IN THE SUPREME COURT OF THE UNITED STATES

VAUGHN ALEXANDER CROPPER

Petitioner

V.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

Vaughn Alexander Cropper
1400 Dale Bumpers Road
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P.O. Box 9000-Low
Forrest City, Arkansas 72336
(Incarcerated)

Appendix "A"

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VAUGHN ALEXANDER CROPPER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 2:22-cv-8018-AMM**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

This case is before the court on Petitioner Vaughn Alexander Cropper's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence. Doc. 1. For the following reasons, Mr. Cropper's motion is **DENIED**.

I. BACKGROUND

On August 10, 2017, Mr. Cropper was sentenced to 188 months of imprisonment after being found guilty of a felon in possession of a firearm offense in violation of 18 U.S.C. § 922(g)(1). *See* Judgment In A Criminal Case, *United States v. Cropper*, No. 2:17-cr-30-AMM-GMB (N.D. Ala. Aug. 10, 2017), ECF No. 79. The following day, Mr. Cropper filed a notice of appeal of the conviction, judgment, and sentence imposed. Notice Of Appeal, *United States v. Cropper*, No. 2:17-cr-30-AMM-GMB (N.D. Ala. Aug. 11, 2017), ECF No. 81. On May 4, 2020,

the Eleventh Circuit affirmed Mr. Cropper's conviction and sentence. Judgment, *United States v. Cropper*, No. 2:17-cr-30-AMM-GMB (N.D. Ala. July 20, 2020), ECF Nos. 117, 117-1. The Supreme Court denied Mr. Cropper's petition for writ of certiorari on May 24, 2021. *See Cropper v. United States*, 141 S. Ct. 2678 (2021).

On May 23, 2022, approximately one year after the Supreme Court denied certiorari, Mr. Cropper filed a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence. Doc. 1. Almost a month after he filed that motion, Mr. Cropper filed a brief in support. Doc. 3. On August 10, 2022, the court ordered the United States "to appear and file its answer . . . within thirty (30) days from the date of [its] order." Doc. 4 at 2. Accordingly, the answer was due on or before September 9, 2022. On September 8, 2022, the day before the deadline to file the answer, the United States filed a motion for a sixty-day extension of time to file a response, Doc. 5, but that motion was not ruled on and remains pending. The United States filed its answer on September 23, 3022. Doc. 6. Mr. Cropper filed a reply on November 16, 2022. Doc. 8.[1]

II. LEGAL STANDARD

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was

[1] Because Mr. Cropper did not object to the untimely filing of the answer in his reply, *see* Doc. 8, the court will consider the arguments made by the United States in its response. Accordingly, the pending motion for an extension, Doc. 5, is **DENIED AS MOOT**.

imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." *Id.* § 2255(b).

"If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

III. ANALYSIS

Mr. Cropper asserts two "ground[s] on which [he] claim[s] that [he is] being held in violation of the Constitution, laws, or treaties of the United States." Doc. 1 at 4. First, Mr. Cropper asserts that there is "[n]ew evidence [that] proves that two of [his] ACCA-predicates actually arose from a single criminal episode and did not

occur on different occasions." *Id.* Second, Mr. Cropper asserts that "[t]he Government withheld Brady material that helps to exculpate [him] from a sentence enhancement under the [Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), ('ACCA' or 'the Act')]." *Id.* at 5. Mr. Cropper requests that the court grant him "[r]esentencing without the enhancement under 18 U.S.C. § 924(e)." Doc. 1 at 12; *see also* Doc. 3 at 15.

A. New Evidence

"It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . , to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1). Under the ACCA, "[i]n the case of a person who violates section 922(g) . . . and has three previous convictions by any court referred to in section 922(g)(1) . . . for a violent felony or a serious drug offense, or both, **committed on occasions different from one another**, such person shall be fined . . . and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)." 18 U.S.C. § 924(e)(1) (emphasis added).

According to Mr. Cropper, "[a]fter being convicted for being a Felon in Possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), [his] sentence was enhanced pursuant to the [ACCA] which is codified at 18 U.S.C. § 924(e)." Doc. 3 at 5. But, according to Mr. Cropper, "two of the three priors that were used as ACCA predicates actually occurred at the same time and place during a single criminal episode." *Id.*

Mr. Cropper asserts that "[b]oth the indictment and the Presentence Investigation Report (PSR) highlight the Government's intent to use three specific prior drug convictions to enhance [his] sentence under the [ACCA]" and that "[a]ll three predicates are convictions that were obtained on June 3, 2009, in the District Court of Shelby County, Alabama under the following case numbers: DC2008-3747; DC2008-4344; and DC2008-4345." Doc. 1 at 4 (citing Indictment and Presentence Investigation Report, *United States v. Cropper*, No. 2:17-cr-30-AMM-GMB (N.D. Ala. Jan. 25, 2017 & August 10, 2017), ECF Nos. 1 & 77). Specifically, Mr. Cropper asserts "[t]he indictment lists the following prior convictions as predicates to trigger the ACCA enhancement: First Degree Possession of Marijuana in Case No. DC2008-3747; Unlawful Distribution of a Controlled Substance in Case No. DC2008-4344; Unlawful Distribution of a Controlled Substance in Case No. DC2008-4345." Doc. 3 at 5; *see also id.* at 24–25. Mr. Cropper further asserts that "[t]he [PSR], while referring to Case No. DC2008-3747 as Docket No. CC2009-

