in the law, the defendant is entitled to relief under the fundamental miscarriage of justice exception." Davis v. United States, 417 U.S. 333, 346, 41 L.Ed.2d 109, 94 S.Ct. 2298 (1974).

Shrader went to a jury trial in July 2010 on a Second Superseding Indictment on a charge of being a felon in possession of a firearm, and was found guilty.

Shrader believed he could possess firearms because the State of West Virginia in Febraury 1999 had restored ANY and ALL of Shrader's Civil Rights by an "Official Certificate of Discharge". (See: Attached Exhibit "A").

HOWEVER, 18 USC §922(g) et al. HAS AN "EXCEPTION" FROM BEING PROSECUTED BY THE FEDERAL GOVERNMENT FOR BEING A, "FELON IN POSSESSION" of A FIREARM. This "EXCEPTION" IS FOUND AT 18 USC §921(a)(20) which states IN PART;

"... ANY CONVICTION which has been EXPUNGED, OR SET ASIDE OR FOR which A PERSON has been PARDONED OR has had Civil Rights RESTORED shall not be CONSIDERED A 'CONVICTION' FOR PURPOSES of this chapter, UNLESS such PARDON, EXPUNGEMENT, OR RESTORATION of Civil Rights EXPRESSLY PROVIDES that the PERSON may not ship, TRANSPORT, POSSESS, OR RECEIVE FIREARMS."

18 USC §921(a)(20) BECAME LAW ON NOVEMBER 15th, 1986. THREE (3) YEARS LATER the State of WEST VIRGINIA ENACTED WEST VIRGINIA CODE §61-7-7 IN 1989, titled; "PERSONS PROHIBITED FROM POSSESSING FIREARMS; CLASSIFICATIONS; REINSTATEMENT of RIGHTS TO POSSESS; OFFENSES; PENALTIES."

THEN IN 1990 the FOURTH CIRCUIT COURT of APPEALS IN the CASE of UNITED STATES v MCLEAN, 904 F.2d 216, held;

"... that it must look beyond the language of the Certificate allegedly RESTORING the Civil Rights of a defendant AND EXAMINE 'the whole of State law.'"

Shrader's Certificate which RESTORED ALL of Shrader's Civil Rights did NOT EXPRESSLY PROVIDE that Shrader MAY NOT ship, TRANSPORT, POSSESS, OR

receive firearms.

However, in 2010 the Federal Government was of the opinion that pursuit to United States v. McLean, 904 F.2d 216, West Virginia Code §61-7-7 was applicable to Shrader and no "exemption" was applicable to Shrader even though the State of West Virginia had restored any and all of Shrader's Civil Rights by a Certificate of Restoration.

This held true until 2018 when the West Virginia Legislator's amended West Virginia Code §61-7-7, and is currently retitled as; "Persons prohibited from possessing firearms; classifications; right of nonprohibited persons over twenty-one years of age to carry concealed deadly weapons; offenses and penalties; reinstatement of rights to possess; offenses; penalties."

In 2018 the West Virginia legislator's enacted a new provision and exemption into West Virginia Code §61-7-7 at §61-7-7(c)(4); which now states;

> "(c) Any person may carry a concealed deadly weapon without a license therefor who is;
> (4) Not prohibited from possessing a firearm under the provisions of 18 U.S.C. §922(g) or (n). (See; Exhibit "B")

This Amendment or Revision of West Virginia Code §61-7-7 in 2018 by the West Virginia Legislator's makes Shrader's previous Felon In Possession of a Firearm, "No longer criminal" under the

application of 18 U.S.C. §921(a)(20), by virtue of the State of West Virginia issuing to Shrader a Certificate which restored ANY and ALL of Shrader's Civil Rights with an affirmative action by the State of West Virginia.

Therefore, a review of the, "whole of State Law" in West Virginia, (pursuit to United States v. McLean, 904 F.2d 216), confirms that the 2018 West Virginia Legislator's by law, now recognizes the fact, "if the State of West Virginia issue(s) a Certificate restoring any and all Civil Rights of a person and does not state therein upon said Restoration of Civil Rights, that said person cannot ship, transport, possess, or receive firearms", is applicable to the Federal Statute 18 USC §922(g) or (n), if said person is not prohibited to posses a firearm by restoration of his Civil Rights by the State under 18 USC §921(a)(20).

Due to this change in the West Virginia Code, Shrader's conviction for being a Felon In Possession of a firearm is "no longer criminal" due to Shrader having his Civil Rights restored in February 1999 pursuit to 18 USC §921(a)(20) which is applicable to 18 USC §922(g) which therefore does not prohibit Shrader from owning or possessing firearms, in conformity to WV Code § 61-7-7(c)(4).

Shrader is currently incarcerated and has served more than one hundred twenty four (124) months on a sentence and "conviction" that is no longer criminal.

Justice demands that Shrader's Felon In Possession conviction be vacated and for

this court to enter an ORDER immediately ORDERING Shrader's immediate release.

To keep Shrader incarcerated any longer or further would result in a complete miscarriage of Justice. Davis v. United States, 417 U.S. 333, 346-347, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

Respectfully Submitted,

Thomas Creighton Shrader
Reg. No. 08691-088
Fed. Correctional Institution
P.O. Box 9
Mendota, CA 93640

I, Thomas Creighton Shrader, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and memory.

Executed on this 3rd day of April 2020.

Thomas Creighton Shrader

Attachments;
Exhibit "A" - Certicate of Discharge
Exhibit "B" = (B-1, B-2, B-3) Revised WV Code §61-7-7

STATE OF WEST VIRGINIA

Division of Corrections

Charleston

Official Certificate of Discharge

This is to Certify That

Thoams Shrader, DOC-9994

Is hereby discharged from parole and any or all civil rights heretofore forfeited are restored, unless otherwise prohibited by law.

Done this the *5th* day of *February*, 19 *99*

DIVISION OF CORRECTIONS

Deputy COMMISSIONER

EXHIBIT "A"

C6

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§61-7-7. Persons prohibited from possessing firearms; classifications; right of nonprohibited persons over twenty-one years of age to carry concealed deadly weapons; offenses and penalties; reinstatement of rights to possess; offenses; penalties.

