No. 04-692

In the Supreme Court of the United States

CARLTON L. CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's denial of petitioner's motion under 28 U.S.C. 2255 on a claim of ineffective assistance of counsel on the alternative ground, raised *sua sponte*, that petitioner could not establish prejudice from counsel's allegedly deficient performance.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter*, but is reprinted in 101 Fed. Appx. 160. The order of the district court (Pet. App. 15-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2004. A petition for rehearing was denied on August 23, 2004 (Pet. App. 12). The petition for a writ of certiorari was filed on November 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of one count of armed bank robbery, in violation of 18 U.S.C. 2113(a); one count of carjacking, in violation of 18 U.S.C. 2119(1); and two counts of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Following a separate jury trial, he was also convicted of one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). He was sentenced to a total of 430 months of imprisonment, to be followed by five years of supervised release, and was ordered to pay $40,299.76 in restitution. On direct review, the court of appeals affirmed. App., *infra*, 10a-18a. Petitioner then filed a motion to vacate his convictions and sentence under 28 U.S.C. 2255. The district court initially denied the motion, App., *infra*, 5a-9a, but the court of appeals vacated and remanded, *id.* at 1a-2a. On remand, the district court again denied the motion, Pet. App. 15-29, and the court of appeals affirmed, *id.* at 1-11.

1. On the morning of April 18, 1997, three masked men, armed with handguns, robbed a bank in Indianapolis. One of the robbers carried a pink and white pillowcase, into which he put around $28,000 in cash (including $250 in bills with recorded serial numbers). The robbers escaped in a Cadillac; two bystanders, James Nulf and Donna Dauby, followed the robbers in separate cars. The robbers stopped a short distance away; two of the robbers dropped off the third (petitioner) and drove away in the Cadillac. Dauby lost sight of the robbers when they stopped their car. When Dauby again caught sight of the Cadillac, a Chevrolet Suburban driven by petitioner swerved around the

Cadillac, crashed into Dauby's truck, and then careened into the back of a neighboring house. Petitioner then broke into the nearby home of Mary and William Howe, stole the keys to their Oldsmobile at gunpoint, and drove away in the Oldsmobile. Pet. App. 2; App., *infra*, 11a-12a; C.A. App. 3-4.

When police recovered the Suburban, they found a pink and white pillowcase with around $16,000 in cash (including the bills with the recorded serial numbers), along with a black mask and a roll of duct tape. They also found an Indiana identification card with petitioner's picture, bearing the name "Jesse James," and various car-repair documents, some bearing the name "Troy Smith." They also found six fingerprints, later identified as petitioner's, on the inside of the driver's window. When police recovered the Cadillac, they found a piece of duct tape, the end of which matched the end of the roll found in the Suburban. Pet. App. 2; App., *infra*, 11a-12a; C.A. App. 4.

Two weeks later, police went to arrest petitioner at an apartment that he was leasing under the name of Michael Troy Smith. When petitioner left the apartment in his girlfriend's car, police followed him; when they stopped him, he pointed a gun at them and then drove away at high speed. After police finally apprehended petitioner, they found on his person an Indiana driver's license with his picture, bearing the name "Troy Smith." In searching the car, police also found a gun, which witnesses later testified resembled the gun used in the bank robbery and carjacking. Pet. App. 2-3; App., *infra*, 12a-13a; C.A. App. 5.

The police sought to determine whether the Howes could identify the individual who broke into their home and stole their car. Although William Howe could not identify the intruder, Mary Howe (who had a better

view during the incident) tentatively identified petitioner in a photographic array and from the picture on the Indiana identification card found in the Suburban. App., *infra*, 12a; C.A. App. 4.

2. a. Petitioner was indicted in the Southern District of Indiana on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a); one count of carjacking, in violation of 18 U.S.C. 2119(1); two counts of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). Petitioner moved for a separate trial on the last two counts in order to exclude evidence concerning his criminal history from his trial on the other counts. The district court granted petitioner's motion. The government subsequently dropped one of the last two counts. Before and during the trial on the first four counts, petitioner moved to suppress the eyewitness identification testimony by Mary Howe. The district court denied those motions, and Mary Howe subsequently testified that she was certain that petitioner was the individual who had broken into her home and stolen her Oldsmobile. After separate jury trials, petitioner was convicted of all of the five remaining counts. He was sentenced to 430 months of imprisonment, to be followed by five years of supervised release, and was ordered to pay $40,299.76 in restitution. Pet. App. 3; App., *infra*, 12a, 13a, 15a.

