

In The
Supreme Court of the United States

GORDIE LEROY PENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is: What is the nature and extent of evidence which must be adduced by the government in an armed robbery case needed to prove defendant's guilt when there is no eye witness identification of the robber and no confession of guilt by the defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gordie Leroy Penson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's unpublished opinion in this case is reprinted at App. 1a-5a. The district court's judgment can be found at App. 8a-13a.

JURISDICTION

The court of appeals entered its judgment on April 5, 2017; and it denied Penson's petition for panel or *en banc* rehearing on August 29, 2017. App. 7a.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The Hobbs Act, 18 U.S.C. § 1951, provides, in relevant part, the following:

(a)(1) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b)(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

Gordie Leroy Penson was convicted by jury of, *inter alia*, violating the above-quoted provisions of the Hobbs Act. There was no in court eye witness identification of Penson as being the robber, and there was no confession by Penson. Under such circumstances what is the nature and extent of evidence which is sufficient to overcome the presumption of innocence and to constitute the required proof of guilt beyond a reasonable doubt?

There were various witnesses to the robbery, but none identified Penson as being the robber. Further, while Penson was arrested nearby the scene of the robbery soon after it occurred, he did not confess to the crime. He did not confess to being the robber. Consequently, Penson's conviction is based on circumstantial evidence, the sufficiency of which he questioned in his direct appeal.

At trial Penson's counsel failed to make a motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. CAJA 468.¹ Such a motion is routinely made by defense counsel in nearly every federal criminal trial. This is significant in that Penson was denied *de novo* review in the Fourth Circuit as a result of this failure pursuant to *United States v. Singh*, 518 F. 3d 236, 246 (4th Cir. 2008). Penson offered no evidence at the trial. Nonetheless, the trial court must determine before submitting the case to the jury that the evidence adduced by the government was sufficient for a reasonable trier of facts to find guilt beyond a reasonable doubt. Even though there was evidence of the taking of DNA samples

¹CAJA is reference to the Joint Appendix filed in the Court of Appeals.

and latent fingerprints defendant's counsel made no pretrial motion to secure the results of any testing of those samples and prints. He could have, but did not, think to secure those samples and prints for defense testing. He failed to subject the government's test to the adversarial process anticipated in this Court's *Strickland* decision. A conviction without such a degree of evidence constitutes an unlawful deprivation of liberty without due process of law in violation of the Fifth Amendment. The Court of Appeals reviewed the issue for plain error. App. 2. Penson's conviction was affirmed by an unpublished *per curiam* opinion. App. 1. The opinion of the Court of Appeals erroneously states that “eyewitnesses saw Penson leave the restaurant and run toward the trees and bushes.” App. 4. While witnesses testified that they observed the robber leave the restaurant no eyewitness identified Penson as being the robber or as being one who left the restaurant and ran anywhere.²

None of the witnesses to the robbery identified Penson. Only one ventured a “guess” that the robber was an African-American. Hence, though she couldn't see any skin, “it looked very dark behind the mask”. JA 177. There were no latent fingerprint reports, no DNA reports, and the limitations and possible explanations of the gunshot residue evidence were apparent and were effectively brought out in cross examination. There was a lack of ballistic evidence to even

² Witness Andree testified on direct examination pursuant to a leading question propounded by the Assistant United States Attorney, without objection, that he observed Penson leave the restaurant and walk toward the woody area; however, on cross examination he admitted that he could not identify Penson as being the one he observed leaving the restaurant. No other witness identified Penson as being either the robber or the one observed leaving the restaurant.

connect the gun found near Penson with the gun fired in the robbery despite the fact that bullets were recovered from the scene of the robbery. The evidence concerning the cell phones was also lacking, particularly the issue of ownership of the iPhone found in the Nike bag. It is noteworthy that the government could have, but apparently did not, avail itself of the provisions of 18 U.S.C. Sects. 2701-2711. Particular attention is invited to Section 2703 which permits the government to obtain the name of the subscriber. That would be important in regard to the iPhone.

Penson filed a petition for rehearing in the Court of Appeals, specifically noting that misstatement. App. 8. The Court of Appeals denied the petition for rehearing. App. 7. Penson now petitions this Court for the issuance of a writ of certiorari to address the issue of sufficiency of the evidence of a robbery where there is no eyewitness identification and no confession.

REASON FOR GRANTING THE WRIT

The question presented is important and frequently recurring, and this case presents an excellent vehicle to resolve it.