(a) Except as provided in this section, no person shall possess a firearm, as such is defined in section two of this article, who:

(1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) Is habitually addicted to alcohol;

(3) Is an unlawful user of or habitually addicted to any controlled substance;

(4) Has been adjudicated to be mentally incompetent or who has been involuntarily committed to a mental institution pursuant to the provisions of chapter twenty-seven of this code or in similar law of another jurisdiction: *Provided*, That once an individual has been adjudicated as a mental defective or involuntarily committed to a mental institution, he or she shall be duly notified that they are to immediately surrender any firearms in their ownership or possession: *Provided, however*, That the mental hygiene commissioner or circuit judge shall first make a determination of the appropriate public or private individual or entity to act as conservator for the surrendered property;

(5) Is an alien illegally or unlawfully in the United States;

(6) Has been discharged from the armed forces under dishonorable conditions;

(7) Is subject to a domestic violence protective order that:

(A) Was issued after a hearing of which such person received actual notice and at which such person had an opportunity to participate;

(B) Restrains such person from harassing, stalking or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

EXHIBIT "B-1"

(ii) By its terms explicitly prohibits the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(8) Has been convicted of a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter or the provisions of subsection (b) or (c), section nine of said article or a federal or state statute with the same essential elements in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable misdemeanor crime of domestic violence.

Any person who violates the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100 nor more than $1,000 or confined in the county jail for not less than ninety days nor more than one year, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, any person:

(1) Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another or of a felony sexual offense; or

(2) Who has been convicted in this state or any other jurisdiction of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II or a Schedule III controlled substance as such are defined in sections two hundred four, two hundred five and two hundred six, article two, chapter sixty-a of this code and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than $5,000, or both. The provisions of subsection (f) of this section shall not apply to persons convicted of offenses referred to in this subsection or to persons convicted of a violation of this subsection.

(c) Any person may carry a concealed deadly weapon without a license therefor who is:

(1) At least twenty-one years of age;

(2) A United States citizen or legal resident thereof;

(3) Not prohibited from possessing a firearm under the provisions of this section; and

(4) Not prohibited from possessing a firearm under the provisions of 18 U. S. C. §922(g) or (n).

(d) As a separate and additional offense to the offense provided for in subsection (a) of this section, and in addition to any other offenses outlined in this code, and except as provided by subsection (e) of this section, any person prohibited by subsection (a) of this section from possessing a firearm who carries a concealed firearm is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than three years or fined not more than $5,000, or both.

(e) As a separate and additional offense to the offense described in subsection (b) of this section, and in additional to any other offenses outlined in this code, any person prohibited by subsection (b) of this section from possessing a firearm who carries a concealed firearm is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than ten years or fined not more than $10,000, or both.

(f) Any person prohibited from possessing a firearm by the provisions of subsection (a) of this section may petition the circuit court of the county in which he or she resides to regain the ability to possess a firearm and if the court finds by clear and convincing evidence that the person is competent and capable of exercising the responsibility concomitant with the possession of a firearm, the court may enter an order allowing the person to possess a firearm if such possession would not violate any federal law: *Provided*, That a person prohibited from possessing a firearm by the provisions of subdivision (4), subsection (a) of this section may petition to regain the ability to possess a firearm in accordance with the provisions of section five, article seven-a of this chapter.

(g) Any person who has been convicted of an offense which disqualifies him or her from possessing a firearm by virtue of a criminal conviction whose conviction was expunged or set aside or who subsequent thereto receives an unconditional pardon for said offense shall not be prohibited from possessing a firearm by the provisions of the section.

EXHIBIT "B-3"

C9

A-15

APPENDIX D

Pages D1 - D14

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
INFORMAL BRIEF FOR HABEAS AND SECTION 2255 CASES

No. 20-6728, US v. Thomas Shrader
1:09-cr-00270-1, 1:16-cv-05559

1. **Declaration of Inmate Filing**

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

- a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or
- a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 6/5/2020

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621), to the best of my knowledge and memory.

Signature: Thomas C. Shrader Date: 6/5/2020

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

2. **Jurisdiction**

Name of court from which you are appealing:
United States District Court For The Southern District of West Virginia

Date(s) of order or orders you are appealing:
May 5th, 2020

3. **Certificate of Appealability**

Did the district court grant a certificate of appealability? Yes [ ]No[ ] - N/A
If Yes, do you want the Court of Appeals to review additional issues that were not certified for review by the district court? Yes [ ]No[ ]
If Yes, **you must** list below the issues you wish to add to the certificate of appealability issued by the district court. If you do not list additional issues, the Court will limit its review to those issues on which the district court granted the certificate.

No. 20-6728

Statement Of Reason For Appeal

Comes now Appellant, Thomas Creighton Shrader, hereinafter known as Shrader and states as "fact" he has been denied justice before District Court Judge Irene C. Berger. Which deprived Shrader of his 5th amendments.

A review of the Court Order entered by Judge Berger in this case on May 5th, 2020 to the "actual" issue raised and set forth in Shrader's Rule 60 (b)(6) Motion was not addressed, and was in fact circumvented by the District Court to misconstrue the "fact" that Shrader's "fundamental miscarriage of justice exception" was applicable to this current filing, "due to a change in the law". Which, by application of the change nulled and voided any and all prior considerations by the district court or this court based on the prior status of the "old" law, in effect prior to 2018.

Judge Berger in her May 5th, 2020 denial ORDER reverted solely back to her previous court ORDER's of denial which were; Shrader's "Motion For A New Trial", based upon 18 U.S.C. §921 (a)(20) and denied on December 17, 2012, and her denial of Shrader's Original 28 U.S.C. §2255 Motion on January 25th, 2016 that had been filed on December 24, 2013 which also raised the issue under 18 U.S.C. §921 (a)(20) that solely under said United States Code applicable language Shrader was not guilty of being a felon in possession as the State of West Virginia had issued Shrader an "Official Certificate of Discharge" which restored to Shrader "any and all" Civil Rights heretofore forfeited are Restored", and therefore under the sole wording, "Congresses language as stated in §921 (a)(20)", Shrader was not in violation of 18 U.S.C. 922(g)(1).

