United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 4, 2022
Lyle W. Cayce
Clerk

No. 21-50885
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CAROL JOHNENE MORRIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:97-CR-10

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Carol Morris filed a notice of appeal ("NOA") on September 13, 2021. We must examine the basis of our jurisdiction. *See Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000).

The NOA fails to designate the judgment or order that Morris wants

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

this court to review. The NOA does not comply with Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure, which requires that the NOA identify the judgment or appealable order from which the appeal is taken. *See* FED. R. APP. P. 3(c)(1)(B); *Smith v. Barry*, 502 U.S. 244, 248 (1992).

We do not have jurisdiction over Morris's appeal, which is therefore DISMISSED. Morris's motion to proceed *in forma pauperis* on appeal is DENIED as moot.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 04, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 21-50885 USA v. Morris
USDC No. 7:97-CR-10-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Joseph H. Gay Jr.
Ms. Carol Johnene Morris

United States Court of Appeals for the Fifth Circuit

No. 21-50885

UNITED STATES OF AMERICA,

- [illegible]

versus

CAROL JOHNENE MORRIS,

! [illegible]

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:97-CR-10-1

ON PETITION FOR REHEARING

Before SMITH, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 04, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-50885 USA v. Morris
USDC No. 7:97-CR-10-1

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Mr. Joseph H. Gay Jr.
Ms. Carol Johnene Morris

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

CAROL JOHNENE MORRIS § USDC MO-97-CR-10
Fed. Reg. # 76547-080; TDCJ-ID # 488243; §
TDCJ-ID # 1681899 §
PETITIONER PRO SE, §
§
V. §
UNITED STATES OF AMERICA §
RESPONDENTS. §

NOTICE OF APPEAL

NOW COMES CAROL JOHNENE MORRIS, Fed. Reg. # 76547-080; TDCJ-ID # 488243, # 1681899, PETITIONER PRO SE, IN THE ABOVE-STYLED, TITLE 28 USC § 1651(a), WRIT OF ERROR CORAM NOBIS WITH EXHIBITS MARKED: A THRU C; ALSO EXHIBITS MARKED: # 1 THRU # 28, GIVES HER NOTICE OF APPEAL FROM THE DISTRICT CLERK'S RECHARACTERIZATION OF HER § 1651(a) CORAM NOBIS PETITION, AS A PETITION FOR § 2241 WRIT OF HABEAS CORPUS AND RENUMBERED: # 7:21-CV-00157-DC; (W/ CORAM NOBIS'S PETITION, p.1; CIVIL DOCKET FOR CASE SHEET AND ITS RECEIPT IN SUPPORT) AND WOULD SHOW THE COURT THE FOLLOWING:

I.

PURSUANT TO, FED. R. CIV. PROC. RULE 60(b)(3), THIS IS "FRAUD ON THE COURT" DECEMBER 10, 1997, TRIAL ATTORNEY DAVID GREENHALL WAS TERMINATED IN MO-97-

CR-10's; U.S.A. v. Carol Joinene Morris. Appellate Attorney Merry Worley (both of Odessa, Texas), only challenged Morris's pre-trial jail credit. Compare to, MD-97-CR-10's, Modified Docket Sheet, dated March 12, 2017; EXHIBIT #8, specifically, Consider, Greenhaw's Amended Objections Under §5G1.3(b) or (c).

In U.S. v. Morgan, 74 S.Ct. 247 (1954), the Supreme Court held, "Where it cannot be deduced from record whether counsel was properly waived, no other remedy is then available, and sound reasons exist for failure to seek earlier appropriate relief, motion in nature of extraordinary writ of coram nobis to set aside petitioner's conviction and sentence must be heard by federal trial court. Fed. Rules Crim. Proc., Rule 35, 18 U.S.C.A.; 28 U.S.C.A. §§1651(a), 2255. See, Hohn v. U.S., 118 S.Ct. at 1923 (1998). USCA Const. Art. III §2. November 22, 2018, when stole Morris's, ND. 18-7598's; its 5 Exhibits, pet. for writ of cert.

Wherefore premises considered, Carol Joinene Morris, Fed. Reg. # 76547-080; TDCJ-ID # 488243; TDCJ-ID # 1681899, prays ther, Title 28 USC § 1651(a), is correctly numbered: MD-97-CR-10; afterwards an evidentiary hearing be scheduled pursuant to, Fed. Rules Crim. Proc., Rule 35, and all ther entitled coram nobis relief, BE GRANTED.

