

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN HUDGINS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Marvin Hudgins #47239-039

(Your Name)

FCI-Milan/ P.O. Box 1000

(Address)

Milan, MI. 48160-0190

(City, State, Zip Code)

None

(Phone Number)

QUESTION(S) PRESENTED

Question # One: Whether Petitioner Hudgins' ex-lawyer Attorney Villarruel failure to obtain Hudgins' consent before entering Stipulation and failure to file Motion To Dismiss Complaint and Indictment in violation of Petitioner's Sixth Amendment, thus does this amount to ineffective assistance of counsel, and, should a C.O.A. issue in light of the Supreme Court's Summary Vacating the Sixth Circuit's Decision in *White v. United States*, No. 17-270 ?

Question # Two: Whether Petitioner Hudgins' ex-lawyer Attorney Villarruel provided him with ineffective assistance of counsel by failing to object to the government's Constructive Amendment of his indictment by the October 11, 2012, First Superseding Information, in which was not returned by the Grand Jury does this violate his Fifth Amendment Rights and absent his ex-lawyer and the Magistrate Judge's failure to adequately explain that the waiver of indictment rights he was given up, thus the WAIVER entered to proceed to Jury Trial on a mere Information was not "knowingly" and "intelligently" entered, thus in violation of his Fifth and Sixth Amendment Rights. Is Petitioner Hudgins, entitled to issuance of a C.O.A. in light of a split in the circuits 6-6, as to whether "knowingly and intentionally" must be charged within the Indictment ?

Question # Three: Whether Petitioner Hudgins, ex-lawyer Attorney Villarruel provided him with ineffective assistance of counsel by failing to object to the Presentence Investigation Report, that the two state Michigan 2007 Delivery drug convictions were actually part of the same criminal episode and the Government was required to produce Shepard-approved documents that the crimes were committed "on occasions different from one another," thus did his ex-

lawyer provide him with ineffective assistance of counsel in violation of his Sixth Amendment Rights. Is Petitioner Hudgins, entitled to issuance of a C.O.A. in light of 18 U.S.C. § 924 (e) (1), requiring that prior offenses were "committed" on different occasions, thus does Descamps/ Mathis; and his Sixth Amendment Rights require these facts to be proven beyond a reasonable doubt to increase the statutory maximum under the ACCA for "serious drug offenses" ?

LIST OF PARTIES

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

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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 **federal courts**:

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

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

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

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

☐ For cases from **state courts**:

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

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

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

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

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 10, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 15, 2017, and a copy of the order denying rehearing appears at Appendix C.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment Rights	6,13,15,21
Sixth Amendment Rights	7,8,12,13,21,22, 24
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STATEMENT OF THE CASE

Petitioner Hudgins, asserts that on May 27, 2015, the Clerk's Office filed his 2255 Petition and on June 10, 2015, the Clerk's Office filed his Amended 2255 Motion. A Show Cause Order was issued by the District Court and the United States was ordered to respond by September 3, 2015. The United States filed their Response Brief with the District Court on September 1, 2015, however Mr. Hudgins did not receive his copy of the Government's Response Brief. On September 21, 2015, Petitioner Hudgins filed a Motion for Issuance of Show Cause and on September 29, 2015, Magistrate Judge Grand denied Motion For Issuance Of Show Cause but in doing so provided Mr. Hudgins with a copy of the Government's Response Brief the same day or next day after receipt of the denial by the District Court, see Doc. # 57, the government also served a copy of their Response Brief upon Hudgins. Thereafter, Petitioner Hudgins filed his Reply Brief and Motion To Expand The Scope Of § 2255 Proceedings Record. On May 31, 2016, U.S. Magistrate Judge David R. Grand filed R. & R. to deny Hudgins' 2255 Motion To Vacate, see Doc. # 77. On June 27, 2016, the District Court denied Petitioner's 2255 Motion To Vacate, however Hudgins filed a pro se Motion To Alter Or Amend A Judgment in which raised an intervening change in law in light of Mathis (2016), however the District Court denied on February 08, 2017. A timely Notice of Appeal was filed, thereafter the Sixth Circuit Court of Appeals denied a C.O.A. on August 10, 2017; and a Panel Rehearing Or Rehearing En Banc was denied on November 15, 2017. Petitioner Hudgins, now files his pro se Writ of Certiorari, thus the U.S. Supreme Court should GRANT a Certificate of Appealability

as to Questions # One, Two and Three in accordance with the U.S. Supreme Court's Rulings in Slack and Miller-El, as such claims are debatable amongst jurists of reason, therefore a C.O.A. should issue in the matter herein.

