

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 11, 2026

Lyle W. Cayce
Clerk

No. 25-60484

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CHRIS EUGENE COSNER,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Mississippi
USDC No. 1:22-CV-69
USDC No. 1:15-CR-96-1

ORDER:

Chris Eugene Cosner, federal prisoner # 13863-045, was convicted by a jury of armed bank robbery and brandishing a firearm in relation to a crime of violence and is serving an aggregate sentence of 360 months in prison. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion challenging this sentence. Cosner asserts that his trial counsel rendered ineffective assistance by failing to ensure that he was aware of the proper statutory range at the time of his plea negotiations and by failing to advise him at the time of plea negotiations of

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the guidelines range that he would face if he went to trial on both counts. Although Cosner raised other claims in his § 2255 motion, he does not brief those issues before this court, and they are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, Cosner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because the district court rejected Cosner’s claims on their merits, he “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Cosner has not made the required showing. Accordingly, the motion for a COA is DENIED.

A handwritten signature in black ink, appearing to read 'SKD', followed by a long horizontal line extending to the right.

STUART KYLE DUNCAN
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

CHRIS EUGENE COSNER

MOVANT

v.

No. 1:15CR96-SA-DAS

UNITED STATES OF AMERICA

RESPONDENT

MEMORANDUM OPINION

This matter comes before the court on the motion [93] of Chris Eugene Cosner to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The government has responded [98] to the motion; Cosner has replied [99], and the matter is ripe for resolution. For the reasons set forth below, the instant motion to vacate, set aside, or correct sentence will be denied.

Habeas Corpus Relief Under 28 U.S.C. § 2255

The writ of *habeas corpus*, a challenge to the legal authority under which a person may be detained, is ancient. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U.L.Rev. 983 (1978); Glass, *Historical Aspects of Habeas Corpus*, 9 St. John's L.Rev. 55 (1934). It is "perhaps the most important writ known to the constitutional law of England," *Secretary of State for Home Affairs v. O'Brien*, A.C. 603, 609 (1923), and it is equally significant in the United States. Article I, § 9, of the Constitution ensures that the right of the writ of *habeas corpus* shall not be suspended, except when, in the case of rebellion or invasion, public safety may require it. *Habeas Corpus*, 20 Fed. Prac. & Proc. Deskbook § 56. Its use by the federal courts was authorized in Section 14 of the Judiciary Act of 1789. *Habeas corpus* principles that developed over time in both English and American common law have since been codified:

The statutory provisions on *habeas corpus* appear as sections 2241 to 2255 of the

1948 Judicial Code. The recodification of that year set out important procedural limitations and additional procedural changes were added in 1966. The scope of the writ, insofar as the statutory language is concerned, remained essentially the same, however, until 1996, when Congress enacted the Antiterrorism and Effective Death Penalty Act, placing severe restrictions on the issuance of the writ for state prisoners and setting out special, new *habeas corpus* procedures for capital cases. The changes made by the 1996 legislation are the end product of decades of debate about *habeas corpus*.

Id.

Section 2255 Proceedings

Section 28 U.S.C. § 2255 permits an inmate serving a sentence after conviction of a federal crime “to move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). As with the writ of *habeas corpus*, see 28 U.S.C. §§ 2241, 2254, a § 2255 motion sets forth only four bases on which a motion may be made: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is “otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). Thus, a prisoner must claim either a constitutional violation or want of subject matter jurisdiction to invoke 28 U.S.C. § 2255. In the absence of constitutional or jurisdictional defects, a federal prisoner may invoke § 2255 only if the error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice.” *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

The district court must first conduct a preliminary review of a section 2255 motion, and “[i]f it plainly appears from the motion, any attached exhibits, and the record of the prior proceeding that the moving party is not entitled to relief, the judge must dismiss the motion.” Rules Governing Section 2255 Proceedings, Rule 4(b). If the motion raises a non-frivolous claim to relief, the court must order the Government to file a response or to take other appropriate action. *Id.* The judge may then require

the parties to expand the record as necessary and, if good cause is shown, authorize limited discovery.

Rules Governing Section 2255 Proceedings, Rules 6–7.

After reviewing the government’s answer, any transcripts and records of prior proceedings, and any supplementary materials submitted by the parties, the court must decide whether an evidentiary hearing is warranted. *Rules Governing Section 2255 Proceedings*, Rule 8. Under the statute, an evidentiary hearing must be held unless “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). However, the court need not hold an evidentiary hearing if the prisoner fails to produce “independent indicia of the likely merit of [his] allegations.” *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) (quoting *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998)).