Respectfully submitted,

Carol Johnene Morris

Carol Joinene Morris (pro se)
Fed. Reg. # 76547-080; TDCJ-ID # 488243;
TDCJ-ID # 1681899
501 S. Tyler Street
Midland, Texas 79701

(682) 432-5740

CERTIFICATE OF SERVICE

I, CAROL JOHNENE MORRIS, FED. REG. # 76547-080; TDCJ-CID # 488243; TDCJ-ID # 1681899, DO HEREBY CERTIFY THAT HER NOTICE OF APPEAL; W/ EXHIBITS MARKED: # 1 THRU # 3, HAVE BEEN FILED BY PVI, ADDRESSED TO U.S. DISTRICT COURT, 200 EAST WALL ST. - ROOM # 222, MIDLAND, TEXAS 79701, ON THIS THE 11TH DAY OF SEPTEMBER, 2021.

Carol Johnene Morris

Carol Johnene Morris (PRO SE)
FED. REG. # 76547-080; TDCJ-US # 48824
1681899

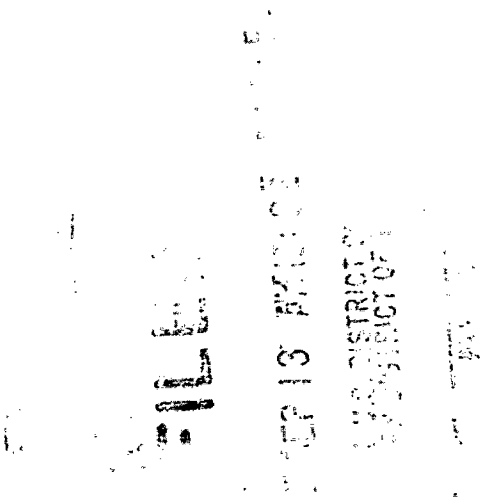
CC: FILE

Carol Johnene Moses
TDCJ-CID # 1681899
501 S. Tyler Street
Midland, Texas 79701

9/13/2021

RECEIVED
SEP 13 2021
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

U.S. District Court, Clerk
200 E. Wall St. - Rm. #222
Midland, Texas 79701



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 11, 2018
Lyle W. Cayce
Clerk

No. 17-51125
Summary Calendar

D.C. Docket No. 7:97-CR-10-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CAROL JOHNENE MORRIS,

Defendant - Appellant

Appeals from the United States District Court for the
Western District of Texas

Before CLEMENT, OWEN, and WILLETT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed as frivolous.

Certified as a true copy and issued as the mandate on Dec 04, 2018

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 11, 2018
Lyle W. Cayce
Clerk

No. 17-51125
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

CAROL JOHNENE MORRIS,

Defendant–Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 7:97-CR-10-1

Before CLEMENT, OWEN, and WILLETT, Circuit Judges.

PER CURIAM:*

Carol Johnene Morris, former federal prisoner # 76547-080 and current Texas prisoner # 1681899, moves to proceed in forma pauperis (IFP) in her appeal from the district court's order denying her a motion for free transcripts to file a third motion for coram nobis relief. Morris's brief focuses on appealing the denial of coram nobis relief in the district court's order of August 8, 2016, which was the subject of a prior appeal. She has not addressed her eligibility

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

for a transcript nor has she addressed this court's sanction order, which resulted from the prior appeal. Although pro se briefs are liberally construed, even pro se litigants must brief arguments in order to preserve them. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Morris has abandoned all nonfrivolous issues for appeal. *See Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Because Morris has not shown that her appeal involves legal points arguable on their merits, leave to proceed IFP is DENIED. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. *See Baugh v. Taylor*, 117 F.3d 197, 202 n.24 (5th Cir. 1997); 5TH CIR. R. 42.2.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

December 04, 2018

Ms. Jeannette Clack
Western District of Texas, Midland
United States District Court
200 E. Wall Street
Room 222
Midland, TX 79701-0000