b. On direct review, the court of appeals affirmed. App., *infra*, 10a-18a. Petitioner's sole contention on appeal was that the district court erred by taking insufficient curative measures when petitioner's father referred during his testimony to petitioner's previous incarceration. *Id.* at 15a. The court of appeals noted that the district court had immediately stricken the

testimony and later "specifically and emphatically" instructed the jury to disregard it. *Id.* at 16a. The court then held that, "[e]ven if the trial court's striking of the comment and instructions to the jury did not fully cure the impact of [the father's] comment, the evidence of [petitioner's] guilt was so overwhelming that there is no doubt that the jury would still have convicted [petitioner] if the comment had not been made." *Id.* at 17a. The court cited the numerous items found in the Suburban; Mary Howe's identification of petitioner; and the gun found when petitioner was eventually arrested. *Ibid.* The court concluded that "the record [was] replete with evidence of [petitioner's] involvement with the bank robbery and carjacking," and that any error in petitioner's father's testimony was therefore harmless. *Id.* at 17a-18a.

3. a. Petitioner filed a motion to vacate his convictions and sentence under 28 U.S.C. 2255, alleging that his trial counsel was constitutionally ineffective because (1) trial counsel had failed to move for a judgment of acquittal on the bank-robbery count; (2) counsel had failed to object to the imposition of a sentence beyond the statutory maximum on the carjacking count; and (3) counsel had failed to object to a two-level upward adjustment for obstruction of justice under Sentencing Guidelines § 3C1.2. App., *infra*, 7a-8a. The district court denied the motion. *Id.* at 5a-9a. The court reasoned that (1) any motion for a judgment of acquittal would have been futile because, as the court of appeals had previously noted, "the record [was] replete with evidence of [petitioner's] involvement with the bank robbery"; (2) petitioner's sentence did not actually exceed the statutory maximum; and (3) under then-prevailing Seventh Circuit law, counsel's failure to object to the two-level upward adjustment was not

prejudicial because it had an insignificant effect on petitioner's overall sentence. *Id.* at 6a-8a.

b. The court of appeals initially denied petitioner's motion for a certificate of appealability. App., *infra*, 3a-4a. After petitioner moved for reconsideration, however, this Court held in *Glover* v. *United States*, 531 U.S. 198 (2001), that any increase in a Guidelines sentence is prejudicial for purposes of a claim of ineffective assistance at sentencing. The court of appeals thereafter granted petitioner's motion for reconsideration, granted a certificate of appealability, summarily vacated the decision below, and remanded for reconsideration in light of *Glover*. App., *infra*, 1a-2a.

4. a. On remand, petitioner filed a "Pro Se Petition (And Accompanying Brief) To Present Newly Discovered Evidence Of Counsel's Ineffective Assistance," in which he alleged that counsel was ineffective for three additional reasons: (1) that appellate counsel had failed to challenge the district court's decision not to suppress Mary Howe's identification of petitioner; (2) that trial and appellate counsel had failed to challenge the indictment as deficient for providing inadequate notice of the offense of aiding and abetting; and (3) that trial and appellate counsel had failed to contend that carrying a firearm during and in relation to a crime of violence was a lesser included offense of armed bank robbery. Pet. App. 5, 17 n.2.

The district court again denied petitioner's Section 2255 motion. Pet. App. 15-29. As a preliminary matter, the court held that the only claim it could consider on remand was petitioner's claim, from his original motion, that trial counsel was ineffective in failing to object to the two-level upward adjustment for obstruction of justice, since that claim was the only one potentially affected by this Court's intervening decision in *Glover*.

Id. at 16-21. In so holding, the court rejected petitioner's contention that he was entitled to amend his original motion under Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 20 n.5. On the merits of the remaining claim, the court held that, although the two-level upward adjustment was incorrectly applied, it ultimately had no effect at all on petitioner's total offense level (and thus his sentencing range), because the adjusted offense level for another group of counts was higher than for the group affected by the adjustment. *Id.* at 24.[1]

b. The court of appeals granted a certificate of appealability on the issue "whether [petitioner] received ineffective assistance of counsel," and ordered the parties "also" to address whether "analysis of counsel's assistance properly may be limited to counsel's performance in just one aspect of the case." Pet. App. 13-14. In an unpublished, *per curiam* order, the court of appeals subsequently affirmed. *Id.* at 1-11. The court noted that, on appeal, petitioner had abandoned his original three claims of ineffective assistance and was pursuing only the additional claims advanced for the first time on remand. *Id.* at 6-7. The court reasoned that, "whether theories of ineffective assistance of counsel comprise one or multiple claims," petitioner was required to amend his Section 2255 motion in order to advance any new theories. *Id.* at 7. The court of

[1] For reasons not stated, the district court proceeded to consider yet another ineffective-assistance claim, advanced for the first time in briefing on remand: specifically, a claim that trial counsel should have objected to a three-level upward adjustment for assaulting a law enforcement officer in the course of committing the offense, on the ground that it constituted "double counting." Pet. App. 17 n.3, 25-26. The district court rejected this claim on the merits, *id.* at 25-28, as did the court of appeals, *id.* at 10-11.

appeals concluded that the district court had erred by holding that it lacked the discretion under Rule 15 to allow petitioner to amend his Section 2255 motion, though the court of appeals indicated that "[t]he lateness of [petitioner's] new submissions seems to be one reason why the district court could have acted within its discretion in not permitting an amendment." *Id.* at 9.

