

IN THE
UNITED STATES SUPREME COURT

CASE NO.

A.C. JACKSON, *Pro Se*

Petitioner-Appellant

v.

ERIC D. WILSON, Warden

Respondent-Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 17-6900

PETITION FOR A WRIT OF CERTIORARI

A.C. Jackson, *Pro Se*
United States Correctional Complex
P.O. Box 1000
Petersburg, Virginia 23804

ISSUES PRESENTED FOR REVIEW

1. WHETHER PETITIONER'S DETENTION VIOLATES EX POST FACTO AND SUBSTANTIVE DUE PROCESS.
2. WHETHER PETITIONER'S PRIOR CONVICTIONS ARE VIOLENT FELONIES UNDER 18 U.S.C. 924(e), or 4B1.2(a)'s DEFINITION OF CRIMES OF VIOLENCE.
3. WHETHER PETITIONER'S SENTENCE OF 210 MONTHS AND THREE YEARS OF SUPERVISORY RELEASE IS SUBSTANTIVELY UNREASONABLE.

LIST OF PARTIES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari
issue to review the judgment below.

OPINIONS BELOW

For cases from the United States District Court for the Eastern District of Virginia appears at Appendix A-1 - A-7.

Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix B-1 – B-2.

Opinion of the United States Court of Appeals for the Fourth Circuit denying rehearing and rehearing en banc appears at Appendix C.

JURISDICTION

COMES NOW Petitioner, A.C. Jackson, *Pro Se*, and would move this Honorable Court to issue a Certificate of Appealability.

Jurisdiction is invoked under 28 U.S.C., subsection 1254, and under the Antiterrorism and Effective Death Penalty Act.

For cases from Federal Courts:

The date on which the United States Court of Appeals for the Fourth Circuit decided Petitioner's 28 U.S.C. 2241 *Habeas Corpus* was October 20, 2017.

A timely Petition for Rehearing or Rehearing *En Banc* was denied by the United States Court of Appeals for the Fourth Circuit on January 9, 2018.

STATEMENT OF ISSUES

1. WHETHER PETITIONER’S DETENTION VIOLATES EX POST FACTO AND SUBSTANTIVE DUE PROCESS

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2. WHETHER PETITIONER’S PRIOR CONVICTIONS ARE VIOLENT FELONIES UNDER 18 U.S.C. 924(e) OR 4B1.2(a)’s DEFINITION OF CRIMES OF VIOLENCE.

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3. WHETHER PETITIONER’S SENTENCE OF 210 MONTHS AND THREE YEARS OF SUPERVISED RELEASE IS SUBSTANTIVELY UNREASONABLE.

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Petitioner’s sentence is substantively unreasonable for constructive possession of a firearm.

Petitioner’s prior convictions are not violent crimes under the guidelines.

Petitioner's continued detention violates Ex Post Facto and the laws of the United States, and Due Process of the United States Constitution.

Substantive Due Process refers to certain actions that the government may not engage in. No matter how many procedural safeguards it employs.

The guarantee of due process protects citizens against deliberate harm from government officials.

STATEMENT OF THE CASE

On July 18, 2013, a two count indictment was returned charging Appellant, A.C. Jackson, with violations of 18 U.S.C. §922(g)(1) punishable under 18 U.S.C. §924(e). Mr. Jackson first appeared on the indictment before the Honorable Lewis M. Blanton, United States Magistrate Judge for the Eastern District of Missouri, Southeastern Division, on August 6, 2013. Pretrial motions were heard on August 30, 2013, and further hearings were conducted on September 10, 2013. A Report and Recommendation was filed on November 15, 2013, recommending denial of Mr. Jackson's motion to suppress statements, physical evidence, and motion to sever the two counts. On December 12, 2013, the Honorable Stephen N. Limbaugh, Jr., United States District Court Judge for the Eastern District of Missouri adopted the Report and Recommendation. Trial commenced before Judge Limbaugh on January 14, 2014, and the jury verdict of guilty was returned on that date.

Mr. Jackson was sentenced on April 10, 2014, to 210 months in the custody of the Attorney General of the United States on each of Counts I and II to run concurrently. He is housed at the Federal Correctional Complex in Petersburg, Virginia.

On the afternoon of March 28, 2013, Appellant, A.C. Jackson contacted the Wayne County, Missouri Sheriff's Department and reported the theft of a firearm.

Deputy Travis Hanger responded and met Mr. Jackson at the residence of Bob Elledge. (Transcript of Trial (Trial Tr.) at 25-27).

Mr. Jackson told Deputy Hanger that he had purchased a speedmaster .22 firearm from Mr. Elledge and had left the gun at Elledge's house and that he was "going to have Bob Elledge keep it and hold it for me until I could see if I could get my hunting rights back. If not, then I was gonna have them sell it and get my money back and make a profit on the gun". (Trial Tr. at 27, 118, 138). The rifle was kept at Bob Elledge's home and Elledge testified that it was left at his house because Mr. Jackson did not want it in his possession. (Trial Tr. at 86). Mr. Jackson acknowledged at his trial that he knew he could not have possession of a firearm after his previous conviction for attempted robbery and that was the reason for it being kept at Elledge's home. (Trial Tr. at 117, 140). Deputy Hanger took statements from Mr. Elledge and Mr. Jackson and then proceeded to speak to Mr. Jackson's nephew, Bobby Joe Jackson, who was the person who had taken the gun from Bob Elledge's home. (Trial Tr., at 32). On the way he learned that A.C. Jackson was a convicted felon. (Trial Tr. at 37). Bobby Joe Jackson led Deputy Hanger to his home and gave him the firearm. Deputy Hanger then arrested Appellant A.C. Jackson and took him to jail. (Trial Tr. at 39).

Deputy Hanger had been told by Bobby Joe Jackson that there were other firearms in A.C. Jackson's residence and decided to apply for a search warrant.

(Trial Tr. at 39-40). After obtaining the search warrant, the firearm which was the subject of count II of the indictment (the .22 rifle was the subject of count I) was seized. The Jackson residence, a trailer home, was not locked and was in modest condition. (Trial Tr. at 69).

A.C. Jackson testified. Age 65, he was born in rural Arkansas and raised in the Fisk and Poplar Bluff area of Southeast Missouri. (Trial Tr. at 110 - 111). He had returned to Missouri from Minnesota in 2010 to take care of his dying brother, Bobby Joe, who passed away in 2012. (Trial Tr. at 112-113). His nephew Bobby Joe Jackson, Jr. also lived with them a portion of that time. Eventually, disagreements arose between Bobby Joe Jackson, Jr. and his uncle, appellant A.C. Jackson, over a vehicle and other matters. (Trial Tr. pp. 115-116). Mr. Jackson testified that he knew he could not possess a firearm and that is the reason why he did not ever handle the firearm that was stored at Bob Elledge's home. He viewed the gun both as an investment and something he might one day again have the right to possess. (Trial Tr. at 118). When he learned that his nephew had taken the gun without his permission he called that police. (Trial Tr. at 119). He denied having had possession of the gun found in his home and believed that his nephew who had purchased it placed it in his home in the day between his arrest and the search and seizure. (Trial Tr., pp. 121-122). Bobby Joe Jackson, Jr. testified that the firearm

found in A.C. Jackson's home was purchased from a man named "Snake" (Trial Tr. at 170-172) and denied putting it there.

Special Agent David Diveley of the Bureau of Alcohol, Tobacco, and Firearms also testified. He had transported Mr. Jackson from the county jail where he had been since his arrest in March to federal court on August 6, 2013. He testified that, contrary to what A.C. Jackson had said to Deputy Hanger, Jackson admitted handling the gun on an occasion at Mr. Elledge's house. (Trial Tr. at 96). Diveley also testified that there was no point in determining if Mr. Jackson's DNA or fingerprints was on any of the weapons. (Trial Tr. at 106).