This Court needs to provide guidance to the trial and appellate courts as to the measure of such evidence needed in a Hobbs Act prosecution where there is no eye witness in court identification and in which the defendant has not confessed. Many prosecutions under the Hobbs Act are based on either in court eye witness identification or out of court confessions. When a prosecution is grounded on either of such basis, or both, proof beyond a reasonable doubt is easily articulated; however, when neither exists as in the case of this prosecution it is infinitely more difficult to say when the proof of guilt adduced by the prosecution is sufficient.

In *Thompson v. Louisville*, 362, US 199, 80 S. Ct. 624, 4 L.Ed.2d 654 (1960) this court granted *certiorari*. The trial court had sentenced defendant to a a \$10 fine with no imprisonment. This court noted that while the punishment is small, the due process questions presented are substantial”. *Id.*, at 203. The charges and convictions in that case were for loitering and disorderly conduct. The question presented before the court was “whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional”. *Id.*, at 199. Ultimately, this Court found no evidence in the record to support these convictions and concluded that it is “a violation of due process to convict and punish a man without evidence of his guilt.”. *Id.*, at 206.

In *United States v. Strayhorn*, 743 F. 3d 917 (4th Cir. 2014), the Fourth Circuit found that the evidence adduced at the trial was not sufficient to sustain his conviction for robbery in violation of 18 U.S.C. §1951. The victim did not identify Jason Strayhorn but did identify Jimmy Strayhorn. Jimmy Strayhorn's DNA was found on the plastic zip ties used to bind the victim. Jason Strayhorn's fingerprints were found on the duct tape used to bind the victim, but the expert could not tell when the prints were placed on the duct tape. Jason Strayhorn appealed, and the Fourth Circuit found the evidence to be insufficient to convict him. The decision requires substantial evidence in the record for a conviction and defines substantial evidence as “evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.” *Id.*, at 925. Penson respectfully contends that this is an inadequate definition to

give meaningful guidance in assessing the nature and extent of evidence required for conviction. Likewise, this Court's direction to the trial courts to only submit cases to the jury when the evidence and inferences arising from the evidence most favorable to the government “would *warrant* the jury's finding the defendant guilty beyond a reasonable doubt” is not adequate to give direction to the federal trial and appellate courts. *United States v. Burks*, 437 US 1, 16, 98 S. Ct. 2148, 57 L.Ed. 1 (1977) (Emphasis added). Exactly what kind, nature and extent of evidence would warrant such a finding when there is no in court identification and no confession?

In such a setting should the government not be required to submit to the jury the results of any fingerprint and DNA analysis that was undertaken? In Penson's trial there was evidence that both fingerprint and DNA samples were taken, but no evidence of the results of any evaluations of these samples was presented. Additionally, there was no evidence of any ballistics testing of the gun found in close proximity to Penson even though bullets had been recovered in the restaurant from the shots fired by the robber. In *Burks, supra*, the Sixth Circuit had found that the evidence was insufficient to support the verdict but had remanded the case to the district court for a determination as to whether a directed verdict of acquittal should be entered or whether a new trial should be held. *United States v. Burks*, 437 F.2d 968 (6th Cir. 1976). This Court, on certiorari review, held that the Double Jeopardy Clause of the Fifth Amendment precludes a new trial once the appellate court determined that the evidence was legally insufficient. *Burks v. United States*, 437 US at 18.

Additionally, the Fourth Circuit's decision herein appears at odds with its decision in *United States v. Bonner*, 648 F. 3d 209 (4th Cir. 2011). Perhaps the difference may be explained by the fact that Bonner's counsel made multiple Rule 29 motions, and the trial court granted Bonner's motion and entered a judgment of acquittal finding “several *missing*, flawed or contradictory facts” to conclude the evidence was insufficient. *Id.*, at 213. (Emphasis added). The Fourth Circuit affirmed the trial court's judgment of acquittal. Likewise, Penson asserts herein that there was missing evidence in his trial, to wit: the results of any tests conducted of the latent fingerprints and DNA collected or evidence that the government elected not to have any such tests conducted. If no tests were conducted the jury should know. In fact, Penson's counsel should have had defense testing done on the latent fingerprints, the DNA samples, and ballistic tests on the bullets found in the restaurant.