The court of appeals, however, ultimately affirmed the district court's denial of petitioner's Section 2255 motion on the alternative ground that "the proposed new theories are frivolous." Pet. App. 9. Specifically, the court held that (1) petitioner could not establish prejudice "when his attorney failed to object to unreliable witness [identification] testimony," because the court had previously concluded that overwhelming evidence supported his convictions; (2) aiding and abetting need not be pleaded in an indictment, and the statutory provision on aiding and abetting was in any event expressly cited in the bank-robbery count; and (3) the lesser-included-offense argument had been repeatedly rejected by other courts. *Id.* at 9-10.

ARGUMENT

Petitioner contends (Pet. 5-18) that the court of appeals violated due process by affirming the district court's rejection of his ineffective-assistance claim based on the alternative ground, raised *sua sponte*, that petitioner could not establish prejudice. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 5-12) that the court of appeals acted improperly by raising on its own, and

then deciding, a mixed question of law and fact. That contention is erroneous.

a. It is well established that an appellate court, including this Court, may affirm the decision of a lower court on any ground that the law and record permit. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 29-30 (1984); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970). The court of appeals acted consistently with that principle in affirming the district court's decision on the alternative ground that petitioner's additional ineffective-assistance claims, including his claim concerning the admission of the identification evidence, lacked merit. In order to establish ineffective assistance of counsel under the Sixth Amendment, a defendant must show both deficient performance and prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Based on the record —which it had previously reviewed on direct appeal— the court of appeals held that petitioner could not make that showing on his claim concerning the admission of the identification evidence, in light of the "overwhelming evidence" of his guilt. Pet. App. 10. The court of appeals properly exercised its appellate jurisdiction by affirming the district court's decision on a ground permitted by the law and record.

b. Nothing in *Singleton* v. *Wulff*, 428 U.S. 106 (1976), alters that conclusion. In *Singleton*, the district court dismissed the relevant count for lack of standing. *Id.* at 110-111. The court of appeals reversed, concluding not only that the plaintiffs had standing, but also (at the plaintiffs' urging) that the plaintiffs were entitled to

prevail on the merits. *Id.* at 111-112. This Court reversed and remanded, agreeing that the plaintiffs had standing but reasoning that the court of appeals had improperly exercised its jurisdiction by reaching the merits. *Id.* at 119-121.

As a preliminary matter, *Singleton* dealt only with the situation in which a court of appeals *reverses* a district court's decision on a ground not addressed below —not the situation, as here, in which a court of appeals *affirms* on such a ground. Even assuming that the reasoning of *Singleton* applies equally in the latter situation, however, the court of appeals' reasoning in this case is consistent with it. In *Singleton*, the Court seemingly recognized a presumption against resolving on appeal an issue not addressed below, based on the principle that parties should have the opportunity to offer all relevant evidence on the issue. 428 U.S. at 120. The Court, however, ultimately refused to adopt a general rule, concluding instead that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. And the Court specifically concluded that a court of appeals could resolve an issue not addressed below when "the proper resolution [of the issue] is beyond any doubt." *Ibid.* This case falls squarely into that category of cases, because the court of appeals expressly determined that petitioner's contention that he suffered prejudice from any failure to challenge the identification evidence was "frivolous." Pet. App. 10.[2]

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[2] Contrary to petitioner's suggestion (Pet. 12 n.5), the court of appeals stated only that "the proposed new *theories* [of ineffective assistance of counsel] are frivolous," Pet. App. 9 (emphasis added);

c. Petitioner repeatedly suggests that the court of appeals erred in concluding that his contention was "frivolous" because, absent the allegedly tainted identification evidence, the remaining evidence supporting his convictions was not overwhelming. See, *e.g.*, Pet. 2 (alleging that the identification evidence was "[t]he linchpin of the government's case"); Pet. 4 n.3 (contending that the identification evidence "likely tipped the scales"); Pet. 15 (asserting that "it could not be 'frivolous' for [petitioner] to contend that he was prejudiced in this case"). That issue is entirely factbound and has no prospective importance. Especially in light of this Court's confirmation in *Singleton* that courts of appeals have discretion to determine what issues to resolve for the first time on appeal, see 428 U.S. at 121, any claim that the court of appeals erred in holding that "the proper resolution is beyond any doubt," *ibid.*, does not warrant further review.