00812, emphasizes the Government's intent to use the three prior convictions listed in the indictment as predicates for ACCA enhancement." *Id.* at 5–6; *see also id.* at 32–37. Mr. Cropper asserts that "the PSR subsequently explains that the conviction in Docket No. CC2009-00812 was obtained under Case No. DC2008-3747." *Id.* at 6.[2] According to Mr. Cropper, "[w]hen analyzing the charging information . . . , it appears that the offense in Case No. DC2008-3747 occurred on February 22, 2007." *Id.*; *see also id.* at 44.

Mr. Copper asserts that "the information in DC2008-3747, which charges [Mr.] Cropper with violating section 13A-12-213 of the Alabama Code . . . , is erroneous with respect to the date of the offense." *Id.* at 6 (emphasis omitted). Specifically, Mr. Cropper asserts that he was convicted of "First Degree Possession of Marijuana . . . in the Circuit Court of Shelby County, Alabama under Case No. YO-07-865," and that "[t]he information in [that c]ase . . . charges that [he] unlawfully possessed marijuana, in violation of [Alabama Code] § 13A-12-213, on February 22, 2007." *Id.* at 6–7; *see also id.* at 68–78. Mr. Cropper asserts that "the information in Case No. DC2008-3747 also charges that [he] unlawfully possessed marijuana, in violation of [Alabama Code] § 13A-12-213, on February 22, 2007."

[2] The PSR provides that in Docket No. CC2009-00812 Mr. Cropper pled guilty to Possession of Marijuana 1st Degree, and notes that Mr. Cropper "was convicted . . . under Case No. DC2008-3747" because the Circuit Clerk of Shelby County was ordered to "assign a Circuit Court case number[] to pending district court cases[] in which a plea is entered at the district court level." Doc. 3 at 34–35. Accordingly, it appears that Docket Nos. CC2009-00812 and DC2008-3747 can be used interchangeably.

Id. at 7; *see also id.* at 44. According to Mr. Cropper, "when comparing the charging information in YO-07-865 versus the charging information in DC2008-3747, it becomes evident that [he] was convicted twice for an unlawful possession of marijuana, in violation of [Alabama Code] § 13A-12-213, that occurred on February 22, 2007." *Id.* at 7. Mr. Cropper further asserts that, in a brief filed in the Court of Criminal Appeals of Alabama, "the State of Alabama admitted that the offense in DC2008-3747 actually occurred on September 19, 2008, and that the charging information in DC2008-3747 contains a 'clerical error' regarding the stated date of February 22, 2007." *Id.* at 8; *see also id.* at 98–99. Mr. Cropper thus asserts that "the conviction in DC2008-3747 is either double jeopardy, or the charging information in DC2008-3747 contains a 'clerical error' with respect to the date of the offense." *Id.* at 7.[3]

According to Mr. Cropper, because "it is . . . established . . . that the offense in DC2008-3747 actually occurred on September 19, 2008, it is easy to see that two of the three ACCA-predicate offenses occurred during a single occasion." *Id.* at 9. Specifically, Mr. Cropper asserts that "Case No. DC2008-4345 charges [him] with distributing marijuana on September 19, 2008 . . . [; t]therefore, [he] committed the offense of distributing marijuana in DC2008-4345 on the same day he committed

[3] Mr. Cropper concedes that he "raised the double jeopardy claim on direct appeal from the . . . federal conviction and sentence" and that "[t]he Eleventh Circuit concluded that [he] could not collaterally attack his prior state conviction on double jeopardy grounds." Doc. 3 at 8; *see also id.* at 87–89.

the offense of unlawfully possessing marijuana in Case No. DC2008-3747." *Id.*; *see also id.* at 117–20. Mr. Cropper thus asserts that "the offenses of First Degree Possession of Marijuana in Case No. DC2008-3747, and Unlawful Distribution of a Controlled Substance in Case No. DC2008-4345, both occurred on September 19, 2008, at the same time and place during a single criminal episode." Doc. 1 at 4; *see also* Doc. 3 at 11. Specifically, according to Mr. Cropper, "[o]n September 19, 2008, while inside of his home at 196 Creekstone Trail in Calera, Alabama, [he] sold seven (7) grams of marijuana out of a larger stash of marijuana that he unlawfully possessed." Doc. 3 at 13. Mr. Cropper asserts that "[t]his . . . one event encompass[ed] both offenses[]" in Case Nos. DC2008-3747 and DC2008-4345. *Id.*

Mr. Cropper argues that, "[w]hen considering the true fact that the offenses charged in Case Nos. DC2008-3747 and DC2008-4345 occurred on the same day, and recapping the event that led to those charges, it is clearly evident that said offenses occurred during a single occasion." *Id.* Mr. Cropper further argues that the two "offenses constitute a single criminal episode qualifying as one predicate for ACCA enhancement purposes[;] . . . [t]hus, the Government has only a total of two ACCA predicates to rely upon." *Id.* at 15.

Further, Mr. Cropper argues that "[t]he evidence used by the Government must be reliable and specific evidence[,]" but the charging instrument in Case No. DC2008-3747 is "erroneous" and "unreliable" because "it contains a clerical error."

Id. at 11–12 (cleaned up). Mr. Cropper further argues that "information contained in . . . a PSR must also be based on reliable and specific evidence," but "[t]he information at paragraph 32 of [his] PSR derived from the faulty charging instrument of Case No. DC2008-3747." *Id.* at 12 (cleaned up). According to Mr. Cropper, "[b]ecause paragraph 32 of the PSR derived from erroneous information, it must be corrected and the entire PSR must be adjusted accordingly." *Id.* Further, according to Mr. Cropper, "[t]he clerical error is causing [him] to serve a sentence approximately six (6) years above the statutory maximum prescribed for his offense[]" because it "has caused [him] to be wrongly subjected to a sentence enhancement under § 924(e)(1) which carries a mandatory minimum of fifteen (15) years imprisonment." *Id.* (cleaned up). According to Mr. Cropper, "the clerical error is a 'fundamental defect which inherently resulted in a complete miscarriage of justice' and 'presents exceptional circumstances that justify relief' under 28 U.S.C. § 2255." *Id.* at 13 (quoting *Davis v. United States*, 417 U.S. 333, 346–47 (1974)) (cleaned up).

Mr. Cropper asserts that he did not raise this issue of the alleged clerical error in Case No. DC2008-3747 in in his direct appeal of the judgment of conviction because "[a]t the time, [he] lacked a key piece of evidence to sufficiently support this claim; and . . . [he] withheld this issue to meet the 30-page limit requirement ordained by [Federal Rule of Appellate Procedure] 32(a)(7)(A)." Doc. 1 at 4.

According to Mr. Cropper, the State of Alabama's brief in the Court of Criminal Appeals, *see* Doc. 3 at 94–105, "did not exist" at the time his direct appeal was decided, *id.* at 16. Mr. Cropper asserts that such brief "is evidence that is necessary to supplement [other] . . . source[s] in proving the inaccuracy [of the charging instrument in Case No. DC2008-3747]." *Id.* at 17. According to Mr. Cropper, "[w]ithout [that brief] to supplement the charging instrument of YO-07-865 . . . , [he] had no other . . . documents to support this 'clerical error' claim." *Id.*

Mr. Cropper further asserts that he raised the issue of the alleged clerical error in the district court on a "Motion to Review and Revoke Magistrate's Detention Order" and the court granted *de novo* review of the magistrate judge's detention order, "but release pending the outcome of appeal was denied." Doc. 1 at 4; *see also id.* at 13–29. Mr. Cropper asserts that he appealed that denial and raised the issue of whether his "ACCA-predicates actually arose from a single criminal episode" in that appeal, but the Eleventh Circuit denied his appeal. *Id.* at 4–5.

The United States responds that, even though the State of Alabama's brief in the Court of Criminal Appeals "concedes a clerical error in the information as to one of his cases, the Alabama Court of Criminal Appeals made no such finding, having dismissed his petition on procedural grounds," and that "the claim [Mr.] Cropper . . . raises is not cognizable under § 2255 and is procedurally barred." Doc. 6 at 5–6.

As to the argument that Mr. Cropper's claim is not cognizable under Section 2255, the United States asserts that "claims of non-constitutional error are not cognizable on collateral review." *Id.* at 6. Further, according to the United States, "with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding may not collaterally attack his prior state convictions that served as the predicate offenses for an enhancement." *Id.*

As to the argument that Mr. Cropper's claim is procedurally barred, the United States asserts that Mr. Cropper's claim "was available to him on direct appeal and was either raised[] and denied by the Eleventh Circuit, or [such claim was] not pursued." *Id.* First, the United States asserts that "[t]he Eleventh Circuit opinion in [Mr. Cropper's] case was clear—other than a violation of his right to counsel, [Mr.] Cropper cannot collaterally attack his prior state convictions." *Id.* at 8. The United States thus asserts that Mr. Cropper's "present challenge to his qualifying convictions is procedurally barred by the Eleventh Circuit's decision in his case." *Id.* According to the United States, "[w]hen a prisoner raises a claim that has been decided on direct review, he ordinarily cannot later attempt to relitigate that claim in a Section 2255 proceeding." *Id.* at 7.

Second, the United States asserts that, "[e]ven if [Mr.] Cropper's present claim was not decided on direct appeal, it remains procedurally defaulted." *Id.* at 8. According to the United States, "the general rule [is] that claims not raised on direct

appeal may not be raised on collateral review." *Id.* Further, according to the United States, "[h]aving failed to raise his . . . claim on direct appeal, [Mr.] Cropper faces a heightened threshold for having it considered in a Section 2255 proceeding." *Id.*

The Eleventh Circuit has observed that, "[u]nder the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). The procedural default "rule generally applies to all claims, including constitutional claims." *Id.* "A defendant can avoid a procedural bar only by establishing one of the two exceptions to the procedural default rule[:]" (1) "Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error[]"; and (2) "Under the second exception, a court may allow a defendant to proceed with a § 2255 motion despite his failure to show cause for procedural default if a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* (cleaned up).

As to the first exception, "[i]n procedural default cases, the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all." *Id.* at 1235. "[T]o show cause for procedural default, [the defendant] must show that some

objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [his] own conduct." *Id.* Further, the second "exception is exceedingly narrow in scope as it concerns a petitioner's 'actual' innocence rather than his 'legal' innocence." *Id.* at 1235 n.18 (cleaned up). "'Actual innocence' means factual innocence, not mere legal innocence." *Id.* (cleaned up).

The United States asserts that Mr. "Cropper does not and cannot demonstrate that he is actually innocent of the charge of which he stands convicted." Doc. 6 at 10. The United States also asserts that Mr. Cropper "cannot avoid the procedural bar through the miscarriage of justice exception" because "his claim could have been raised on direct appeal and has not resulted in a complete miscarriage of justice." *Id.* Further, the United States asserts that Mr. Cropper "cannot avoid the procedural default concerning his claims" because he "fails to allege, much less demonstrate, cause for or prejudice from his failure to raise his claim on direct appeal." *Id.*

Mr. Cropper replies that "the Government either misunderstands, or has disregarded the context of[] both[his] appellate double-jeopardy argument and the Eleventh Circuit's opinion regarding said argument." Doc. 8 at 6. According to Mr. Cropper, his "double-jeopardy claim on direct appeal attacked the validity of the prior state conviction itself, the judgment in Case No. DC2008-3747, in order to effectuate the invalidity of the ACCA enhancement that was applied to his federal

sentence." *Id.* at 7. According to Mr. Cropper, the Eleventh Circuit held that his "federal sentencing court could not have deemed void the judgment of his prior state conviction unless his state conviction was obtained in violation of his right to counsel," which "determination would bar [him] from using 28 U.S.C. § 2255 to relitigate his double-jeopardy claim and attack the validity of his prior state conviction." *Id.* at 8. But, according to Mr. Cropper, such determination "does not expressly bar [him] from raising a different claim to challenge his sentence via § 2255." *Id.* at 8–9.

Mr. Cropper asserts that his "instant claim does not attack the validity of the prior state conviction," as he concedes that "the conviction itself is legitimate." *Id.* at 9. Mr. Cropper asserts that he "merely asks that this Honorable Court (1) acknowledge the fact that the date of [the] offense stated in the charging information of Case No. DC2008-3747 is a clerical error; and (2) consider the actual date of that offense in correlation with the date of offense in Case No. DC2008-4345." *Id.* Mr. Cropper further asserts that his "instant claim shows that [his] ACCA sentence enhancement does not comport with the laws of the United States, namely, 18 U.S.C. § 924(e)(1)." *Id.*

Further, Mr. Cropper replies that his "instant claim is based on new evidence that was not available to him at the time of his direct appeal." *Id.* at 10. The "new evidence" to which Mr. Cropper refers, *see id.*, is a brief submitted by the State of

Alabama in the Court of Criminal Appeals of Alabama on November 16, 2020, in which the State of Alabama concedes that "[i]t appears a clerical error occurred on [Mr.] Cropper's intent to plead to information in DC-08-3747 with the date of February 22, 2007 being stated, which did not match the date on the complaint in DC-08-3747 of September 19, 2008, on which the crime occurred[,]" Doc. 3 at 94, 99. According to Mr. Cropper, "[b]ecause said evidence came into existence subsequent to the conclusion of [his] direct appeal, [he] could not have pursued the instant claim on direct appeal." Doc. 8 at 11. Also, according to Mr. Cropper, "the merits of [his] instant claim could not have been reviewed on direct appeal without 'further factual development' . . . [; t]herefore, the 'ground of error' was not 'available' to him on direct appeal." *Id.* at 11–12 (quoting *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)). Mr. Cropper thus asserts that "[t]he fact that the new evidence did not exist at the time of [his] direct appeal establishes cause for him not pursuing the clerical-error claim at that time, and he has shown the actual prejudice that has resulted from the clerical error." Doc. 8 at 12.

Mr. Cropper also replies that the United States does not "argue that the two ACCA-predicates in question occurred on 'occasions different from one another.'" *Id.* (quoting 18 U.S.C. § 924(e)(1)). According to Mr. Cropper, he is "actually innocent of being an Armed Career Criminal" because, "[i]f it were not for the clerical error, the Government would have lacked the prerequisite predicates to

pursue a sentence enhancement under 18 U.S.C. § 924(e)." Doc. 8 at 13. According to Mr. Cropper, "[t]he miscarriage of justice exception applies where a movant is actually innocent of the crime of which he was convicted or the penalty which was imposed." *Id.* (cleaned up). Mr. Cropper asserts that "the actual prejudice that has resulted in a miscarriage of justice" is that "[t]he clerical error creates the semblance that [he] qualifies for ACCA enhancement when he actually . . . does not." *Id.* at 14. Mr. Cropper further asserts that "the clerical error has caused a grossly unfair outcome in [his] sentencing proceeding by subjecting him to an excessive sentence which is unjustly depriving him of his right to liberty, in violation of the Fifth Amendment's Due Process Clause." *Id.*

Finally, Mr. Cropper asserts that "this claim shows that [his] entire sentencing was prejudiced by the clerical error, which is why a plenary sentencing hearing is necessary." *Id.* at 15. Mr. Cropper asserts that "[s]ignificant portions of [his] presentence report were derived from erroneous information due to this clerical error, which resulted in [him] receiving an excessive sentence." *Id.* Mr. Cropper thus asserts that "the clerical error certainly presents exceptional circumstances where [the] need for postconviction relief is apparent, even if, somehow, it is not deemed a miscarriage of justice." *Id.* (cleaned up).

The court need not address the merits of Mr. Cropper's claim because such claim is barred by the procedural default rule, which provides that "a defendant

generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn*, 365 F.3d at 1234. Mr. Cropper did not bring his claim on direct appeal and has not established an exception to the procedural default rule.

Mr. Cropper has not established that he can avoid procedural default by showing cause for not raising the claim on direct appeal and actual prejudice from the alleged error. Mr. Cropper asserts that he did not raise this issue in in his direct appeal because the State of Alabama's brief in the Court of Criminal Appeals, *see* Doc. 3 at 94–105, "did not exist" at that time, *id.* at 16. That brief admitted that there appears to be a clerical error regarding the date of the offense, but the correct date of the offense is something that Mr. Cropper has always known. Because Mr. Cropper has always known the date of the offense, as he was present on that date, the State's admission in an appellate brief of an incorrect date in his plea agreement, *id.* at 44, is not cause for his failure to raise the issue on appeal.

Mr. Cropper further asserts that he "only had the judicial records of his prior convictions that the Government submitted in its discovery disclosure . . . and the judicial records of Case No. YO-07-865 . . . at his disposal." *Id.* at 16; *see also id.* at 41–66. But the judicial records he concedes were submitted by the Government indicate that the offense in DC2008-3747 occurred on September 19, 2008, as

opposed to February 22, 2007. *See id.* at 42. Accordingly, his argument that this claim was unavailable to him at the time of his direct appeal is unconvincing.

Further, Mr. Cropper's argument that he "withheld this issue to meet the 30-page limit requirement ordained by [Federal Rule of Appellate Procedure] 32(a)(7)(A)," Doc. 1 at 4, implicitly concedes that he was aware of the claim at the time of him appeal, but chose not to include it in his brief to meet the Eleventh Circuit's page requirements.

Mr. Cropper also has not established that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Lynn*, 365 F.3d at 1234 (cleaned up), as he does not argue that he is actually innocent of the charge underlying his conviction—felon in possession of a firearm. *See* Docs. 3 & 8. Rather, Mr. Cropper argues that he is "actually innocent of being an Armed Career Criminal" because "the Government . . . lacks the prerequisite three ACCA-predicates that are required to sustain the ACCA enhancement." Doc. 8 at 13. "Neither the Supreme Court nor th[e Eleventh Circuit] ha[ve] yet ruled on whether [a petitioner's] actual innocence of sentence exception extends to the noncapital sentencing context." *McKay v. United States*, 657 F.3d 1190, 1197 (11th Cir. 2011). "Even assuming that this exception does extend beyond the capital sentencing context, it still [would] not apply to [a defendant whose] claim is one of legal, rather than factual, innocence . . . ." *Id.* at 1198.

Here, Mr. Cropper asserts that he "does not attack the validity of the prior state conviction" and "admits that he unlawfully possessed marijuana on September 19, 2008, and that he pled guilty to that offense in Case No. DC2008-3747." Doc. 8 at 9. Mr. Cropper argues that he is actually innocent of his ACCA-enhancement on the ground that his prior conviction of possession of marijuana (Case No. DC2008-3747) occurred at "the same time and place" as his conviction of distribution of marijuana (Case No. DC2008-4345) and "that said offenses constitute a single criminal episode qualifying as one predicate for ACCA enhancement purposes." Doc. 3 at 15.

Because "the Supreme Court and [the Eleventh Circuit] repeatedly have emphasized that circumstances meriting the consideration of procedurally defaulted or barred constitutional claims are 'extremely rare' and apply only in the 'extraordinary case,'" *Rozzelle v. Sec'y, Fla. Dep't of Corrs.*, 672 F.3d 1000, 1015 (11th Cir. 2012) (per curiam), the court cannot allow Mr. Cropper to proceed with his Section 2255 under this exception. If this is a truly extraordinary case, then it is for the Eleventh Circuit, not this court, to expand the list of exceptional circumstances meriting the consideration of procedurally defaulted claims.

Accordingly, Mr. Cropper's Section 2255 motion is **DENIED** under the procedural default rule.

B. *Brady* Violation

The Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Evidence is material, *i.e.*, prejudicial, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Rodriguez v. Sec'y, Fla. Dep't of Corrs.*, 756 F.3d 1277, 1303 (11th Cir. 2014) (cleaned up). "*Brady* requires a showing that the result would have been different had the prosecution disclosed the withheld evidence . . . ." *Id.* (emphasis omitted).

According to Mr. Cropper, "[t]he Government was ordered to disclose any of [his] arrest and conviction records, or other evidence that may qualify as *Brady* material." Doc. 1 at 5. Further, according to Mr. Cropper, "[t]he judicial records of Case No. Y0-07-865 qualify as material evidence favorable to [Mr.] Cropper on the issue of punishment and could have been obtained by the Government through the exercise of due diligence[,]" but "said judicial records were suppressed by the Government." *Id.* (emphasis omitted); *see also* Doc. 3 at 18. According to Mr. Cropper, "the charging information in Case No. YO-07-865 is [an] essential judicial record that exposes an error regarding the stated date of February 22, 2007 as the

date of [the] offense in the charging information of Case No. DC2008-3747." Doc. 3 at 18. Further, Mr. Cropper asserts that "the revelation of YO-07-865 create[d] a reasonable doubt that was previously nonexistent regarding [his] status as an Armed Career Criminal." *Id.*

Mr. Cropper also asserts that "the judicial records of Case No. YO-07-865 are a part of [his] arrest and conviction records, the existence of which should have been known by the Government through the exercise of due diligence, and qualify as material evidence favorable to [him] on the issue of punishment." *Id.* Mr. Cropper thus asserts that "the judicial records of YO-07-865 should have been furnished by the Government" and that, "[h]ad the Government done so, the 'clerical error' may have been detected before trial, which would have allowed [his] defense counsel to negotiate a suitable plea agreement to serve a sentence well under the 15-year mandatory minimum ordained by 18 U.S.C. § 924(e)(1)." *Id.* at 18–19. Mr. Cropper further asserts that, "[h]ad the Government not pursued the ACCA enhancement, [he] would have been more inclined to plead guilty" and "would not have gone to trial *pro se* out of desperation." *Id.* at 19. According to Mr. Cropper, "the outcome of [his] sentencing proceeding would have been different had the 'clerical error' been detected earlier as a result of the Government's full compliance with the discovery order." *Id.* Accordingly, Mr. Cropper asserts that "the Government . . . violated [Federal Rule of Criminal Procedure] 16(a)(1)(D) and [Mr.] Cropper's 5th

Amendment due process rights," Doc. 1 at 5, "by failing to disclose exculpatory evidence regarding [his] susceptibility to enhancement under 18 U.S.C. § 924(e)(1)," Doc. 3 at 19–20.

Mr. Cropper asserts that he raised this issue on appeal "[i]n supplement to the double jeopardy issue raised on appeal[]" and that "[t]he appellate court failed to address this issue." Doc. 1 at 5. Further, Mr. Cropper asserts that he raised the issue in a "Motion for a New Trial." *Id.* at 6. On August 10, 2022, the district court denied the motion for a new trial. *See* Order, *United States v. Cropper*, No. 2:17-cr-30-AMM-GMB (N.D. Ala. August 10, 2022), ECF No. 121.

The United States responds that, "[a]lthough [Mr. Cropper] styles an alleged *Brady* violation as a second claim on collateral attack, his discovery violation claim is dependent upon and subsumed within his single claim." Doc. 6 at 5 n.2. According to the United States, "[t]he document [Mr. Cropper] claims to have not received was from a sealed juvenile record, which is not available to the United States upon request." *Id.* Further, according to the United States, Mr. Cropper "could have obtained his juvenile record, [but] it was not available to the United States, and thus, was not within its possession." *Id.* The United States asserts that even if such record was available to the United States, Mr. Cropper's "juvenile record would not have resolved any alleged 'clerical error' in his ACCA predicate conviction." *Id.*

Mr. Cropper did not reply to the arguments in the response of the United States regarding *Brady* violations. *See* Doc. 8.

The court does not agree that "the charging information in Case No. YO-07-865 is [an] essential judicial record that exposes an error regarding the stated date of February 22, 2007 as the date of [the] offense in the charging information of Case No. DC2008-3747." Doc. 3 at 18. Mr. Cropper does not establish that, had the charging information in Case No. YO-07-865 been disclosed to him, the result of his sentencing would have been any different. Indeed, the judicial records Mr. Cropper concedes he was provided by the United States before his direct appeal, *see id.* at 16; *see also id.* at 41–66, and his Presentence Investigation Report, *id.* at 26–39, show that there were discrepancies in the date of the offense in Case No. DC2008-3747 even without the charging information in YO-07-865. Specifically, those records show: (1) The PSR provides that Mr. Cropper was arrested on September 19, 2008 for the offense in Case No. DC2008-3747, and that the "Information charged that on or about February 22, 2007, the defendant unlawfully possessed marijuana for other than personal use," *id.* at 34–35; (2) The PSR provides that Mr. Cropper was arrested on February 22, 2007 for a drug possession offense in a case with an unknown case number, *id.* at 38; (3) The judicial records for Case No. DC2008-3747 provide that the offense occurred on September 19, 2008, *id.* at 42, and (4) The judicial records

for Case No. DC2008-3747 provide that Mr. Cropper possessed marijuana on or about February 22, 2007, *id.* at 44.

Because Mr. Cropper has not established that the charging information in YO-07-865 is material to his conviction or sentence, his Section 2255 claim for an alleged *Brady* violation is **DENIED**.

C. Certificate of Appealability ("COA")

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

Rule 11(b) provides that "Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules[, a] timely notice of appeal must be filed even if the district court issues a certificate of appealability[, and t]hese rules do not extend the time to appeal the original judgment of conviction."

Further, Federal Rule of Appellate Procedure 22(b)(1) provides that, "in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Further, "[a] certificate of appealability may issue . . . only if the applicant

has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. § 2253(c)(3).

To establish a substantial showing of the denial of a constitutional right, a petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003) (cleaned up). "[I]ssuance of a COA must not be *pro forma* or a matter of course." *Id.* at 337.

"'When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Lambrix v. Sec'y, Fla. Dep't of Corrs.*, 851 F.3d 1158, 1169 (11th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (emphasis omitted). Accordingly, "when a COA request concerns a procedural ruling, the required showing must include both the procedural issue and the constitutional issue." *Lambrix*, 851 F.3d at 1169.

The issue of whether Mr. Cropper's case is truly extraordinary and requires the consideration of procedurally defaulted claims is reasonably debatable. Accordingly, a certificate of appealability is **GRANTED** as to that issue.

IV. CONCLUSION

For the foregoing reasons, Mr. Cropper's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence, Doc. 1, is **DENIED**. The Clerk of Court is **DIRECTED** to terminate the pending motions in Case No. 2:17-cr-30-AMM-GMB-1.

DONE and **ORDERED** this 13th day of February, 2023.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

Appendix "B"

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10701

Non-Argument Calendar

VAUGHN ALEXANDER CROPPER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 2:22-cv-08018-AMM

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Vaughn Cropper, a federal prisoner proceeding *pro se*, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence of 188 months' imprisonment on the ground that his claim was procedurally defaulted. After careful review, we affirm.

I.

A jury found Cropper guilty of one count of possession of a firearm by a person previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).[1] In anticipation of sentencing, a probation officer prepared a presentence investigation report ("PSR"). In the report, the officer determined that Cropper was subject to the 15-year mandatory minimum sentence in the Armed Career Criminal Act ("ACCA"), because he had three prior serious drug offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The offenses were an Alabama conviction for first-degree marijuana possession, for which he was arrested on September 19, 2008; and two Alabama convictions for unlawful distribution of a controlled substance (marijuana), for which he was arrested on November 16, 2008. The PSR noted that the marijuana

[1] Cropper waived his right to counsel pre-trial and proceeded *pro se* throughout the district court proceedings and on appeal. *See United States v. Cropper*, 812 F. App'x 927, 928 (11th Cir. 2020) (unpublished).

possession offense was committed on or about February 22, 2007, and the two distribution convictions stemmed from unlawful conduct committed on two different occasions—the first on or about September 12, 2008, and the second on or about September 19, 2008.

Cropper objected to the PSR but not to the PSR's determination that he had been convicted of three separate and distinct serious drug offenses. At sentencing, the district court overruled Cropper's objections and sentenced him under ACCA to 188 months' imprisonment. Cropper appealed. He also continued simultaneous proceedings in the district court.

Cropper moved in the district court to be released pending appeal. At a hearing on the matter, Cropper indicated that he believed the ACCA enhancement "shouldn't apply . . . because the three prior felonies being applied were all one case." Crim. Doc. 91 at 17.[2] A magistrate judge denied his motion, relying on the PSR to conclude that Cropper's three prior drug convictions were committed on different occasions. *See* 18 U.S.C. § 924(e)(1). Cropper sought review of the magistrate judge's order, arguing that his marijuana possession offense did not, as stated in the PSR, take place on February 22, 2007, but rather occurred on September 19, 2008, the same day as one of his distribution offenses that served as an ACCA predicate. Cropper attached a pretrial document prepared by a probation officer listing his criminal history. The document

[2] "Crim Doc." numbers are the district court's docket entries in Cropper's underlying criminal case.

listed his marijuana possession conviction as based on offense conduct "on or about September 19, 2008." Crim. Doc. 110-4 at 8. He also raised a double jeopardy claim. Cropper argued that the marijuana possession conviction, for which the PSR listed an offense date of February 22, 2007, violated the Double Jeopardy Clause of the Fifth Amendment because he previously had been convicted for the same offense conduct.

The district court denied Cropper's motion. As relevant here, the court stated that Cropper had not "argue[d] that this Court should change his sentence so that [ACCA] does not apply," but rather had "present[ed] this argument to challenge the magistrate judge's alternative finding that [Cropper] should be detained" pending appeal "because none of his appeal issues—including the issue that the [ACCA] enhancement was incorrectly applied to him—are likely to result" in a new sentence. Crim. Doc. 112 at 12 n.2. Further, the court explained, even if Cropper was asking for a lesser sentence, his failure to object to the relevant facts in the PSR meant that he was deemed to have admitted those facts, including the dates on which the offenses were committed. Cropper did not appeal this order.

Meanwhile, in this Court, Cropper challenged his marijuana possession ACCA predicate on the same double jeopardy grounds he raised in the district court. He did not argue that the marijuana possession offense was committed on the same occasion as one of his distribution offenses. We rejected Cropper's double jeopardy argument, concluding that he could not use an appeal of his federal

sentence to collaterally attack his prior state conviction. *See United States v. Cropper*, 812 F. App'x 927, 931–32 (11th Cir. 2020) (unpublished).

After Cropper was unsuccessful seeking relief via a motion for release pending appeal in district court and before this Court on direct appeal, he filed a § 2255 motion in district court. In his motion he alleged that "[n]ew evidence prove[d] that two of [his] ACCA-predicates actually arose from a single criminal episode and did not occur on different occasions." Civ. Doc. 1 at 4.[3] Thus, he argued, he lacked three prior serious drug offense convictions and should not have received an ACCA-enhanced sentence. *See* 18 U.S.C. § 924(e)(1). He alleged that his Alabama marijuana possession conviction and one of his distribution convictions "both occurred on September 19, 2008, at the same time and place during a single criminal episode." *Id.* Cropper acknowledged that he did not raise the issue in his direct appeal, explaining that at the time he "lacked a key piece of evidence to sufficiently support this claim" and that he had "withheld this issue" to meet page limit requirements. *Id.* The evidence, Cropper said, was the State of Alabama's concession in a November 2020 state-court brief that the February 22, 2007 date of his marijuana possession was a "clerical error" and

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[3] "Civ. Doc." numbers are the district court's docket entries in Cropper's § 2255 case.

Cropper's § 2255 motion contained two claims, but only one is at issue in this appeal—the one about which the district court issued a certificate of appealability.

that the possession actually occurred on September 19, 2008, the same day as one of his distribution charges. Civ. Doc. 3 at 8. Cropper explained that he did not raise the issue on direct appeal because he was not in possession of the brief then, noting that this Court decided his direct appeal in May 2020. Cropper attached Alabama's brief, as well as a state criminal complaint dated September 23, 2008, which specified that he unlawfully possessed marijuana "on or about 9/19/2008." *Id.* at 117; *see also id.* at 42 (criminal form noting "OFF: 09192008").

The district court denied Cropper's § 2255 motion. The court found that Cropper had failed to raise the clerical-error claim on direct appeal despite his ability to do so, and so the claim was procedurally defaulted. The court further concluded that Cropper could show neither cause nor prejudice to excuse the default. And, the court concluded, Cropper had not shown that the default could be excused on the ground of actual innocence. The court nonetheless granted Cropper a certificate of appealability on whether his "case is truly extraordinary and requires the consideration of [a] procedurally defaulted claim[]." Civ. Doc. 9 at 26. This is Cropper's appeal.

II.

In a § 2255 proceeding, we review legal issues *de novo* and factual findings under a clear error standard. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004).

III.

Section 2255 permits a federal prisoner to obtain relief from a sentence when that sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). Generally, a criminal defendant must advance an available challenge to his conviction or sentence on direct appeal or else he is barred from presenting that claim in a § 2255 proceeding. *Lynn*, 365 F.3d at 1234; *see also Granda v. United States*, 990 F.3d 1272, 1286 (11th Cir. 2021) (same). If a defendant fails to do so and then advances his claim in a § 2255 proceeding, his claim is procedurally defaulted and he "cannot succeed on collateral review unless he can either (1) show cause to excuse the default *and* actual prejudice from the claimed error, or (2) show that he is actually innocent of [his offense of] conviction." *Granda*, 990 F.3d at 1286.

Cropper argues that he can satisfy both exceptions to the procedural default rule. As to cause and prejudice, he argues that he lacked the necessary evidence to prove that his marijuana possession conviction was committed on the same occasion as one of his distribution convictions until after his direct appeal concluded. Acknowledging that he had some evidence during his direct appeal, Cropper asserts that the State of Alabama's brief was the linchpin for his argument because it took the amount of evidence he had over the threshold he would need to prove his claim. As to actual prejudice, he argues that because of the error in his PSR he was sentenced to over five years above the ten-year statutory maximum that would have applied had he not been given the ACCA enhancement.

We must reject Cropper's cause-and-prejudice argument. The question we must ask is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all. *Lynn*, 365 F.3d at 1235. Here, the claim that two of his offenses were not committed on separate occasions was available to Cropper at sentencing and on direct appeal. Indeed, Cropper raised the claim in the district court in support of his motion for release pending appeal, further demonstrating its availability. He did not, unfortunately, raise it to this Court. Cropper therefore cannot show cause to excuse the procedural default. We need not address prejudice.

Cropper also argues that he can satisfy the actual-innocence exception to procedural default. He asserts that he was actually innocent of being an armed career criminal. Precedent forecloses Cropper's argument that he is actually innocent. *See Williams v. Warden*, 713 F.3d 1332, 1345–46 (11th Cir. 2013)(holding that actual innocence refers only to factual innocence of crimes and that a challenge to whether a prior offense qualified as an ACCA predicate was a claim of legal innocence), *overruled on other grounds by McCarthan v. Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076, 1096 (11th Cir. 2017) (en banc).

For these reasons, we affirm the district court's denial of Cropper's § 2255 motion.

AFFIRMED.

Appendix "C"

28 U.S.C § 2255. Federal custody; remedies on motion attacking sentence

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

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

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

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

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

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

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

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

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

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

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

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

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

HISTORY:

June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105; April 24, 1996, P. L. 104-132, Title I, § 105, 110 Stat. 1220; Jan. 7, 2008, P. L. 110-177, Title V, § 511, 121 Stat. 2545.

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