On June 22, 2015, Petitioner filed a Pro Se Motion to Vacate, Set Aside, or Correct Sentence with the United States District Court for the Eastern District of Missouri, the District Court that imposed said sentence, as required by 28 U.S.C., Section 2255(e), alleging that the following errors require the Court to reverse the judgment of conviction and remand for a new trial, or correct the unconstitutional sentence.

Petitioner's Motion for the Appointment of Counsel was denied without prejudice on October 19, 2015.

On November 5, 2015, the District Court adopted the Government's Response; denied Petitioner's Motion; and denied Petitioner a Certificate of Appealability claiming that Petitioner "has not made a substantial showing of the denial of a federal constitutional right."

On November 13, 2015, Petitioner filed a timely Notice of Appeal.

On December 3, 2015, Petitioner filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Eighth Circuit.

On January 27, 2016, Petitioner filed a Supplemental Application for a Certificate of Appealability.

On January 28, 2016, the United States Court of Appeals for the Eighth Circuit in Case No. 15-3693, dismissed the appeal, and denied the Application for a Certificate of Appealability.

On February 11, 2016, the Supplemental Application for a Certificate of Appealability was denied.

On February 18, 2016, Petitioner filed a Petition for Rehearing *en banc*.

On March 17, 2016, the United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing *en banc*, and the Petition for Rehearing by the panel was also denied. (15-3693).

On March 24, 2016, Petitioner filed a Notice of Appeal.

On March 23, 2016, Petitioner filed a Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis in the United States Supreme Court. (16-5200).

On October 3, 2016, the above Petition for Writ of Certiorari was denied.

On January 31, 2017, Petitioner filed an Application for permission to file a successive habeas. (17-1214).

On May 19, 2017, the Eighth Circuit Court of Appeals denied a second or successive Application, denied rehearing, and denied Writ of Certiorari.

On June 16, 2017, Petitioner filed a Petition for a Writ of Habeas Corpus, 28 U.S.C. 2241 in the U.S. District Court, Eastern District of Virginia. 1:17-cv-00713-TSE-IDD. On June 30, 2017, Petition for a Writ of Habeas Corpus was denied without prejudice.

On July 17, 2017, Petitioner filed Notice of Appeal and Request for a Certificate of Appealability (File No. 1:17-cv-713).

On August 1, 2017, Petitioner filed an Appeal Brief to the United States Court of Appeals for the Fourth Circuit, Case No. 17-6900 (1:17-cv-00713-TSE-IDD).

On October 20, 2017, the appeal was dismissed.

Petitioner filed a timely Motion for Rehearing or Rehearing En Banc on November 27, 2017.

On January 9, 2018, the court denied the Petition for Rehearing or Rehearing En Banc.

WHETHER PETITIONER'S CONTINUED DETENTION
VIOLATES EX POST FACTO AND SUBSTANTIVE DUE PROCESS

This case concerns Petitioner's right to bring a habeas corpus petition under 28 U.S.C. 2241, challenging the misapplication of an armed career criminal enhancement.

Because Petitioner is foreclosed from bringing a successive or second Petition under 28 U.S.C. 2255, he seeks to challenge his sentence under 2241.

Petitioner was arrested by Federal Marshalls on the above-captioned case on August 6, 2013, on a federal grand jury indictment on July 18, 2013, for felon in possession of a firearm, Title 18 U.S.C. 922(g)(1) two counts and two counts of armed career criminal, Title 18 U.S.C. 924(e).

Petitioner was convicted by jury on December 7, 2013, on two counts of felon in possession of a firearm.

Petitioner was sentenced on April 10, 2014, for two counts of armed career criminal, Title 18 U.S.C. 924(e).

Petitioner now argues that his three robbery convictions and one prior Missouri second degree burglary conviction no longer qualify as crimes of violence, and he is now serving an erroneous armed career criminal sentence that violates the laws of the United States, and the constitutional due process.

At the time of Petitioner's sentencing, as well as when he committed his instant federal conviction, the guideline text itself did not list robbery as an enumerated offense.

Robbery was in the commentary to the guidelines. Where commentary is inconsistent with guidelines text, text controls.

At the time of Petitioner's conviction, only four crimes were expressly enumerated in 18 U.S.C. 924(e) as crimes of violence. U.S.S.G. 4B1.2. After Petitioner's sentencing, the U.S. Supreme Court ruled in *Johnson v. United States*, 135 S.Ct. 2551, 2563, 192 L.Ed. 569 (2015) that the "residual clause" 18 U.S.C. 924(e) (2) (B) (ii) was unconstitutional.

Once stripped of its residual clause, the issue, then, is whether the government can rely solely upon the commentary when it "expands" upon the four offenses specifically enumerated in the guideline itself. The answer is "No".

Thus, in the absence of the residual clause, there is nothing within the guideline text to serve as an anchor for application of robbery within the definition of crime of violence.

Post-*Johnson*, however, 18 U.S.C. 924(e) commentary, standing alone, cannot serve as an independent basis for a conviction to qualify as a crime of violence because doing so would be inconsistent with the post-*Johnson* text of the guideline itself.

By its clear language, once shorn of the residual clause, the guideline sets forth a limited universe of specific offenses that qualify as a “crime of violence.”

There is simply no mechanism or textual hook in the guideline that allows the court to import offenses not specifically listed therein into 924(e)’s definition of “crime of violence.” With no such path available to the court, doing so would be inconsistent with the text of the guideline, and a violation of Due Process.

See: *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (Citing *Stinson v. United States*, 508 U.S. 36, 43; 113 S. Ct. 1913, 1918, 123 L.Ed. 2d 598 (1993)).

See: *United States v. Hastings*, 134 F.3d 235, 239 (4th Cir. 1998)

See: *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013).

Subsequent to *Johnson*, 135 S.Ct. 2251, 2563 (2015), the Sentencing Commission amended the guideline effective August 1, 2016. The guideline itself now expressly enumerates “robbery” as a crime of violence, as well as a number of other crimes which were previously enumerated only in the commentary.

Petitioner is now being unlawfully and unconstitutionally detained in violation of *Ex Post Facto*.

If Petitioner were resentenced in light of the newly amended guideline on August 1, 2016, evidence that “would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found Petitioner guilty of armed career criminal under 924(e).”

“The new existence of the interpretation of statutory law, being the amended guideline, on August 1, 2016,” “issued after the Petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions,” that is retroactive, and applies to the petition’s merits such that it is “more likely than not that no jurist would have convicted” the Petitioner.

That Petitioner’s misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect.

See: *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013).

See also: *Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 1343 (11th Cir. 2013) (interpreting prior precedent to allow application of the savings clause “when a fundamental defect in sentencing occurred and the Petitioner [has] not had an opportunity to obtain judicial correction of that defect earlier.” (internal quotation marks omitted)).

Petitioner asserts that 2255 is ineffective to test the legality of his sentence enhancement because 2255(h) precludes him from bringing an additional 2255 petition, and that intervening change of law requires recourse under the savings clause and 2241 when a sentence exceeds the maximum prescribed by statute.

See: *Begay v. United States*, 553 U.S. 137 (2008).

See: *United States v. Cordera Rayshard Brown, United States District Court for the Middle District of North Carolina, 2016 U.S. Dist. Lexis 114346, 1:15 CR 251-1 (August 25, 2016).*

CONCLUSION

When the Sentencing Commission amended the Armed Career Criminal statute 924(e), on August 1, 2016, to include robbery as an enumerated offense in the guideline text, U.S.S.G. 4B1.2, the new amended law is now being applied retroactively to Petitioner's 2014 sentence in violation of *Ex Post Facto*, and is well above the statutory maximum that the law cannot impose upon Petitioner, the new 2016 amendment violates the constitutional due process, and laws of the United States, and is being used retroactively to Petitioner's unlawful sentence and detention.

Respectfully,

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**WHETHER PETITIONER'S PRIOR CONVICTIONS ARE VIOLENT
FELONIES UNDER 18 U.S.C. 924(e) OR 4B1.2(a)'s DEFINITION OF
CRIMES OF VIOLENCE.**

The first of Petitioner's prior offenses alleged to be a violent felony was for **Attempted** Robbery – First Degree – By **Means** of a Dangerous and Deadly Weapon.

Under Missouri law in 1969, attempted robbery was not a violent felony.

Missouri Rev. Stat. 569.010 states the use or threat of immediate physical force must be for certain enumerated purposes: (a) to prevent or overcome resistance to the taking of property or the retention of property immediately after the taking; or (b) to compel the property's owner or another person "to deliver up the property or to engage in other conduct which aids in commission of the theft."

The Missouri Supreme Court has characterized these enumerated purposes as "either defeating resistance to the theft or compelling the surrender of the property." *State of Coleman*, 463 S.W.3d 353, 354 (Mo. 2015) (*en banc*).

Petitioner contends that **attempted** robbery by its very definition, neither defeats resistance nor compels the surrender of the property.

(See) *State v. Childs*, 257 S.W.3d 655 (Mo.Ct. App. 2008)

(See) *State v. Tivis*, 884 S.W.2d 28, 30 (Mo. Ct. App. 1994)

Petitioner's second count of conviction in the above Missouri 1969 attempted robbery was for carrying a concealed weapon.

(See) *United States v. Corey Jones*, 15-1518-CR, No. 13-CR-00438 (Second Cir. July 21, 2016).

In *Jones*, the Second Circuit Court of Appeals held:

"When we conduct the inquiry *Johnson*, 559 U.S. at 140 requires, we cannot conclude that the presence of a gun that a robber does not display, use, or threaten to use during a robbery has any effect on the nature of the force that the robber exerts on his victim."

(See) *State v. Lewis*, 466 S.W.3d 629, 631 (Mo. Ct. App. 2015).

In *Lewis*, a Missouri Court upheld a conviction for a robbery where a defendant's conduct fell short of using "force" capable of causing physical pain or injury to another person. *Johnson*, 559 U.S. at 140.

(See) *United States v. Shall*, 789 F.3d 335 (4th Cir. 2015).

(See) *United States v. Gardner*, 823 F.3d 793, 801-04(4th Cir. 2016)

The second prior conviction alleged to be a violent offense was in 1993.

Petitioner was convicted of Missouri second degree burglary.

(See) *Deschamps v. United States*, 133 S. Ct. 2276 (2013)

(See) *Johnson v. United States*, 135 S. Ct. 2551 (2015)

(See) *Mathis v. United States*, 136 S. Ct. 2243 (2016)

(See) *Givens v. U.S.*, No. 4:16-cv-1143 Cas. (2016)

(See) *United States v. Bess*, 2016 WL 6476539 at *4

(See) *Henderson v. United States* ____ F. Supp. 3d ____, 2016,
WL496789, at *5 (W.D. Mo. Sept. 16, 2016)

(See) *United States v. Rockwell*, ____ F. Supp. 3d ____, 2016, WL 4939115,
at *3 (W.D. Ark. Sept. 14, 2016)

(See also) *Johnson*, 2016 WL 6542860, at *3 (same);
Taylor, 2016 WL 6995872, at *6.

Missouri second-degree burglary statute includes alternative means, not elements, and is indivisible, and convictions under it cannot be predicate violent felonies under ACCA.

The third conviction alleged to be a violent offense was:

In 2007, Petitioner was convicted of Minnesota felony of attempted robbery in the first degree.

The statute of conviction was M.S.A., subsection 609.245, subdivision 1, states:

“First Degree, whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or

inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree.”

- (A) The Minnesota statute, M.S.A., subsection 609.245, subdivision 1, is not a divisible statute.

(See) *Deschamps v. United States*, 133 S.Ct. 2276 (2013)

(See) *Mathis v. United States*, 136 S.Ct. 2243 (2016)

- (B) Does not have as an element the use, attempted use, or threatened use of physical force.

(See) *United States v. Gardener*, 823 F.3d 793, 801-04 (4th Cir. 2016)

(See) *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016)

- (C) Is not an enumerated offense within the guidelines.

(See) *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015)

(See) *United States v. Brown*, 2016 U.S. Dist. Lexis 114346;

1:15 CR 251-1 (4th Cir. August 25, 2016).

- (D) Does not list alternative elements that define multiple separate crimes.

(See) *Mathis v. United States*, 136 S.Ct. 2243 (2016).

WHETHER PETITIONER'S SENTENCE OF 210 MONTHS
AND THREE YEARS OF SUPERVISED RELEASE
IS SUBSTANTIALLY UNREASONABLE?

For all the reasons stated throughout this Petition, it is substantially unreasonable to sentence Petitioner to two sentences of 210 months, and three years of supervised release for constructive possession of a firearm. Petitioner's sentence was unlawful and unconstitutional, violates Ex Post Facto, and the laws of the United States.

Violates Substantive Due Process.

See: *Aversa v. U.S.*, 99 F.3d 1200 (1st Cir. 1996)

See: *Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996)

See: *Rochin v. California*, 342 U.S. 165, 96 L.Ed 183, 72 S.Ct. 205 (1952).

Substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs.

CONCLUSION - ISSUE THREE

For the District Judge's error in sentencing Petitioner as an armed career criminal based on the above attempt robberies, and one Missouri second degree burglary, is plain, affects Petitioner's substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Petitioner's classification as an armed career criminal raised his base offense level from 11 to 33.

Petitioner is now unlawfully and unconstitutionally detained on a sentence in excess of the maximum authorized by law, and is substantially unreasonable and a denial of due process.

Respectfully,

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REASONS FOR GRANTING WRIT

Petitioner is being detained in violation of the United States laws and Constitution.

Petitioner's sentence is plain error, affects his substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Petitioner's sentence is in excess of what the law can impose, and is substantially unreasonable, and a denial of due process.

The Writ should be granted in the interest of justice and fundamental fairness.

Petitioner's sentence is a fundamental miscarriage of justice.

The Federal District Court for the Eastern District of Virginia, Case No. 117-cv-713, attached herein as Appendix A-1 – A-7.

The court stated in error, page 2, "On June 22, 2015, Petitioner filed a Motion to Vacate Pursuant to 28 U.S.C. 2255, reasserting his argument that the District Court erred in denying his Motion to Suppress."

That is not the issues raised in Case No. 1:15-cv-00115 SNLJ, 2015 WL 6750807 (E.D. Mo. Nov. 5, 2015). Also, *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016) made *Johnson* retroactive to cases on collateral review.

CONCLUSION

Petitioner has been denied meaningful access to the lower courts since 2015 by being denied a Certificate of Appealability, or a ruling on the merits of his issues. See: *Rochins, supra*.

Petitioner is being unlawfully and unconstitutionally detained on a now illegal sentence in violation of *Ex Post Facto* and substantive due process.

For all the reasons stated herein, this Honorable Court should now issue a Writ of Certiorari in the interest of justice and fundamental fairness.

RELIEF SOUGHT

Petitioner would respectfully request that the "Rule of Lenity" be applied to the review of any prior convictions that are relied on by the Respondent to enhance his convictions.

U.S. v. Bass, 404 U.S. 336; 30 L.Ed. 2d 488; 92 S. Ct. 515 (1971).

Petitioner would respectfully request that his *pro se* pleadings be liberally construed.

Boag v. MacDougall, 454 U.S. 364; 70 L.Ed. 551; 102 S.Ct. 700 (1982).

Petitioner would respectfully request that this Honorable Court vacate his unlawful and unconstitutional conviction, and any other relief this court deems necessary in the interest of justice and fundamental fairness.

Respectfully,

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