In *Fehy v. Connecticut*, 375 U.S. 85 (1963) this Court granted certiorari. Fehy was convicted of injuring a public building by painting swastikas on a synagogue. A can of paint and a paint brush had been wrongfully admitted at trial over objection. Connecticut's Supreme Court of Errors held that the evidence had been illegally obtained and that the trial court erred in their admissions but concluded it to be harmless error and affirmed the conviction. *Connecticut v. Fehy*, 149 Conn. 577, 183 A. 2d 256 (1962). This Court reversed *Fehy*, “We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a

reasonable possibility that the evidence complained of might have contributed to the conviction.” *Fehy v. Connecticut*, 375 U.S. at 87-88. This Court concluded that the evidence was prejudicial and cannot be called harmless error. *Id.*, at 91-92.

Barbee v. Warden Maryland Penitentiary, 331 F. 2d 842 (4th Cir. 1964) cites, quotes from, and relies upon this Court's decision in *Fehy*. The decision in *Barbee*, reflecting upon *Fehy*, asserted that this Court in *Fehy* “declined to speculate that the error might have been harmless in the face of sufficient, properly admitted evidence upon which the defendant could have been convicted.” *Barbee* at _____. In *Barbee* defendant was arrested for the shooting of Jimmy McGee. A gun was obtained which Barbee admitted both to the police and in his testimony at trial belonged to him. Further, while in jail awaiting trial, Barbee was identified in a lineup by Baltimore City Police Officer Donald Fisher as the person who had shot him 13 months earlier. Barbee pled guilty to the shooting of Jimmy McGee and was awaiting sentencing in that regard when he went to trial in connection with the shooting of Officer Fisher. At that trial there were three witnesses who identified Barbee as the one who shot Officer Fisher. Each of these witnesses were shown the gun; while each testified that it was similar to the gun they saw Barbee use, none of them was able to make a positive identification of the gun. The gun was formally introduced into evidence at the trial but was offered by the prosecution “for identification purposes only.” Barbee was convicted but did not appeal. Federal *habeas* relief was subsequently denied. Barbee contended that the prosecution displayed guns at the trial, adduced incriminating statements from witnesses

without disclosing to the court or defense counsel reports of ballistics and fingerprints tests made by the police department. The reports cast doubt of Barbee's guilt in the Fisher shooting. There was no indication that the prosecutor had been told of the existence of the report. At the *habeas* hearing the State asserted that Barbee failed to show that the undisclosed evidence had probative value. It asserted that Barbee's counsel never asked that the results of the test be revealed to either defense or the court. It relied on the failure of the defense to show that the prosecuting attorney knew of the existence of the report. Finally, it asserted that Barbee failed to show any prejudice arising from the non disclosure.

The Fourth Circuit reversed the *habeas* court's denial of *habeas* relief. In so doing the appellate court found that since the gun was presented by the prosecution at the trial that “any additional evidence concerning the gun be made available either to substantiate or to refute the suggested incidents.”³ Likewise, the Fourth Circuit rejects the effect of the defense counsel's inaction in failing to ask for the results of the tests.

It is no answer that Barbee's attorney failed to ask the results of the tests while a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial. He may not have known that tests were made. Indeed he may have been misled in his thinking that the tests, if made, supported the state's theory and were adverse to his client, and that otherwise the State's Attorney would not have produced the gun in court.

³ Following this quoted portion of the opinion was Footnote 6 in the opinion which listed the following cases for similar result: *Napue v. Illinois*, 360 U.S. 264, 269, 79 F. Ct. 1173, 3 L.Ed. 2nd 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2D 9 (1957); *Turner v. Ward*, 321 F. 2d, 918, 920 (10th Cir. 1963); and *Ashley v. State of Texas*, 319 F.2d 80, 85 (5th Cir. 1963).

Barbee at _____. The Fourth Circuit emphasized the fundamental fairness of the procedure rather than the “astuteness” of either counsel. The duty to disclose is that of the State and not the prosecuting attorney, the Fourth Circuit found.

Finally, the Fourth Circuit found prejudice to *Barbee*. The undisclosed report “might not have been proof of defendant's innocence, but if its contents had been made known, it might well have nurtured, even generated, a reasonable doubt as to guilt.” *Barbee* at _____. This is so even where, as in *Barbee*, there were three eye witness in-court identifications; of course, in *Penon*'s case there were none.

The cases tend to use the word “substantial” when defining the evidence needed, but the word “substantial” needs further definition or meaning in the context of a Hobbs Act prosecution without in court identification of the robber or confession of the defendant. To say substantial evidence is required without giving any direction as to what is substantial evidence begs the point. Guidance is needed, and this case presents an excellent vehicle for this Court to provide the essential guidance needed to refine the consideration trial courts must make in such cases. Since the enactment of the Hobbs Act an increasingly large number of robbery cases typically prosecuted in state courts are now prosecuted in federal courts, and the federal judiciary needs further guidance from this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

November 27, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles R. Brewer', is written over a horizontal line.