In any event, such a claim would lack merit. As the court of appeals noted in its earlier decision on direct review, petitioner was directly linked to the Suburban seen by one of the eyewitnesses to the bank robbery, in which the pillowcase with cash from the robbery was found: petitioner's fingerprints were found on the inside of the vehicle, along with an identification card bearing petitioner's picture and car-repair documents bearing an alias later traced to petitioner. App., *infra*, 17a. When police attempted to arrest petitioner, he threatened officers with a gun that witnesses later testified resembled the gun used in the bank robbery and carjacking. *Ibid.* In light of those and other facts,

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it did not in any way imply that the entire Section 2255 motion should have been *dismissed* as frivolous, see 28 U.S.C. 1915(e)(2)(B)(i).

the court of appeals correctly concluded that overwhelming evidence supported petitioner's convictions, and thus that petitioner could not show prejudice from any failure to challenge the identification evidence.[3]

d. Petitioner errs by asserting (Pet. 5-9) that appellate courts can properly exercise appellate jurisdiction to resolve only pure questions of law, and not mixed questions of law and fact, *sua sponte*. Nothing in *Singleton* supports such a limitation. To the contrary, appellate courts have suggested that they can properly exercise appellate jurisdiction as long as "the record pertinent to resolution of [the] issue can be developed no further." *E.g.*, *United States* v. *Krynicki*, 689 F.2d 289, 291-292 (1st Cir. 1982).[4] Such a rule is consonant with the underlying rationale of *Singleton*: namely, to allow parties the opportunity to offer all relevant evidence on an issue before it is decided. 428 U.S. at 120. Petitioner's proffered rule, on the other hand, cannot be reconciled with a line of cases in which appellate courts have engaged in harmless-error analysis *sua sponte*, where the harmlessness of the claimed error was clear. See, *e.g.*, *United States* v. *Adams*, 1 F.3d 1566, 1575-1576 (11th Cir. 1993), cert. denied, 510 U.S. 1198 and 510 U.S. 1206 (1994); *Lufkins* v. *Leapley*, 965 F.2d 1477,

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[3] In questioning the court of appeals' conclusion that there was overwhelming evidence to support his convictions, petitioner contends that the court of appeals omitted any mention of the alibi defense that he mounted at trial. Pet. 4 n.3. In its earlier decision, however, the court of appeals recognized, and necessarily discounted, that defense. App., *infra*, 13a.

[4] One of the articles on which petitioner relies asserts that courts have indicated only (and unsurprisingly) that they are "*more likely* to raise pure questions of law * * * sua sponte." Barry A. Miller, *Sua Sponte Appellate Rulings*, 39 San Diego L. Rev. 1253, 1281 (2002) (emphasis added).

1481 (8th Cir.), cert. denied, 506 U.S. 895 (1992); *United States* v. *Rodriguez Cortes*, 949 F.2d 532, 542-543 (1st Cir. 1991).

In this case, the record on the issue of prejudice was complete, and the strength of the evidence against petitioner had already been before the court of appeals on direct review. The court of appeals thus properly exercised its discretion to reach, and resolve, the prejudice issue on collateral review.[5]

2. Finally, petitioner contends (Pet. 12-18) that the court of appeals violated due process by addressing the merits of his ineffective-assistance claim. The rule of *Singleton*, however, was itself predicated on principles of due process, see, *e.g.*, 428 U.S. at 120, and petitioner cites no authority for the proposition that the *sua sponte* resolution of issues by an appellate court presents discrete due-process concerns. Even assuming that it does, petitioner cannot advance a colorable due-process claim. This Court has frequently reiterated that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Petitioner had the opportunity to address the prejudice issue in his briefs before the court of appeals, and failed to do so—notwithstanding the fact that the court of appeals had broadly authorized appeal on the issue "whether [petitioner] received

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[5] Petitioner contends that the court of appeals misapprehended his ineffective-assistance claim because it believed that petitioner was claiming (1) that counsel should have challenged the eyewitness testimony as merely incredible, rather than inadmissible, and (2) that trial counsel, rather than appellate counsel, was ineffective. Pet. 4-5, 14-15. There is no clear support for this contention, however, and petitioner does not contend that the prejudice inquiry would have been materially different if the court of appeals had not been operating under any misapprehension.

ineffective assistance of counsel." Pet. App. 13. And although the court of appeals did not allow petitioner to file a supplemental brief on the prejudice issue, petitioner did have the opportunity to address that issue in his petition for rehearing, and did in fact do so (albeit without elaboration). See, *e.g.*, C.A. Pet. for Reh'g 9-10. Because petitioner received all the process to which he was entitled, further review is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