REASONS FOR GRANTING THE PETITION

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

In the instant case, Petitioner Hudgins, respectfully request that this Honorable U.S. Supreme Court GRANT his pro se Writ of Certiorari and issue a Certificate of Appealability as to Questions # 1, 2, and 3, as relevant to question # 1, Petitioner Hudgins' ex-lawyer Attorney Villarruel stipulated to a Motion To Continue Prel. Exam. and Complaint beyond the 30-Day Rule for plea negotiations, however the U.S. Magistrate Judge failed to make any of the findings required pursuant to the ends of justice requirements under § 3161 (7) (B) (i)-(iv); and the Sixth Circuit's holding in Dunbar and Bowers conflict with the U.S. Supreme Court's Ruling in Bloate, 559 U.S. 196 (2005), however Mr. Hudgins' ex-lawyer stipulated without his consent, thus in the instant case the Government has revealed that no plea offer which ever extended to Marvin Hudgins, therefore because 37 days elapsed before an Indictment was handed down beyond the 30-day limit, thus should a C.O.A. issue pursuant to the U.S. Supreme Court's Summary Vacating Ruling in White v. United States, No. 17-270. In reference to Question # 2, Petitioner Hudgins, ex-lawyer provided him with ineffective assistance of counsel by failing to object to the Government's Constructive Amendment of his Indictment as the October 11, 2012, First Superseding Information in which was not returned by the Grand Jury violated his Fifth Amendment Rights; and absent his ex-lawyer and U.S. Magistrate Judge's failure to adequately explain that the waiver of indictment rights he was

given up, thus his WAIVER was not "knowingly and intentionally" entered. Furthermore, Petitioner Hudgins, argues that this violates his Fifth and Sixth Amendment Rights, therefore he is entitled to a C.O.A. to issue as it is debatable amongst jurists of reason in light of the split in the circuits 6-6, as to whether "knowingly and intentionally" must be charged within the Indictment consistent with standard outlined in Slack and Miller-El, therefore a C.O.A. is warranted as to Question # 2. In reference to Question # 3, Petitioner Hudgins, argues that he has a right not to receive an enhanced Armed Career Criminal enhancement based on an incorrect understanding of the term "committed on occasions different from one another," however his Sixth Amendment Rights affords him the right as recognized by Descamps and Mathis, to permit Shepard-approved documents to establish that his 2007 drug crimes occurred on different occasions and more than one criminal episode. Therefore, Petitioner Hudgins, asserts that the U.S. Constitution grants sentencing courts "wide discretion in determining what sentence to impose," see *United States v. Tucker*, 404 U.S. 443, 446 (1972). It is well-established, however, that the Due Process Clause applies to certain aspects of the sentencing process, see *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980). Therefore, a defendant has a constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. *Whalen v. United States*, 445 U.S. 684, 690 (1980). Thus, Petitioner Hudgins, argues that "jurists of reason would find it debatable whether the petition [Question # 3] states a valid claim of the denial of a constitutional right." Slack, 529 U.S. at 484 (2000).

QUESTION # ONE:

Whether Petitioner Hudgins' ex-lawyer Attorney Villarruel failure to obtain Hudgins' consent before entering Stipulation and failure to file Motion To Dismiss Complaint and Indictment in violation of Petitioner's Sixth Amendment, thus does this amount to ineffective assistance of counsel, and, should a C.O.A. issue in light of the Supreme Court's Summary Vacating the Sixth Circuit's Decision in *White v. United States*, No. 17-270 ?

The question before this Honorable U.S. Supreme Court is whether a certificate of appealability should be issued as to Question # One before this Court herein. Congress has provided that 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 Supreme Court has explained that this means the petitioner must show "reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)); accord *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

The certificate of appealability requirement is to be administered at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the claims, Miller-El, at 336, 123 S. Ct. at 1039, because "the question is the debatability of the underlying constitutional claim, not the resolution of that debate," *id.* at 342, 123 S. Ct. at 1042. That means a petitioner is not required to demonstrate entitlement to [supreme relief] appellate relief in order to be given an opportunity to pursue it. Still, the ce-

rticate of appealability requirement is not a toothless one, and it should be applied with its purpose in mind, which is to separate out those appeals that deserve more careful attention from that do not. More than the absence of frivolity or the presence of good faith is required for a petitioner to clear this hurdle. Id. at 335-38, 123 S. Ct. at 1039-40.

Petitioner Hudgins, asserts that as to Question # One, before this Honorable U.S. Supreme Court the Sixth Circuit Court of Appeals held as follows:

Reasonable jurists would not debate the district court's denial of Hudgins's claim that he received ineffective assistance of counsel when counsel agreed to an adjournment of the preliminary examination and then failed to move for dismissal of the indictment as untimely for violating the Speedy Trial Act. Despite Hudgins's assertion to the contrary, we have held that the Speedy Trial Act "does not require a defendant's consent to the continuance 'if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.'" *United States v. Sobh*, 571 F.3d 600, 603 (6th Cir. 2009) (quoting 18 U.S.C. § 3161 (h) (7) (A)). Hudgins is unable to show that counsel acted unreasonably in stipulating to the continuance of the pretrial examination because the district court determined that the ends of justice was served by continuing the preliminary examination. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Petitioner Hudgins, contends that the U.S. Magistrate Judge Randon granted continuation pursuant to the interests of justice, however Mr. Hudgins would first point out to this Court that the Magistrate Judge simply rubber stamped the Stipulation To Continue Preliminary Examination And Complaint, see Appendix D, a thorough review of the parties Stipulation entered June 1, 2012; and the Magistrate Judge's Order To Continue Preliminary Examination And Complaint are identical. (emphasis added). Furthermore, Petitioner Hudgins, asserts that although the Magistrate Judge granted conti-

uance pursuant to the interests of justice, however he clearly abused his discretion as the statutory requirement of 18 U.S.C. § 3161 (h) (7) (C), requires a judge to consider in determining whether to grant a continuance four key factors and prohibits a judge from granting a continuance for lack of diligent preparation or failure to obtain witnesses on the part of the attorney for the Government. Mr. Hudgins points this Court's attention to Stipulation To Continue Preliminary Examination And Complaint, see ECF # 11, Filed 06/04/12, which states on page 2 of 5 PgID 19, 2. states in relevant part: "The parties would like to further investigate the criminal history of the defendant and the facts of the case before making a decision relative to conducting a preliminary examination and before engaging in any plea negotiations."

The Magistrate Judge held: "Overall, a continuance of the preliminary examination is necessary to allow defense counsel and the government additional time for the facilitation of plea negotiations which, under the Speedy Trial Act, are "other proceedings concerning the defendant," 18 U.S.C. § 3161 (h) (1); see *United States v. Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004), vacated on other grounds (*Booker*), 543 U.S. 1099 (2005); *United States v. Bowers*, 834 F.2d 607, 609-10 (6th Cir. 1987) (*per curiam*). Furthermore, the ends of justice served by continuing the preliminary examination outweigh the best interests of the public and Defendant in a speedy trial." See Appendix D.

Petitioner Hudgins, argues firmly that the U.S. Magistrate Judge failed to make any of the findings required pursuant to the ends-of-justice requirement under § 3161 (h) (7) (B)(i)-(iv); and mo-

reover the Sixth Circuit's holding in Dunbar and Bowers conflicts with the Supreme Court's Ruling in Bloate, 559 U.S. 196, 209 (2005).

Thus, Petitioner Hudgins, asserts that as the result of the Magistrate Judge holding that the continuance was warranted for plea negotiations, however Mr. Hudgins has evidence that no plea offer was ever extended to him, see Appendix E, therefore the 24-days plea-negotiation continuance was not permitted under § 3161 (h) (1), see Bloate, 559 U.S. 196, at 209 (2005). Furthermore, Petitioner Hudgins, contends that the Magistrate Judge failed altogether to consider the ends-of-justice statutory requirement pursuant to 18 U.S.C. § 3161 (h) (7) (B) (i)-(iv), thus without any on the record inquiry of those four key factors, therefore the Magistrate Judge abused it's discretion to hold that the ends-of-justice served by the granting of such continuance in the case herein. See Zedner, 547 U.S. at 500, 502 (2006)(The Court reasoned that the Act requires a district court to make express findings that a continuance fits within one of the specified exclusions of 18 U.S.C. § 3161 (h), and the Act does not provide for such a waiver. Furthermore, prospective waivers are inconsistent with the purpose of the Act because such waivers do not account for the public interest in speedy trials). (emphasis added).

In a recent case before this Honorable U.S. Supreme Court in White v. United States, No. 17-270, the U.S. Solicitor General argued before this Court that the Sixth Circuit Court of Appeals conclusion that the 14-day plea-negotiation continuance was automatically excludable under Section 3161 (h) (1) cannot be squared with Bloate. However, the Solicitor General argued although the Government confesses that federal court of appeals decision is incorrect but the Pe-

tition for Writ of Certiorari should be denied because the District Court did not abuse its discretion in excluding the same period of time on the basis of an ends-of-justice finding under subsection (h) (7).

Although the U.S. Solicitor General requested that White's Petition for Writ of Certiorari to be denied, however this Honorable U.S. Supreme Court decided to GRANT White's Writ of Certiorari and Summary Vacate the judgment of the Sixth Circuit Court of Appeals, see *White v. United States*, No. 17-270 (U.S. Jan. 8, 2018), thus having similar facts and circumstances as to White, thus there can be no doubt that it is debatable amongst jurists of reason that Hudgins's Speedy Trial Rights were violated under § 3161 (b), because more than 37 days elapsed before an Indictment was handed down, thus his ex-lawyer provided him with ineffective assistance of counsel in his failure to file a Motion To Dismiss, thus constituting "deficient performance" in the case herein. Strickland, 466 U.S. 668, 687-88 (1984). Furthermore, Petitioner Hudgins, states that absent his ex-lawyer's 'deficient performance' his Criminal Complaint would have been dismissed with or without prejudice, thus establishes actual prejudice, see *Greenup v. United States*, 401 F.3d 758, 765 (6th Cir. 2004); and *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994) (defense counsel's failure to move to dismiss the two mail fraud counts which violated 18 U.S.C. § 3161 (b) constituted ineffective assistance of counsel).

Petitioner Hudgins, argues that a C.O.A. must issue as to Question # One, as it is debatable among jurists of reasons whether Marvin Hudgins Sixth Amendment Rights were violated; and therefore a C.O.A. must issue, see Slack, 529 U.S. at 484 (2000).

QUESTION # TWO:

Whether Petitioner Hudgins' ex-lawyer Attorney Villarruel provided him with ineffective assistance of counsel by failing to object to the government's Constructive Amendment of his indictment by the October 11, 2012, First Superseding Information, in which was not returned by the Grand Jury does this violate his Fifth Amendment Rights and absent his ex-lawyer and the Magistrate Judge's failure to adequately explain that the waiver of indictment rights he was given up, thus the WAIVER entered to proceed to Jury Trial on a mere Information was not "knowingly" and "intelligently" entered, thus in violation of his Fifth and Sixth Amendment Rights. Is Petitioner Hudgins, entitled to issuance of a C.O.A. in light of a split in the circuits 6-6, as whether "knowingly and intentionally" must be charged within the Indictment ?

Petitioner Hudgins, contends that as to Question # Two, before this Honorable U.S. Supreme Court the Sixth Circuit Court of Appeals held as follows:

Reasonable jurists would not debate the district court's denial of Hudgins's claim that he received ineffective assistance of counsel when counsel advised him to proceed to trial on the first superseding information rather than the indictment. Hudgins's indictment stated that he had been previously convicted of at least three violent or serious drug offenses and specifically set forth the prior convictions. In order to avoid prejudicing the jury, the parties submitted an information which included only Hudgins § 922 (g) offense and contained no specific mention of any of his prior criminal convictions. Hudgins then filed an acknowledgment in which he explicitly stated that he consented to the submission of the information "to prevent advice to the jury of [his] prior criminal felony convictions." Based on the foregoing, Hudgins is unable to rebut the presumption that counsel acted reasonably. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Petitioner Hudgins, asserts that he raised his Constructive Ame-

ndment claim as Ground Four within his 2255 Petition filed with the District Court; and properly litigated within the Sixth Circuit Court of Appeals for a Certificate of Appealability, however the Sixth Circuit failed to address the heart of Mr. Hudgins claim, thus this Honorable U.S. Supreme Court should GRANT a C.O.A. based upon the following:

First, Petitioner Hudgins, argued within the District Court that the original indictment in which was returned by the Grand Jury, see ECF # 12, Filed 06/21/12 Pg 1 of 3 Pg ID 23, which states in relevant part: did knowingly and unlawfully possess a firearm, however the First Superseding Information, see ECF # 23, Filed 10/10/12 Pg 1 of 3 Pg ID 49, which states in relevant part: did knowingly possess the following firearm. See Appendix F.