No. 17-51125 USA v. Carol Morris
USDC No. 7:97-CR-10-1

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

cc:
Mr. Joseph H. Gay Jr.
Ms. Carol Johnene Morris

No. 5793 Bond $ 5,000.00

The State of Texas Vs. CAROL JOHNENE MORRIS

Charge: FORGERY BY PASSING Court: 132ND DISTRICT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Scurry, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the December Term A.D. 1987. of the 132nd Judicial District Court for said County, upon their oaths present in and to said court at said term that

CAROL JOHNENE MORRIS

hereinafter styled Defendant, on or about the 9th day of December A.D. 19 87, and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally, with intent to defraud and harm another, pass to Shana Proctor, a forged writing knowing such writing to be forged, and said writing was a check of the tenor following, save and except the bank stamps thereon:

SONNY'S OILFIELD SERVICES, INC.
PHONE 505/393-4521
P.O. BOX 1430 HOBBS, NEW MEXICO 88240

FIRST INTERSTATE BANK
HOBBS, NEW MEXICO

005446

13 12-4-87 005446

$ 617.43

Forgery

PAY TO ORDER OF: FORREST WEMKEN

SONNY'S OILFIELD SERVICES, INC.

⑈005446⑈ ⑆111220183⑆ 01 01830 2⑈ ⑈0000061743

AND THE GRAND JURORS AFORESAID do further present that prior to the commission of the aforesaid offense by the said Defendant, to-wit: on the 6th day of March, 1984, in the 142nd District Court of Midland County, Texas, in Cause No. CRA-10,176 on the docket of said Court, the said Defendant was duly and legally convicted in said last named Court of a felony, to-wit: Forgery By Possession With Intent To Pass as charged in the indictment, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction and said conviction was a final conviction and was a conviction for an offense committed by him, the said Defendant, prior to the commission of the offense hereinbefore charged against him, as set forth in the first paragraph hereof;

against the peace and dignity of the State.

Foreman of the Grand Jury

Original—Pink; State's Copy—Blue; Defendant's Copy—Yellow

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EXH N 4

NO 5793

THE STATE OF TEXAS	§	IN THE 132ND JUDICIAL
VS	§	DISTRICT COURT OF
CAROL JOHNENE MORRIS	§	SCURRY COUNTY TEXAS

JUDGMENT

Judge Presiding Gene L Dulaney	Date of Judgment July 27, 1988
Attorney for State Ernie B Armstrong	Attorney for Def : John L Pratt
Offense Convicted of: Forgery By Passing	
Degree 2nd Degree as enhanced	Date Offense Committed: December 9, 1988
Charging Instrument: Indictment	Plea: Not Guilty
Jury Verdict Guilty	Punishment 20 yrs TDC
Foreman: Malvin L Donelson	Assessed By Jury
Plea to Enhancement Paragraph(s): Not True	Findings on Enhancement True
Findings on Use of Deadly Weapon: Not Applicable	Change of Venue Not Applicable
Date Sentence Imposed: July 27, 1988	Costs: $101 50
Punishment and Place of Confinement: Twenty (20) years Texas Department of Corrections; fine of $10,000 00	Date to Commence July 27, 1988
Time Credited: 12-18 87 to 12 20 87 5-11-88 to 5 17 88	Total Amount of Restitution $417 43
Concurrent Unless Otherwise Specified	

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of Forgery By Passing and this 25th day of July 1988 this cause being called fo trial the State appeared by her District Attorney Ernie B Armstrong and the Defendant appeared in person and her counsel John L Pratt also being present and both parties anno need ready for trial the said Defendant in open Court was duly arraigned and pleaded NOT GUILTY to the cha ge contained in the indictment herein; thereupon a jury Malvin L Donelson and eleven others was duly selected impaneled and sworn who having heard the indictment read and the Defendant s plea of NOT GUILTY thereto and having heard the evidence ubmitted nd having been duly charged by the Cou t s to their duty to determine the guilt or innocence of the Defendant a d after hearing arguments of counsel r tired i charge of th p ope ffice to con id their verdict and afterward were brought into open Court by the proper officer the Defendant and her counsel being present and in due form of law returned into open Court the following verdict which was received and accepted by the Court and is here now entered upon the minutes of the Court to-wit:

We the J ry find the Defendant Ca ol Joh ene Morris guilty of fo gery by pas ing as charged in the indictment

Malvin L Donelson
Foreman of the Jury

The Defendant having been found guilty by verdict of the jury and heretofore at the time of entering her plea herein having requested in

