

JERRY LEE KEY
DOC-Reg. No. 3518611
Mount Olive Correctional Complex
1 Mountainside Way
Mount Olive, West Virginia 25185

Petitioner pro se

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LEE KEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO. 17-7391

PETITION FOR A WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V

U.S. Const. Amend. VIII

18 U.S.C. §§ 922 (g)(1)

28 U.S.C. § 1291

18 U.S.C. § 924 (a)(2)

28 U.S.C. § 2244

18 U.S.C. § 924 (e)(1)

28 U.S.C. § 2255

18 U.S.C. § 924 (e)(2)(B)(ii)

28 U.S.C. § 2513

OTHER:

See, *Patrick Henry*, Speech at the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 14, 1788), in 3 *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 445-49 (J. Elliot ed., J.B. Lippincott Co. 1891) (1836) (discussing purpose of Bill of Rights to restrain the federal government and protect individual rights).

QUESTION(S) PRESENTED

QUESTION ONE:

Does the failure of the “Unjust conviction and imprisonment” statute [28 U.S.C. § 2513] to provide a clear directive - defining unjust imprisonment, render all or part of the statute void-for-vagueness?

QUESTION TWO:

Does the “Unjust conviction and imprisonment” statute [28 U.S.C. § 2513] violate the Eighth Amendment’s prohibition against cruel and unusual punishments by immunizing the government from having to accept liability for subjecting a convicted criminal defendant to a term of imprisonment that was not authorized by any valid criminal statute?

LIST OF PARTIES

All parties to this action appear on the front cover-page, except the Solicitor General of the United States appearing as counsel for the Respondent in this case.

STATEMENT OF THE CASE

This case was prosecuted by a single-count superseding indictment, charging Petitioner with violations of 18 U.S.C. § 922 (g)(1), §§924 (e)(1) and 924 (e)(2)(B)(ii), in *United States of America v. Jerry Lee Key*, Case No. 2:97-cr-00033-1, out of the United States District Court for the Southern District of West Virginia, Charleston Division.

OPINIONS BELOW

The United States Court of Appeals decision in *Jerry Lee Key v. United States of America*, No. 17-7391 (4th Cir. February 20, 2018) appears in an unpublished opinion and has been marked as **Exhibit A**. The decision of the United States District Court for the Southern District of West Virginia, Charleston Division in *Jerry Lee Key v. United States of America*, Case Nos. 2:17-cv-00556 (Criminal No. 2:97-cr-00033-1) also appears in an unpublished opinion and has been marked as **Exhibit B**. The decision of the United States Magistrate Judge in *Jerry Lee Key v. United States of America*, Case Nos. 2:17-cv-00556 (Criminal No. 2:97-cr-00033-1) out of the United States District Court for the Southern District of West Virginia, Charleston Division, also appears in an unpublished opinion and has been marked as **Exhibit C**.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of West Virginia, Charleston Division - assumed jurisdiction in this case (No. 2:17-cv-00556) pursuant to 28 U.S.C. § 2513. The United States Court of Appeals for the Fourth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Honorable Court is now being invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE FACTS

Procedural History

On October 24, 1995, Petitioner was arrested and charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and inadvertently released on bond on that date and was again arrested on October 27, 1995, and subsequently denied bond.

On February 20, 1997, a Federal Grand Jury sitting in and for the Southern District of West Virginia, at Charleston, returned a single-count indictment charging Petitioner with violations of 18 U.S.C. §§ 922(g)(1), and 924(e)(1). However, on or about April 22, 1997, the original indictment was replaced by a single-count superceding indictment in the case of *United States of America v. Jerry Lee Key*, Criminal Case No. 2:97-cr-00033-1, which again charged Petitioner with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The indictment further alleged a violation of 18 U.S.C. § 924(e)(1) of the Armed Career Criminal Act (hereinafter “ACCA”) of 1984, and set forth three (3) predicate offenses as required by the ACCA.

On June 30, 1997, Petitioner entered a ‘conditional plea of guilty’ to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), while specifically reserving the right to appeal the issue of whether his 1990 escape conviction based on his failure to return to the Charleston Work/Study Release Center from a 48- hour home furlough constitutes a “violent felony” within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii),¹ which has come to be known as the ACCA’s “residual clause.” Upon accepting Petitioner’s conditional plea of guilty to possession of a firearm by a convicted felon, the district court ordered that the United States Probation Department prepare a Pre-sentence Investigation Report (hereinafter “PSR”) prior to sentencing. Subsequently, and upon

¹ See *Chambers v. United States*, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed.2d 484 (2009) (failure to report and/or return not a “violent felony” for ACCA purposes); *United States v. Bethea*, 603 F.3d 254, 257 (4th Cir. 2010) (same); *United States v. Clay*, 627 F.3d 959, 969 (4th Cir. 2010) (same); *United States v. Nichols*, 563 F. Supp.2d 631, 635 (S.D. W. Va. 2008) (same)).

completion, the PSR noted that Petitioner's criminal history revealed four (4) adult convictions. All four of these convictions were set forth in the superceding indictment, namely: two counts of unlawful wounding (to be counted as one prior "violent felony" by the parties stipulations), Petitioner's 1993 escape from the Huttonsville Correctional Center, and his 1990 escape conviction based on his failure to return. It was thereafter recommended that Petitioner be sentenced as an armed career criminal. According to the U.S. probation officer, Petitioner's status as an armed career criminal yielded a Guidelines range of 210 to 262 months of imprisonment. In recommending that Petitioner be sentenced as an armed career criminal, the probation officer concluded that three (3) of Petitioner's prior convictions met the definition of a "violent felony" under the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii).

On September 17, 1997, following the sentencing recommendations of the United States probation officer, the district court found that Petitioner's 1990 escape conviction based on his "failure to return" constitutes a "violent felony" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii), and Petitioner noted his objections. The district court then proceeded to sentence Petitioner to a 210 month (17 ½ years) term of imprisonment, to be followed by a five-year term of supervised release, a \$50.00 special assessment fee and a \$1,000.00 fine.

On March 24, 1998, following a timely Notice of Appeal, Petitioner filed his direct appeal in the United States Court of Appeals for the Fourth Circuit, which was denied on April 22, 1998 in *United States v. Key*, 145 F.3d 1327; published in full-text format at 1998 U.S. App. LEXIS 7814 (4th Cir.), cert. denied, 525 U.S. 844, 142 L. Ed.2d 90, 119 S. Ct. 112 (1998).

On March 31, 2011, Petitioner was released from United States Penitentiary Hazelton to begin serving his 5-year term of supervised release under the supervision of Gregory Swisher, who would later be replaced by Troy Lanham, of the United States Probation Department located at 300 Virginia Street, East, Charleston, West Virginia.

On August 24, 2012, Supervise Release-Probation Officer, Troy Lanham, filed a petition in the United States District Court for the Southern District of West Virginia, at Charleston, seeking

to have Petitioner's 5-year term of supervised release revoked, claiming that he had previously violated the terms and conditions of his court-ordered supervised release, warranting revocation. Based upon the evidence proffered by Mr. Lanham, the district court found that there was reason to believe that Petitioner had violated the terms and conditions of his supervised release and, accordingly, issued a warrant for his arrest.

On August 29, 2012, Petitioner was arrested by the United States Marshal Service while in Roane County, West Virginia, after being shot in the back with a taser gun used by one of the arresting marshals, and thereafter taken to the South Central Regional Jail located at 1001 Centre Way, Charleston, West Virginia, where he was ordered held without bond under a Federal warrant directly related to the revocation proceeding(s) initiated by Supervise Release-Probation Officer, Troy Lanham, while acting on behalf of the United States Probation Department.