18 U.S.C. § 922 (g) (1) states as follows:

The statute or the law that as to § 922 (g) (1) provides in part: 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 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.

Thus, Petitioner Hudgins, argues firmly that as charged within his original Indictment "did knowingly and unlawfully possess a firearm," thus traces all the language from the statute, however the Information omits the "unlawfully" and the Jury Instructions states in relevant part as follows:

14 I am now going to instruct you with respect to the
15 law as it pertains to this particular case. And I think
16 we need to put that screen up. We may want to turn some
17 of these lights down. We are going put this up on the

18 screen and again, members of the jury. I'm going to give
19 you a copy of this for your use while deliberations. Can
20 everybody see that ? All right.
21 Count One of the Information, which is the
22 charging document, charges that on or about May 1st, 2012
23 in the Eastern District of Michigan, Southern Division,
24 Defendant Marvin Hudgins, having been previously convicted
25 of at least one crime punishable by imprisonment for a
See Trial by Jury, Wednesday, October 16, 2012, Doc. # 46 Filed
07/10/13 Pg 15 of 59 Pg ID 370.

1 term exceeding one year which is known as a felony
2 offense, did knowingly possess the following firearm--
3 one Smith and Wesson-- and Smith and Wesson is the name
4 of the manufacture of this item-- Model SW9V2,
5 9-millimeter caliber semi-automatic firearm, serial number
6 PDH7621, which was manufactured outside of the State of
7 Michigan and thus traveled in interstate of foreign
8 commerce in violation of Title 18 United States, Code
9 922 G (1).

See Trial by Jury, Wednesday, October 16, 2012, Doc. # 46 Filed
07/10/13 Pg 16 of 59 Pg ID 371.

Therefore, Petitioner Hudgins, argues firmly that his original
Indictment was Constructively Amended by the Government's Informa-
tion in violation of his Fifth Amendment Rights of the U.S. Consti-
tution. Because the Government omitted "unlawfully" from the Info-
rmation, however it was entailed within his original Indictment
and traces the language from the § 922 (g) (1) statute itself,
therefore Marvin Hudgins, argues firmly that the Information and

Jury Instructions effectively constructively amended his Indictment and such amendment is considered per se prejudicial and warrants reversal of his conviction, see *Stirone v. United States*, 361 U.S. 212, 217-19 (1960). (emphasis added).

Petitioner Hudgins, asserts that there is a split in the federal Circuit Court of Appeals 6-6, as to whether "knowingly and intentionally" must be charged within the Indictment for § 922 (g) (1), thus the First Circuit Court of Appeals requires that for a conviction for § 922 (g) (1), must charge "knowingly and intentionally", see *United States v. Mercado*, 412 F.3d 243, 245-246 (1st Cir. 2005); the Second Circuit Court of Appeals requires "knowingly and intentionally" must be charged, see *United States v. McFadden*, 238 F.3d 198, 201 (2d Cir. 2000); the Third Circuit Court of Appeals merely requires that a individual knowingly possessed the firearm, see *United States v. Brown*, 765 F.3d 278, 291-92 (3d Cir. 2014); the Fourth Circuit Court of Appeals requires "knowingly and intentionally" must be charged, see *United States v. Langley*, 62 F.3d 602, 606 & f.n.11 (4th Cir. 1995). (The amendment inserts the word "willfully" into the general penalty clause contained in 18 U.S.C. § 924 (a). The purpose is to require that penalties be imposed only for willful violations-- those intentionally undertaken in violation of a known legal duty.); the Fifth Circuit Court of Appeals merely requires that a individual knowingly possessed the firearm, see *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988); the Sixth Circuit requires merely that a individual knowing possessed the firearm, see *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008); the Seventh Circuit Court of Appeals merely requires that a individual knowingly possessed the firearm, see *United States v. McNeal*, 900