WILLIAM C. BROWN
Attorney

FEBRUARY 2005

[6] There is no reason to hold the petition pending this Court's decision in *Mayle* v. *Felix*, cert. granted, 125 S. Ct. 824 (2005) (No. 04-563). That case presents the issue of the circumstances under which an amendment to a habeas petition "relates back" to the date of filing under Rule 15(c) of the Federal Rules of Civil Procedure. Because of its ultimate disposition of this case, the court of appeals' discussion of Rule 15 was dictum. And in any event, that discussion focused not on whether any amendment would "relate back" under Rule 15(c), but rather on whether the district court could allow an amendment at all under Rule 15(a), notwithstanding the court of appeals' limited remand. See Pet. App. 7-9.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2127

CARLTON L. CHANEY, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

On Appeal From The United States District Court For
The Southern District Of Indiana
(Indianapolis Division)
No. IP99-1595-C-M/F
Larry J. McKinney, Chief Judge

Submitted: Dec. 27, 2000
Decided: Mar. 13, 2001

ORDER

Before: Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

Carlton Chaney has filed a motion to reconsider this court's denial of his application for a certificate of appealability, which we **GRANT**. The district court resolved Chaney's ineffective assistance of counsel claim based exclusively on Chaney's failure to establish

prejudice under *Durrive* v. *United States*, 4 F.3d 548 (7th Cir. 1993), which has since been overruled by *Glover* v. *United States*, 121 S. Ct. 696 (2001). Accordingly, we **GRANT** Chaney's application for a certificate of appealability limited to the ineffective-assistance claim, summarily **VACATE** the district court judgment, and **REMAND** the case to the district court for reconsideration in light of *Glover*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2127
No. IP99-1595-C-M/F

CARLTON L. CHANEY, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

On Appeal From The United States District Court For
The Southern District Of Indiana
(Indianapolis Division)
No. IP99-1595-C-M/F
Larry J. McKinney, Chief Judge

Submitted: Nov. 9, 2000
Decided: Dec. 8, 2000

ORDER

Before: Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

Carlton Chaney has filed an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Chaney's motions to proceed in forma pauperis and for appointment of counsel are also DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA
(INDIANAPOLIS DIVISION)

IP 99-1595-C-M/F
IP 97-68-CR-01

UNITED STATES OF AMERICA

v.

CARLTON LAMONT CHANEY, DEFENDANT

ENTRY DENYING MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255 AND DIRECTING ENTRY OF FINAL JUDGMENT

This cause is before the court on defendant Carlton Lamont Chaney's motion pursuant to 28 U.S.C. § 2255, on the United States' response, and on the defendant's reply. The court also has before it the files and records in *United States v. Chaney*, No. IP 97-68-CR-01.

The court, having read and examined such pleadings and record, and being duly advised, now finds for the reasons set forth in this Entry that Chaney's motion must be denied and this action dismissed.

I. Background

Chaney was convicted of armed robbery, carjacking, and carrying and using a firearm during those crimes,

and possessing a firearm as a felon in violation of 18 U.S.C. § 922(g). He is serving the executed portion of the sentences imposed for these offenses.

Chaney seeks relief on the grounds that he was denied the effective assistance of counsel at trial and at sentencing. The United States has opposed this motion, and Chaney has replied.

II. Discussion

Habeas corpus relief under 28 U.S.C. § 2255 is warranted only in situations where there has been an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. *Borre v. United States*, 940 F.2d 215, 217 (7th Cir. 1991).

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. When a convicted criminal defendant makes an ineffective assistance of counsel claim, he or she is ordinarily required to make a two-part showing of both deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient; that errors were committed which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To satisfy this requirement, the defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must establish actual prejudice resulting from the deficient performance. That is, the defendant must demonstrate "a reasonable probability that, but for counsel's errors," the result would have

been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The *Strickland* standard is conjunctive. If counsel's actions did not prejudice *Chaney*, there is no reason to address counsel's performance. *Milone v. Camp*, 22 F.3d 693, 703-04 (7th Cir. 1994).

With the foregoing in mind, it is apparent that Chaney is not entitled to the relief he seeks. His first specification of attorney error is that his attorney erred by not seeking a directed verdict as to count 1 at the close of the government's case. The Court of Appeals noted that the "record [was] replete with evidence of Chaney's involvement with the bank robbery." Though Chaney contends that there was no evidence identifying him as one of the bank robbers, the fact is that there was no reasonable probability, nor even a reasonable *possibility* in this case, that a motion for acquittal on the bank robbery charge would have been granted if made at the close of the government's case. Chaney was not prejudiced by the absence of such a motion.