Spliting Of The Hair's

Shrader's "Official Certificate of Discharge" which restored back to Shrader "ANY AND ALL" civil Rights heretofore forfeited did not expressly provide or state thereon that Shrader may not ship, transport, possess, or receive firearms.

Therefore, Shrader's three (3) prior State of West Virginia convictions, (which arose out of one criminal episode/soree of less than two (2) minutes from begining to end), pursuant to 18 U.S.C. §921(a)(20) "Shall Not be considered a conviction for purposes of this chapter", since the State Of West Virginia restored ANY and ALL of Shrader's Civil Rights.

On page two (2) of the Court's Order of May 5th, 2020 in reference to the Courts Order of December 17, 2012 finding that; "Defendant stipulated to the prior felony conviction that the Official Certificate of Discharge was not adequate to restore the Defendants firearm rights."

Then on page three of the same Order the Court reference's the January 25, 2016 Order denying Shrader's §2255 Motion issue of 18 U.S.C. §921(a)(20) by stating; "... there was no evidence showing that the State of West Virginia had restored all of the Defendant's Civil Rights, including, specifically, his right to possess a firearm."

What is so important and missing from this ORDER in regards to the Court's decision of both December 17, 2012 and January 25, 2016 were not based on 18 USC §921(a)(20) but in fact were based upon this courts holding in; United

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States v. McLean, 904 F.2d 216, 218 (4th Cir. 1990) holding that;

> "The court must look to the whole of State law - not just the Certificate granting RESTORATION of Civil Rights."

A Fifth Amendments Equal Protection and Due Process conviction under the Constitution of the United States of America "must be" in accordance with the United States Code, and 18 U.S.C. §921(a)(20) clearly states Congresses intent; "... A person... has had Civil Rights restored Shall Not be considered "A conviction" for purposes of this chapter, UNLESS such pardon, expungement, or RESTORATION of Civil rights expressly provides that the person may not ship, transport, possess or receive firearms."

Nowhere in 18 U.S.C §921(a)(20) did Congress "Authorize" any District or Appeal Courts of the Federal government to Supercede or perform an act of "usurpation" to nullify a portion of §921(a)(20) and make said "Congressional" language" of no effect and void to "override" congresses "intent" and the law.

Pursuant to 18 USC §921(a)(20) Shrader was not in violation of "Federal Law" to be prosecuted on Felon in Possession of Firearm charges.

However, the District Court denied Shrader in December 17, 2012 and January 25, 2016 based on this Circuits holding in United States v. McLean. Due to the State of West Virginia enactment in 1989 of W.Va. Code §61-7-7 which prohibited

felons from possessing firearms, but could petition a Circuit Court to possess firearms.

With the District Courts "application" of this courts holding in McLean that the court must look to the, "whole of State laws" usurped the "law" enacted by Congress in 18 U.S.C. §921(a)(20) for "conviction(s)" to be based upon and dictated on the "unless clause" and whether said "restoration" prohibited possession of firearms. (Period) Nothing else.

However, after the denial of Shrader's §2255 Motion in January 2018, which included Shrader's restoration of Civil Rights, the W.Va. Legislatures in 2018 Amended West Virginia Code §61-7-7 at §61-7-7 (c)(4) which allowed a person who was;

"(4) Not prohibited from possessing a firearm under the provisions of 18 U.S.C. §922(g) or (n)."

With the admendment and inclusion of W.Va. Code §61-7-7 (c)(4) to W.Va. Code §61-7-7 eradicated the possession of firearms by a felon on a case-by-case bases to Shrader. With W.Va. law now allowing Shrader "under the whole of State Law" to now possess a "firearm" if the person was not prohibited from possessing a firearm under 18 U.S.C. §922(g) or (n), could now possess firearms in West Virginia.

Federal Court in compliance to and with Congresses language and intent in 18 U.S.C. §921(a)(20) must concede that if a State has restored a felon's Civil Rights, Then under application of §921(a)(20) a felon is "EXEMPT" from being convicted under

violation of 18 U.S.C. §922(g) and said felony is not prohibited from possessing firearms.

With the amendment by West Virginia Legislator's in 2018 to W.Va. Code §61-7-7 of being able to possess a firearm if the person was not prohibited from possessing a firearm under the provisions of 18 U.S.C. §922(g), is applicable to Shrader by application of §921(a)(20).

Shrader is, "Actually Innocent" of being a Felon In Possession of a firearm, and actual innocence is applicable under, McQuiggin v. Perkins, 133 S.Ct. 185 L.Ed.2d 2019 (2013).

Also, very applicable as so stated in Shrader's Rule 60(b)(6) Motion and ignored by Judge Berger is the fact that;

> "By law, 'when the conduct for which defendant was convicted is no longer criminal due to an intervening change in the law,' the defendant is entitled to relief under the 'fundamental miscarriage of justice exception.'" Davis v. United States, 417 U.S. 333, 346, 41 L.Ed.2d 109, 94 S.Ct. 2298 (1974)

With the Amendment of W.Va. Code §61-7-7 in 2018 by the W.Va. Legislation was a "intervening change in the law". Which made Shrader's possession of a firearm "no longer criminal". Shrader is not prohibited from possessing a firearm under State law now. As he is not prohibit from possessing under 18 U.S.C. §922(g), for the restoration of Shrader's Civil Rights removed any 922(g) liability.

Court Errors and Objection to Errors

#1. On page two of the Courts May 5th., 2020 Order the Court states;

"On December 17, 2012, the defendant filed a Motion for a new trial - making the same argument as the Defendant makes in the current motion..."

#2. On page three of the Court's May 5th, 2020 Order the Court states; (in reference §2255)

"In that motion, [§2255] the defendant put forth another rendention of the argument presented in the current motion,..."

Argument to #1 and #2

The court is in error, incorrect, and clearly failing to apply the law or current changes and circumstances of the law!

Number one was decided by the Court on December 17, 2012. Number two was decided by the Court in January 2016.

The "change in the law" by the Amendment to W.Va. Code §61-7-7 changed the basis on which Shrader's "whole of State law" conviction was based when the Court entered decision's in 2012 and 2016.