F.2d 119, 121 (7th Cir. 1990); the Eighth Circuit Court of Appeals require that the defendant "knowingly and intentionally" possess a firearm, see *United States v. White*, 356 F.3d 865, 871 (8th Cir. 2004); the Ninth Circuit Court of Appeals merely requires that a individual knowingly possessed the firearm, see *United States v. Beasley*, 346 F.3d 930, 933-34 (9th Cir. 2003); the Tenth Circuit Court of Appeals merely requires that a defendant knowingly possessed a firearm, see *United States v. Mains*, 33 F.3d 1222, 1228 (10th Cir. 1994); the Eleventh Circuit Court of Appeals requires that a defendant "knowingly and intentionally" possessed the firearm, see *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005); and the D.C. Circuit Court of Appeals requires that a defendant "knowingly and intentionally" possess the firearm, see *United States v. Kpodi*, 824 F.3d 122, 124-25 (D.C. Cir. 2016).

The U.S. Supreme Court has long held in *Ex parte Wilson*, 114 U.S. 417, 426, 5 S. Ct. 935, 29 L. Ed. 89 (1885) (holding that the Grand Jury Clause mandates that a person "shall not be put upon his trial" without the benefit of an indictment). (emphasis added).

Therefore, Petitioner Hudgins, argues that his ex-lawyer's erroneous advisement to Mr. Hudgins to consent to proceed to Jury Trial on a mere Information and failing to object to the constructive amendment error constitutes 'deficient performance'; see *Strickland*, 466 U.S. 668, 687-88 (1984). Thus, actual prejudice exist because Mr. Hudgins's ex-lawyer defective representation is sufficient to warrant reversal of his conviction as the result of his jury trial being unreliable and the proceeding fundamentally unfair because of the performance of his ex-lawyer, see *Lockhart v. Fretwell*, 506 U.S. 364, 368-69 (1993). (emphasis added).

Second, Petitioner Hudgins, argued that the Magistrate Judge violated the Federal Rules of Criminal Procedure 7 (b), thus rendering his WAIVER of Indictment was rendered "unknowingly" and "unitelligently" and, thus VOID in violation of due process of law rights.

Petitioner Hudgins, contends that as argued before the District Court the U.S. Magistrate Judge failed to adequately comply with the Federal Rules of Criminal Procedure 7 (b), by failing to inform Marvin Hudgins of the essential elements of § 922 (g) (1) Felon In Possession Of A Firearm and explain the constitutional Fifth Amendment Rights he was giving up thereto.

Petitioner Hudgins, contends that pursuant to Rule 7 (b) of the Federal Rules of Criminal Procedure provides in relevant part: that the waiver of a defendant's right to indictment by a grand jury must be made by "the defendant-- in open court and after being advised of the nature of the charge and of the defendant's rights. However, Petitioner Hudgins contends that a thorough review of the trial record states as follows:

The Court: All right. Good morning, sir.

The Defendant: Good morning.

The Court: You have the right to remain-- do you understand you have the right to remain silent. Anything you say at this hearing can be used against you. Do you understand that, sir ?

The Defendant: Yes.

The Court: Mr. Hudgins, you are here today for an arraignment on a First Superseding Information. Have you received a copy of the First Superseding Information ?

The Defendant: Yes.

The Court: All right. And have you gone over the charge in that First Superseding Information with your lawyer ?

The Defendant: Yes.

The Court: All right. The charge is one Count of Felon In Possession Of A Firearm. And it carries with it a maximum sentence of up to ten years in prison, a \$250,000 fine or both. Do you understand that ?

The Defendant: Yes.

The Court: And it's also potentially subject to an enhancement if there had been-- if you have been convicted of at least three violent and/ or serious drug felonies. That would result in a possible enhancement of 15 years to life imprisonment, a \$ 250,000 fine or both. Do you understand that ?

The Defendant: Yes.

The Court: And you understand that typically the Government would have to proceed by an Indictment and it's the Court's understanding that you are waiving that right and allowing them to proceed by Information. Is that correct ?

The Defendant: Yes.

The Court: For the purpose of entering a plea, do you believe you had enough time to discuss this matter with your lawyer ?

The Defendant: Yes.