R J HL I LRI L3
VO I 11 11 372

writing that the jury assess the punishment herein and further evidence being heard by the jury the Court again charged the jury as provided by l w and the jury after hearing arguments of counsel retired in charge of the proper officer to consider of their verdict and afterwards was brought into open Court by the proper officer the Defendant and her counsel being present and in due form of law returned into open Court the following verd ot which was received and accepted by the Co t a d is here and now entered upon the minutes of the Court to-wit

We the Jury having found the defendant Carol Johne e Morris guilty of the felony offense of Forgery By Passing do further find that the said defendant is the same person who prior to the commission of that offense had been convicted of the felony offense of Forgery By Possession With I tent To Pass as alleged in paragraph 2 of the indictment

We the Jury therefore find that the allegation with respect to said prior conviction is true and we assess her punishment at 20 years in the Texas Department of Corrections In addition we assess a fine of $10,000 00

Melvin L Donelson
Foreman

IT IS THEREFORE FOUND AND ADJUDGED BY THE COURT that the said Defendant is guilty of the felony offense of Forgery By Passing and that said Defendant committed said offense on the 9th day of December 1987 and that the punishment is hereby assessed at Twenty (20) years confinement in the Texas Department of Corrections and that the Defendant be punished in accordance with the same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended for which execution will issue

THEREUPON the said Defendant was asked by the Court whether she had anything to say why sentence should not be pronounced against her nd sh answered nothing in bar thereof and it appearing to the Court that the Defendant is mentally competent and understanding of the English language the Court proc ded in the presence of said Defendant and her counsel to pronounce sentence agai st her as follows

IT IS THE ORDER OF THE COURT that said Defendant who has been adjudged to be guilty of Fo gery By Passing has been a s sed by th Co rt at confinement in the Texas Department of Corrections for Twenty (20) years be delivered by the Sheriff of Bau y Co ty Tex immedi t ly to the Director of the Texas Depa tment of Co rections o other pe on leg lly authorized to receive such convicts and said Defendant shall be confined in said Texas Department of Corrections for Twenty (20) years in accordance with the provisions of the law governing the Texas Department of Corrections and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence

It is further ADJUDGED and DECREED by this Court that the se tence pronounced herein shall begin this date

Gene L Dulaney Judge Presiding

July 27, 1988
Date Signed

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OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

PER CURIAM.

On April 2, 1987, the First Court of Appeals, in an unpublished opinion, affirmed the trial court's judgment in its cause numbered 01-86-0546-CR, in which James E. Atomanczyk, henceforth appellant, was shown to have been convicted by a jury of the offense of murder. The jury also assessed punishment at confinement in the penitentiary for life and a $10,000 fine. The court of appeals rejected, inter alia, appellant's contention that Art. 37.07, § 4, V.A.C.C.P. (which then governed the giving of a statutory instruction on parole) was unconstitutional. *Atomanczky v. State*, No. 01-86-0546-CR, 1987 WL 8750, April 2, 1987.

In *Rose v. State*, 752 S.W.2d 529 (Tex.Cr.App.1988), which was decided after the court of appeals had decided appellant's cause, this Court declared Art. 37.07, § 4, supra, unconstitutional. This Court subsequently granted appellant's petition for discretionary review solely to consider appellant's contentions that concerned the statutory parole law instruction that was given in this cause.

On November 16, 1988, in an unpublished opinion, this Court sustained appellant's contention that the statute was unconstitutional and thereafter remanded the cause to the court of appeals so that that court could make the determination whether the statutory parole law instruction that was given the jury in this cause was harmless beyond a reasonable doubt to the punishment that the jury had assessed appellant. See Tex.R.App.Pro., Rule 81(b)(2). *Atomanczky v. State*, No. 0509-87, November 16, 1988.

On remand, the court of appeals, in a published opinion, ruled that the parole law instruction charge error was harmless beyond a reasonable doubt and affirmed. *Atomanczky v. State*, 776 S.W.2d 297 (Tex.App.-Houston [1st Dist.] 1989). However, the court of appeals decided to reconsider appellant's contentions concerning his competency to stand trial and the failure of the trial judge to instruct the jury on the defense of insanity: "[B]ecause the dissenting opinion [by Justice O'Connor] disagrees, not only with our decision on the *Rose* issues, but also with the court's earlier opinion regarding appellant's competence to stand trial and his sanity at the time of the crime, we have decided to reconsider those issues, even though they were not specifically included in the order of remand. *See Adkins v. State*, 764 S.W.2d 782, 784 (Tex.Crim.App.1988). Having reconsidered these issues in the light of the appellate record before us, we remain of the opinion that both questions were correctly decided by this Court's earlier opinion."

We granted appellant's petition for discretionary review this time solely in order to consider the correctness of the court of appeals' holdings regarding the competency to stand trial issue and the insanity defense issue. Upon reconsideration, we now find that we improvidently granted appellant's petition for discretionary review. Accordingly, appellant's petition for discretionary review is ordered dismissed. See *Grigsby v. State*, 653 S.W.2d 43 (Tex.Cr.App.1983).

WHITE, J., concurs in the result.

CLINTON and TEAGUE, JJ., dissent.

STURNS, J., not participating.

Ex parte Carol Johnene MORRIS.

No. 70,934.

Court of Criminal Appeals of Texas, En Banc.

Dec. 12, 1990.

Rehearing Denied Feb. 6, 1991.

Following her conviction of forgery in the 132nd Judicial District Court, Scurry County, Gene L. Dulaney, J., defendant

sought habeas corpus relief on grounds that indictment was fundamentally defective. The Court of Criminal Appeals, Baird, J., held that applicant could not raise defect in indictment for first time in post-conviction proceedings, even though indictment omitted constituant element of offense.

Relief denied.

Clinton and Teague, JJ., concurred in result.

Criminal Law ⇐998(3)

Defendant could not raise defect in indictment for first time in postconviction proceedings even though indictment, by which grand jury purported to charge defendant with forgery; omitted element of crime that writing purported to be act of another "who did not authorize the act." V.T.C.A., Penal Code §§ 21.08, 32.21(a)(1)(A); Vernon's Ann.Texas C.C.P. arts. 1.14(b), 21.15; Vernon's Ann.Texas Const. Art. 5, § 12.

Carol Johnene Morris, pro se.

Ernie Armstrong, Dist. Atty. and Dana W. Cooley, Asst. Dist. Atty., Snyder, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

BAIRD, Judge.

Applicant was convicted of the offense of forgery. Tex.Penal Code Ann. § 32.21(a)(1)(A). After finding the enhancement allegation "true," the jury assessed punishment at twenty years and a fine of ten thousand dollars. Applicant filed a motion to dismiss her appeal in this cause, and the Court of Appeals granted the request. *Morris v. State*, No. 11-88-199-CR (Tex.App.—Eastland delivered April 6, 1989).

In her application for writ of habeas corpus, see Art. 11.07 Tex.Code Crim.Proc. Ann., applicant submits that the indictment upon which she was convicted is fundamentally defective for failing to allege each constituent element of the offense. Specifically, she complains of the indictment's failure to allege that the writing purported to be the act of another who "did not authorize the act."

Applicant's claim is supported by the indictment which alleges in pertinent part that applicant:

> intentionally, with intent to defraud and harm another, pass to Shana Proctor, a forged writing knowing such writing to be forged, and said writing was a check of the tenor following, save and except the bank stamps thereon:
> [THE INDICTMENT INCLUDES THE CHECK IN QUESTION]

Applicant does not contend that she objected to the indictment; rather, she argues that the indictment, because of the omission, failed to invest the trial court with jurisdiction, relying on *Cotton v. State*, 626 S.W.2d 531 (Tex.Cr.App.1981) (forgery indictment failing to allege that writing purported to be the act of another "who did not authorize the act" held fundamentally defective); *Ex parte Bilton*, 602 S.W.2d 534 (Tex.Cr.App.1980) (forgery indictment failing to allege writing purported to be the act of another "who did not authorize the act" held fundamentally defective), to support her proposition. However, those cases involved indictments presented before December 1, 1985, the effective date of Art. 1.14(b) Tex.Code Crim.Proc.Ann. and Art. V, § 12, Tex. Const.

The State, citing to Tex. Const. Art. V, § 12(b) and Tex.Code Crim.Proc.Ann. Art. 1.14(b), submits that applicant waived the right to now object to the defect by her failure to object to the indictment prior to trial.

The law surrounding what constitutes an indictment and a defendant's ability to waive error attendant thereto changed radically with the amendments to Art. 1.14 and Art. V, § 12.[1]

Art. 1.14 of the Texas Constitution provides:

1. Article 1.14 Tex.Code Crim.Proc.Ann. became effective December 1, 1985 and applies only to

(b) If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

Art. V, § 12(b) states:

An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.

This Court recently addressed the application of those provisions in *Studer v. State*, 799 S.W.2d 263 (Tex.Cr.App.1990), and *Ex parte Gibson*, 800 S.W.2d 548 (Tex.Cr.App.1990).

The charging instrument in *Studer* involved a substance defect in that it failed to allege an element of the offense; namely, it failed to allege the act or acts relied upon to constitute recklessness in an indecent exposure case. See Tex.Penal Code Ann. § 21.08; Tex.Code Crim.Proc.Ann. art. 21.15. Despite the flaw, Studer's charging instrument was sufficient to invest the trial court with jurisdiction. *Studer*, 799 S.W.2d at 272 citing Art. V, Tex. Const. Studer's failure to object to the charging instrument prior to trial waived review of the issue on appeal. *Studer*, 799 S.W.2d at 273 citing Art. 1.14(b) Tex.Code Crim.Proc.Ann.

After reviewing the legislative histories of both articles and analyzing the interplay between them and code provisions regulating the practices and procedures governing charging instruments, this Court held that the change in Art. 1.14(b) requires that substance exceptions be raised pre-trial or otherwise the accused has waived his right to raise the complaint on appeal or by collateral attack. *Studer*, 799 S.W.2d at 268. The Court concluded that an indictment is still an indictment, "at least as contemplated by Art. V, § 12, though it be flawed by matters of substance *such as the absence of an element.*" *Studer*, 799 S.W.2d at 271 (emphasis added).

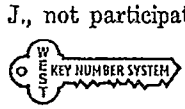
This change in the law can be summarized as follows: "[I]f the instrument comes from the grand jury, purports to charge an offense and is facially an indictment, then it is an indictment for purposes of Art. V., § 12(b), and its presentation by a State's attorney invests the trial court with jurisdiction to hear the case." *Gibson*, 800 S.W.2d at 551.

In the case at bar, the indictment in question clearly fails to allege a constituent element of the offense of forgery, namely, that the writing purported to be the act of another "who did not authorize the act." Tex.Penal Code Ann. § 32.21(a)(1)(A). However, the charging instrument was issued by the grand jury, filed with the district clerk and purports to charge applicant with the primary offense of forgery. Pursuant to the rationale in *Studer* and *Gibson*, this instrument is an indictment as contemplated by Art. V, § 12(b). *Studer*, 799 S.W.2d 271; *Gibson*, 800 S.W.2d at 551. Article 1.14(b) prohibits applicant from raising the defect in the indictment for the first time in a postconviction proceeding. *Gibson*, 800 S.W.2d at 551.

The relief prayed for is denied.

CLINTON and TEAGUE, JJ., concur in the result.

STURNS, J., not participating.



charging instruments presented to courts on or after that date. *Gibson*, 800 S.W.2d at 550, n. 3, Acts 1985, 69th Leg., ch. 577, § 1. The amendment, therefore, applies to the instant case, which involves an indictment presented in 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

M097CR010

UNITED STATES OF AMERICA,	)	CRIMINAL NO. _____
	)	
Plaintiff,	)	I N D I C T M E N T
	)	Vio: 18 U.S.C. 922(g)(1) -
VS.	)	Felon in Possession of
	)	Firearm; 18 U.S.C. 922(a)(6) -
CAROL JOHNENE MORRIS,	)	False statement in Acquiring
	)	a Firearm
Defendant.	)	

THE GRAND JURY CHARGES:

COUNT ONE
[18 U.S.C. § 922(g)(1)]

That on or about May 8, 1996, in the Western District of Texas, the Defendant,

CAROL JOHNENE MORRIS,

who having been convicted of a crime punishable by imprisonment for a term exceeding one year, namely for the felony offense of Forgery by Passing, in the 132nd Judicial District Court of Scurry County, Snyder, Texas, Cause Number 5793 on July 27, 1988, did knowingly possess in and affecting commerce a firearm, to wit: a Raven, .25 caliber semi-automatic pistol, Model MP-25, serial number 1824182, which had been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Section 922(g)(1).

Additional material from this filing is available in the Clerk's Office.