Ultimately, the petitioner bears the burden of establishing his claims of error by a preponderance of the evidence. See *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980). For certain “structural” errors, relief follows automatically once the error is proved. See *Burgess v. Dretke*, 350 F.3d 461, 472 (5th Cir. 2003). For other errors at the trial court level, the court may grant relief only if the error “had substantial and injurious effect or influence” in determining the outcome of the case. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); see also *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) (applying *Brecht*’s harmless error standard in a § 2255 proceeding). If the court finds that the prisoner is entitled to relief, it “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

Facts and Procedural Posture¹

On August 26, 2015, a grand jury in the Northern District of Mississippi returned an indictment charging Chris Eugene Cosner with Armed Bank Robbery and Brandishing a Firearm During a Crime of Violence. Doc. 1. On August 31, 2015, the Federal Public Defender's Office was assigned to represent Cosner and Assistant Federal Defender George Lucas subsequently entered a notice of appearance as defense counsel. Doc. 7.

On March 15, 2016, the United States filed a motion to amend or substitute penalties in the case, which was granted on the same day. Doc. 25. This substitution amended the notice of penalties for Count Two from 30 years to life and corrected the notice to seven years to life. *Id.*

On March 21, 2016, Cosner filed a motion to appoint new counsel and to continue the trial scheduled for March 28, 2016. Docs. 26, 27.

On March 28, 2016, a jury was impaneled, and the trial commenced. Tr., Vol. 2, p. 85. The jury returned a verdict of guilty on Counts One and Two on March 30, 2016. Doc. 36.

On August 3, 2016, defense counsel filed a motion to set aside the verdict, and the government responded on August 18, 2016. Doc. 40, 43. A hearing was held on that motion on September 15, 2016, and the court denied the motion on September 20, 2016, with a memorandum opinion. Docs. 44, 45, 46.

On September 29, 2016, the court sentenced Cosner to 360 months in prison: 276 months on Count One and 84 months on Count Two – to run consecutively. Doc. 54.

¹ The court has drawn the facts and procedural posture from the Government's response to the instant motion to vacate, set aside, or correct sentence, as they are both well-documented and uncontested.

Cosner filed a notice of appeal on October 11, 2016. Doc. 55. On October 25, 2016, defense counsel moved to withdraw, and new counsel was appointed on November 4, 2016. Docs. 60, 61.

After briefing by both Cosner and the United States, the Fifth Circuit Court of Appeals issued an opinion on July 5, 2017, affirming the judgment of the District Court. Doc. 73, 74.

Cosner filed a Motion to Vacate under 28 U.S.C. § 2255 on November 8, 2018, and on January 23, 2019, the court issued an order for the United States to respond. Docs. 75, 80.

The United States responded to that Motion to Vacate on March 19, 2019, and conceded that there was no evidence that Cosner's appellate counsel advised him of his right to appeal the judgment of the Fifth Circuit Court of Appeals to the United States Supreme Court. Doc. 82. The United States further agreed that Cosner should have counsel appointed for the purpose of seeking a Fifth Circuit affirmance on his direct appeal and filing a Writ of Certiorari to the U.S. Supreme Court. *Id.*

On June 12, 2020, this court transferred the case to the Fifth Circuit Court of Appeals and on April 28, 2021, the Fifth Circuit affirmed the judgment of the District Court. Docs. 84, 91. On January 11, 2022, the U.S. Supreme Court denied Cosner's Writ of Certiorari. Doc. 92.

Cosner then filed another motion [93] to vacate sentence under 28 U.S.C. § 2255, in which he presents the following grounds for relief:

(1) Ineffective assistance of counsel:

- a. Trial counsel provided ineffective assistance by failing to inform Cosner of the correct penalties for his charge under § 924(c) during plea negotiations in 2016;
- b. Trial counsel failed to investigate witnesses' statements, which would have produced exculpatory evidence, which would have aided the defense during trial or resulted in an acquittal;
- c. Trial counsel failed to have exculpatory evidence tested for composition, which would have shown Cosner to be innocent;