See Jury Selection Transcripts on Friday, October 11, 2012, see Doc. #44, Filed 07/10/13 Pg. 3 of 84 Pg ID 132 and Pg 4 of 84 Pg ID 133.

Petitioner Hudgins, contends that in Short, the Sixth Circuit held that a valid waiver of reindictment as a waiver of any constitutional right must be knowing and voluntary, see *Martin v. Rose*, 744 F.2d 1245, 1251 (6th Cir. 1984) (citing *Johnson v. Zerbst*, 304

U.S. 458, 464 (1938)). Rule 7 (b) of the Federal Rules of Criminal Procedure further provides that the waiver of a defendant's right to indictment by a grand jury must be made by "the defendant-- open court and after being advised of the nature of charge and of the defendant's rights." Short, 471 F.3d 686, 695-96 (6th Cir. 2006).

Hudgins's waiver failed to comply with Rule 7 (b), this is so as the result even though the Magistrate Judge questioned Marvin Hudgins in open court, however he specifically failed to explain to Hudgins the difference between an indictment and an information, including the role of the grand jury in an indictment and the consequences of waiving his right to a grand jury indictment, see *United States v. Preston*, 2013 U.S. App. LEXIS 4690 (9th Cir. 2013), however because the Magistrate Judge in the instant case failed to ensure that Marvin Hudgins understood the consequences of his WAIVER of indictment in open court, thus Marvin Hudgins swears and declares within his sworn affidavit as follows:

13. I was never informed of my Rights to proceed to jury trial by an Indictment and prior to me agreeing in open court I never actually understood the rights I was waiving, thus my waiver of Indictment was Tainted by ineffective assistance of counsel of my trial counsel in the case at bar.

See Marvin Hudgins Sworn Affidavit at page 2 of 5, Para. # 13, see Doc. # 49.

A defendant must knowingly, intelligently, and voluntarily waive his right to an indictment. See *Ferguson*, 758 F.2d 843, 850-51 (2nd Cir. 1984). (emphasis added).

Because Marvin Hudgins proceeded to jury trial he had a consti-

tutional right to proceed to jury trial by Indictment, however to proceed by a mere Information required a knowingly, intelligently, and voluntarily waiver of his right to such, however because the U.S. Magistrate Judge failed to ensure that such waiver was entered knowingly, intelligently and voluntarily, see Johnson v. Zerbst, 304 U.S. 458, 464 (1938), it is VOID as a violation of due process of law rights. Petitioner Hudgins, argues firmly that once due process of law rights are violated all proceedings thereafter are VOID. See Combs v. Nick Garin Trucking, 285 F.2d 437 (D.C. Cir. 1987); Pacurar v. Hernly, 611 F.2d 179 (7th Cir. 1979); 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d sec. 2862 (1995); and Void Judgment, ab initio 50 Corpus Juris Secundum, Judgment, § 546, pp. 101-102.

Therefore, Petitioner Hudgins, argues firmly that "reasonable jurists would find the court of appeals' assessment of the constitutional [Fifth Amendment and Sixth Amendment] claim debatable or wrong," Slack v. McDaniel, 529 U.S. 473, 484 (2000), thus a C.O.A. should issue in the case herein as to Question # Two.

QUESTION # THREE:

Whether Petitioner Hudgins, ex-lawyer Attorney Villarruel provided him with ineffective assistance of counsel by failing to object to the Presentence Investigation Report, that the two state Michigan 2007 Delivery drug convictions were actually part of the same criminal episode and the Government was required to produce Shepard-approved documents that the crimes were committed "on occasions different from one another," thus did his ex-lawyer provide him with ineffective assistance of counsel in violation of his Sixth Amendment Rights. Is Petitioner Hudgins, entitled to

issuance of a C.O.A. in light of 18 U.S.C. § 924 (e) (1), requiring that prior offenses were "committed" on different occasions, thus does Descamps/ Mathis; and his Sixth Amendment Rights require these facts to be proven beyond a reasonable doubt to increase the statutory maximum under the ACCA for "serious drug offenses" ?

Petitioner Hudgins, asserts that as to Question # Three, before this Honorable U.S. Supreme Court the Sixth Circuit Court of Appeals held as follows:

Reasonable jurists would not debate the district court's denial of Hudgins's claim that he received ineffective assistance of counsel when counsel failed to object to the presentence report. Specifically, Hudgins argues that the government failed to show that his 2007 convictions were committed on occasions different from one another, as required for the § 924 (e) sentence enhancement to apply. See *United States v. Barbour*, 750 F.3d 535, 546 (6th Cir. 2014). The government asserts that Hudgins's initial 2007 conviction was the result of a May 8, 2007, narcotics transaction, and that his second 2007 conviction was the result of a May 14, 2007, narcotics transaction with another individual. Because Hudgins has not offered any evidence in support of this claim, an objection to the presentence report would have been futile. Because counsel cannot be ineffective in failing to make a futile objection, reasonable jurists would not debate the district court's resolution of this claim.

In the case of a person who violates 18 U.S.C. § 922 (g) (1) of this title and has three previous convictions for violent felony or serious drug offenses committed on occasions different from one another, such person shall be imprisoned not less than fifteen years. 18 U.S.C. § 924 (e) (1).

In the instant case, Petitioner Hudgins, contends that the Presentence Investigation Report was adopted by the District Court, however the Sentencing Record reflects as follows:

The Court: Mr. Villarruel, have you had an opportunity to review the Presentence Report with your client; and if so, do you have

any additions, corrections, deletions or objections that you want to bring to my attention ?

Mr. Villarruel: No, Your Honor.

The Court: No, you have not reviewed it with your client ?

Mr. Villarruel: No, I have no corrections, deletions or other things. I have reviewed it with Mr. Hudgins.

See Sentencing Hearing Transcripts, see Doc. # 42, held on March 12, 2013, before the Honorable Lawrence P. Zatkoff at page 3, line 17-25.

Petitioner Hudgins, asserts that limiting the "on occasions different from one another" analysis to Taylor and Shepard materials avoids potential constitutional problems associated with affording broad factfinding powers to a sentencing court in evaluating ACCA predicate offenses. In Shepard, the plurality noted:

[T]he dispute raises the concern underlying Jones and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence.... The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as Taylor constrained judicial findings about the generic implication of a jury's verdict. 544 U.S. at 25-26.

In determining whether offenses were committed "on occasions different from one another" for purposes of sentencing under the ACCA, a sentencing court is bound by the sources limitations established by Taylor and Shepard. See U.S. v. Dantzler, 771 F.3d 137, 145 (2d Cir. 2014); U.S. v. Boykin, 669 F.3d 467, 470-71 (4th Cir. 2012); U.S. v. Fuller, 453 F.3d 274, 279 (5th Cir. 2006); U.S. v. King, 853 F.3d 267, 271 (6th Cir. 2017); U.S. v. Ngo, 406 F.3d 839, 843 (7th Cir. 2005); U.S. v. Taylor, 413 F.3d 1146, 1157 (10th Cir.

2005); U.S. v. Sneed, 600 F.3d 1326, 1332 (11th Cir. 2010); and U.S. v. Thomas, 572 F.3d 945, 950 (D.C. Cir. 2009).

Here, Petitioner Hudgins, argues firmly that in light of Descamps and Mathis the Government had a duty to meet it's burden of proof through Taylor and Shepard-approved sources that the ACCA enhancement applies as his Sixth and Fourteenth Amendment Rights protects Marvin Hudgins against "[s]uch improper factfinding as occurred here strikes at the core of our judicial system's protection for criminal defendants." United States v. Boykin, 669 F.3d 467, 472 (4th Cir. 2012).

Because the District Court relied solely upon the PSR; and the Presentence Report derived their information from a prior state Presentence Report which is prohibited under Taylor and Shepard, thus the Government has failed altogether to meet their burden of proof, therefore the 2007 Michigan drug convictions were a single criminal episode in which was part of a continuous course of criminal dealing. Therefore, Marvin Hudgins is "actually innocent" of being an Armed Career Criminal and because of the "inconclusive" record both the Fifth and Ninth Circuit "have declined to apply the ACCA enhancement when faced with an inconclusive record." Barbour, 750 F.3d 535, 545-46 (6th Cir. 2014). (emphasis added).

Therefore, Petitioner Hudgins, argues firmly that "reasonable jurists would find the court of appeals' assessment of [Sixth and Fourteenth Amendment] the constitutional claim debatable or wrong, see Slack, 529 U.S. 473, 484 (2000), thus a C.O.A. should issue in the case herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x *Mauri Hudg*

Date: February *11*, 2018