Chaney argues that he received a sentence of 20 years for the carjacking offense, a violation of 18 U.S.C. § 2119(1), and that this sentence was substantially in excess of the 15-year statutory maximum. He argues, correctly, that where the statutorily authorized maximum sentence is less than the minimum guideline, the statutory maximum shall be the guideline sentence. U.S.S.G. § 5G1.1(a). What is inapt about this argument, however, is Chaney's premise that he received a 20-year sentence for the § 2119(1) violation. On the contrary, the written judgment entered on the clerk's docket on March 11, 1998, shows that Chaney received an executed sentence of 130 months. This written judg-

ment is consistent with the transcript of Chaney's sentencing on March 5, 1998. This works out to 10.83 years, nearly 1/3 less than the statutory maximum. The factual predicate for this claim is therefore inaccurate, and the record shows that a sentence less than the statutory maximum was imposed on count 3. It could not have been prejudicial for Chaney's attorney to refrain from making an unsupportable objection to the sentence on count 3. The 20-year sentence (240) months was triggered by the § 2219(1) violation as a "second or subsequent" crime of violence in count 4, all as provided for in § 924(c). The court was required to impose a 20-year sentence under § 924(c) and was required to impose this sentence consecutive to the other sentences. See *United States v. Gonzales*, 520 U.S. 1, 11 (1997) (the language of § 924(c) indicates Congress's intent to make section 924(c) enhancements run consecutively to all other prison terms).

Chaney adds the claim that his attorney was ineffective for not objecting to the 2 point increase in his offense level under U.S.S.G. § 3C.1.2. For purposes of sentencing issues, prejudice means a significant (and improper) increase in the sentence. *Martin v. United States*, 109 F.2d 1177 (7th Cir. 1996); *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993). *Durrive* and *Martin* hold that an effect of this magnitude is not significant. This forecloses Chaney's argument that his attorney's failure to object to the 2 point increase was prejudicial.

III. Conclusion

Chaney is not entitled to relief in this action. Each underlying specification of his claim lacks factual support, and in fact is refuted by the record. A defendant asserting a Sixth Amendment claim has "the heavy burden of affirmatively establishing that counsel's per-

formance was constitutionally deficient." *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1133 (7th Cir. 1990). No such showing has been made in this case, nor are further proceedings required in order to resolve the claim Chaney makes. "A district judge need not grant an evidentiary hearing in all § 2255 cases. Such a hearing is not required if 'the record standing alone conclusively demonstrates that a petitioner is entitled to no relief.'" *Daniels v. United States*, 54 F.3d 290, 293 (7th Cir. 1995) (quoting *Humphrey v. United States*, 896 F.2d 1066, 1070 (7th Cir.), *cert. denied*, 498 U.S. 938 (1990)).

Accordingly, Chaney is not entitled to relief in this action, and his motion for relief pursuant to 28 U.S.C. § 2255 must be denied. Final judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

/s/ LARRY J. MCKINNEY
LARRY J. MCKINNEY, Judge
United States District Court

Date: [FEB 18, 2000]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1655

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

CARLTON L. CHANEY, DEFENDANT/APPELLANT

Appeal From The United States District Court
For The Southern District Of Indiana,
Indianapolis Division

Argued: Oct. 8, 1998
Decided: Oct. 23, 1998

ORDER

Before: Hon. RICHARD A. POSNER, Chief Judge, Hon. WALTER J. CUMMINGS, Hon. JESSE E. ESCHBACH, Circuit Judges.

Carlton Chaney was convicted in separate jury trials of armed robbery, carjacking, and carrying and using a firearm during those crimes (the first trial); and possessing a firearm as a felon in violation of 18 U.S.C. § 922(g) (the second trial). Chaney contends that the guilty verdict in the first trial must be vacated because of a government witness's unsolicited reference to the

fact that Chaney had been incarcerated on an earlier occasion. We affirm.

On April 18, 1997 at about 9:20 a.m., three male African-Americans wearing masks and armed with handguns robbed the NBD Bank located at 7007 Shore Terrace in Indianapolis. One of the robbers carried a pink and white pillowcase, into which tellers put $28,173 in cash, including $250 in bills with recorded serial numbers ("bait money"). The robbers ran out of the bank and got into a dark blue Cadillac that had been stolen earlier that morning, and sped away. James Nulf, the husband of one of the bank employees, followed them in his car. On Inland Drive, Nulf saw the robbers (still wearing their masks) standing outside the Cadillac and talking. One robber walked east on Inland Drive while the other two drove west in the Cadillac.