On August 31, 2012, while confined at the South Central Regional Jail under Federal warrant for alleged violations of his supervised release, Petitioner was physically assaulted by another inmate so severely that his injuries required approximately three (3) hours of reconstructive surgery, requiring a "Left orbital floor fracture reduction with implant placement," and "Left zygomatic maxillary complex (ZMC) open reduction internal fixation," and "Nasal septal manipulation," which was unreasonably delayed by the United States Marshal Service and medical personnel at the South Central Regional Jail for a period of time exceeding one (1) month. **Medical records will be provided upon request, or at the direction of the Court.**

On December 11, 2012, the District Court, with the Honorable John T. Copenhaver, Jr., presiding, entered an Order revoking Petitioner's 5-year term of supervised release in the case of *United States of America v. Jerry Lee Key*, Criminal Case No. 2:97-cr-00033-1. The district court further ordered that Petitioner serve an additional 60 month (5-years) term of imprisonment under the care, custody and control of the United States Attorney General and/or Federal Bureau of Prisons for his violation of supervised release, with no other term of supervised release to be served following his release from custody.

On June 26, 2015, the United States Supreme Court in the case of *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed.2d 569, held that the imposition of an increased sentence under the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii) violates the Due Process Clause because the "residual clause" is "unconstitutionally vague."

On January 26, 2016, Petitioner's unopposed Motion For Authorization To File A Successive Motion Under 28 U.S.C. § 2255 was received and filed in the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §§ 2244(b)(3), and 2255(h).

On March 30, 2016, the United States Supreme Court in the case of *Welch v. United States*, 136 S. Ct. 1257, 194 L. Ed.2d 387, held that its decision in *Johnson v. United States*, 135 S. Ct. 2551, is retroactively applicable to cases on collateral review.

On June 16, 2016, the United States Court of Appeals for the Fourth Circuit granted Petitioner's Motion For Authorization To File A Successive Motion Under 28 U.S.C. § 2255, and remanded the case back to the United States District Court for the Southern District of West Virginia, Charleston Division, for further proceedings consistent with the Court's Order.²

Again, on June 16, 2016, having received the Fourth Circuit's Order authorizing the filing of a successive motion under 28 U.S.C. § 2255, the district court, by standing order, appointed Christian M. Capece, of the Federal Public Defender Office as counsel for Petitioner, who immediately filed (on the same date) a "Emergency Consent Motion To Correct Sentence Under 28 U.S.C. § 2255," which the United States [Government] through Assistant United States Attorney John J. Frail consented to the filing of said motion. In the motion, counsel for Petitioner argued, inter alia, (and the Government agreed) that Petitioner is not an armed career criminal and had served a sentence "far beyond the non-ACCA 10-year statutory maximum" for his Federal offense of being

² See *In re: Jerry Lee Key*, No. 16-127 (4th Cir. June 16, 2016) (Authorizing the United States District Court to consider second or successive motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in *United States v. Jerry Lee Key*, Criminal Case No. 2:97-cr-00033-1, before the Honorable John T. Copenhaver, Jr., United States District Court Judge).

a convicted felon in possession of a firearm, as well as “far beyond” the two-year statutory maximum for his supervised release violation and, therefore, entitled to an immediate release.

On July 20, 2016, the United States [Government] through Assistant United States Attorney John J. Frail filed its consent to the relief sought in the Emergency Motion.

On July 21, 2016, the district court entered an Order requiring the Federal Bureau of Prisons to “process the Court’s order quickly so as to release the Plaintiff immediately,” adopting the findings and recommendations set forth in the Emergency Consent Motion To Correct sentence Under 28 U.S.C. § 2255, filed on Petitioner’s behalf.

On January 12, 2017, Petitioner filed his “Motion for Certificate of Innocence” pursuant to 28 U.S.C. § 2513, in which he also challenges the constitutionality of 28 U.S.C. § 2513, claiming that the statute is “unconstitutionally vague” and “violates the Eighth Amendment’s prohibition against cruel and unusual punishments.”

On August 15, 2017, United States Magistrate Judge DeWane L. Tinsley entered his “Proposed Findings and Recommendation,” wherein recommending “that the presiding District Judge **DENY** Movant’s Motion for Certificate of Innocence pursuant to 28 U.S.C. § 2513, including his constitutional challenges thereto.”