Therefore, the argument is not the same as it was in 2012 or 2016 since the argument is now

based on "new law" that took effect in the State of West Virginia in 2018.

#3. On page four of the Courts May 5th, 2020 Order the Court states;

"In order to qualify for relief under Rule 60(b)(6) for 'any other reason that justifies relief' extraordinary circumstances must be demonstrated. Ziegler, No. 2:19-cv-00410, at *2. 'Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue.' United States v. Williams, 674 F.2d 310, 312 (4th Cir.)(1982). 'Where the motion is nothing more than a request that the district court change its mind... it is not authorized by Rule 60(b).' Id. at 312-13."

#4. On page five of the Court's May 5th, 2020 Order the Court stated;

"... a motion pursuant to Rule 60(b) must be made within a reasonable time and 'no more than a year after the entry of the Judgement or Order.' Fed. R. Civ. P. 60(c)"

#5. Further on page five the Court stated;

"Because the Defendant has filed this motion pursuant to Rule 60(b) almost ten years after he was

convicted by a jury and sentenced - well after the one-year filing deadline - his motion is barred even if it were applicable. Fed. R. Civ. P. 60(c). Importantly, Rule 60(b) is generally only available in civil cases.

#6. Continued on page five the Court stated;

"Moreover, to the extent that the Defendant's motion should be construed as a successive §2255 motion, it is additionally barred because the Defendant did not apply to the Fourth Circuit for authorization to file a successive 2255 motion in contravention of the procedures outlined in 28 U.S.C. §2255(h). Such application, however would likely prove futile because the Fourth Circuit has previously denied the Defendant's motion under 28 U.S.C. §2244 for an Order authorizing this Court to consider a successive application for relief under 28 U.S.C. §2255 (Doc. 521) and because this court has given consideration to Defendant's argument in prior rulings. (Doc. 376 and 449)."

Argument to #3, #4, #5 and #6

The Court's reasoning in Error #3 must clearly fail due to the "fact" that Shrader's Rule 60(b)(6) motion was not a "request for the district court to change its mind". But, for the application of "new law" to an issue and ground raised by Shrader

in his §2255 Motion and Denied by the Court in January 2016. Shrader was not asking the District Court to just change its mind, but to revisit the issue of 18 U.S.C. §921(a)(20) application now under the new Amended W.Va. Statute §61-7-7 (c)(4) which clearly "altered" this circuits application of; "the whole of State Law" as now applicable to the State of West Virginia under this new standard and the Federal Courts application in the Rule of "Lenity" as applicable in consideration of the application of the law and punishment.

A change in the law that made Shrader's conviction "no longer criminal" is an "extraordinary circumstance" which does justify relief under Rule 60(b)(6).

The Court's reasoning in Error #4 must also clearly fail due to the misstatement and application of Rule 60(c). As clearly set out in Rule 60(c)(1) a Rule 60(b) motion for 60(b) reasons (1), (2), or (3) must be made no more than a year after the entry of the judgement. Shrader's 60(b) filing was not filed under reason (1), (2), or (3) with a one year limitation.

The Courts reasoning in Error #5 must clearly fail in "honest" consideration of the contents and issue raised by Shrader in his Rule 60(b)(6) Motion.

Judge Irene C. Berger, (for whatever her reasons) authored this part of her May 5th, 2020 Order contrary to the "facts" and the law to deny Shrader Equal Protection and Due Process under the Fifth Amendment to the Constitution of the United States of America.

Judge Berger, in support of her previous

statement from Error #4 (must be made within one year after the entry of judgement), then author's, "Because the Defendant has filed this motion pursuant to Rule 60(b) almost ten years after he was convicted by a jury and sentenced - well after the one-year filing deadline, his motion is barred even if it were applicable. . . Importantly Rule 60(b) is generally only available in Civil cases.

This portion of Judge Berger's Order is only "self-serving" to justify her action in denying Shrader's Rule 60(b)(6) motion.

Please take notice in this part of her Order Judge Berger did not address Shrader's Rule 60(b) Motion was "Reason (6)" and therefore not applicable to the "no more than a year after the entry of the judgement or Order", which is by United States Rules of Civil Procedure at Rule 60(c)(1) applicable only to reasons (1), (2), and (3) of Rule 60(b), and not Rule 60(b)(6).

Shrader's Rule 60(b)(6) motion would be barred if it were filed under reason (1), (2), or (3) of Rule 60(b).

However, Congress did not set a time limit on Reason's (4), (5), or (6). Only that a Motion under Rule 60(b) must be made within a reasonable time. A reasonable time varies from case to case.

Although Shrader did file under Reason (6). Shrader could have filed under Reason (5) but was of the opinion that Reason (6) would "also" cover the reasons listed in Reason (5) under "applying it [Shrader's conviction and sentence] prospectively is no longer equitable.

In the past many Federal Courts have Granted Rule 60(b) motions under Reason's (4), (5), and (6), years after the entry of the judgement or Order. Cf. to Court ORDER's in a Civil Action placing "something"

in receivership or under supervision of another exitity until something required to be done or finished may take 8-15 years to complete. Then when achieved the party can file under reason (4), (5), or (6) for relief or consideration of the original civil action filed years before, for a review or hearing on the "merits" of the "new" applicable facts to the case, and/or to reconsider the prior Order on "new" facts.

Judge Berger insinuated and implied that Rule 60(b) of the Rules of Civil Procedure was not applicable to Shrader's Rule 60(b)(6) motion and was filed almost ten years after being convicted by a jury.

A judge can author a Order anyway they want to achieve their desires and not the application of the law.

Judge Berger Order as stated in part in Error #6 proves that Shrader has and will file for permission to file a second or successive §2255 Motion if need be.

However this current Rule 60(b)(6) filing was in fact a; "True 60(b)" filing by Shrader, filed on his previous denied §2255 Motion in January 2016, (pursuant to this courts holding in, "United States v. McRae, 793 F.3d 397 (4th Cir. 2015)) and assigned Civil Action No. 1:13-33098, and denied in January 2016. Only four (4) years ago and not "almost ten years ago" a inferred by Judge Berger to the Original "criminal" action which was not a civil action.

The Court's Error in Error #6 is in construing Shrader's "True 60(b)(6)" filing on his prior §2255 Civil Action #1:13-33098 as a

successive §2255 motion must fail. As Shrader is aware of what action's and issue's he is required to file with the Fourth Circuit for permission to file a second or successive §2255 motion.

Since the issue was addressing a ground and issue raised by Shrader in his §2255 civil action which the District Court denied in 2016, pursuant to United States v. McRae, 793 F.3d 392 (4th Cir. 2015) was the proper and legal use of Rule 60(b)(6) of C.V.R.P., to re-open his §2255 Motion.

Judge Berger was clearly mistaken and in error in stating at the conclusion of her May 5th, 2020 Order the following;

> "... and because this court has given consideration to Defendants argument in prior rulings. (Doc. 376 and 419)."

This is clearly a "false" and very misleading statements, because Shrader's Rule 60(b)(6) motion dealt with a "change in the law" effecting the application of 18 U.S.C. §921(a)(20) making Shrader's Felon in Possession of Firearms "no longer criminal".

Which, "change in the law" did not take place until 2018, so it would have been impossible for Judge Berger to have ruled on same in 2012 in document 376 or in 2016 in document 419. (See Exhibit "A" - Courts May 5th, 2020 Order)

Issue 4.

Supporting Facts and Argument

5. **Relief Requested**

Identify the precise action you want the Court of Appeals to take: To take jurisdiction under the proper United States Code, then Grant Shrader's Rule 60(b)(6) motion and release Shrader based on the contents of this Appeal and the contents for relief as stated in Shrader's Rule 60(b)(6) motion. (See Exhibit "B")

6. **Prior appeals (for appellants/petitioners only)**

A. Have you filed other cases in this Court? Yes [ ] No [ ]

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

Thomas C. Shrader
Signature
[Notarization Not Required]

Thomas Shrader
[Please Print Your Name Here]

CERTIFICATE OF SERVICE

****

I certify that on 6/5/2020 I served a copy of this Informal Brief on all parties, addressed as shown below:

Office of The U.S. Attorney
110 N. Heber St.
Beckley, W.Va. 25801

Thomas C. Shrader
Signature

NO STAPLES, TAPE OR BINDING PLEASE

APPENDIX E

Pages E1 - E7

UNITED STATES OF AMERICA, v. ZAYJUAN PAYNE Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
382 F. Supp. 3d 71; 2019 U.S. Dist. LEXIS 103186
Case No. 1:19-cr-00109 (TNM)
June 19, 2019, Decided

Editorial Information: Subsequent History

Appeal dismissed by United States v. Payne, 2019 U.S. App. LEXIS 25471 (D.C. Cir., Aug. 13, 2019)

Counsel **{2019 U.S. Dist. LEXIS 1}**TRAVIS TAVON BLOCKER, Defendant: H. Heather Shaner, LEAD ATTORNEY, LAW OFFICES OF H. HEATHER SHANER, Washington, DC.

For ZAY JUAN PAYNE, also known as ZAYJUAN PAYNE, Defendant: Ernest Wendell McIntosh, LEAD ATTORNEY, NEWMAN & MCINTOSH, LLC, Washington, DC.

For USA, Plaintiff: Andrew Talis Floyd, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA, Washington, DC.

Judges: TREVOR N. McFADDEN, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: TREVOR N. McFADDEN

Opinion

{382 F. Supp. 3d 72} **MEMORANDUM OPINION**

Zayjuan Payne is charged with unlawful possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1), the federal "felon-in-possession" law. He now moves to dismiss the indictment, arguing that because his prior convictions were set aside under the District of Columbia's Youth Rehabilitation Act ("YRA"), the Government cannot show that he has a qualifying predicate felony as required by Section 922(g)(1). The Court agrees. It will therefore grant his motion and dismiss his indictment.

I.

In the early morning hours of a Friday in March, police officers conducted a security sweep of a parking garage near a D.C. night club. ECF No. 1-1 at 1. They noticed an unoccupied car that had a purple (yes, purple) handgun and an extended magazine**{2019 U.S. Dist. LEXIS 2}** sticking out of the rear pocket of the driver's seat. *Id.* Later, they watched three people enter the car and drive away. *Id.* The police stopped the car. *Id.* Because they noticed a gun in the car, the officers detained the driver and two passengers, one of whom was Payne. *Id.* The officers saw the purple handgun and extended magazine were now on the rear floorboard at Payne's feet. *Id.* Payne was ultimately indicted by a federal grand jury for violating 18 U.S.C. § 922(g)(1). *See* ECF No. 2.

Section 922 makes it unlawful for "any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Congress later narrowed the scope of Section

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922 in the Firearms Owners' Protection Act of 1986, 18 U.S.C. § 921(a).

The Act states that what constitutes a "crime punishable by imprisonment for a term exceeding one year" is determined "in accordance with the law of the jurisdiction in which the proceedings were held." *Id.* § 921(a)(20). But any conviction that "has been expunged, or set aside or for which a person has been pardoned or had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement,**{2019 U.S. Dist. LEXIS 3}** or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.*

Payne has twice been convicted of crimes punishable by imprisonment for a term exceeding one year. *See* ECF No. 26-2. The first felony conviction was for attempted robbery. *See id.* at 3. The second was for assault with significant bodily injury. *See id.* at 6.

But both convictions were ultimately set aside under the YRA, D.C. Code § 24-906. *See id.* The YRA provides that the sentencing court may, in its discretion, "unconditionally discharge" a youth offender before the end of any sentence imposed. *See* D.C. Code § 24-906(a), (e). Any such **{382 F. Supp. 3d 73}** discharge automatically sets aside the offender's underlying conviction. *Id.*

For each conviction, the Superior Court of the District of Columbia unconditionally discharged Payne from the sentence it imposed before he completed it. *See* ECF No. 26-2 at 3, 6. Payne's convictions were thereby set aside or expunged.1 *Id.* The Superior Court issued an "Order of Discharge and Certificate Setting Aside Conviction" for each expunged felony. *Id.* These certificates read in relevant part:

> "The offender has successfully completed the conditions of his/her sentence prior to the expiration of the maximum**{2019 U.S. Dist. LEXIS 4}** period previously imposed by the Court,"
>
> "Therefore, it is hereby ORDERED that the offender be unconditionally discharged from the imposed sentence and,"
>
> "It is further ORDERED that by this discharge the conviction shall be set aside, and the Court shall issue a copy of this order and Certificate to the offender, and all appropriate agencies, pursuant to D.C. Code 24-906(e)."*See id.* at 3. The certificates do not mention any firearms prohibitions. *See id.*

Because his convictions were set aside under the YRA, and because the set-aside certificates did not expressly bar him from possessing a firearm, Payne argues that he cannot be convicted under 18 U.S.C. § 922(g)(1). He has therefore moved to dismiss the indictment against him. *See* Def.'s Mot. to Dismiss ("Def.'s Mot."), ECF No. 23.

The Government opposes Payne's motion. *See* Gov't's Resp., ECF No. 27. It argues that, even if the set-aside certificates do not discuss the possession of firearms, Payne "is expressly prohibited from possessing firearms by District of Columbia law, as stated in both the [YRA] and its procedures." *Id.* at 5. The Government points to Subsection (f) of the YRA, which provides that a "conviction set aside under this section may be used in determining whether a person has been**{2019 U.S. Dist. LEXIS 5}** in possession of a firearm in violation of § 22-4503." D.C. Code § 24-906(f)(8). Section 22-4503, in turn, states that "[n]o person shall . . . have a firearm in his or her possession . . . within the District of Columbia, if the person has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." D.C. Code § 22-4503(a)(1). These laws, the Government argues, expressly prohibit Payne from possessing a firearm. Gov't's Resp. at 5. In the Government's view, he may thus be charged under the federal felon-in-possession law. *Id.*

The parties submitted briefing on these issues and presented oral arguments before the Court.

Payne's Motion to Dismiss is now ripe for review.

II.

Before trial, a criminal defendant may move to dismiss an indictment for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). A claim that a statute named in the indictment does not proscribe the alleged conduct is properly brought through a motion to dismiss. *See United States v. Hillie*, 289 F. Supp. 3d 188, 193 (D.D.C. 2018).

In ruling on a motion to dismiss, the Court is "limited to reviewing the face of the indictment and, more specifically, the language used to charge the crimes." **{382 F. Supp. 3d 74}** *Id.* The Court must presume that the allegations in the indictment are true. *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009). The "operative question" is whether these allegations, if proven, are "sufficient**{2019 U.S. Dist. LEXIS 6}** to permit a jury to find that the crimes charged were committed." *United States v. Sanford, Ltd.*, 859 F. Supp. 2d 102, 107 (D.D.C. 2012).

III.

Even if the factual allegations against Payne are proven true, the expungement of his prior felonies make a conviction under 18 U.S.C. § 922(g) impossible. For this reason, the Court must dismiss the indictment.

Consider first the statutory text. An expunged conviction cannot serve as the basis of a Section 922(g) violation unless the expungement "*expressly provides* that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20) (emphasis added). The certificates setting aside Payne's convictions say nothing about firearms. *See* ECF No. 26-2 at 3, 6. The YRA, however, does provide that an expunged conviction may still serve as the basis for a violation of D.C.'s felon-in-possession law. *See* D.C. Code § 24-906(f)(8). Thus, the issue here is whether it is the certificate, the YRA, or some combination of the two that serves as the "expungement" of a conviction. If it is the first, Payne cannot be convicted under Section 922(g). If it is either of the latter two options, he may be.

Courts are split on this issue. Some believe that Section 921(a)(20) "limits the inquiry to the language of the certificate." *United States v. Bost*, 87 F.3d 1333, 1335, 318 U.S. App. D.C. 324 (D.C. Cir. 1996) (citing examples from the Fifth, Seventh, and Ninth Circuits). Others believe that the "whole**{2019 U.S. Dist. LEXIS 7}** of state law must be reviewed in order to determine whether a felon's firearms privileges are restricted." *Id.* (citing examples from the Fourth, Sixth, and Tenth Circuits).

Bost discussed the two approaches without conclusively adopting either. There, an Ohio defendant was charged with violating Section 922(g). *See id.* at 1334. The predicate felony was a conviction for kidnapping. *Id.* But after serving his sentence for that offense, the defendant had his civil rights restored. *Id.* Ohio issued him a certificate that expressly restored his rights to serve on a jury and "to hold office of honor, trust, or profit." *Id.* Separately, a statute automatically restored his right to vote. *Id.*

Bost argued that because the certificate restoring his civil rights placed no restrictions on his right to possess a firearm, he could not be convicted under Section 922(g). *See id.* The Government urged the Circuit to look past the certificate to Ohio's state law, which "prohibits convicted felons from possessing firearms." *Id.* at 1335.

The Circuit began by instructing that courts must presume that Congress "says in a statute what it means and means in a statute what it says." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)). Thus, if the statutory text is unambiguous,

courts need not look any{2019 U.S. Dist. LEXIS 8} further to identify the intent of Congress. *Id.* at 1336 (citing *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L. Ed. 2d 404 (1987)). Applying these principles, it found that the text of Section 921(a)(20) "makes it clear" that "a court may look no further than the source of the restoration of [a defendant's] civil rights to see whether his gun-related rights have been restricted." *Id.*

Because there were two "sources" of the restoration of the defendant's civil rights-the certificate he was issued and a state statute that restored a separate right-the {382 F. Supp. 3d 75} Circuit reviewed both. *Id.* at 1337. It found that "neither imposed any restriction on his right to possess a gun." *Id.* It therefore concluded that it "need not decide whether, if his right to vote had not been restored by statute, the certificate would have constituted a sufficient 'restoration of civil rights' to satisfy the requirements of [S]ection 921(a)(20)." *Id.*

Here, both the Government and Payne rely on *Bost* to support their positions. The Government suggests that, considering the choice between reviewing the "language of the certificate" or the "whole of state law," "the *Bost* Court appeared to take a middle approach." Gov't's Resp. at 4. This middle approach, the Government argues, permits consideration of the YRA. *Id.*

In fact, a judge{2019 U.S. Dist. LEXIS 9} in this district has read *Bost* this way. *United States v. Aka* considered whether a conviction set aside under the YRA may be used as a predicate felony for Section 922(g). 339 F. Supp. 3d 11 (D.D.C. 2018). The court found that both the set-aside certificate and the YRA constituted the "source" of the expungement of the defendant's conviction. *See Aka*, 339 F. Supp. 3d at 16 (concluding that the "authorizing statute is as much a part of the 'expungement' as is the certificate itself). So, because the YRA "expressly subjects [defendants with set-asides] to the District of Columbia's prohibition on felons possessing firearms," the court concluded that the defendant's "conviction qualifies under § 922(g)(1) as a prior [felony] conviction." *Id.* at 18.

Payne argues that *Aka* reads *Bost* too broadly. *See* Def.'s Reply, ECF No. 31 at 2-4. The Court, respectfully, agrees. True, *Bost* examined both the certificate and a state statute to determine whether either expressly prohibited the defendant from possessing a firearm. But, as the Circuit made clear, this was because the defendant's "right to vote was restored by a statute, and his rights to hold office and serve on juries were restored by a certificate." *Bost*, 87 F.3d at 1337. In other words, because the defendant had his "civil rights restored" by both{2019 U.S. Dist. LEXIS 10} a certificate and a statute, "such . . . restoration of civil rights" necessarily encompasses both sources. *See* 18 U.S.C. § 921(a)(20). The court had to look to both sources to determine whether his civil rights had been restored.

Indeed, what constitutes the "restoration of civil rights" is a different-and often harder-question than determining the source of an expungement, set-aside, or pardon. *See, e.g., United States v. Thomas*, 991 F.2d 206, 212-13 (5th Cir. 1993) (discussing the difficulties in identifying the state statute to review in "the case of passive (or automatic) restoration of civil rights"); *United States v. Erwin*, 902 F.2d 510, 513 (7th Cir. 1990) (noting that when a state "sends no document granting pardon or restoring rights," a prohibition on the possession of a firearm "is no less 'express' when codified elsewhere" in the state's laws).

In determining how to interpret "restoration of civil rights," courts must grapple with important questions the statute leaves unresolved. Which civil rights must be restored for Section 921 to apply? How many of these rights must be restored? Must the restoration be explicit and specific to a defendant? Or does some form of "restoration" occur immediately upon a convict's release from prison through the automatic operation of a state law?

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These questions concern the potential applicability{2019 U.S. Dist. LEXIS 11} of Section 921 to a defendant charged with a Section 922 violation. They are, in other words, threshold questions that must be answered before a court may even consider whether a state has expressly prohibited the defendant from possessing a firearm. And it is to resolve these {382 F. Supp. 3d 76} predicate questions that courts have used the "whole of state law" approach. *See, e.g., United States v. Caron*, 77 F.3d 1, 2 (1st Cir. 1996) (noting that the First Circuit used to require a restoration of civil rights by "focused, individualized, affirmative action," but now considers state "laws of general application" to determine whether rights have been restored); *see also Thomas*, 991 F.2d at 213 (contrasting a certificate that restores "*all* civil rights" with the "passive (or automatic) restoration of civil rights" through state laws) (emphasis in original).

Expungements are different. Generally, whether a conviction has been expunged is a simpler, binary inquiry. It certainly is here. There is no question that Payne's convictions were expunged: he has the certificates to prove it. So there is no need to look beyond them to determine whether his convictions were set aside. *Accord United States v. Glaser*, 14 F.3d 1213, 1218 (7th Cir. 1994) ("When the state gives the person a formal notice . . . [courts should look] not at the contents of the state's statute books{2019 U.S. Dist. LEXIS 12} but at the contents of the document."). Again, the language of the statutory text is instructive. It requires that "such . . . expungement . . . expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). It is hard to see how the certificate itself is not the "expungement," and it contains no such express prohibition.

More, *Bost* emphasized that a "whole of state law" approach is "inconsistent with the plain directive of [S]ection 921(a)(20)." *Id.* at 1335. It noted that a narrower interpretation of that section "comports better with fairness than the alternative approach," because it "requir[es] the state to give the felon fair notice if his restoration of civil rights makes an exception for firearms." *Id.* at 1336. And it suggested that, based on the text of Sections 921 and 922, "it is not self-evident that Congress would have felt a particular need to federalize [a state's] restrictions on the possession of firearms." *Id.* at 1337.

Bost also cited *Erwin* with approval. *Id.* In that case, Judge Easterbrook described Section 921(a)(20) as "an anti-mousetrapping rule." *Erwin*, 902 F.2d at 512. He concluded that if "the state sends the felon a piece of paper implying that he is no longer 'convicted' and that *all* civil rights have been restored,{2019 U.S. Dist. LEXIS 13} a reservation in a corner of the state's penal code can not be the basis of a federal prosecution. A state must tell the felon point blank that weapons are not kosher." *Id.* at 512-13.

Erwin's reasoning, according to *Bost*, "suggests that even in a case where the issuance of a certificate may be superfluous, a state that wishes its felon-in-possession law to be enforced at the federal level would be well-advised to include its firearms restrictions in any restoration certificate it provides a convicted felon." 87 F.3d. at 1337-38.2

Based on this discussion, the Court reads *Bost* as requiring that, when a Section 922(g) defendant is issued a certificate unconditionally setting aside his conviction or restoring his civil rights, the certificate should expressly forbid the defendant from possessing firearms. Both the plain text of the statute-which states that the "expungement" must "expressly" include this prohibition-and fair notice to the defendant support this reading.

Applying this proposition here, the indictment against Payne must be dismissed. He was issued certificates purporting to {382 F. Supp. 3d 77} set aside his convictions. *See* ECF No. 26-2 at 3, 6. Each certificate "unconditionally discharged" him from the "imposed sentence." *Id.* Each stated{2019 U.S. Dist. LEXIS 14} that "by this discharge the conviction shall be set aside." *Id.* And each was

titled "Order of Discharge and Certificate Setting Aside Conviction." *Id.* Neither certificate included any restriction on Payne's ability to possess a firearm. *Id.*

These certificates, by their clear terms, constituted the "expungement" or set-aside of Payne's convictions. And because neither "expressly provides that the person may not ship, transport, possess, or receive firearms," Payne did not receive fair notice of any such restriction. *See* 18 U.S.C. § 921(a)(20).3 Thus, the convictions these certificates set aside cannot serve as the basis for a Section 922(g) offense. To hold otherwise would void the anti-mousetrapping purpose of Section 921(a)(20). *See Erwin*, 902 F.2d at 513 ("The final sentence of § 921(a)(20) cannot logically mean that the state may dole out an apparently-unconditional restoration of rights yet be silent so long as any musty statute withholds the right to carry guns.").

To be clear, nothing here suggests that Payne cannot be prosecuted in D.C.'s courts for a violation of the city's felon-in-possession law. Payne concedes that such a prosecution would be permissible in the Superior Court. Hr'g Tr. 21:10-12. Rather, the Court holds that, assuming the facts alleged**{2019 U.S. Dist. LEXIS 15}** against him are true, Payne may not be convicted of a Section 922(g) violation as a matter of law.4

IV.

For these reasons, Payne's Motion to Dismiss will be granted. A separate Order accompanies this Opinion.

Dated: June 21, 2019

/s/ Trevor N. McFadden

TREVOR N. McFADDEN, U.S.D.J.

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

{382 F. Supp. 3d none} **ORDER**

For the reasons set forth in the accompanying Memorandum Opinion, upon consideration of the Defendant's Motion to Dismiss, the Indictment, the memoranda and arguments of counsel in opposition and in support, and the relevant law, it is hereby

ORDERED{2019 U.S. Dist. LEXIS 16} that the Defendant's Motion to Dismiss is GRANTED and the Indictment against Defendant Zayjuan Payne is hereby DISMISSED.

SO ORDERED.

This is a final, appealable Order.

Dated: June 19, 2019

/s/ Trevor N. McFadden

TREVOR N. McFADDEN

United States District Judge

Footnotes

1

The parties agree that, for the purposes of this case, an "expungement" and a "set-aside" are

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functionally equivalent. *See* Hr'g Tr. 18:7-15; 21:16-22. The Court therefore uses the terms interchangeably.
2

Over two decades after this admonition from the D.C. Circuit, D.C.'s local courts continue to issue expungement certificates without this warning.
3

During oral argument, Payne's counsel suggested that he cannot be prosecuted under Section 922 because a "federal offense is not enumerated in the [YRA]" and nothing in the statute "fairly supports even an inference that the legislature . . . intended to allow a federal crime to be prosecuted." Hr'g Tr. 19:2-8. But this argument misreads Sections 921 and 922. Indeed, if the set-aside certificates expressly provided that Payne may not possess a firearm under local law, this would be enough for a prosecution under Section 921. *See Thomas*, 991 F.2d at 209 (explaining that the purpose of Section 921 was to give *state* statutes about firearm possession federal effect).
4

Because the Court finds that Section 921(a)(20) is clear, it need not determine whether the rule of lenity applies. But it notes that, if the statute is ambiguous, the rule would require resolving any doubt in Payne's favor. Lenity "means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980). The "touchstone" of the rule "is statutory ambiguity." *Moskal v. United States*, 498 U.S. 103, 107, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). Thus, if a "reasonable doubt persists about a statute's intended scope" after an interpretation of its text and structure, the rule should be applied in favor of a criminal defendant. *Id.* at 108.

APPENDIX F

Edwin Arthur Avery, Petitioner v. United States.
SUPREME COURT OF THE UNITED STATES
140 S. Ct. 1080; 206 L. Ed. 2d 488; 2020 U.S. LEXIS 1651
No. 19-633.
March 23, 2020, Decided

Notice:

The LEXIS pagination of this document is subject to change pending release of the final published version.

Editorial Information: Prior History

{2020 U.S. LEXIS 1}ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUITAvery v. United States, 770 Fed. Appx. 741, 2019 U.S. App. LEXIS 15740 (6th Cir. Ohio, May 28, 2019)

Judges: Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

{140 S. Ct. 1080} Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Statement of Justice Kavanaugh respecting the denial of certiorari.

Federal prisoners can seek postconviction relief by filing an application under 28 U. S. C. §2255. State prisoners can seek federal postconviction relief by filing an application under §2254.

The issue in this case concerns second-or-successive applications. As relevant here, the law provides that a ``claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed." §2244(b)(1) (emphasis added). The text of that second-or-successive statute covers only applications filed by state prisoners under §2254. Yet six Courts of Appeals have interpreted the statute to cover applications filed by state prisoners under §2254 and by federal prisoners under §2255, even though the text of the law refers only to §2254. See *Gallagher* v. *United States*, 711 F. 3d 315 (CA2 2013); *United States* v. *Winkelman*, 746 F. 3d 134, 135-136 (CA3 2014); *In re Bourgeois*, 902 F. 3d 446, 447 (CA5 2018); *Taylor* v. *Gilkey*, 314 F. 3d 832, 836 (CA7 2002); *Winarske v. United States*, 913 F. 3d 765, 768-769 (CA8 2019); *In re Baptiste*, 828 F. 3d 1337, 1340 (CA11 2016).

After Avery's case was decided, the Sixth Circuit recently rejected the other**{206 L. Ed. 2d 489}** Circuits' interpretation of the second-or-successive statute and held that the statute covers**{2020 U.S. LEXIS 2}** only applications filed by state prisoners under §2254. *Williams* v.United States, 927 F. 3d 427 (2019)

Importantly, the United States now agrees with the Sixth Circuit that ``Section 2244(b)(1) does not apply to Section 2255 motions" and that the contrary view is ``inconsistent with the text of Section 2244." Brief in Opposition 10, 13. In other words, the Government now disagrees with the rulings of the six Courts of Appeals that had previously decided the issue in the Government's favor.

In a future case, I would grant certiorari to resolve the circuit split on this question of federal law.

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