

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Apr 25, 2018

DEBORAH S. HUNT, Clerk

In re: MICHAEL D. SMITH,
Movant.

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ORDER

Before: SUHRHEINRICH, GILMAN, and SUTTON, Circuit Judges.

Michael D. Smith, a pro se federal prisoner, moves the court for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Smith was convicted of conspiracy and eleven substantive counts of mail fraud in 2011. The district court sentenced Smith to an aggregate term of 120 months in prison, and we affirmed. *See United States v. Smith*, 749 F.3d 465 (6th Cir. 2014). In July 2015, Smith filed a motion to vacate his sentence under § 2255. The district court denied Smith's motion, and we denied his application for a certificate of appealability. *See Smith v. United States*, No. 17-5798 (6th Cir. Nov. 29, 2017) (order).

Smith now moves the court for permission to file a second or successive motion to vacate. He seeks to raise claims that his trial attorney provided ineffective assistance because he failed to challenge the allegedly defective indictment and that the district court lacked jurisdiction over his case. To receive permission to file a second or successive motion to vacate, the prisoner's claim must rely on newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty, or on a new rule of constitutional law that applies retroactively to his case. *See* 28 U.S.C. § 2255(h).

No. 17-5798

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL D. SMITH,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

FILED
Nov 29, 2017
DEBORAH S. HUNT, Clerk

ORDER

Michael D. Smith, a pro se federal prisoner, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Smith moves the court for a certificate of appealability (COA) and for a change of venue.

In 2010, Smith was convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1349, and eleven substantive counts of mail fraud, in violation of 18 U.S.C. § 1341. The district court sentenced Smith to a total term of 120 months of imprisonment. This court affirmed Smith's convictions and sentence, *United States v. Smith*, 749 F.3d 465 (6th Cir. 2014), and the United States Supreme Court denied Smith's petition for a writ of certiorari, *Smith v. United States*, 135 S. Ct. 307 (2014) (mem.).

In 2015, Smith filed a motion to vacate his sentence under § 2255, raising four claims: (1) he received ineffective assistance of trial counsel because counsel failed to file "19-Pre-Trial Jurisdictional motions"; (2) he received ineffective assistance of counsel in the forfeiture phase of his trial; (3) the government failed to get an indictment for the seizure and forfeiture of property; and (4) the district court lacked subject matter jurisdiction over the crimes charged in the indictment. The district court concluded that: (1) Smith failed to provide any factual or legal

support for his first ineffective-assistance claim and, in any event, Smith failed to show that he was prejudiced by his attorney's allegedly deficient performance; (2) Smith's forfeiture-related ineffective-assistance claim was not cognizable in § 2255 proceedings; (3) Smith procedurally defaulted his claim that the indictment was insufficient by not raising it in his direct appeal; and (4) Smith's claim that the court lacked subject matter jurisdiction over the indictment was meritless. The district court therefore denied Smith's motion to vacate and declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a district court denies a motion to vacate on procedural grounds, the court may issue a COA only if the applicant shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Smith claims that his trial counsel performed deficiently because he failed to file nineteen unspecified pretrial motions. In his traverse, Smith listed eighteen pretrial motions, without further explanation, that he claims that his trial counsel should have filed. Reasonable jurists would not debate the district court's conclusion that Smith was not entitled to relief on this claim because it was without factual or legal support, and because he failed to demonstrate a reasonable probability that the outcome of his trial would have been different but for counsel's allegedly ineffective representation. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Reasonable jurists would not debate the district court's conclusion that Smith was not entitled to relief on his claim that he received ineffective assistance of counsel in the forfeiture phase of his trial because, even if proved, he would not be released from confinement. *See*

United States v. Watroba, 56 F.3d 28, 29 (6th Cir. 1995) (“The plain language of § 2255 provides only prisoners who claim a right to be released from custody an avenue to challenge their sentences.”); *Remble v. United States*, No. 16-3020, at 3-4 (6th Cir. June 20, 2016) (denying petitioner a COA on a claim that trial counsel was ineffective in forfeiture proceedings).