- d. Trial counsel failed to seek a hearing on Cosner's motion to dismiss his trial counsel before jury selection;
 - e. Trial counsel failed to move for an acquittal of the § 2113(d) charge regarding a destructive device at the close of the government's case.
- (2) Government misconduct:
- a. The government violated Cosner's Sixth Amendment rights by not clarifying the maximum and minimum penalties as Cosner's charges under § 924(c);
 - b. The government violated Cosner's due process rights under the Fourteenth Amendment by knowingly permitting the presentation of false evidence as to the testimony of Captain Joshlin and Chief Bailey, which deceived the court and the jury.
- (3) Errors by the trial court:
- a. The trial court erred in not setting Cosner's motion to dismiss his counsel before the jury was selected; Cosner believes that counsel was not prepared to proceed to trial, denying Cosner the right to a fair trial;
 - b. The trial court erred in denying Cosner's motion for judgment of acquittal in violation of the Fifth Amendment;
 - c. The trial court erred by running Cosner's two periods of incarceration consecutively, contrary to United States Sentencing Guideline 4B1.1(C)(2)(3), as set forth in the Presentence Investigation Report.
- (4) Section 924(c) is unconstitutionally vague because the statute does not set forth how mandatory penalties apply under the sentence enhancements of USSG 4B1.B as to his conduct.

Ineffective Assistance of Counsel²

The Movant's claims regarding ineffective assistance of counsel are without substantive merit. The court must address claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove that

² In the interest of brevity, the court also addresses several of Cosner's underlying substantive grounds for relief in the instant section discussing his related claims of ineffective assistance of counsel.

defense counsel was ineffective, the Movant must show that counsel's performance was deficient – and that the deficiency resulted in prejudice to his defense. Under the deficiency prong of the test, the Movant must show that counsel made errors so serious that he was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. The court must analyze counsel's actions based upon the circumstances at the time – and must not use the crystal clarity of hindsight. *Lavernia v. Lynaugh*, 845 F.2d 493, 498 (5th Cir. 1988). The Movant “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689 (citation omitted). To prove prejudice, the Movant must demonstrate that the result of the proceedings would have been different or that counsel's performance rendered the result of the proceeding fundamentally unfair or unreliable. *Vuong v. Scott*, 62 F.3d 673, 685 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 557 (1995); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); *Sharp v. Johnson*, 107 F.3d 282, 286 n.9 (5th Cir. 1997).

Grounds 1(a) and 2(a): Recitation of Incorrect Maximum Penalties

Cosner first argues that he was not provided the correct minimum and maximum penalties for charged offenses during plea negotiations – resulting in prejudice to him and a violation of his Sixth Amendment Rights. In Ground 1(a) he couches the argument in terms of ineffective assistance of counsel; in Ground 2(a) he argues that the initial incorrect minimum penalty, standing alone, violates his right to due process. Neither ground for relief has merit.

The original penalties for Count Two (using, possessing, or brandishing a firearm during the commission of a crime of violence) incorrectly showed a minimum of 30 years and a maximum of life imprisonment; however, those penalties were later corrected on March 15, 2016, and properly listed as 7 years to life.. Although Cosner was charged in Count One with using an explosive device and a firearm to rob a bank, Count Two only mentioned that he used, possessed, and brandished a firearm

during the commission of a crime of violence. As such, the penalties for Count Two were amended to correctly show a minimum of seven years and maximum of life imprisonment – consecutive to any other sentence – for brandishing a gun during the commission of a crime of a violence.

The original penalty page, indeed, reflected an erroneously high maximum possible sentence that Cosner faced; however, neither this error nor failure by defense counsel to recognize it and discuss it with his client constitute ineffective assistance of counsel. The corrected penalties benefitted Cosner considerably, and he was advised of the corrected penalties before trial.

Cosner's argument that he would have pled guilty had he been aware of the corrected penalties in this case is both illogical and unsupported in the record. Generally speaking, a greater potential sentence is more of an inducement to plead guilty than a lesser one. In this case, the original erroneous penalty was substantially greater (30 years to life) than the corrected one (7 years to life). Hence, all things being equal, the higher erroneous original sentence would have been a more powerful inducement to plead guilty (in exchange for a lesser sentence) than the lower corrected one. In any event, the correction of the range of sentences renders moot any objection Cosner may raise.