The bank robbery was also witnessed by Donna Dauby, who was driving by the bank in her pickup truck when she saw three masked men get out of a Cadillac and run into the bank. She turned her truck around and parked, watching the bank. When she saw the three robbers run out, she called 911 on her cellular telephone and followed their car onto Inland Drive, where it pulled into a driveway. Dauby drove past and turned around, temporarily losing sight of the robbers. As she came back into view of the Cadillac and began watching it, a Chevrolet Suburban drove toward her, swerved around the Cadillac and then drove directly at her, hitting and sideswiping the truck along the length of the driver's side. Dauby drove away as fast as she could. Shortly thereafter, the Suburban crashed into the back of a residence. It was unoccupied by the time the police arrived, but police found a black mask and a pink and white pillowcase with $16,890 in cash, includ-

ing the recorded bait money, in the passenger area. Also in the car were an Indiana identification card for "Jesse James" with Carlton Chaney's picture, and various car repair documents, some bearing the name "Troy Smith." Six fingerprints, later identified as Chaney's, were on the inside of one of the Suburban's windows. As for the Cadillac, the police recovered it in an apartment complex. Its right rear window was broken and had been covered with duct tape. The end of one of the pieces of duct tape on the Cadillac's window matched the end of a roll of duct tape found in the Suburban.

At about 9:30 a.m. on April 18, 1997, an unmasked African-American man entered the home of Mary and William Howe, threatened them with a gun, and demanded the keys to their Oldsmobile. He then took the car and drove off. During the carjacking, Mrs. Howe had more opportunity to observe the man than did her husband. Mrs. Howe tentatively selected Chaney's photograph from an array four days later; Mr. Howe could not make an identification. The police then showed the Howes the "Jesse James" ID with Chaney's photograph; Mrs. Howe believed that it was the same man, but again Mr. Howe could not identify the man. Mrs. Howe eventually testified in court that, when she saw Chaney in court, she was certain he was the carjacker.

Police arrested Carlton Chaney on May 2, 1997 as he left an apartment that he had leased in the name of Michael Troy Smith. In the course of the arrest, Chaney fled from the police in his car, pointed his gun at them when he was stopped, and then fled again. When arrested, Chaney was carrying an Indiana driver's license with his picture in the name of Troy Smith, and police found a handgun on the floor of his

car. Witnesses later testified that the gun looked like a gun used in the bank robbery and carjacking.

Chaney was ultimately charged with armed bank robbery (count 1), carjacking (count 3), using and carrying a firearm in relation to a bank robbery and carjacking (counts 2 and 4), and two counts of unlawful possession of a firearm by a convicted felon (counts 5 and 6). Chaney moved to sever trial on the first four counts from the felon-in-possession counts so that his criminal history would not be introduced at the trial on the bank robbery and carjacking. The district court granted his motion and severed the trials.

At his first trial on the first four counts, Chaney put on an alibi defense, introducing testimony from his girlfriend Nyree Lackey and a day care provider that Chaney was taking Lackey's children to day care at the time of the robbery. Lackey stated that Chaney dropped her off at work first, where she clocked in at 9:26 a.m., and then took the children to day care. Additionally, in an effort to show that Chaney had legal means of support, Lackey testified that Chaney lived with her, and paid half the rent between June 1993 and March 1997 from his part-time employment at Magnifiscents, an incense shop. Lackey thought that Chaney also might have worked for his father, Carlton Chaney, Sr.

Rebutting the implication that Chaney had significant income, the government put on two witnesses: Dwayne Tyler, who owned Magnifiscents and who said that on two or three occasions he had given Chaney $30-35 for helping out around the shop; and Carlton Chaney, Sr. Near the beginning of his testimony, Mr. Chaney, Sr. responded to a question about the dates

when his son might have worked for him by noting that his son had been incarcerated during part of that time:

> Q: Directing your attention between June of 1993 and May of 1997, did your son, Carlton Lamont Chaney, work for you?
>
> A: I'm not really sure about dates, but I can say that, if I may, my son was incarcerated, and upon his release, he came—
>
> MR. LOISEAU [Chaney's attorney]: Judge, I'm going to have to move to strike.
>
> THE COURT: Just tell us—I'll have to strike that. Just tell us whether he worked for you, or not.

Tr. at 520. Mr. Chaney, Sr. eventually testified that his son had worked for him over a two- or three-month period, and that he paid him $350 per week and less than $1,000 total. At the end of Mr. Chaney, Sr.'s testimony, the district judge addressed the jury:

> THE COURT: Before the next witness comes in, ladies and gentlemen, I just granted the objection to the testimony that this witness had given who related—he just related something about the defendant having been incarcerated. Now, I sustained that objection and I have stricken that from the record. That makes absolutely no difference in this case. That is not to be considered by you at all any time during the course of your deliberation. Everybody understand that?
>
> Anybody think they can't do that?

Tr. at 522. The judge also instructed the jury, during both the preliminary and the final jury instructions, that testimony stricken by the court was not evidence and must be disregarded. *See* Appellee's Br., Supp.