On September 29, 2017, in denying Petitioner’s motion for certificate of innocence (*Key v. United States*, Case No. 2:17-cv-00556), the district court adopted the proposed findings and recommendation of the United States magistrate judge.

On October 4, 2017, Petitioner filed his timely “Notice of Appeal” with the district court, whereby moving this case forward on appeal.

On February 20, 2018, the United States Court of Appeals for the Fourth Circuit denied Petitioner’s appeal and affirmed the district court’s ruling in *Jerry Lee Key v. United States of America*, No. 17-7391 (Case 2:17-cv-00556 - (S.D. W. Va.) (4th Cir. February 20, 2018).

QUESTION(S) PRESENTED

QUESTION ONE:

Does the failure of the “Unjust conviction and imprisonment” statute [28 U.S.C. § 2513] to provide a clear directive - defining unjust imprisonment, render all or part of the statute void-for-vagueness?

REASONS FOR GRANTING THE PETITION

When a statute’s constitutionality is in doubt, courts have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, e.g., *Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The “void-for-vagueness” doctrine is applicable to civil as well as criminal actions, where the exaction of obedience to a rule or standard is so vague and indefinite as really to be no rule at all and strips a participant of his rights. *Boutilier v. INS*, 387 U.S. 118, 123, 18 L. Ed.2d 661, 87 S. Ct. 1563 (1967); see also *Small Co. v. Sugar Ref. Co.*, 267 U.S. 233, 239, 69 L. Ed 589, 592, 45 S. Ct. 295 (1925). The Supreme Court has made clear that vagueness challenges may be brought against a statute “on its face” without regard to specific conduct... . Facial challenges strike at the heart of the statute, and, if successful, invalidate any and all application of the challenged provision until it is given a construction that sufficiently clarifies it. See *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S. Ct. 1209, 39 L. Ed.2d 505 (1974); cf. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971); see also *Bond v. United States*, 564 U.S. ___, 131 S. Ct. ___, 180 L. Ed.2d 269 (2011). A “void-for-vagueness” challenge...is a “Facial” challenge, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, and nn. 5,6,7, 102 S. Ct. 1186, 71 L. Ed.2d 362 (1982), and the Supreme Court has long held that a court’s authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed 60 (1803), when the Court severed an unconstitutional provision from the Judiciary Act of 1789. The Supreme Court has

applied a two-part guide as the framework for severability analysis. The test has been deemed “well established.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 94 L. Ed.2d 661 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. 480 U.S. at 685, 107 S. Ct. 1476, 94 L. Ed.2d 661 (1987). Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. 480 U.S. at 685, 107 S. Ct. 1476, 94 L. Ed.2d 661.

At issue in the instant case is whether 28 U.S.C. § 2513 is “void-for-vagueness.” Title 28, Section 2513 of the United States Code provides that...

“§ 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title [28 USCS § 1495] must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction

had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.”

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme, and a reviewing court should not confine itself to examining a particular statutory provision in isolation. *Cumberland Cnty. Hosp. Sys. v. Burwell*, 816 F.3d 48 (4th Cir. 2016). Interpreting statutory text solely in light of purpose, absent any reliance on text or structure, is dangerous business because it places courts in peril of substituting their policy judgment for that of Congress. Therefore, “in considering statutory purpose,” courts “should be careful that any inferences of purpose are tied to text rather than instinct.” *Ala. Dep’t of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1147, 191 L Ed.2d 113 (2014). Through its enactment of 28 U.S.C. § 2513, Congress intended to place **unjust “conviction” [and] “imprisonment”** into ‘two separate and very distinct categories,’ whereby subjecting each to independent review. Despite Congress having expressed in the [title] of 28 U.S.C. § 2513, its intent to provide for both unjust “conviction” [and] “imprisonment,” the provisions of § 2513 (a), (b), and (c) focus entirely upon an unjust “conviction,” without even the slightest mention of a prisoner’s unjust “imprisonment.” It is equally clear that § 2513(e)’s primary interest focuses on the amount of money damages to be awarded, while failing to provide a clear directive - defining an “unjust-imprisonment,” that “has not been authorized by any valid criminal statute.” See *Welch v. United States*, 136 S. Ct. 1257, 1268, 194 L. Ed.2d 387 (2016).

In his proposed findings and recommendation of August 15, 2017, upon which the district court relies, United States Magistrate Judge DeWane L. Tinsley recommended that “the presiding District Judge **DENY** Movant’s Motion for Certificate of Innocence pursuant to 28 U.S.C. § 2513,

including his constitutional challenges thereto.” According to Magistrate Judge...

“Section 2513 clearly addresses the situation where a defendant’s conviction is overturned or set aside based upon actual innocence or the defendant is pardoned. The reference to “imprisonment” in this statute is that attendant to the unlawful conviction. The statute does not apply to a defendant, like Movant, whose conviction stands, but whose sentence was found to be improper. The undersigned has been unable to locate a single case in which a similar challenge has been addressed, let alone resolved in Movant’s favor. Accordingly, the undersigned proposes that the presiding District Judge **FIND** that Movant’s vagueness challenge is frivolous and fails to state a claim upon which relief can be granted.” Id. at p. 8. See Exhibit C.

The contention that “...reference to “imprisonment” in this statute is that attendant to the unlawful conviction,” attempts to circumvent the law by compounding the statutory provisions of 28 U.S.C. § 2513 (a), (b), and (c), with those of (e), as given into one meaning. This clearly violates separation-of-powers. Further, Magistrate Judge claims that he has been “unable to locate a single case in which a similar challenge has been addressed, let alone resolved in Movant’s favor.” However, In *Crooker v. United States*, 828 F.3d 1357 (Fed. Cir. 2016), the Court made clear that 28 U.S.C. § 2513 (e) is not self-defining. Specifically, the Court found that...

“The measure of damages flows from a separate statutory provision, 28 U.S.C.S. § 2513 (e), which provides that the amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff. At least as it relates to the contours of the “period of incarceration” for which a successful plaintiff may receive damages, the provision is not self-defining. It does not address whether the “period of incarceration” includes pre-trial detention. Likewise, no statutory provision specifically addresses whether the “period of incarceration” should exclude those periods credited to another, lawful sentence.”

Petitioner argues that the lack of clarity in 28 U.S.C. § 2513 (e) itself, renders the statute unconstitutionally vague, and Magistrate Judge’s reliance upon *United States v. Graham*, 608 F.3d 164 (4th Cir.2010) in this case has been badly misplaced. The Fourth Circuit’s decision in *Graham* is one of ‘first impression’ and does not address whether 28 U.S.C. § 2513 is “unconstitutionally

vague and/or violates the Eighth Amendment’s prohibition against cruel and unusual punishments.” *Graham*, 608 F.3d at 170. In fact, the Fourth Circuit makes no mention of §2513 (e) in its *Graham* decision. It is without doubt that the “final judgment in a criminal case means sentence. The sentence is the judgment,” *Burton v. Stewart*, 549 U.S. 147, 156, 127 S. Ct. 793, 166 L. Ed.2d 628 (2007) (quoting *Berman v. United States*, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed 204 (1937)), just as “every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.” *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 166 L. Ed.2d 973 (2007). It is equally clear that an “unjust-imprisonment,” is an imprisonment not authorized by law. See, e.g., *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed.2d 569 (2015); *United States v. Newbold*, 791 F.3d 455, 460 (4th Cir. 2015); *Welch v. United States*, 136 S. Ct. 1257, 194 L. Ed.2d 387 (2016).

Notwithstanding Petitioner’s claims of innocence, or lack thereof, the [objects] expressed in the title of 28 U.S.C. § 2513, namely **unjust “conviction” [and] “imprisonment”** have been individualized in the [title] and therefore must be viewed separately. Giving the term “unjust-imprisonment” its ordinary meaning, as courts must, the meaning is unambiguous. Finding no definitive answer in the statutory text of 28 U.S.C. § 2513 addressing “unjust-imprisonment,” this Court is now called upon to find that 28 U.S.C. § 2513 is unconstitutionally vague.

QUESTION TWO:

Does the “Unjust conviction and imprisonment” statute [28 U.S.C. § 2513] violate the Eighth Amendment’s prohibition against cruel and unusual punishments by immunizing the government from having to accept liability for subjecting a convicted criminal defendant to a term of imprisonment that was not authorized by any valid criminal statute?

REASONS FOR GRANTING THE PETITION

The Eighth Amendment to the United States Constitution provides that “Excessive bail shall

not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Eighth Amendment prohibition against cruel and unusual punishment admits of several dimensions. It limits the power of the legislative body to establish penalties for crimes, *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976), restricts the courts when sentencing convicted defendants, *Weems v. United States*, 217 U.S. 349, 54 L. Ed 793, 30 S. Ct. 544 (1910), and protects prisoners from excesses of prison authorities in the executive branch, *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed.2d 251, 97 S. Ct. 285 (1976). The precedents established in one context do not always transfer comfortably to another and therefore must be read with the appropriate distinctions in mind. The language of the Eighth Amendment, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” manifests “an intention to limit the power of those entrusted with the criminal-law function of government.” *Ingraham v. Wright*, 430 U.S. 651, 664, 51 L. Ed.2d 711, 97 S. Ct. 1401 (1977).

The “concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed.2d (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed 793 (1910)). Accordingly, a disproportionate sentence may be cruel and unusual even if it is not “inherently barbaric.” *Id.* A court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 77 L. Ed.2d 637 (1983). A defendant may raise two types of Eighth Amendment challenges to his sentence: He may raise an “as-applied” challenge on the grounds that “the length of a certain term-of-years sentence [is] disproportionate ‘given all the circumstances in a particular case,’” or he may raise a “categorical” challenge asserting “that an entire class of sentences is disproportionate based on ‘the nature of the offense’ or ‘the

characteristics of the offender.” *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014) (quoting *Graham*, 560 U.S. at 59-60). The Supreme Court has long held that a conviction under an unconstitutional law “is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.” *Ex parte Siebold*, 100 U.S. 371, 376-377 (1880). The same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose. *Penry v. Lynaugh*, 492 U.S. 301, 330 (1989).³

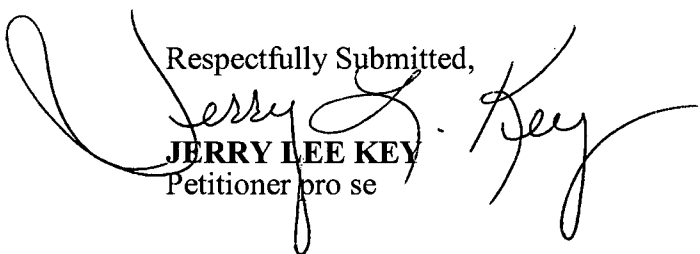
The statutory provisions of 28 U.S.C. § 2513, requiring that a petitioner prove, inter alia, his “innocence” as a prerequisite to pursuing claims against the United States [Government] for “unjust-imprisonment” is nothing more than a one-sided configuration intended to shield the government from having to accept liability for subjecting a convicted criminal defendant to a term of imprisonment that was not authorized by any valid criminal statute, while at the same time denying him or her a viable form of redress. By and through its enactment of 28 U.S.C. § 2513, Congress blatantly chose to ignore one of the most fundamental rights that the Constitution has to offer: the right to be free from “cruel and unusual punishments.” Having been empowered by the United States Constitution to correct such an injustice - this Court is now called upon to do so in this case.

³ See also, *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976) (The Eighth Amendment prohibition against cruel and unusual punishment limits the power of the legislative body to establish penalties for crimes.); *Weems v. United States*, 217 U.S. 349, 54 L. Ed 793, 30 S. Ct. 544 (1910) (The Eighth Amendment restricts the courts when sentencing convicted defendants.).