In addition, Cosner consistently pushed to go to trial throughout the proceedings. In fact, in January of 2016, a plea agreement was provided to Cosner's counsel that proposed the outright dismissal of Count Two in exchange for Cosner's plea of guilty to Armed Bank Robbery as charged in Count One. ROA. 876, 878, 879-881.³ Under that plea agreement, the incorrect penalties that Cosner

³ The Government has referenced page numbers of the Record on Appeal ("ROA") throughout its brief; however, the Record on Appeal in this case (including the plea agreement mentioned here) is not available on this court's docket. Nonetheless, as neither party disputes the contents of the plea agreement, the court has taken the terms of the agreement from the Government's Response to the instant motion. The court has otherwise referenced transcripts and other documents necessary to support this memorandum opinion from their locations in the docket of this case.

complains of in Count Two would not have been at issue given its dismissal. Significantly, the plea agreement reflected that Cosner would have faced a maximum sentence of 25 years, rather than life. Nonetheless, even when presented with a chance to plead guilty to Count One – and avoid an additional lengthy consecutive sentence in Count Two – Cosner rejected that plea and insisted on proceeding to trial. It is thus clear that the erroneously high penalties initially listed in Count Two had no bearing on his decision to proceed to trial.

These facts also undermine Cosner's claims that he would have pled guilty if he had been aware that he would be considered a career offender who faced a sentence of 360 months to life. He states that he believed he faced 25 years on the armed bank robbery and seven years on the 18 U.S.C. § 924(c) – for a total of 32 years (384 months). He argues that if he had been aware that he was facing a triple digit sentence of 360 to life, he would “take the plea in a heartbeat”:

So I didn't really have any information as far as 360 to life when it came to a plea trial agreement. That information was not available until I found out Friday. So I had to make a decision off what I had 25 years plus seven consecutively was 32 years.

The government offers a double[-]digit plea agreement. I'm looking at double digits. To me they didn't offer me enough to not – to give up my right to a trial. And that[']s what I [had] been telling George Lucas all this time. They have not been giving me enough to give up that right. I'm looking at double digits. I might as well take the trial. If you['re] offering me triple digits to life I'm going to take the plea agreement in a heartbeat.

1:15-cr-00096-SA-DAS, Doc. 95, Page ID # 1221.

Cosner cites the cases of *Beckham v. Wainwright*, 639 F.2d 263 (5th Cir. 1981) and *Teague v. Scott*, 60 F.3d 1167 (5th Cir. 1995) to support his argument that he received ineffective assistance of counsel. Neither case, however, supports his position.

In *Beckham*, the court found ineffective assistance after trial counsel advised a defendant that he faced a maximum of five years in prison if convicted at trial, when he was ultimately sentenced to

50 years. *Beckham*, 639 F.2d at 267. Similarly, the petitioner in *Teague* argued that his counsel advised him that he faced a maximum sentence of 20 years – when he ultimately received a 99-year sentence. *Teague*, 60 F.3d at 1171. In that case, the court found sufficient evidence that Teague was not advised of the maximum sentence he could receive if he went to trial. *Id.* at 1171-72. The court further found that defense counsel’s failure to provide Teague with the correct maximum likely explained why he rejected a plea deal of 25 years, and that there was sufficient evidence Teague was prejudiced by defense counsel’s failure to advise him of the correct maximum. *Id.*

Cosner’s argument fails because the facts of the instant case are contrary to those in *Teague* and *Beckham*. In those cases, the defendants received terms of incarceration far *exceeding* the maximum sentence counsel erroneously said they could receive – 45 years more in *Beckham* and 79 years more in *Teague*. However, in the instant case, the court imposed a sentence totaling two years *less* than the maximum sentence he believed he might face.

In sum, the corrected sentencing range in Count Two renders the instant claim moot. In addition, even if the claim were not moot, it is without substantive merit. Cosner repeatedly showed that he wished to proceed to trial – even when the government offered a plea excluding Count Two – which excluded the erroneously high penalty provision. As the underlying claim is without merit, counsel performed effectively in choosing not to raise it as an issue during his criminal proceedings in trial court.

Grounds 1(b), 1(c): Failure to Present Exculpatory Evidence on Cosner’s Behalf

Cosner next argues that trial counsel was ineffective for failing to present exculpatory evidence on his behalf. Cosner argues that trial counsel failed to conduct a thorough pretrial investigation which would have produced exculpatory evidence supporting a Rule 29 acquittal. He believes that trial counsel should have conducted a more thorough pretrial investigation and interviews

to challenge a teller's description of the pistol used in the robbery, as well as statements that the robber had star tattoos on his face – and to challenge evidence regarding firearms found miles away in his son's RV. Cosner also claims that counsel should have requested tests to determine the composition of the red substance found on the latex gloves he was wearing when law enforcement found him – and that counsel failed to note that other witnesses did not observe the bank robber wearing gloves.

Cosner complains that counsel did not more thoroughly cross-examine a victim teller about a written statement she provided on the day of the robbery – and her description of the gun used during the robbery. Doc. 95, p. 16. Cosner notes that the prosecutor never asked the teller to identify the gun found at the scene as the one the suspect used during the robbery. *Id.* at 16-17. He argues that counsel should have cross-examined the teller more meticulously to show that her written statement described the gun as two-toned (black and silver), though the gun seized was, instead, black and brown. *Id.* Cosner also suggests the counsel should have cross-examined the teller more extensively about her description of the robber as having star tattoos on his cheeks. *Id.* at 16. He further argues that a second silver and black gun found during the search of his RV shows that the gun in the woods at the scene could well have been planted to frame him. *Id.* at 16-17. Given the mountain of evidence supporting the jury's guilty verdict, these arguments are without substantive merit.

As outlined in the statement of facts, evidence of Cosner's guilt was, to say the least, overwhelming. First, a dentist and his patient saw Cosner (who had already donned his disguise) hiding in the bushes outside the dentist's office – which stood close to the bank. Tr., Vol. 2, p. 128-29. They called the police as Cosner left the bushes, and they lost sight of him. *Id.* The dentist retrieved a pistol from his truck and spotted Cosner leaving the bank. *Id.* Cosner had entered the bank and exited with the money two to three minutes later. *Id.* The dye pack exploded as the dentist looked on. *Id.* Multiple witnesses saw Cosner fleeing the bank, and he was apprehended minutes later while hiding

in a small, wooded area near the bank. Tr., Vol. 3, p. 227-235. When officers first began tracking him, he was seen with a gun – and wearing a disguise. *Id.* at 249, 279. Multiple witnesses saw the red dye pack explode as he fled the bank. Tr., Vol. 2, p. 129, 199-200; Tr., Vol. 3, p. 229, 249, 304. The robber then dropped a bag of money stained with red dye in the area, and Cosner (the only person seen in the area – which virtually never sees foot traffic) was wearing latex gloves covered in a red substance when law enforcement located him a few minutes later. Tr., Vol. 2, p. 134; Vol. 3, p. 239, 242, 253, 310, 330. By the time officers approached Cosner hiding in the woods, he had discarded most of the disguise, and pieces of it were found all around him. *Id.* Officers did not initially find the gun; however, Sheriff Johnson questioned Cosner, and he pointed to the area where he dropped the gun. Tr. Vol. 4, p. 448-49. Officers located the gun precisely where Cosner said it would be. *Id.* In addition, Cosner knew that the pipe bomb used in the robbery was a convincing fake containing chalk, rather than an explosive. Tr., Vol. 4, p. 447-48. He readily confessed committing the crime while still at the scene. Tr., Vol. 3, p. 245; Vol. 4, p. 447-48. An empty gun box that matched the make, model, *and serial number* of the gun found in the woods was located in the Cosner's motor home. Tr., Vol. 3, p. 383-87.

Nothing about these facts suggested that a gun was planted to frame the Cosner. The evidence also leaves no doubt as to the composition of the red substance found on the gloves he was wearing – or the identity of the robber.⁴ Defense counsel cross examined the victim teller about the description

⁴ Cosner claims in Ground 2(b) that the prosecution “knowingly permitted the presentation of false [testimony]” that the red substance on his gloves came from the exploding dye packs. Two witnesses gave testimony to that effect, and Cosner argues that the witnesses could not have known the source of the red substance because no one conducted tests to determine its composition. However, given very brief period between the explosion of the red dye packs and Cosner's capture (with red substance all over his gloves), the multiple eyewitnesses who saw the packs explode – *and*

of the gun that she provided to FBI in a written statement – as well as her statement that the robber had star tattoos on his face. Tr. Vol. 2, p. 199. She confirmed her statement and answers and testified she had tried to be observant. *Id.* Additional cross-examination would not likely have changed her answers – and could well have appeared to the jury that counsel was bullying a very emotional, distraught, and sympathetic victim. Nonetheless, counsel used the teller’s answers during his cross examination, arguing multiple times in closing that reasonable doubt existed because Cosner had no star tattoos on his face. Tr., Vol. 4, p. 489-497. While Cosner may have chosen a different strategy, these facts do not meet the *Strickland* test for ineffective assistance of counsel. *See Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993) (the court must not second-guess counsel’s strategic choices, given the nearly “infinite variety of possible trial techniques and tactics available.”)

Given this overwhelming evidence, trial counsel had no reason to seek testing of the red dye on the gloves that Cosner was wearing; as such, counsel properly chose not to request such tests. *See Yohey v. Collins*, 985 F.2d. at 228 (where evidence of guilt is overwhelming, defendant’s conclusory allegations that expert testimony might have changed outcome of trial does not establish ineffective assistance of counsel).

In this ground for relief, Mr. Cosner has focused on the few droplets of evidence not tending to support the guilty verdict – while ignoring the tidal wave of evidence supporting that verdict. Cosner’s case was tried before a jury of his peers. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. (emphasis added). The requirement of

Cosner’s confession at the scene – counsel’s decision not to seek testing of the substance was reasonable. Thus, Ground 2(b) is without substantive merit.

jury trial in a criminal case is applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). It is the province of the jury to determine the facts in a criminal case – and apply to those facts the law given by the court through jury instructions. Indeed, “[j]uries are typically called upon to render unanimous verdicts on the ultimate issues of a given case.” *McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S. Ct. 1227, 1236, 108 L. Ed. 2d 369 (U.S. 1990) (plurality opinion) (Blackmun, J., concurring). The jury, as the trier of fact in this case, weighed the evidence – including the allegedly exculpatory evidence Cosner highlights in his § 2255 motion – and found him guilty.

The problem Cosner faces with these arguments is that *the evidence against him was overwhelming*. He was seen carrying a gun and wearing a disguise by multiple witnesses as he fled the bank carrying a gun and a bag of money into the nearby woods. Multiple witnesses saw the dye pack explode as he fled. When officers surrounded him in the woods, the disguise and the dye-stained bag of money were nearby; the gun was located where Cosner indicated; he was wearing dye-stained gloves, and he immediately confessed to robbing the bank. The jury decided that the minor inconsistencies Cosner points out did not overcome the devastating evidence of his guilt; as such, he cannot show that counsel’s representation prejudiced his legal position, and his claim of ineffective assistance of counsel is without merit.

Grounds 1(d), 3(a): Failure to Seek a Hearing on the Defendant’s Motion to Appoint New Counsel Before Jury Selection

Cosner alleges in Grounds 1(d) and 3(a) of his motion that the court erred in failing to hold a hearing on his motion to appoint new counsel before a jury was impaneled. He couches the issue as a claim for ineffective assistance of counsel in Ground 1(d) – and as the court’s error in Ground 3(a).

Neither ground for relief has merit, however, as the decision was squarely within the court's discretion, and denying the motion did not constitute error.

On March 21, 2016, about a week before the scheduled trial date, the court received a motion from Cosner to replace appointed counsel and continue the trial. On March 28, 2016, Cosner appeared with his counsel, Assistant Federal Public Defender George Lucas, for trial. Once a jury was selected, the court heard arguments and statements from the parties on the motion to appoint new counsel. Tr., Vol. 2, p. 87-96. After questioning Cosner about the timing and reasons for his motion, the court queried Cosner about his ability to work with appointed counsel during the jury selection process and going forward at trial. *Id.* The court noted that the motion was filed within two weeks of trial, that there did not appear to be a complete breakdown in communications – and found that it was in Cosner's best interests and the best interests of the case for him to go forward represented by attorney Lucas. *Id.* The court notes that counsel ultimately did an admirable job defending his client in the face of overwhelming evidence of guilt.

Though “an indigent criminal defendant has a right to be represented by counsel, he does not have a right to be represented by a particular lawyer, or to demand a different appointed lawyer except for good cause.” *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973). Good cause includes “a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.” *Id.* A district court's denial of a motion for new counsel is reviewed for abuse of discretion. *Id.*

In this case, the court did not commit error in holding a hearing on Cosner's motion for new counsel after the jury was impaneled – or by denying Cosner's motion. The court is familiar with former Assistant Federal Public Defender George Lucas; he has ably represented criminal defendants on a regular basis over the course of years. The court questioned Mr. Cosner during the hearing about

the reasons for his motion to appoint new counsel and noted that, while Cosner disagreed with Lucas and felt he had been untruthful, they had conferred during jury selection, discussed issues – and Lucas listened to Cosner’s views on those issues.⁵ Tr., Vol. 2, p. 96. There was no “complete breakdown in communication.” As such, the court’s denial of Cosner’s motion to substitute counsel was not error; the hearing was timely, and counsel’s decision not to seek an earlier hearing on the motion was reasonable. Cosner’s claims for relief in Grounds 1(d) and 3(a) are without substantive merit.

Ground 1(c): Failure to Seek Acquittal of the § 2113(d) Destructive Device Charge at the Close of the Prosecution’s Case

Cosner alleges that defense counsel was ineffective for failing to seek a judgment of acquittal under Fed. R. Crim. P. 29 at the conclusion of the Government’s case because the pipe bomb used in the robbery did not qualify as an “explosive device” under 18 U.S.C. § 841 (d). This claim is contradicted in the record, as counsel, indeed, moved for judgment of acquittal under Rule 29 at the conclusion of the Government’s case, arguing

Your Honor, at this point, the Government having rested, we would move for a directed – or judgment of acquittal under Rule 29 of the Federal Rules of Civil (sic) Procedure.

Your Honor is aware of the standard. We submit that no reasonable jury could find the defendant guilty at this point based on the evidence that’s been produced. We believe that the Government has not proven that the defendant intentionally took money from the person or from the presence of bank employees that the money belonged to or was in the possession of a federally-insured bank at the time of the taking; and the defendant took the money by means of force and violence or by means of

⁵ Cosner believed that Lucas had previously deceived him because Lucas stated that he had been in Aberdeen earlier that day for court and had discussed the status of the upcoming trial with the court. Tr., Vol. 2, p. 91-92. Cosner did not believe that the court would have discussed the trial with defense counsel because of Rule 11. *Id.* The court confirmed for Cosner that there was a discussion between the court, defense counsel, and the prosecution about the status of the trial, but clarified that the parties did not discuss the merits of the case. *Id.* Despite this assurance, Cosner continued to argue that his counsel’s assertions that the court had asked him about the status of the trial had “posed a flag” for him and he had walked out on counsel. *Id.*

intimidation; and that the defendant assaulted some person or put in jeopardy the life of some person by the use of a dangerous weapon or destructive device while engaged in taking the bank's robbery – money.

At this time, we do not believe the Government has produced enough evidence for the – for a reasonable jury to find the defendant guilty of these charges or of these elements. Thank you, Your Honor.

Tr., Vol. 4, ps. 456-57.

Though defense counsel did not focus exclusively on the destructive device at trial, such a motion would have been pointless, as the armed bank robbery count alleged (and the evidence at trial proved) that a firearm was involved, the use of which *also* constituted a violation of 18 U.S.C. § 2113(d). In addition, the court gave a jury instruction that included the definition of “destructive device” which read:

The term destructive device means any explosive bomb or any device similar to an explosive bomb or any combination of parts either designed or intended for use in converting any device into an explosive bomb or any combination of parts from which a destructive device, such as an explosive bomb, may be readily assembled.

Tr., Vol. 4, p. 477.

It is not necessary that a weapon be operational in order to qualify as a “destructive device” under 18 U.S.C. § 2113(d). The Fifth Circuit has relied upon the analogy of an unloaded gun; a gun used in connection with and at the scene of a bank robbery is *as a matter of law* a dangerous weapon, whether loaded or not, and those on the scene are placed in an objective state of danger. *United States v. Parker*, 542 F.2d 932, 934 (5th Cir. 1976), *cert. denied*, 430 U.S. 918, 97 S.Ct. 1333, 51 L.Ed.2d 597 (1977) (citing *Baker v. United States*, 412 F.2d 1069, 1072 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509 (1970)); *see also United States v. Ruiz*, 986 F.2d 905, 908 (5th Cir. 1993).

Just as an unloaded gun is indistinguishable in appearance to a loaded one, the incomplete pipe bomb

in the present case was indistinguishable in appearance to an operational one – even to an experienced EOD team.

Based on this definition and the testimony that was presented at trial, it is clear that the “pipe bomb” used during the robbery of the First American National Bank on July 1, 2015, qualifies as a “destructive device” under § 2113(d) – even though it was not operational at the time of the robbery. It gave the appearance of a bomb to even experienced bomb technicians, and the responding technicians testified that it would have been fully functional with the addition of only two readily obtainable parts that could have been added in less than two minutes (though the evidence did not suggest that Cosner was in possession of the parts to complete the bomb at the time of the robbery).