Interspersed with his claim that the indictment failed to allege the seizure and forfeiture of property, Smith claimed that the indictment was invalid because it was not signed by a government attorney. *See Fed. R. Crim. P.* 7(c)(1). The district court concluded that Smith procedurally defaulted his claim challenging the sufficiency of the indictment by not raising it in his direct appeal. The district court also rejected Smith’s claim that the indictment was invalid because a signed copy was filed under seal with the court. Reasonable jurists would not debate the district court’s conclusion that Smith procedurally defaulted his sufficiency claim by not raising it in his direct appeal. *See Peveler v. United States*, 269 F.3d 693, 698 (6th Cir. 2001); *see also* *Fed. R. Crim. P.* 12(b)(3) (requiring motions challenging defects in the grand jury proceedings or the indictment to be filed before trial). Reasonable jurists would not debate the district court’s conclusion that Smith failed to establish cause and prejudice to excuse the procedural default of this claim.

Reasonable jurists would not debate the district court’s conclusion that Smith’s claim that the court was without subject matter jurisdiction over the crimes charged in the indictment was meritless. *See 18 U.S.C. § 3231* (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”).

In his COA application, Smith lists a series of ineffective-assistance-of-counsel claims that he did not raise in the district court until he filed objections to the report and recommendation and that the district court did not consider in denying his motion to vacate. Smith did not properly raise these ineffective-assistance claims in the district court, and, consequently, they are not properly before this court. *See Rule 2(b), Rules Governing Section 2255 Proceedings* (requiring the petitioner’s motion to vacate to specify all grounds for relief



Signed By:

Robert E. Wier *REW*

United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

UNITED STATES OF AMERICA,)
Plaintiff,) Criminal Action No.
v.) 3:08-cr-31
MICHAEL D. SMITH,) ORDER
Defendant.)

*** *** *** *** ***

This matter is before the Court upon Defendant Michael D. Smith's request for relief [DE 895] styled, alternatively, "Pursuant to Fed. R. Crim. P. 6(f) and the 1977 Historical Notes Requester request[s] a copy of the Indictment and Juror's Voting Slips" and "RE: FOIA/PA Request Pursuant to Title 5 USCS §§ 552, 552a, and the State of Kentucky FOIA/PA KRS Statutes. . ."

The Court presumes that Defendant Smith seeks relief, in the first instance, pursuant to Fed. R. Crim. P. 6(e) (3) (F), which provides that "[a] petition to disclose a grand-jury matter under Rule 6(e) (3) (E) (i) must be filed in the district where the grand jury is convened . . ." and that the court "must afford a reasonable opportunity appear

and be heard to . . . the parties to the judicial proceeding." Rule 6(e)(3)(E)(i) provides that the court "may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs - of a grand-jury matter . . . preliminary to or in connection with a judicial proceeding." The Court sees no reason to release any information sought based on Defendant's request pursuant to this rule. There is no anticipated or pending judicial proceeding. Rather, all matters before this Court and the direct appeals process have finally concluded.

Next, to the extent that Defendant Smith seeks relief under the Privacy Act and the Freedom of Information Act ("FOIA"), codified at 5 U.S.C. §§ 552, 552a, the Court denies his request because the statute does not apply to the Judicial Branch. See 5 U.S.C. § 551(1)(B) (stating that "agency" does not include "the courts of the United States" for the purposes of 5 U.S.C. § 551, *et seq.*). Nor may he seek relief under the Kentucky Open Records Act, KRS 61.870, *et seq.*, as it does not apply to federal courts. See KRS 61.870(1) (defining "public agency" and "public record" for the purposes of the Act).

Accordingly, **IT IS ORDERED** that Defendant Michael D. Smith's request for relief [DE 895] is **DENIED**.

This the 5th day of May, 2015.



Signed By:

Joseph M. Hood *jmh*

Senior U.S. District Judge