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GORDIE LEROY PENSON,

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UNITED STATES OF AMERICA,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4092

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GORDIE LEROY PENSON,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina,
at Asheville. Martin K. Reidinger, District Judge. (1:15-cr-00007-MR-DLH-1)

Submitted: March 21, 2017

Decided: April 5, 2017

Before DUNCAN, FLOYD, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Charles R. Brewer, Asheville, North Carolina, for Appellant. Amy E. Ray, Assistant
United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gordie Leroy Penson appeals his convictions for Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (2012); knowingly and unlawfully discharging a firearm in furtherance of a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (2012); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (2012). After consideration of Penson’s claims, we affirm.

Penson first argues that the district court plainly erred when it failed to require the Government to comply with the court’s discovery order and disclose exculpatory evidence in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963). Because Penson did not raise this objection below, our review is for plain error. To establish plain error, Penson must show that (1) an error exists, (2) the error is plain, and (3) the error affects his substantial rights. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). If a defendant satisfies those conditions, then we may exercise our discretion to correct the error if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 732 (alterations and internal quotation marks omitted).

In order to prove a *Brady* violation, (1) “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching”; (2) “that evidence must have been suppressed by the [s]tate, either willfully or inadvertently”; and (3) the evidence must be material. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *see id.* at 280. Here, Penson does not identify any favorable evidence that the Government failed to disclose, nor does he show how such evidence might be material to his case. *See United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010) (“Because [defendant] can only

speculate as to what the requested information might reveal, he cannot satisfy *Brady*'s requirement of showing that the requested evidence would be favorable to [him]."). Thus, we reject this claim.

Penson further argues that comments the Government made during closing argument prejudiced him. Our review is for plain error. For claims of prosecutorial misconduct during closing argument, "an appellant must show that the remarks were improper and that they prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." *United States v. Rand*, 835 F.3d 451, 465 (4th Cir.) (internal quotation marks omitted) (stating factors courts consider), *cert. denied*, 137 S. Ct. 525 (2016).

Penson does not show that the district court plainly erred when it allowed the Government to comment during closing argument regarding possible ownership of a cell phone found near the scene of the robbery. Assuming *arguendo* that the Government's comments relating to information retrieved from the cell phone were improper, Penson does not establish prejudice. Absent the remarks about the cell phone, the remaining evidence at trial, particularly when viewed in the light most favorable to the Government, established Penson's guilt. Thus, the district court did not plainly err.

Penson also argues that the Government presented insufficient evidence to identify him as the robber, so the district court erred when it submitted his case to the jury. "In evaluating the sufficiency of the evidence to support a criminal conviction, we must determine—viewing the evidence and all of the inferences reasonably to be drawn from it in the light most favorable to the Government—whether a reasonable trier of fact could

have found the defendant guilty beyond a reasonable doubt.” *United States v. Hughes*, 401 F.3d 540, 544-45 (4th Cir. 2005) (internal quotation marks omitted). “[I]n sufficiency challenges our focus is the complete picture that the evidence presents.” *United States v. Strayhorn*, 743 F.3d 917, 921-22 (4th Cir. 2014) (internal quotation marks omitted). Penson bears a heavy burden, as “[a]ppellate reversal on grounds of insufficient evidence . . . [is] confined to cases where the prosecution’s failure is clear.” *United States v. Clarke*, 842 F.3d 288, 297 (4th Cir. 2016) (citations and internal quotation marks omitted).

Contrary to Penson’s assertion on appeal, the Government established an effect on interstate commerce through a stipulation of that element by the parties. Additionally, the record refutes Penson’s contention that the evidence did not prove he committed the robbery. The evidence presented at trial showed the following: within minutes of the robbery, officers found Penson hiding in trees and bushes on the property of the restaurant that was robbed; eyewitnesses saw Penson leave the restaurant and run toward the trees and bushes; officers found a bag containing a .45-caliber pistol near Penson and ammunition inside the restaurant’s office; Penson tested positive for gunshot residue on his hands at the time of his arrest; officers found near Penson a large amount of cash and clothing consistent with the eyewitnesses’ descriptions of the robber’s attire; and officers found cell phones with connections to Gordie Penson near the scene of the crime. When viewed in the light most favorable to the Government, even in the absence of DNA or fingerprint evidence, the jury could reasonably conclude that Penson was the person who

robbed the restaurant. Thus, the district court did not plainly err by submitting the case to the jury.