Ground 3(b): The Trial Court Erred in Denying Cosner’s Rule 29 Motion for Acquittal

Cosner argues in Ground 3(b) that the court erred in denying his motion for acquittal under Fed. R. Crim. P. 29. He alleges that there are “no physical material evidence or witnesses that place petitioner in the bank during the robbery,” that no one stated that the robber wore gloves, gloves were not captured on the bank cameras, and that the witnesses who saw him outdoors did not notice any gloves. He notes that the composition of the red substance on the gloves he was wearing when arrested was never determined. As discussed at great length above, the evidence against Cosner was overwhelming – and included his confession. The court had no basis to grant a motion for judgment of acquittal; as such, this ground for relief is without merit.

Grounds 3(c) and 4: 18 U.S.C. § 924(c) Is Unconstitutionally Vague, and Cosner Thus Did Not Understand How the USSG Would Apply to His Conduct to Determine His Sentence

Cosner’s claims in Grounds 3(c) and 4 are intertwined; as such, the court will consider them together. Cosner argues in Ground 4 that 18 U.S.C. § 924(c) is unconstitutionally vague, difficult to comprehend and did not explain how the mandatory penalties would apply to his conduct or how

to understand. He also alleges that he was not aware that he faced a potential life sentence. However, Cosner previously raised this issue at sentencing, and he voiced proper understanding about the sentence he faced – and that he ultimately received. Sent. Tr., p. 3-10.

The initial notice of penalties attached to the Indictment incorrectly stated that Cosner faced a sentence of 30 years to life on Count Two because his crime of violence involved his use of a destructive device and brandishing of a firearm. Doc. 1. In March of 2016, those penalties were amended with defense counsel's consent to reflect the correct penalty range of seven years to life – because Count Two itself only mentioned Cosner's act of brandishing a gun during the bank robbery. Doc. 25.

At sentencing in this case, Cosner argued to the court that he was not aware he faced a potential life sentence on Count Two, despite the penalty provisions that had been provided to him listing life as the maximum term of incarceration.⁶ Sent. Tr., p. 3-10. He stated that he had not been aware of the career offender guidelines and the potential for a sentence of 360 months to life under “4B1-1C, Paragraph 2 and 3” of his presentence report. *Id.* He repeatedly told the court that he knew he could receive up to 25 years for armed bank robbery – and an additional seven years consecutive if he was convicted of brandishing the firearm during the robbery as charged in Count Two – for a potential sentence of 32 years (384 months). *Id.*

After hearing his arguments that he had been expecting up to 32 years – not the possibility of life imprisonment – the court informed him that his sentence was 30 years (less than the 32 years he believed to have been the maximum). Sent. Tr., p. 17-18. The court questioned Cosner about whether

⁶ As noted above, even the initial incorrect notice of penalties listed the maximum sentence of life.

he understood – and if this resolved his issue:

The Court:

The most you thought you could be sentenced was 32 years, and I'm sitting here telling you it's not going to exceed 32 years. Okay? Does that satisfy you and give you an explanation of –

The Defendant: Yes, Ma'am.

The Court: Okay.

Sent. Tr., p. 3-10. The court also noted that, given Cosner's age, "[thirty years] is, essentially, a life sentence" because he would be 88 years old upon release. Sent. Tr., p. 18.

For these reasons, Cosner's arguments that 924(c) is unconstitutional for vagueness are without merit. In addition, Cosner's argument that he was unaware of the career offender guideline's applicability to his case – or that it is also unconstitutionally vague – is moot, as his sentence fell within the range he expected upon conviction.

Conclusion

In sum, none of the Movant's grounds for relief has merit, and the instant motion to vacate, set aside, or correct sentence will be denied. A final judgment consistent with this memorandum opinion will issue today. The pending pro se motion to exceed page limit [94] shall be TERMINATED on the docket.

SO ORDERED, this, the 6th day of August, 2025.

/s/ Sharion Aycock
SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CHRIS EUGENE COSNER

MOVANT

v.

No. 1:15CR96-SA-DAS

UNITED STATES OF AMERICA

RESPONDENT

FINAL JUDGMENT

In accordance with the memorandum opinion issued today in this cause, the instant motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is **DENIED**.

SO ORDERED, this, the 6th day of August, 2025.

/s/ Sharion Aycock

SENIOR UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**