CONCLUSION

Petitioner has clearly established that (1) his conditional plea of guilty to possession of a firearm by a convicted felon [18 U.S.C. § 922(g)(1)] was punishable by no more than 10-years of imprisonment under 18 U.S.C. § 924(a)(2); (2) that his increased sentence under the ACCA's "residual clause," 18 U.S.C. § 924(e)(2)(B)(ii) violated the Due Process Clause because the "residual clause" is "unconstitutionally vague," *Johnson*, 135 S. Ct. 2551; (3) that the Supreme Court's decision in *Johnson*, supra, is retroactively applicable to cases on collateral review. *Welch*, 136S.Ct. 1257; (4) that his ACCA 'residual clause' sentencing enhancement was not authorized by any valid criminal statute and, therefore, void ab initio; (5) that 28 U.S.C. § 2513 is unconstitutionally vague; and (6) that his ACCA sentencing enhancement was disproportionate "as-applied" to the offense of possession of a firearm by a convicted felon, thereby in violation of the Eighth Amendment's prohibition against "cruel and unusual punishments. Thus, there can be no legal-justification offered by the United States [Government] to excuse having forced Petitioner to languish in federal prison (for approximately 20-years) under a sentence that was void from the beginning. Permitting the government to hide behind the pre-colonial, British based, regal shield of sovereign immunity to immunize itself from the consequences of violating Petitioner's constitutional rights would be antithetical to the spirit of the Constitution and leave the Bill of Rights an empty shell. See *Patrick Henry*, Speech at the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 14, 1788), in 3 *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 445-49 (J. Elliot ed., J.B. Lippincott Co. 1891) (1836) (discussing purpose of Bill of Rights to restrain the federal government and protect individual rights).

Respectfully Submitted,


JERRY LEE KEY
Petitioner pro se

PROOF OF SERVICE

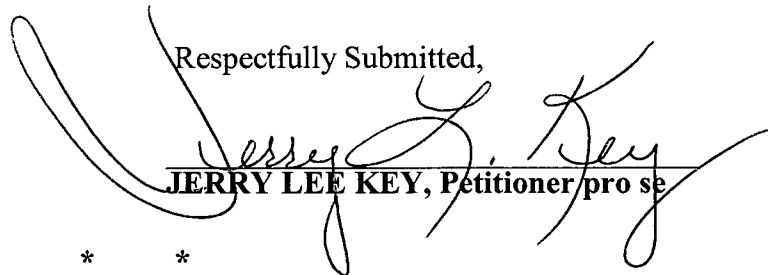
I, Jerry Lee Key, the petitioner proceeding pro se herein, do hereby certify that I have served upon counsel for the Respondent, copies of the foregoing **Request to Proceed in Forma Pauperis w/Financial Affidavits; Petition for a Writ of Certiorari w/Exhibits and Declaration of Inmate Filing**, by depositing same in the United States mail (via Institutional Legal Mail System) with First-Class postage prepaid, addressed to the following.

Solicitor General of the United States
U.S. Department of Justice, Room 5614
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent

Dated this 8th day of May 2018

Respectfully Submitted,

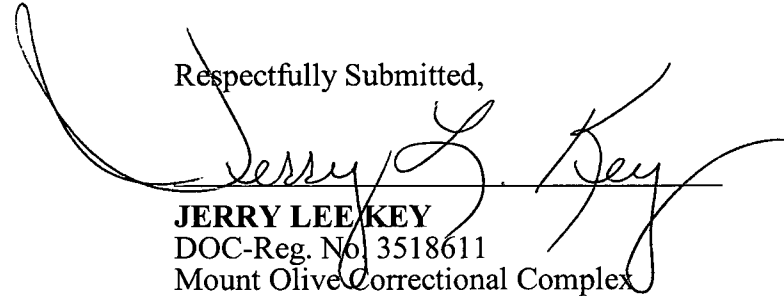

JERRY LEE KEY, Petitioner pro se

* * *

DECLARATION OF INMATE FILING

I, Jerry Lee Key, do hereby declare under penalty of perjury that **the documents identified above (in bold print)** have been deposited in the institution's legal mail system this 8th day of May 2018. (See 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Respectfully Submitted,


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Petitioner pro se