Finally, Penson argues that trial counsel provided ineffective assistance by failing to raise objections in the district court, which resulted in this court reviewing his claims for plain error. Unless an attorney's ineffectiveness conclusively appears on the face of the record, ineffective assistance claims are not generally addressed on direct appeal. *United States v. Galloway*, 749 F.3d 238, 241 (4th Cir. 2014). Instead, such claims should be raised in a motion brought pursuant to 28 U.S.C. § 2255 (2012), in order to permit sufficient development of the record. *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010). Because the record does not conclusively establish ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 688 (1984) (providing standard), we decline to review this claim on direct appeal.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: April 5, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4092
(1:15-cr-00007-MR-DLH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GORDIE LEROY PENSON

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: August 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4092
(1:15-cr-00007-MR-DLH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GORDIE LEROY PENSON

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Judge Floyd and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

RECORD NO. 16-4092

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

V.

GORDIE LEROY PENSON,

Defendant/Appellant.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA**

**DEFENDANT/ APPELLANT'S PETITION FOR REHEARING
AND/OR REHEARING *EN BANC***

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NOW COMES the defendant/appellant, by and through counsel, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, moving for a panel rehearing and/or a rehearing *en banc*.

Rule 35(b)(1) statement

In the opinion of the undersigned counsel for petitioner this appeal involves one or more questions of exceptional importance, to wit: the need for producing identity evidence when making a determination of guilt beyond a reasonable doubt and whether the decision of the panel is in conformity with the Supreme Court case of *Thompson v. Louisville*, 362 US 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and the decisions of this Circuit including *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. 2014); *United States v. Blue*, 957 F.2d 106 (4th Cir. 1992); and *United States v. Bonner*, 648 F.3d 209 (4th Cir. 2011).

Arguments

Petitioner hereby adopts his opening brief (Doc. 37) and his reply brief (Doc. 54) and incorporates these documents by reference herein. Additionally, it is respectfully argued that the first and main issue raised by petitioner in this appeal relates to the sufficiency of the evidence adduced at trial. *Appellant's opening brief*, pp 26-36. The decisions in *Thompson*, *Bonner*, *Blue*, and *Strayhorn* were cited, discussed and analyzed in that argument. Moreover, in *Appellant's reply brief*, *Bonner* was again discussed at pp 1-2 in that it was the

only one of the above-cited cases that was referred to in the brief of the United States. *Brief of US at p 25*. In the unpublished *per curiam* opinion of the panel the main issue in this appeal was scantily mentioned. There was no citation in the panel opinion of any of the above-referenced cases except the following quotation from *Strayhorn*, 743 F.3d at 921-22: “ [I]n sufficiency challenges our focus is the complete picture that the evidence presents.” *Opinion at p 4*. The opinion neither quotes from, cites, much less discusses *Thompson*, *Bonner* nor *Blue*. Yet, these cases form the basis of the petitioner's primary argument. Collectively, these cases show that when there is a lack of evidence of the elements of the underlying offenses, the evidence will be deemed insufficient to find guilt beyond a reasonable doubt. The difficulty with this case relates to the fact that there was no eye witness identification of the defendant. The statement contained in the panel's opinion that “eyewitnesses saw Penson leave the restaurant and run toward the trees and bushes” is not supported by the record. *Opinion at 5*. There simply was no eyewitness identification of Penson. This is a particularly significant point. Obviously, if there had been eyewitnesses that identified petitioner leaving the restaurant, the case would be a horse of a different color. There was no DNA evidence or fingerprint evidence despite the fact that both such evidence could have been available and were needed in light of the nonexistence of eyewitness identification as to the robber. The fact that the panel mistakenly believed that

there was eyewitness identification of the petitioner alone is sufficient to suggest that a rehearing is necessary. Petitioner contends that the mere connections to data on a cell phone and the other evidence adduced by the government at the trial were not sufficient to prove beyond a reasonable doubt that the petitioner was the robber.

Conclusion

For the reasons set forth above the panel should rehear this appeal and/or this Court should conduct a rehearing *en banc*.

Respectfully submitted this the 19th day of April, 2017.

s/Charles R. Brewer
Charles R. Brewer
Counsel for Gordie Leroy Penson,
Petitioner
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002

CERTIFICATE OF SERVICE

The undersigned certifies that on April 19, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Amy Ray
amy.ray@usdoj.gov

s/ Charles R. Brewer
Charles R. Brewer

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/s/ Charles R. Brewer
Charles R. Brewer

April 19, 2017

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA

V.

GORDIE LEROY PENSON

) **JUDGMENT IN A CRIMINAL CASE**
) (For Offenses Committed On or After November 1, 1987)
)
)
) Case Number: DNCW115CR000007-001
) USM Number: 29962-058
)
) Jack W. Stewart Jr.
) Defendant's Attorney

THE DEFENDANT:

- ☐ Pled guilty to counts 1, 2 & 3.
- ☐ Pled nolo contendere to count(s) which was accepted by the court.
- ☒ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18 U.S.C. § 1951(a)	Robbery	8/02/2014	1
18 U.S.C. § 924(c)(1)(A)(iii)	Discharging of a Firearm in Relation to a Crime of Violence	8/02/2014	2
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	8/02/2014	3

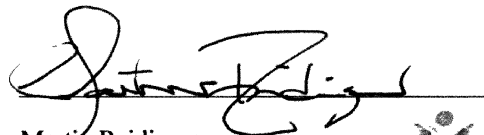
The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

- ☐ The defendant has been found not guilty on count(s).
- ☐ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 2/11/2016

Signed: February 19, 2016


Martin Reidinger
United States District Judge



IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FORTY-ONE (41) MONTHS as to each of Counts 1 and 3 to run concurrently, and a term of ONE HUNDRED TWENTY (120) MONTHS on Count 2 to be served consecutively to the term imposed on Counts 1 and 3, for a total of ONE HUNDRED SIXTY-ONE (161) MONTHS.

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
- Participation in the Federal Inmate Financial Responsibility Program.
 - Participation in any available substance abuse treatment program and if eligible receive benefits of 18:3621(e)(2).
 - Participation in any available educational and vocational opportunities.
 - The defendant spent from 8/3/2014 to 11/17/2014 and from 3/28/2015 to 4/17/2015 in state custody as a result of the offense for which sentence is imposed herein. This information is provided for the purpose of allowing the defendant such credit as he is entitled pursuant to 18 USC § 3585.
- ☒ The Defendant is remanded to the custody of the United States Marshal.
- ☐ The Defendant shall surrender to the United States Marshal for this District:
- ☐ As notified by the United States Marshal.
 - ☐ At _ on _.
- ☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ As notified by the United States Marshal.
 - ☐ Before 2 p.m. on _.
 - ☐ As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS. This term consists of terms of three (3) years as to each of Counts 1 and 3, and five (5) years as to Count 2, all such terms to run concurrently.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

- 1 The defendant shall not commit another federal, state, or local crime.
- 2 The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
- 3 The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Court
- 4 The defendant shall provide access to any personal or business financial information as requested by the probation officer.
- 5 The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
- 6 The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer
- 7 The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer
- 8 A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons
- 9 The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 10 The defendant shall support his or her dependents and meet other family responsibilities.
- 11 The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
- 12 The defendant shall notify the probation officer within 72 hours of any change in residence or employment
- 13 The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician
- 14 The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18 3563(a)(5) or 18 3583(d), respectively; The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of supervision
- 15 The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 16 The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer
- 17 The defendant shall submit his person, residence, office, vehicle and/or any computer system including computer data storage media, or any electronic device capable of storing, retrieving, and/or accessing data to which they have access or control, to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition
- 18 The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer
- 19 The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
- 20 The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
- 21 As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 22 If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty
- 23 If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
- 24 The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- 25 The defendant shall participate in transitional support services under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer

ADDITIONAL CONDITIONS:

26. Throughout the period of supervision the probation officer shall monitor the defendant's economic circumstances and shall report to the court, with recommendations as warranted, any material changes that affect the defendant's ability to pay any court-ordered penalties

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
\$300.00	\$0.00	\$0.00

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

FINE

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay \$0.00 towards court appointed fees.

SCHEDULE OF PAYMENTS

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

- A ☐ Lump sum payment of \$0.00 due immediately, balance due
☐ Not later than _____
☐ In accordance ☐ (C), ☐ (D) below; or
- B ☒ Payment to begin immediately (may be combined with ☐ (C), ☒ (D) below); or
- C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or
- D ☒ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court costs:
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order [Doc. 38] entered 8/25/2015:

Hi-Point Model JH, .45 Caliber Handgun, SN: 315801 with Approximately 8 Rounds
of Ammunition

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____ months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness