UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7467

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES MORRIS SELLERS,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, District Judge. (4:13-cr-00783-RBH-1; 4:16-cv-03396-RBH)

Submitted: April 19, 2018 Decided: April 23, 2018

Before GREGORY, Chief Judge, and THACKER and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

James Morris Sellers, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James Morris Sellers seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2255 (2012) motion and denying Sellers' Fed. R. Civ. P. 59(e) motion to alter or amend judgment. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Sellers has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

James Morris Sellers,	Crim. No.:	4:13-cr-00783-RBH-1
Petitioner,	Civ. No.:	4:16-cv-03396-RBH
v.	**ORDER**	
United States of America,		
Respondent.		

This matter is before the Court on Petitioner James Morris Sellers' pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. *See* ECF No. 99. The Court denies the motion for the reasons herein.

Background

Petitioner was indicted for unlawfully possessing a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). *See* ECF No. 2. On March 10, 2014, Petitioner, represented by Assistant Federal Public Defender William F. Nettles, IV, proceeded to a jury trial and was found guilty. *See* ECF No. 76. The presentence investigation report ("PSR") recommended that the Court sentence Petitioner as an armed career criminal pursuant to the Armed Career Criminal Act[1] ("ACCA") because Petitioner had three prior state drug convictions qualifying as serious drug offenses. *See* ECF No. 90. The Court adopted the PSR and sentenced Petitioner as an armed career criminal to 210 months' imprisonment and five years' supervised release. *See* ECF Nos. 82 & 83. Judgment was entered on July 21, 2014. *See* ECF No. 82. Petitioner filed a timely notice of appeal, and on November

[1] 18 U.S.C. § 924(e).

18, 2015, the Fourth Circuit affirmed the Court's judgment in a published opinion. *See United States v. Sellers*, 806 F.3d 770 (4th Cir. 2015). The Fourth Circuit issued its mandate on December 10, 2015. *See* ECF No. 93.

On October 11, 2016,[2] Petitioner filed the instant pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. *See* ECF No. 99. On October 25, 2016, the Government filed a response in opposition and a motion for summary judgment. *See* ECF Nos. 103 & 104. On November 28, 2016[3] Petitioner filed a reply to the Government's response. *See* ECF No. 107.

Summary Judgment Standard

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 413 (4th Cir. 2015); *see* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party, *Reyazuddin*, 789 F.3d at 413, but the Court "cannot weigh the evidence or make credibility determinations." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015).

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[2] Filing date under *Houston v. Lack*, 487 U.S. 266 (1988) (stating a prisoner's pleading is deemed filed at the moment of delivery to prison authorities for forwarding to district court).

[3] *Houston v. Lack* filing date.

Moreover, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "A dispute of material fact is 'genuine' if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party." *Seastrunk v. United States*, 25 F. Supp. 3d 812, 814 (D.S.C. 2014). A fact is "material" if proof of its existence or nonexistence would affect disposition of the case under the applicable law. *Anderson*, 477 U.S. at 248.

At the summary judgment stage, "the moving party must demonstrate the absence of a genuine issue of material fact. Once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992) (internal citation omitted). Summary judgment is not warranted unless, "from the totality of the evidence, including pleadings, depositions, answers to interrogatories, and affidavits, the [C]ourt believes no genuine issue of material fact exists for trial and the moving party is entitled to judgment as a matter of law." *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 385 (4th Cir. 2013); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

Applicable Law

Prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. For a court to vacate, set aside, or correct a sentence under § 2255, a petitioner must prove one of the following occurred: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral

attack. 28 U.S.C. § 2255(a). In deciding a § 2255 motion, the court may summarily dismiss the motion "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rules Governing Section 2255 Proceedings 4(b); *see* 28 U.S.C. § 2255(b) (a hearing is not required on a § 2255 motion if the record of the case conclusively shows the petitioner is not entitled to relief).

"Generally, an evidentiary hearing is required under 28 U.S.C. § 2255 unless it is clear from the pleadings, files, and records that a movant is not entitled to relief." *United States v. Robinson*, 238 F. App'x 954, 954–55 (4th Cir. 2007) (citing *United States v. Witherspoon*, 231 F.3d 923, 925–26 (4th Cir. 2000)). An evidentiary hearing "is required when a movant presents a colorable Sixth Amendment claim showing disputed material facts and a credibility determination is necessary to resolve the issue." *United States v. Coon*, 205 F. App'x 972, 973 (4th Cir. 2006) (citing *Witherspoon*, 231 F.3d at 925–27).

Discussion

Petitioner raises two grounds for relief in his § 2255 motion. *See* ECF No. 99 at 4–9.

I. Ground One

Petitioner alleges he "was denied due process by being sentenced as an armed career offender when he did not qualify for that status." ECF No. 99 at 4. He argues he was improperly designated as an armed career criminal in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.* at 4–7.

The ACCA enhances the sentence of a defendant convicted of being a felon in possession of a firearm if he has three prior, distinct convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). In *Johnson*, the Supreme Court dealt with the definition of a "violent

felony"—***not*** that of a "serious drug offense"—and held the ACCA's residual clause[4] defining a violent felony was unconstitutionally vague. *See* 135 S. Ct. at 2555–57. "The *Johnson* decision had no impact on 'serious drug offenses' under the ACCA." *Kennedy v. United States*, 2017 WL 2439141, at *1 (D. Md. June 6, 2017).

Here, and as detailed in the Fourth Circuit's opinion, Petitioner's enhanced sentence under the ACCA was based on his three prior serious drug offenses, namely his three prior South Carolina drug convictions for possession with intent to distribute crack cocaine. *See* Revised PSR [ECF No. 90] at ¶¶ 21, 51; *see Sellers*, 806 F.3d at 771–72, 777. His sentence enhancement was ***not*** based on three prior violent felonies. Accordingly, the Court denies relief as to Ground One.

II. Ground Two

Petitioner alleges trial counsel was ineffective for failing to argue Petitioner's three state drug convictions should count as a single prior conviction for purposes of the ACCA sentence enhancement. ECF No. 99 at 8; ECF No. 107 at 1–3.

Claims of ineffective assistance of counsel must be reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). A habeas petitioner must first show counsel's performance was deficient and fell below an objective standard of reasonableness. 466 U.S. at 687–88. Second, the petitioner must show prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

As indicated above, the ACCA provides for sentence enhancement when a defendant has three

[4] *See* 18 U.S.C. § 924(e)(2)(B)(ii) (defining the term "violent felony" to include "conduct that presents a serious potential risk of physical injury to another").

prior convictions for a serious drug offense "***committed on occasions different from one another***." 18 U.S.C. § 924(e)(1) (emphasis added). The Fourth Circuit has ruled "the occasion test of § 924(e)(1) is satisfied so long as each charged crime is a 'separate and distinct criminal episode.'" *United States v. Letterlough*, 63 F.3d 332, 334 (4th Cir. 1995); *see also United States v. Span*, 789 F.3d 320, 328 (4th Cir. 2015) ("Offenses are deemed to have been committed on different occasions under the ACCA when they arise out of a *separate and distinct criminal episode.*" (internal quotation marks omitted)). "Occasions" mean "those predicate offenses that can be isolated with a beginning and an end—ones that constitute an occurrence unto themselves." *Letterlough*, 63 F.3d at 335. "In other words, it does not matter for sentencing purposes if the several crimes are part of a larger criminal venture, as long as each constitutes, by itself, a 'complete and final transaction.'" *United States v. Hobbs*, 136 F.3d 384, 388 (4th Cir. 1998) (quoting *Letterlough*, 63 F.3d at 337).

Here, the PSR indicates Petitioner's three state convictions for possession with intent to distribute crack cocaine arose from separate and distinct criminal episodes. *See* Rev. PSR at ¶ 21. Specifically, Petitioner was convicted of distributing crack cocaine to an undercover officer on one occasion on **December 31, 1997**; on one occasion on **January 8, 1998**; and on one occasion on **May 16, 1998.** *Id.* It is clear that Petitioner's three drug distributions were offenses that were committed on different occasions. *See, e.g.*, *Letterlough*, 63 F.3d at 33 (finding the defendant's drug sales—made less than two hours apart on the same day to the same undercover officer—were not part of a single criminal episode). Consequently, Petitioner's sentence was properly enhanced under the ACCA because his three prior convictions for serious drug offenses were committed on occasions different from one

another; and therefore trial counsel was not ineffective for not arguing otherwise.[5] The Court denies relief as to Ground Two.

Conclusion

For the foregoing reasons, the Court **GRANTS** Respondent's motion for summary judgment [ECF No. 104] and **DENIES AND DISMISSES WITH PREJUDICE** Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [ECF No. 99]. The Court **DENIES** a certificate of appealability at this time because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court **DENIES as moot** Petitioner's motion for discovery [ECF No. 95].

IT IS SO ORDERED.

Florence, South Carolina
June 26, 2017

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

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[5] Petitioner further claims that "since the state drug crimes were consolidated into a single legal proceeding, there remained but one conviction for purposes of" the ACCA. ECF No. 99 at 8. He contends he did not qualify for a sentence enhancement because "[t]he three offenses were consolidated by court order, and a single sentence imposed on the same day and in the same proceeding." ECF No. 107 at 1. He also argues that "[i]f a defendant's prior convictions flowed from execution of a common scheme or plan, then, under 18 USC § 924(e)(1), they are to be counted as a single prior conviction." *Id.* at 2.

The Court notes Petitioner's claims lack merit. Based on his arguments and some of the cases he cites, he apparently misunderstands the difference between sentence enhancement under the ACCA and the career-offender provision of the Sentencing Guidelines. *See generally Hobbs*, 136 F.3d at 388 (explaining the "difference between (I) the *Letterlough* analysis for determining whether prior offenses were committed 'on occasions different from one another' for purposes of the ACCA, and (ii) the analysis for determining whether prior offenses were 'related' as part of a 'common scheme or plan' for purposes of applying the career-offender provision of the Sentencing Guidelines[.]").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

James Morris Sellers,	Crim. No.:	4:13-cr-00783-RBH-1
Petitioner,	Civ. No.:	4:16-cv-03396-RBH
v.	**ORDER**	
United States of America,		
Respondent.		

On June 26, 2017, the Court issued an order granting Respondent's motion for summary judgment and denying and dismissing Petitioner's § 2255 motion with prejudice, and the Clerk entered judgment the same day. *See* ECF Nos. 109 & 110. On July 24, 2017,[1] Petitioner filed a Motion to Reconsider pursuant to Federal Rule of Civil Procedure 59(e).[2] *See* ECF No. 114.

Federal Rule of Civil Procedure 59(e) permits a party to file a motion to alter or amend a judgment within twenty-eight days after entry of the judgment. "A district court has the discretion to grant a Rule 59(e) motion only in very narrow circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (internal quotation marks omitted). A party may not use a Rule 59(e) motion to make arguments it could have made before judgment was entered. *Id.* A party's mere disagreement with the court's ruling does not

[1] Filing date under *Houston v. Lack*, 487 U.S. 266 (1988) (stating a prisoner's pleading is deemed filed at the moment of delivery to prison authorities for forwarding to district court).

[2] The Motion to Reconsider does not raise new claims not presented in Petitioner's § 2255 motion, and therefore it does not implicate the concerns discussed in *United States v. Winestock*, 340 F.3d 200 (4th Cir. 2003), and *United States v. McRae*, 793 F.3d 392 (4th Cir. 2015).

warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted. *Hutchinson v. Staton*, 994 F.2d 1076, 1081–82 (4th Cir. 1993).

Petitioner presents two primary arguments in his Motion to Reconsider. His first argument concerns Ground Two of the § 2255 motion. *See* ECF No. 114 at pp. 1–2. The Court denied relief on this ground, finding Petitioner's sentence was properly enhanced under the Armed Career Criminal Act[3] ("ACCA") because his three prior convictions for serious drug offenses were committed on occasions different from one another, and therefore trial counsel was not ineffective for not arguing otherwise. *See* ECF No. 109 at pp. 5–7. Petitioner asserts that under *United States v. Hobbs*, 136 F.3d 384 (4th Cir. 1998)—which the Court cited in its order—"crimes committed on different dates can arise from a continuous course of criminal conduct if the same victim is involved." ECF No. 114 at p. 1. Petitioner contends that because his three drug distributions involved the same undercover officer and because "[a]n arrest warrant could have issued following the initial sale," his prior offenses "should be counted as a single continuous course of conduct." *Id.* at pp. 1–2. However, as the Court explained in its order, Petitioner's argument is clearly foreclosed by *United States v. Letterlough*, 63 F.3d 332 (4th Cir. 1995),[4] wherein the Fourth Circuit found two drug sales to the same undercover officer less than

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[3] 18 U.S.C. § 924(e).

[4] In *Hobbs*, the Fourth Circuit cited the *Letterlough* factors that govern when offenses can be deemed to have been committed on different occasions. *See Hobbs*, 136 F.3d at 387–88. One such factor is "'whether the offenses involved ***multiple victims***'"; other factors include "(i) whether the offenses occurred in different geographic locations; (ii) whether the offenses were substantively different; and (iii) 'whether the offenses involved . . . multiple criminal objectives.'" *Id.* at 388 (emphasis added) (quoting *Letterlough*, 63 F.3d at 335–36). However, as the Fourth Circuit explained in both *Letterlough* and *Hobbs*, "[t]hese factors may be considered together or independently, and 'if any one of the factors has a strong presence, it can dispositively segregate an extended criminal enterprise into a series of separate and distinct episodes.' In other words, it does not matter for sentencing purposes if the several crimes are part of a larger criminal venture, as long as each constitutes, by itself, a 'complete and final transaction.'" *Id.* (internal citation omitted) (quoting *Letterlough*, 63 F.3d at 336–37). *See also United States v. Linney*, 819 F.3d 747, 751 (4th Cir. 2016) (discussing the *Letterlough* factors).

two hours apart did not constitute a single occasion:

> We also cannot conclude that these two sales constituted a single occasion because the undercover officer to whom the drugs were sold chose not to arrest Letterlough after the first sale. Although Letterlough would like to assign some culpability for the second sale to the undercover officer who purchased the drugs, the responsibility for the crime falls squarely on Letterlough. We cannot disregard the additional criminal activity simply because the government allowed Letterlough to engage in it. To do so would force officers to arrest all evildoers as soon as they see a crime committed; it would destroy large scale police "sting" operations and undercover infiltrations, as were present in this case.

Id. at 337. The Court reaffirms its finding that Petitioner's three convictions were committed on different occasions, and therefore his sentence was properly enhanced under the ACCA.[5]

Second, Petitioner seeks a certificate of appealability, which the Court previously denied. *See* ECF No. 109 at p. 7. The Court again denies a certificate of appealability because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Court finds Petitioner has not pointed to any basis under Rule 59(e) warranting alteration or amendment of the Court's judgment on Petitioner's § 2255 motion. Accordingly, the Court **DENIES** Petitioner's Motion to Reconsider [ECF No. 114].

IT IS SO ORDERED.

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[5] To the extent Petitioner argues the Court should not consider "extraneous facts in aged court documents," ECF No. 114 at p. 3, the Fourth Circuit has explained "courts rely on '*Shepard*-approved sources'" when considering the *Letterlough* factors. *Linney*, 819 F.3d at 751 (quoting *United States v. Span*, 789 F.3d 320, 326 (4th Cir. 2015)). "In cases such as this that involve prior convictions based on guilty pleas, these sources consist of conclusive judicial records such as the indictment, judgment, any plea agreement, the plea transcript or other comparable record confirming the factual basis for the plea, and any document explicitly incorporated into one of the foregoing." *Id.* at 751–52 (internal quotation marks and citation omitted). *See United States v. Sellers*, 806 F.3d 770, 771 (4th Cir. 2015) ("In February 1999, Sellers pled guilty in state court to three indictments charging him with possession with intent to distribute crack cocaine, in violation of S.C. Code Ann. § 44–53–375(B).").

Florence, South Carolina
September 29, 2017

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge