No. 21-5906

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL J. PETTWAY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael J. Pettway
(Your Name)

FPC-Morgantown/ P.O. Box 1000
(Address)

Morgantown, W.V. 26507
(City, State, Zip Code)

None (incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

QUESTION NUMBER ONE:

Whether Petitioner Pettway's ex-lawyer provided him with ineffective assistance of counsel by failing to object to Rule 11 (b) (1) (G) violation, thus, actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution, moreover, should the U.S. Supreme Court issue a Certificate of Appealability in the case herein ?

QUESTION NUMBER TWO:

Whether there were an "insufficient factual basis" to accept guilty plea on June 27, 2018, thus, was his ex-lawyer's failure to object to such Rule 11 (b) (3) violation, therefore, rendering his guilty plea involuntary of Pettway's Due Process Clause Rights and actual prejudice exist violating his Sixth Amendment Rights of the U.S. Constitution in the matter herein ?

QUESTION NUMBER THREE:

Whether Petitioner Pettway's ex-lawyer provided him with ineffective assistance of counsel as to Count Five the Section 924 (c) (1) count by failing to file a pre-trial Motion to Dismiss Defective Indictment in which fails to state an offense, thus, does actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution in the case at bar ?

QUESTION NUMBER FOUR:

Whether Petitioner Pettway's ex-lawyer Attorney Cripps provided him with ineffective assistance of counsel by failing to consult with him about filing an Notice of Appeal after his federal sentencing, thus, absent his ex-lawyer's failure to consult he would have instructed Attorney Cripps to file a Notice of Appeal, therefore, was Michael J. Pettway's Sixth Amendment Rights violated in the situation herein ?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

TABLE OF AUTHORITIES CITED CONTINUED

CASES **PAGE NUMBER**

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 8, 2021.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 30, 2021, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner Pettway, states that on September 3, 2019, the Clerk's Office filed his Pro Se 2255 Motion to Vacate and 2255 Brief, see ECF No. 41. Thereafter, Petitioner Pettway, asserts that the district court issued a Show Cause Order directing the United States to address the merits of Pettway's 2255 Motion to Vacate with a Responsive Pleading entered on May 29, 2020, see ECF No. 46. On July 22, 2020, the Government filed their Response Brief, see ECF No. 47. On August 12, 2020, Petitioner Pettway filed his Pro Se Reply Brief, see ECF No. 49. On September 1, 2020, the district court issued a 5-Page Opinion Denying Pettway's 2255 Motion to Vacate, see ECF No. 51. A timely Notice of Appeal was filed and a Certificate of Appealability Application was submitted to the Sixth Circuit Court of Appeals, thus, on April 8, 2021, the Sixth Circuit denied Pettway a Certificate of Appealability. A timely Motion for Panel Rehearing or Rehearing En Banc was filed and the Sixth Circuit denied on June 30, 2021.

Mr. Pettway now files his Pro Se Petition For Writ of Certiorari and requests that the U.S. Supreme Court **GRANT** Michael J. Pettway a Certificate of Appealability as to one or all four Questions as this Honorable U.S. Supreme Court deem warranted in the case herein.

REASONS FOR GRANTING THE PETITION

Petitioner Pettway, acknowledges that a review on a writ of certioarari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted by this court only for compelling reasons, see Supreme Court Rule 10.

In the instant case, Petitioner Pettway, respectfully request that this Honorable U.S. Supreme Court **GRANT** his pro se Writ of Certiorari and issue a Certificate of Appealability as to Question Number One, Question Number Two, Question Number Three, and Question Number Four, thus, consistent with U.S. Supreme Court precedents in **Slack v. McDaniel,** 529 U.S. 473, 484 (2000); and **Miller-El v. Cockrell,** 537 U.S. 322, 335-36 (2003), as it is debatable amongest jurists of reason whether Michael J. Pettway's Sixth Amendment Rights of the U.S. Constitution were violated in the case herein (emphasis added).

Standard for Issuance of C.O.A.

Petitioner Pettway, asserts that the AEDPA permits a court to issue a C.O.A. when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253 (c) (2). In **Barefoot,** the Court established several ways in which a petitioner can make the "substantial showing of the denial of a (constitutional) right." To meet this "threshold inquiry," **Slack,** 120 S. Ct. at 1604, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further." **Barefoot,** 463 U.S. at 893 n. 4 (1983); and **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER ONE:

Whether Petitioner Pettway's ex-lawyer provided him with ineffective assistance of counsel by failing to object to Rule 11 (b) (1) (G) violation, thus, actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution, moreover, should the U.S. Supreme Court issue a Certificate of Appealability in the case herein ?

A C.O.A. MUST AS TO QUESTION # ONE:

(1) To prove ineffective assistance of counsel, Petitioner Pettway must first establish that his attorney's performance was objectively unreasonable, see Hill, 474 U.S. 52, 57 (1985);

Petitioner Pettway, contends that on June 27, 2018, Attorney David Cripps represented him at his Change of Plea Hearing before Bernard A. Friedman, however a thorough review of the Rule 11 Change of Plea transcripts reveal that the Court failed altogether to explain the nature of the charges specifically essential elements of the offense in which is

required by the Federal Rules of Criminal Procedure 11 (b) (1) (G), see United States v. McCreary-Redd, 475 F.3d 718, 723-24 (6th Cir. 2007) ("Under Rule 11 (b) (1) (G), the district court must be satisfied, after discussion with the defendant in open court, that the elements of the offense are understood. Minimally, the defendant must understand the critical or essential elements of the offense to which he or she pleads guilty. Because a guilty plea is an admission of all elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. Therefore, some rehearsal of the elements of the offense is necessary for any defendant, and the failure to identity the elements of the offense is error and cannot be said to be harmless. If a district court fails to comply with Rule 11, and that failure is not harmless, a defendant is entitled to a remedy."). (emphasis added).

Petitioner Pettway, states that although the Rule 11 Plea Agreement at page 2-3, however lists the essential elements of crimes of conviction but Petitioner Pettway's ex-lawyer failed to carefully review the Plea Agreement with Mr. Pettway; and also his ex-lawyer failed altogether to explain the elements necessary for the government to secure a conviction and discuss the evidence as it bears on those elements as required by Sixth Circuit precedents, see Smith v. United States. 348 F.3d 545, 553 (6th Cir. 2003). This Court should recognize that consistent with Sixth Circuit precedents Pettway's Indictment as to Count Five, Section 924 (c) (1), should have put Michael Pettway on NOTICE of mens rea element "knowingly," see United States v. Ceballos-Torres, 218 F.3d 409, 410 (11th Cir. 2000) (The Government was required to prove to convict for 18 U.S.C. 924 (c) (1) (A) that he "knowing possession of a firearm in furtherance of a drug trafficking

offense"); and United States v. Bailey, 553 F.3d 940, 945 (6th Cir. 2009) (To prove possession [18 U.S.C. 924 (c) (1) (A) conviction], however, the government must present evidence that a defendant "knew that the thing was present."). Thus, Mr. Pettway, argues firmly that neither Attorney Cripps advised him of the correct essential elements of 18 U.S.C. 924 (c) (1) (A), nor did the Plea Agreement informed him of the CORRECT essential elements of 924 (c) (1) (A), see Appendix C (A copy of Plea Agreement filed with the Court on June 27, 2018, at pages 1-3), and the Indictment fails to inform Michael J. Pettway of mens rea element of Section 924 (c) (1) (A), therefore, Petitioner Pettway's guilty plea at minimum as to Count Five was entered unknowingly, unintelligently, and thus VOID in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution. See Boykin v. Alabama, 395 U.S. 238 (1969).

Under Sixth Circuit precedents "the district court is required pursuant to Rule 11 (b) (1) (G) to determine in open court whether the defendant understands the nature of each charge to which the defendant is pleading. "The Sixth Circuit has held that in order to adequately meet this requirement a district court must, in a simple case, read indictment to the defendant and permit the defendant to ask questions about the charges, or in more complex case, explain the nature of the charges further until the district court is satisfied that the defendant understands the elements of the offense." See United States v. Syal, 963 F.3d 900, 904-05 (6th Cir. 1992).

Petitioner Pettway, argues firmly that in light of the Sixth Circuit's Rulings in Harton v. United States, 1999 U.S. App. LEXIS 1610 (6th Cir. 1999) (In spite of the District court's plain error in taking a plea from a defendant who did not understand the nature of the offense charged, Horton's counsel did not object. Under these circumstances, we find

unreasonable defense counsel's inaction in this regards); and United States v. Maye, 582 F.3d 622, 631 (6th Cir. 2009) (The Sixth Circuit held: "Under such circumstances, we are constrained to conclude that the district judge erred in carrying out his Rule 11 duties, that the error was plain, that it clearly affect substantial rights possessed by Maye, and that such error that allows a loss of liberty based upon a quantum of evidence that fails to meet statutory requirements seriously affects the fairness, integrity, and reputation of the judicial proceedings. We thus hold that Maye is entitled to another opportunity to plead the Section 924 (c) charge – this time fully cognizant of the nature of the charge to which he is pleading.). (emphasis added).

Therefore, Petitioner Pettway, argues firmly that Attorney Cripps provided him 'deficient performance' by failing to object to Rule 11 (b) (1) (G) violation and failing to carefully review Plea Agreement as to the elements of Count Five, however as stated on previously herein the Government's Plea Agreement erroneously informs Pettway as to the essential elements of 18 U.S.C. 924 (c) (1) (A), thus his guilty plea as to Count Five was entered unknowingly, thus VOID, see Boykin v. Alabama, 395 U.S. 238 (1969); and Libertti v. United States, 516 U.S. 29, 51 (1995) (observing that "a defendant's obvious confusion about [procedures in a plea agreement]" should not stand uncorrected"). Thus, the first prong of the Hill test has been established.

(2) To show prejudice in the context of a guilty plea, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have plead guilty [as to Count Five] and would have insisted on going to trial," see Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Actual prejudice exist as the result of the is a reasonable probability that, but for counsel's 'deficient performance' Petitioner Pettway would not have pleaded guilty and would have insisted on going to trial, see Hill, 474 U.S. 52, 59 (1985). Moreover, Petitioner Pettway, argues firmly that because based upon counsel's 'deficient performance' he was deprived altogether of a jury trial, thus actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution, see Lee v. United States, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017).

Because Michael J. Pettway's Question Number One, thus presents a substantial showing of a denial of his Sixth Amendment Rights, thus, 28 U.S.C. 2253 (c) (2); and Supreme Court precedents requires issuance of a Certificate of Appealability as to Question Number One in the case herein. See Miller-El, 537 U.S. 322, 327 (2003). (bold emphasis added).

Question Number Two:

Whether there were an "insufficient factual basis" to accept guilty plea on June 27, 2018, thus was his ex-lawyer's failure to object to such Rule 11 (b) (3) violation, thus rendering his guilty plea involuntary of

Pettway's Due Process Clause Rights, therefore does actual prejudice exist violating his Sixth Amendment Rights of the U.S. Constitution?

Statement of Facts

On August 17, 2017, the Grand Jury handed down a six count Indictment against Pettway and on June 27, 2018, Mr. Pettway pled guilty before the Honorable Bernard A. Friedman in which he pleaded guilty to all six counts of his Indictment during Change of Plea Hearing, thus Pettway was represented by Attorney David R. Cripps. The Federal Rules of Criminal Procedure 11 (b) (3), requires that: "Because entering judgement on a guilty plea, the court must determine that there is a factual for the plea." However, Mr. Pettway, asserts that during the Court's Rule 11 Plea Hearing on Wednesday, June 27, 2018, AUSA O'Brien questioned Mr. Pettway during the Rule 11 Plea Colloquy, however as reflected by the Plea Hearing Transcripts at page 13, line 14-18, there simply exist an insufficient factual to accept Pettway's guilty plea as to Count Five Section 924 (c) count as the record does not adequately establish a factual basis that Mr. Pettway in fact possessed firearms in furtherance of a Drug Trafficking Crime, thus Petitioner Pettway's ex-lawyer provided him with 'deficient performance' by failing to object establishing the first prong of the Hill test. Furthermore, Petitioner Pettway, asserts that actual prejudice exist as absent counsel's 'deficient performance' he would not have pled guilty, however insisted on going to jury trial in the matter herein.

A C.O.A. MUST ISSUE AS TO QUESTION # TWO:

(1) To prove ineffective assistance of counsel, Petitioner Pettway must first establish that his attorney's performance was objectively unreasonable, see Hill, 474 U.S. 52, 57 (1985);

Petitioner Pettway, contends that he pleaded guilty to the offense of possession of a firearm "in furtherance of" a drug-trafficking crime. See 18 U.S.C. Section 924 (c). In Maye, the Sixth Circuit Court of Appeals found plain error where the district court consistently "expressed a mistaken understanding" of what was required to establish that a firearm was possessed in furtherance of a drug trafficking crime and failed to ensure that the defendant understood this elements of the offense, and there was insufficient evidence in the record that the defendant did in fact possesses the weapon in furtherance of a drug trafficking crime, see Maye, 582 F.3d 622, 630-31 & n. 3 (6th Cir. 2009). Similarly, Petitioner Pettway, states that the following Rule 11 Plea Colloquy commenced in reference to Count Five, Section 924 (c) charge:

The Court: I'm going to ask Mr. O'Brien to ask you some questions concerning the facts of this case because he knows them better than I do, and that's establish that, in fact, you, you know that you've done what is charged and what you're pleading guilty to.

So if you have any questions or don't understand something, let us know, okay?

The Defendant: yes, sir.

See Change of Plea Trans. at page 11, line 12-19.

Mr. O'Brien: The weapons that you had, sir, were they, among other things, to protect your home to protect the drugs, or protect any proceeds if you would have be able to successfully sell those drugs ?

The Defendant: Yes.

See Change of Plea Trans. at page 13, line 14-18.

Petitioner Pettway, states when the AUSA asked him a broad question listed above herein, however his answer of YES was that he had the firearms for his own personal protection in his home but the firearms for his own personal protection in his home but the firearms were not present for the purposes of protecting drugs or the proceeds of drugs, see Untied States v. Pleasant, 125 F. Supp. 2d 173, 2000 U.S. Dist. LEXIS at 22 (E.D. Va., Dec. 18, 2000) (Congress added the part of the statute that proscribes and punishes the possession of a firearm "in furtherance of" a predicate crime on November 13, 1998. The discussions on the floor of Congress likewise demonstrate that Congress wishes to distinguish the two prongs of the statute. The proponent of the Senate bill, Senator Dewine, explained:

> The purpose of adding the "infurtherance" language is to assure that someone who possesses a gun that has nothing to do with the crime does not fall under 924 (c). I believe that the "in furtherance" language is a slightly higher standard that encompasses "during and in relation to" language, by requiring an indication of helping forward, promote, or advance a crime. 144 Cong. Rec. S12671 (daily ed. Oct. 16, 1998) (statement of Sen DeWine). In the House

of Representatives, Rep. McCollum stated, "It is also important to note that this bill will not affect any person who merely possesses a firearm in the original vicinity of a crime, nor will it impact someone who use a gun in self-defense." 140 Cong. Rec. H10330 (Oct. 9, 1998). See generally 144 Cong. Rec. H530-35 (daily ed. Feb. 24, 1998) (possession must be shown to be in furtherance of the predicate crime, therefore the statute would not cover someone that merely possesses a firearm in the general vicinity of a crime or someone who might use a gun in self-defense).) (emphasis added).

Therefore, Petitioner Pettway, argues that possessing firearms in his residence for personal protection falls outside of Congress's intent for chargeable Section 924 (c) (1) violations, thus the presence of the firearms in Pettway's residence were not there to advance or promote the commission of his Drug Trafficking Crime but present by mere coincidence, see United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004). The Ninth Circuit Court of Appeals found a lack of a factual basis, see Untied States v. Monzon, 429 F.3d 1268, 1269 (9th Cir. 2005) (Federal agents executed a search warrant at defendant's residence while defendant was in bed. The agents seized a loaded semi-automatic handgun from under the bedcovers, $ 3, 060 in cash in the closet, and 248.9 grams of heroin also in the closet. The Ninth Circuit Court of Appeals VACATED his guilty plea as to his conviction for Possession of a Drug Trafficking Crime, in violation of 18 U.S.C 924 (c), holding there was no factual basis to accept his guilty plea for the Section 924 (c) charge). Also, in Monzon, the Ninth Circuit held that: "The 'in

furtherance' element of the offense of [18 U.S.C. 924 (c) (1) (A)] turns on the intent of the defendant," see, id. 429 F.3d 1268, 1273 (9th Cir. 2005).

The fact that the Indictment fails to charge any mens rea [specifically the required element of "knowing" was omitted from his Indictment as to Count Five Section 924 (c) charge]; the Court failed to recite the essential elements of 18 U.S.C. 924 (c) (1) (A) during the plea colloquy; and the Government's Plea Agreement erroneously lists the elements of Section 924 (c) (1) (A), see Appendix C, attached herein moreover Petitioner Pettway's ex-lawyer failed to explain that "knowing" was a required element to convict him of Section 924 (c) (1) (A), therefore in light of these facts and circumstances Michael J. Pettway lacked an understanding of the "in furtherance of" element of 18 U.S.C. 924 (c) (1), thus there is a lack of a factual basis for the Petitioner Pettway's conviction as to Count Five in violation of Rule 11 (b) (3), see Maye, 582 F.3d 622, 627-31 (6th Cir. 2009). See Foot note 1 (emphasis added).

Therefore, Petitioner Pettway, asserts that this ex-lawyer's failure to object to the "insufficient" factual basis as to Count Five, Section 924 (c) (1) charge constitutes 'deficient performance' establishes the first prong of the Hill test.

(2) To show a prejudice in the context of a guilty plea, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's

errors, he would not have plead guilty and would have insisted on going to trial," see Hill, 474 U.S. 52, 59 (1985).

Petitioner Pettway, contends that absent Attorney Cripps' 'deficient performance,' thus, he would not have plead guilty to Count Give of Indictment and would have insisted on proceeding to jury trial on that count, therefore actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution in the case at bar. See Hill, 474 U.S. 52, 59 (1985).

A C.O.A. should issue as to Question Number Two, thus Petitioner Pettway has demonstrated a substantial showing of a denial of his Sixth Amendment Rights pursuant to 28 U.S.C. 2253 (c) (2), a Certificate of Appealability must issue, see Miller-El, 537 U.S. 322, 336-38 (2004).

QUESTION NUMBER THREE:

Whether Petitioner Pettway's ex-lawyer provided him with ineffective assistance of counsel as to count Five the Section 924 (c) (1) count by failing to file a pre-trial Motion to Dismiss Defective Indictment in which fails to state an offense, thus does actual prejudice exist in violation of Pettway's Sixth Amendment Rights of the U.S. Constitution?

Statement of Facts

On August 17, 2017, the Grand Jury handed down a 6-count Indictment against Pettway and the Court scheduled the Plea cut-off/Final Pretrial Conference for June 5, 2018, thus it appears that all

pre-trial motions had to be filed on or before June 5, 2018, however Attorney David R. Cripps failed to file a pre-trial Motion to Dismiss Defective Indictment in reference to Count Five. Petitioner Pettway, states that Count Five Section 924 (c) count is fatally defective as it omits the "knowingly" as required by the Sixth Circuit and Supreme Court precedents, thus Count Five fails to state an offense and is fatally defective; and should have been dismissed with or without prejudice, thus his ex-lawyer provided him with 'deficient performance' by failing to file pre-trial Motion to Dismiss Defective Indictment as to Count Five. Therefore, Mr. Pettway, argues that absent his ex-lawyer's 'deficient performance' the outcome of the proceedings would have been different as Count Two would have been dismissed and he would never pled guilty to the Section 924 (c) count, thus, Petitioner Pettway was provided with ineffective assistance of counsel in violation of his Sixth Amendment Rights of the U.S. Constitution.

A C.O.A. MUST ISSUE AS TO QUESTION # THREE:

(1) that his attorney's representation fell below an objective standard of reasonableness;

Rule 7 (c) (1) of the Federal Rules of Criminal Procedure requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged..." Fed. R. Crim. P. 7 (c) (1); see United States v. Blandford, 33 F.3d 685, 704 (6th Cir. 1984) (The Sixth Amendment requires an indictment to "inform the defendant

of 'the nature and cause of the accusation'" (quoting United States v. Piccolo, 723 F.2d 1234, 1238 (6th Cir. 1983) (en banc)). It need only contain those facts and elements necessary to inform the accused of the charges so that he may prepare a defense, see Williams v. Haviland, 467 F.3d 527, 535 (6th Cir. 2006), and protect against double jeopardy. See Untied States v. Douglas, 398 F.3d 407, 413 (6th Cir. 2005). "An indictment is generally sufficient if it 'fully, directing, and expressly.... set[s] forth all the elements necessary to constitute the offense intended to be punished.'" United States v. Kuehne, 547 F.3d 667, 696 (6th Cir. 2008) (quoting Douglas, 398 F.3d at 411).

The Supreme Court in Russell v. United States, 368 U.S. 749, 8 L Ed. 2d 240, 82 S. Ct. 1038 (1962), held that an indictment is sufficient if it (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to meet, and (3) enables the accused to plead a judgement under the indictment as a bar to any subsequent prosecution for the same offense. Russell, 369 U.S. at 763-64. These criteria, the Court stated, reflect "the protection which an indictment is intended to guarantee." Russell, 369 U.S. at 763. See also, United States v. Debrow, 346 U.S. 374, 376, 98 L. Ed. 92, 74 S. Ct. 113 (1953). "It is settled law that in order for an indictment to be valid it must allege ALL THE ELEMENTS which are necessary to constitute a violation of the statute." David v. United States, 253 F.2d 24,

25 (6th Cir. 1958); and United States v. Richman, 369 F.2d 465, 467 (7th Cir. 1966) (same).

Petitioner Pettway, asserts that Count Five of his Indictment fails to state an offense is fatally defective as to Count Five, Possession of a Firearm in Furtherance of a Controlled Substance Offense in violation of 18 U.S.C. 924 (c), as it fails to allege an essential element of the offense as required by Sixth Circuit and Supreme Court precedents. (bold emphasis added).

COUNT FIVE

(18 U.S.C. Section 924 (c)- Possession of a Firearm in Furtherance of a Controlled Substance Distribution Offense)

On or about June 29, 2017, in the Eastern District of Michigan, Southern Division, MICHAEL JEROME PETTWAY, in furtherance of a drug distribution offense, that is: Possession with Intent to Distribute a Controlled Substance, as charged in Counts 1 through 4 of this Indictment, did possess firearms, specifically, one (1) Bushmaster AR-15 semi-automatic rifle, two (2) Winchester 12 gauge shotguns, and one (1) Browning semi-automatic handgun, all in violation of Title 18, U.S.C. Section 924 (c),

Petitioner Pettway, asserts that his Indictment as to Count Five fails to charge an Offense and is FATALLY DEFECTIVE for the following reasons as follows:

(1) Count Five of Pettway's Indictment charges specifically: (18 U.S.C. Section 924 (c)- Possession of a Firearm of a Controlled Substance Distribution Offense), however 18 U.S.C. 924 (c) (1) (A), charges a Possession of a Firearm in Furtherance of a Drug Trafficking Crime, see Untied States v. Comb, 369 F.3d 925, 931 (6th Cir. 2004) (The Sixth Circuit has held that 18 U.S.C. Section 924 (c) (1) contains two separate offenses: one for possession of a firearm "in furtherance of" a drug trafficking crime, and one for using or carrying a firearm "during and relation to" a drug trafficking crime.), thus Mr. Pettway was charged by the Grand Jury and convicted of per Judgement in a Criminal Case as to Count Five: Possession of a Firearm in Furtherance of a Controlled Substance Distribution Offense in which is an nonexistent offense, see Appendix D (A copy of Judgement in a Criminal Case, see ECF No. 39, at PageID. 109, dated November 7, 2018). See United States v. Castano, 543 F.3d 826, 835-36 (6th Cir. 2008) (At the very least, these errors affect Savoires' substantial rights by authorizing a conviction for a non-existent offense." Id. At 381. We concluded that "[w]e are satisfied, therefore, that plain error has been established... and that the Section 924 (c) conviction must be reversed. Id. As in Savories, the errors in Castano's case "authorize[ed] [**24] a conviction for a non-existent offense" and Castano's Section 924 (c) conviction should be reversed."; and United States v. Williams, 475 Fed. Appx. 36, 41 (6th Cir. 2012) (The Sixth Circuit VACATED and REMANDED for resentencing as

Defendant was convicted of a nonexistent federal crime for Section 924 (c) (1)).

(2) Count Five of Pettway's Indictment fails to charge the specific statutory violation of Section 924 (c) actually violated as Indictment as to Count Five merely charges 18 U.S.C. 924 (c), however the Indictment should have charged specifically 18 U.S.C. 924 (c) (1) (A) (i), thus the Indictment fails to put Pettway on NOTICE, see F. No.-1, of the specific violation of Section 924 (c) he was charged with committing, see United States v. Cruz-Rodriguez, 570 F.3d 1179, 1182 (10th Cir. 2009) (The Sixth Amendment "guarantees notice of the charges against him."). (emphasis added).

(3) Count Five of Pettway's Indictment omits an essential element of 18 U.S.C. Section 924 (c) (1), in which is required by the Sixth Circuit and Supreme Court precedents the mens rea "knowingly" element, thus, Petitioner Pettway's Indictment as to Count Give should have charged: did KNOWINGLY possess firearms, however the Sixth Circuit Court of Appeals has held: "Section 924 (c) does not include any mens rea term language of the statute (cf. Section 922 (g), for which the mens rea of knowingly is supplied by Section 924 (a)), BUT COURTS HAVE IMPOSED A MENS REA OF KNOWINGLY [to be charged within Indictment]," see United States v. Odom, 13 F.3d 949, 961 (6th Cir. 1994); and Muscarrollo v. United States, 524 U.S. 125, 126-27 (1998) (Section 924 (c) does not include any mens rea term in the language of

the statute (cf. Section 922 (g), for which the mens rea of knowingly is supplied by Section 924 (a)), but [federal] courts have imposed a mens rea of knowingly). See also, United States v. Ceballos-Torres, 218 F.3d 409, 410 (11th Cir. 2000) (The government was required to prove to convict for 18 U.S.C. 924 (c) (1) (A) that he "knowingly possessed a firearm in furtherance of a drug trafficking offense"); United States v. Bailey, 553 F.3d 940, 945 (6th Cir. 2009) (To prove possession [18 U.S.C. 924 (c) (1) (A) conviction], however, the government must present evidence that a defendant "knew that the thing was present."); and United States v. Monzon, 429 F.3d 1268, 1270-71 (9th Cir. 2005) (The Ninth Circuit stated within the appeal: "The Magistrate Judge advised Monzon that, if there were a trial on Count 21, the government would be required to prove that Monzon committed a drug trafficking offense and that Monzon KNOWINGLY possessed a firearm in furtherance of the drug trafficking offense. Monzon stated that he understood the elements of these offenses charged.). (bold emphasis added).

Thus, Petitioner Pettway, asserts that federal court of appeals have held Indictments in which fails to charge mens rea required by case law to be fatally defective and must be DISMISSED, see United States v. Yefsy, 994 F.2d 885, 893-94 (1st Cir. 1993) (Indictment fatally defective and must be dismissed because failed to allege plan to defraud as required by case law); United States v. Opsta, 659 F.2d 848, 850 (8th Cir.

1981) (Indictment fatally defective and must be dismissed because failed to charge intent element required by case law); and United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (The Ninth Circuit held that: "Although not stated in the Hobbs Act itself, criminal intent-acted "knowingly or willingly" – is an implied and necessary element that the government must prove for a Hobbs Act conviction.

United States v. Soriano, 880 F.2s 192, 198 (9th Cir. 1989). "Implied, necessary elements, not present in the statutory language, must be included in an indictment." United States v. Jackson, 72 F.3d 1370, 1380 (9th Cir. 1995). Thus, the Ninth Circuit held: "Because the indictment charging Du Bo failed to include a necessary element of the offense at issue, and because Du Bo timely raised a challenge, the indictment was fatally flawed. Accordingly, we reverse the judgement against Du Bo and direct the district court to dismiss the indictment." Reversed and

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F.N.-1- See Smith v. O'Grady, 312 U.S. 329, 334 (1941) (finding that, because the defendant did not know intent was an element of the crime to which he pleaded guilty, his plea could not be voluntary.). Because Mr. Pettway was not put on **NOTICE** by the Court, his ex-lawyer, the Plea Agreement, or the Government that **"knowingly"** was an essential element of 18 U.S.C. 924 (c) (1) (A), thus his guilty plea as to Count Five is not voluntary consistent with U.S. Supreme Court precedents in **Smith v. O'Grady.** (emphasis added).

Remanded). (bold emphasis added).

The U.S. Supreme Court held in Russell v. United States, 368 U.S. 749, 765-66 (1962) (An indictment not framed to apprise the defendant "with certainty, of the nature of the accusation him.... is defective, although it may follow the language of the statute.").

Furthermore, Petitioner Pettway, contends that as the result of the Fifth Amendment, requires that a defendant be convicted only on considered and found by a grand jury, see United States v. Du Bo, 186 F.3d 1177, 1179-80 (9th Cir. 1999). See also, United States v. Jackson, 749 F. Supp. 2d 19, 2010 U.S. Dist. LEXIS at *13-14 (N.D.N.Y., Nov. 9, 2010) (The parties agree that the Fifth Amendment requires an indictment to contain the elements of the offenses charged and that a defendant must be convinced on the basis of the facts presented to the Grand Jury which indicted him.). (bold emphasis added).

Absent an Indictment as to Count Five's express presentation of EVERY ELEMENT of the offense as required by Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), there is no way to tell whether the Grand Jury in the Eastern District of Michigan considered the OMITTED essential element of "knowingly," thus, see Russell, 369 U.S. 749, 770 (1962) (Such guessing would "deprive the defendant of a basic protection that the grand jury was designed to secure," by allowing a defendant to be convicted "on the basis of facts not found by, and

perhaps not even presented to, the grand jury that indicted him."). A federal judge in the Northern District of Ohio GRANTED Samuel L. William's Petition for a Writ of Habeas Corpus as the Court found that the indictment violated the inmate's rights under the Fifth and Sixth Amendment because the mens rea elements of the charged offenses were not presented to the grand jury, see Williams v. Haviland, 2005 U.S. Dist. LEXIS 13228, 2005 WL 156672 (N.D. Ohio, 2005), however this decision was appealed and overturned by the Sixth Circuit Court of Appeals for the limited reason as the result of Samuel L. Williams being a Ohio state prisoner and not having the protection of the Fifth Amendment of the U.S. Constitution, see Williams v. Haviland, 467 F.3d 527, 529 (6th Cir. 2006) (The Sixth Circuit reversed on the ground that the Fifth Amendment grand jury right, U.S. Const. amend. V, was not incorporated by the Fourteenth Amendment, U.S. Const. amend, XIV, and thus does not apply to state proceeding under the Apprendi holding). See also, United States v. Demmon, 483 F.2d 1093, 1095 (8th Cir. 1973) (the failure to allege an essential element makes the indictment fatally defective and requires dismissal thereof.). Thus, Petitioner Pettway, argues firmly absent Michael J. Pettway pleading guilty to a FATALLY DEFECTIVE INDICTMENT in which fails to state an offense, therefore warrants DISMISSAL of Count Five in the matter herein. See United States v. Spinner, 180 F.3d 514, 515, 1999 WL 3955995, at *1 (3d Cir. 1999) (an indictment that fails to contain elements of a crime requires

reversal per se shall remain "a vital part of our Federal criminal jurisprudence (decided after Neder)). (bold emphasis added).

Therefore, Petitioner Pettway, argues firmly that his ex-lawyer provided him with 'deficient performance" by failing to file pre-trial Motion to Dismiss Defective Indictment as to Count Five, thus satisfying the first prong of the Strickland test.

(2) due to counsel's unprofessional errors that the results of the proceedings would have been different;

Petitioner Pettway, argues firmly that absent his ex-lawyer's 'deficient performance' there is a reasonable probability that Count Five of his Indictment would have been dismissed, thus he would have not pled guilty to Count Five which is fatally defective and fails to state an offense, therefore his ex-lawyer's failure to file Motion to Dismiss constitutes actual prejudice in violation of his Sixth Amendment Rights of the U.S. Constitution. See United States v. Greenup, 401 F.3d 758, 767-68 (6th Cir. 2005) (Greenup argued that his counsel was ineffective by failing to move to dismiss the indictment; and the Sixth Circuit held that: "While this failure may constitute ineffective assistance of counsel, the district court already remedied any ineffective assistance by dismissing the attempted kidnapping charge. When a defendant has received ineffective assistance of counsel, the district court has the power to remedy the violation by placing the defendant in the same position he was in prior to the ineffective assistance.); and United States

v. Hansel, 70 F.3d 6, 8-9 (2d Cir. 1995) (Employing the Strickland test the Second Circuit held: "Hansel's counsel was therefore ineffective under Strickland, and Hansel's Sixth Amendment right to counsel was thereby impaired. Hansel's waiver of the time-bar defense cannot be deemed knowing and intelligent; we may assume that he would not have pled guilty to counts that he knew to be time-barred. Accordingly, we reverse Hansel's convictions on counts seven and eight of the indictment.). (emphasis added).

A Certificate of Appealability should be issued as to Question Number Three as Petitioner Pettway as demonstrated a substantial showing of the denial of his Sixth Amendment Rights of the U.S. Constitution, thus consistent with 28 U.S.C. 2253 (c) (2); and Supreme Court precedents in Miller-El, 537 U.S. 322, 336-38 (2004), therefore a C.O.A. should be GRANTED in the case herein.

QUESTION NUMBER FOUR:

Whether Petitioner Pettway's ex-lawyer Attorney Cripps provided him with ineffective assistance of counsel by failing to consult with him about filing an Notice of Appeal after his federal sentencing, thus absent his ex-lawyer's failure to consult he would have instructed Attorney Cripps to file a Notice of Appeal, therefore was Michael J. Pettway's Sixth Amendment Rights violated ?

Statement of Facts

On June 27, 2018, Petitioner Pettway plead guilty to all six counts of his Indictment, however as part of the terms of the plea agreement Mr. Pettway waived his right to appeal his conviction on any grounds and if his sentence does not exceed 131 months he waives any right he may have to appeal his sentence on any grounds. The exception was that the waiver does not bar filing a claim of ineffective assistance of counsel in court. See Plea Agreement, at ECF No. 26, pg. 10, at Para. #9. On November 6, 2018, Mr. Pettway was sentenced to 120 months of imprisonment by this Honorable Court, however as reflected by the Sentencing Transcripts at page 14, line 8-9, this Court specifically informed Petitioner Pettway as follows: "You do not have the right to appeal because you've waived your right to appeal in the Rule 11." However, Mr. Pettway, states that this was erroneous for several reasons first Michael Pettway preserved the right to raise any claims of ineffective assistance of counsel and consistent with Sixth Circuit precedents "[a] waiver of appeal rights may be challenged on the grounds that it was not knowing and voluntary, was not taken in compliance with Fed. R. Crim. P. 11, or was the product of ineffective assistance of counsel," see In re Acosta, 480 F.3d 421, 422-23 (6th Cir. 2007). After Petitioner Pettway's federal Sentencing Attorney Cripps never consulted with him about filing a Notice of Appeal or the advantages and disadvantages to filing a notice of appeal as required by

the Supreme Court's Ruling in Roe v. Flores-Ortega, 528 U.S. 470 (2000).

A C.O.A. MUST ISSUE AS TO QUESTION # FOUR:

(1) that counsel's representation "fell below an objective standard of reasonableness," see Strickland, 466 U.S. at 688;

The Supreme Court has held that an attorney performs deficiently if, after consulting with his client, he "disregards specific instructions" from his client "to file a notice of appeal"- "a purely ministerial task." Roe, 528 U.S. at 477. The Court has recognized that an attorney's performance is not per se deficient simply because he does not consult with his client about the benefits and drawbacks of an appeal. Id. at 479. In that case, we must determine whether the attorney should have consulted with his client about an appeal because either (1) "a rational defendant would want to appeal," or (2) the "defendant reasonably demonstrated to counsel that he had interested in appealing." Id. at 480. The Sixth Circuit has held that: If we determine that the attorney failed to file a notice of appeal either after the client's express instructions or because there is no reasonable strategic reason not to appeal, then the defendant was prejudiced because he has been deprived "of the counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id at 483-84. See Pola v. United States, 778 F.3d 525, 533-34 (6th Cir. 2015).

In the instant case, Petitioner Pettway, contends that his ex-lawyer provided him with 'deficient performance' by failing to 'consult' with him after his federal sentencing on November 6, 2018, to explain the advantages and disadvantages to filing a notice of appeal, however Attorney Cripps specifically advised him that he could not file a Notice of Appeal due to the waiver provision and the Court confirmed this erroneous advisement during the Sentencing Hearing, see Sent. Trans. at page 14, line 8-9, in which states as follows:

The Court: You do not have the right to appeal because you've waived your right to Appeal in the Rule 11.

However, Petitioner Pettway, argues that his ex-lawyer Attorney Cripps advisement was erroneous as well as the Court's during the Sentencing Hearing because he actually preserved the right to lodge any claim of ineffective assistance of counsel within his written Plea Agreement in which if the record is adequate maybe raised on direct appeal proceedings; and consistent with Sixth Circuit precedents, thus the appellate court has held that: "[a] waiver of appeal rights may be challenged on the grounds that it was not knowing and voluntary, was not taken in compliance with Fed. R. Crim. P. 11, or was the product of ineffective assistance of counsel," see In re Acosta, 480 F.3d 421, 422-23 (6th Cir. 2007).

Thus, Petitioner Pettway, argues firmly that in light of Attorney Cripps erroneous advisement as well as this Court erroneous

advisement, therefore a rational defendant being Mr. Pettway would want to appeal as the result of him having nonfrivolous issues to appeal as evidenced at Ground One, Ground Two, and Ground Three herein raised within his Certificate of Appealability Application, moreover Pettway's ex-lawyer provided him with 'deficient performance' establishing the first prong of the Strickland test.

(2) that counsel's deficient performance prejudiced the defendant, see Strickland, 466 U.S. 668, 694 (1984);

Petitioner Pettway, asserts that he suffers actual prejudice as the result of his ex-lawyer's failure to 'consult' and providing Pettway with erroneous advisement in which constitutes 'deficient performance,' thus absent counsel's errors he would have instructed Attorney David Cripps to file Notice of Appeal, see Pola, 778 F.3d at 533-34 (6th Cir. 2015), therefore Michael J. Pettway's Sixth Amendment Rights were violated of the U.S. Constitution.

A Certificate of Appealability should issue as the Court's erroneous advisement at his federal sentencing and Attorney Cripps erroneous advisement is contrary to the U.S. Supreme Court's holding in Garza v. Idaho, 139 S. Ct. 738, 750 (2019) (The U.S. Supreme Court held that:"We hold today that the presumption of prejudice recognized in Flores-Ortega applies regardless of whether a defendant has signed an appeal waiver. This ruling follows squarely from Flores-Ortega and from the fact that even the broadest appeal waiver does not deprive a

defendant of all appellate claims."), thus, a C.O.A. should issue as to Question Four herein. See **Miller-El,** 537 U.S. 322, 336-38 (2004) (bold emphasis added).

In conclusion, Michael J. Pettway, concludes that this Honorable U.S. Supreme Court should **GRANT** a Certificate of Appealability as to the four Questions presented above herein as he has met the requirement outlined in 28 U.S.C. 2253 (c) (2), in the case herein.

Respectfully Submitted,

Date: 09/27/21

x Michael J. Pettway

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Pettway

Date: 09/27/2021