Appendices 1 and 2. The jury found Chaney guilty of Counts 1-4, the bank robbery and carjacking counts, on November 19, 1997. He was also convicted in his second trial, on Count 6.[1] On March 5, 1998, Chaney was sentenced on all counts to a total of 430 months in prison and ordered to pay $40,299.76 in restitution.

Chaney's sole contention on appeal is that his father's mention of incarceration during the first trial was reversible error that effectively negated the purpose of severing the trial. The standard of review is harmless error.[2] In order to establish that the error was harmless, the government must show that the error "does not affect substantial rights," Fed. R. Crim. P. 52(a), and that the jury's verdict of guilty was "surely unattributable to the error." *Ross*, 77 F.3d at 1540 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)); *see also Olano*, 507 U.S. at 734 (government bears the burden of persuasion with regard to errors analyzed under Rule 52(a)). The error must be harmless beyond a reasonable doubt. *Chap-*

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[1] The government later dropped count 5.

[2] The government contends that the standard of review is for plain error because Chaney did not move for a mistrial. The purpose of the rule that "an objection is forfeited if not raised at trial" is to create "an incentive for defendants to raise objections where they may be most efficiently resolved—before the district court." *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996). Here, however, Chaney's attorney objected and moved to strike the reference to incarceration in a timely manner. A motion for a mistrial would not have provided the court with any additional notice of possible error beyond that already provided by the motion to strike. Thus, the error is governed by Federal Rule of Criminal Procedure 52(a) (harmless error), not Rule 52(b). *See United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("Rule 52(a) . . . governs nonforfeited errors.").

man v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In analyzing the harmfulness of the error, we look to circumstances surrounding the error at trial. *See, e.g.*, *Greer v. Miller*, 483 U.S. 756, 765-66, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (erroneous remark must be viewed in context). Here, the erroneous mention of Chaney's criminal record was an apparently unsolicited statement by Chaney's father, made in the course of testimony on another topic (Chaney's work history). Defense counsel immediately objected and moved to strike, and the judge immediately struck the testimony. The judge then revisited the error at the close of Mr. Chaney, Sr.'s testimony, specifically and emphatically instructing the jury to disregard the comment about incarceration. In the preliminary and final jury instructions, the judge also instructed the jury to disregard testimony that was the subject of a successful objection or motion to strike.

"[W]e presume that the jury understood and followed the court's limiting instructions," *United States v. Moore*, 115 F.3d 1348, 1358 (7th Cir. 1998), and thus errors that are the subject of correct instructions to the jury are presumed harmless. *Id.*; *see also Greer*, 483 U.S. at 766 n.8 ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant.") (internal quotation marks and citations omitted). *Cf. Wilson v. Groaning*, 25 F.3d 581, 587 (7th Cir. 1994) ("highly inflammatory and totally irrelevant" testimony was adequately cured by court's prompt

striking of testimony and later instructions to disregard; harmless error). The district court's prompt and thorough instructions to the jury rendered Mr. Chaney, Sr.'s comments harmless.

Even if the trial court's striking of the comment and instructions to the jury did not fully cure the impact of Mr. Chaney, Sr.'s comment, the evidence of Chaney's guilt was so overwhelming that there is no real doubt that the jury would still have convicted Chaney if the comment had not been made. Chaney's identification and fingerprints were found in a car containing the pillowcase full of cash from the bank robbery and a mask identified by a teller as the one worn by the leader of the robbers. The car contained repair records under Chaney's "Troy Smith" alias, suggesting that it was Chaney's car. Mrs. Howe identified Chaney as the man who took the Howes' car at gunpoint. When the police later attempted to arrest Chaney, he fled from them and threatened them with a gun. Witnesses testified that Chaney's gun was similar to the one used in the bank robbery and the carjacking. The error in this case—testimony that Chaney had been incarcerated on some earlier occasion—adds little to a record replete with evidence of Chaney's involvement with the bank robbery and carjacking. Moreover, the "incarceration" comment was fairly vague and not particularly prejudicial. For instance, there was no mention of the crime for which Chaney had been imprisoned, or whether the crime was a misdemeanor or a felony.

A court may find improperly admitted evidence harmless when the other evidence of guilt is overwhelming. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("the overall strength of the prosecution's case" is "of course" a

factor in harmless-error analysis); *e.g.*, *United States v. Johnson*, 137 F.3d 970, 975 (7th Cir. 1998) (error was harmless where evidence against defendant was overwhelming); *United States v. Wilson*, 134 F.3d 855, 867 (7th Cir. 1998) (same). In light of the substantial evidence that Chaney committed the bank robbery and the carjacking (and used a gun while committing these crimes), the error was harmless beyond a reasonable doubt.

For the foregoing reasons, we AFFIRM the judgment of the district court.