INDEX TO APPENDICES

APPENDIX

A.

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus GREGORY W. BURWELL, Defendant - Appellant.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

162 Fed. Appx. 203; 2006 U.S. App. LEXIS 24

No. 04-4200

November 4, 2005, Submitted

January 3, 2006, Decided

Notice:

RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Editorial Information: Subsequent History

Subsequent appeal at United States v. Burwell, 304 Fed. Appx. 185, 2008 U.S. App. LEXIS 26057 (4th Cir. Va., 2008)Decision reached on appeal by United States v. Burwell, 2012 U.S. App. LEXIS 987 (4th Cir. Va., Jan. 18, 2012)

Editorial Information: Prior History

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CR-03-203).

Disposition:

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Counsel Charles A. Gavin, BLACKBURN, CONTE, SCHILLING & CLICK, P.C., Richmond, Virginia, for Appellant.

Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Judges: Before WILKINSON, NIEMEYER, and LUTTIG, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted in the United States District Court for the Eastern District of Virginia of three counts of conspiracy to interfere with commerce by violence, under 18 U.S.C.S. § 1951 (2000), two counts of actual interference with commerce by violence, under 18 U.S.C.S. § 1951, and two counts of use of a firearm while committing a crime of violence, under 18 U.S.C.S. § 924(c) (2000 & Supp. 2005). He appealed the convictions and sentence.Defendant's convictions under 18 U.S.C.S. § 1951 (2000) for conspiracy to interfere with commerce by violence and actual interference with commerce by violence were affirmed because the evidence was sufficient to support the convictions. Resentencing was required because the district court made factual findings that increased defendant's sentence.

OVERVIEW: The evidence, which was partly a coconspirator's testimony, was that defendant and his coconspirators agreed to rob a grocery store, a fast-food restaurant, and a clothing store. In two of the robberies defendant went into the stores and pulled a gun. In the third robbery he waited in a car while a

coconspirator robbed the restaurant at gunpoint. In two of the robberies, the perpetrators obtained money. The district court found that defendant was involved in other uncharged robberies. Because of this finding the district court increased defendant's offense level and increased defendant's sentencing range on the robbery counts. On appeal, the court found that the evidence was sufficient to prove that defendant conspired to commit the robberies and that he committed the robberies. Also, the evidence was sufficient to show that the robberies affected interstate commerce as all of the businesses were engaged in interstate commerce. However, because the district court made factual findings that increased defendant's sentence, there was plain error that resulted in defendant being exposed to a longer prison term, which affected his substantial rights so that correction was necessary.

OUTCOME: The judgment was affirmed in part as to the convictions. The judgment was vacated in part as to the sentence, and the case was remanded for resentencing.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > General Overview
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

A violation of the Hobbs Act, 18 U.S.C.S. § 1951 (2000), requires proof of two elements: (1) the underlying robbery or extortion crime, and (2) an effect on interstate commerce. The effect on commerce need not be a material effect; rather, the second element may be satisfied by even a minimal effect on commerce.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > General Overview
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

There is no need to prove that a defendant specifically intended to obstruct, delay, or affect commerce. The crime of interference with commerce is committed if a defendant commits a robbery or conspires to commit robbery, the natural consequence of which is an obstruction of commerce, even if that effect is minimal.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > General Overview

The theft of merchandise that would otherwise be sold has an effect on commerce.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

Carrying a firearm during a robbery qualifies as a crime of violence.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Impartial Jury
Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Sentencing > Adjustments
Criminal Law & Procedure > Sentencing > Imposition > General Overview
Criminal Law & Procedure > Sentencing > Imposition > Factors

The United States Supreme Court has held that the mandatory U.S. Sentencing Guidelines scheme that provided for sentence enhancements based on facts found by a court violated the Sixth Amendment.

The Supreme Court has remedied the constitutional violation by severing and excising the statutory provisions that mandate sentencing and appellate review under the U.S. Sentencing Guidelines, thus making the U.S. Sentencing Guidelines advisory.

Criminal Law & Procedure > Sentencing > Appeals > General Overview
Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Sentencing > Adjustments
Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

A sentence that is imposed under the pre-Booker mandatory sentencing scheme and is enhanced based on facts found by a court, not by a jury or admitted by the defendant, constitutes plain error that affects a defendant's substantial rights and warrants reversal under Booker.

Criminal Law & Procedure > Sentencing > Appeals > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

Where a defendant did not raise an issue at sentencing, appellate review is for plain error. Under the plain error standard, the defendant must show: (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights. Even when these conditions are satisfied, the appellate court may exercise its discretion to notice the error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Sentencing > Imposition > General Overview
Criminal Law & Procedure > Sentencing > Imposition > Factors

Although the U.S. Sentencing Guidelines are no longer mandatory, a sentencing court must still consult the U.S. Sentencing Guidelines and take them into account when sentencing.

Editorial Information: Prior History

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CR-03-203).

Disposition AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Counsel Charles A. Gavin, BLACKBURN, CONTE, SCHILLING & CLICK, P.C., Richmond, Virginia, for Appellant.

Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Judges: Before WILKINSON, NIEMEYER, and LUTTIG, Circuit Judges.

Opinion

PER CURIAM:

Following a jury trial, Gregory W. Burwell was convicted of three counts of conspiracy to interfere with commerce by violence, in violation of 18 U.S.C. § 1951 (2000) , two counts of actual interference with commerce by violence, in violation of 18 U.S.C. § 1951 , and two counts of use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C.A. § 924(c) (West 2000 & Supp. 2005) . The district court sentenced Burwell under the federal sentencing guidelines to 168 months of incarceration on the § 1951 charges and consecutive sentences of 84 months and 300 months on the two firearm charges, for a total sentence of 552 months. On appeal, Burwell challenges the sufficiency of the evidence to support his convictions and argues that his sentence was erroneously enhanced by facts found by the district court judge. *See United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) . For the reasons that follow, we affirm Burwell's convictions, but vacate his sentence and remand for resentencing.

Burwell contends that the evidence was insufficient on the charges of conspiracy to interfere and interference with commerce by violence in violation of the Hobbs Act, 18 U.S.C. § 1951 . "A Hobbs Act violation requires proof of two elements: (1) the underlying robbery or extortion crime, and (2) an effect on interstate commerce." *United States v. Williams*, 342 F.3d 350, 353 (4th Cir. 2003) (citation omitted), *cert. denied*, 540 U.S. 1169, 157 L. Ed. 2d 1219, 124 S. Ct. 1189, (2004) . The effect on commerce need not be a material effect; rather, the second element may be satisfied by even a minimal effect on commerce. *Id.* at 354 .

The offenses charged in Counts 1 to 3 arose from the robbery of the J&D Supermarket. The evidence supporting these charges included the testimony of Jorrell Toler, a co-conspirator who testified for the Government at Burwell's trial. Toler testified that he, Burwell, and another individual discussed robbing the J&D Supermarket. The J&D Supermarket sells products that were made in Mexico and products purchased from distributors in Maryland and the District of Columbia.

On March 10, 2003, Toler and Burwell armed themselves with a gun and went to the Supermarket in Burwell's car, which had a personalized license plate "BURWELL." They wore masks and entered the store shortly before closing. Burwell drew his gun and demanded the money from the cash register, but he and Toler left the store before obtaining the money. This evidence, viewed in the light most favorable to the Government, was sufficient for a rational fact finder to find Burwell guilty of all three charges. *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942) ; *Williams*, 342 F.3d at 354 ; *see United States v. Kennedy*, 328 U.S. App. D.C. 190, 133 F.3d 53, 57-58 n.3 (D.C. Cir. 1998) (holding that Hobbs Act violations are crimes of violence).

Burwell was also convicted of conspiracy to interfere and interference with commerce by threats and violence arising from the robbery of a McDonald's fast food restaurant in Bowling Green, Virginia. The

evidence on these charges, viewed in the light most favorable to the Government, showed that Burwell and Antonio Gray were driving around in Burwell's car "looking for a place to rob." Burwell was hungry, so they stopped at a McDonald's. Burwell went into the restaurant and purchased food. He returned to the vehicle and informed Gray that the manager had the safe open, and there were three women working there. Burwell and Gray determined that Gray would rob the restaurant, Burwell would wait in the car at a certain location, and they would split the proceeds. Gray then entered the restaurant, asked for the manager, and demanded the money from the safe. However, the safe was no longer open, so he obtained $ 662 from a cash register. The restaurant purchased food and products from outside of Virginia. The McDonald's closed for an hour or two following the robbery. We find that this evidence was clearly sufficient to show that Gray and Burwell entered into an agreement to commit a robbery, that they committed the robbery, and that the robbery had an effect on interstate commerce. *See Glasser*, 315 U.S. at 80 ; *Williams*, 342 F.3d at 353-54 .

Burwell's convictions on the remaining counts result from his involvement in the robbery of the Steady Flow Clothing Store in Richmond, Virginia. Burwell was convicted of conspiracy to interfere with commerce by threats and violence, interference with commerce by threats and violence, and use and carry of a firearm in relation to a crime of violence. The evidence supporting those convictions was as follows: Burwell, Gray, and Toler agreed to rob the clothing store. On the day of the robbery, Burwell drove the three of them to the store. He and Toler carried firearms. The three entered the store wearing ski masks and robbed it of $ 1500, a diamond watch, and some vintage jerseys, which the store had purchased from a company in Pennsylvania.

Burwell contends that there was no evidence of an agreement to or intent to obstruct, delay, or affect commerce, and there was no evidence that commerce was materially affected. However, there is no need to prove that the defendant specifically intended to obstruct, delay or affect commerce. The crime is committed if the defendant commits a robbery or conspires to commit robbery, the natural consequence of which is an obstruction of commerce, even if that effect is minimal. *See Williams*, 342 F.3d at 353-54 . We find that the evidence was sufficient to prove both that Burwell conspired to commit the robbery and that he committed the robbery. Also, the evidence was sufficient to show that the robbery affected commerce. Notably, there were customers in the store at the time of the robbery, and the store closed early because of the robbery. Also, the theft of merchandise that would otherwise be sold has an effect on commerce. *See id.* at 354-55 ("Commerce is sufficiently affected under the Hobbs Act where a robbery depletes the assets of a business that is engaged in interstate commerce."). Additionally, we find that the evidence was sufficient for the jury to find that Burwell carried a firearm during the robbery, which qualifies as a crime of violence. *Glasser*, 315 U.S. at 80 ; *Kennedy*, 133 F.3d at 57-58 n.3 .

Having found the evidence--viewed in the light most favorable to the Government--was sufficient to support Burwell's convictions on all the charges, we affirm his convictions.

Relying on *United States v. Booker*, Burwell contends that the district court erred by making factual findings concerning other criminal conduct and departing upward from the sentencing range based on those findings. Specifically, the district court found that Burwell was involved in twenty-four other uncharged robberies. This finding resulted in an increase in his offense level from level 27 to level 32, and an increase in his sentencing range on the robbery counts from 78 to 97 months, to 135 to 168 months.

In *Booker*, the Supreme Court held that the mandatory guidelines scheme that provided for sentence enhancements based on facts found by the court violated the Sixth Amendment . 125 S. Ct. at 746-48, 755-56 . The Court remedied the constitutional violation by severing and excising the statutory provisions that mandate sentencing and appellate review under the guidelines, thus making the guidelines advisory. *Id.* at 756-57 . Subsequently, in *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005) , this court held that a sentence that was imposed under the pre-*Booker* mandatory sentencing scheme and was enhanced based on facts found by the court, not by a jury or admitted by

the defendant, constitutes plain error that affects the defendant's substantial rights and warrants reversal under *Booker* . *Hughes*, 401 F.3d at 546-56 .

Burwell contends that he did not admit to participating in the additional robbery offenses listed in the presentence report, nor was this fact submitted to the jury for a determination. Therefore, he argues that the five-level upward departure violated his Sixth Amendment rights. Because Burwell did not raise this issue at sentencing, our review is for plain error. *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ; *Hughes*, 401 F.3d at 547 . Under the plain error standard, Burwell must show: (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights. *Olano*, 507 U.S. at 732-34 . Even when these conditions are satisfied, this court may exercise its discretion to notice the error only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Hughes*, 401 F.3d at 555 (internal quotation marks omitted).

Because the court made factual findings that increased Burwell's sentence, we find that there was plain error. Also, this error resulted in Burwell being exposed to a longer prison term, and therefore affects his substantial rights. *Id.* at 548 . Because the district court "imposed a sentence greater than the maximum authorized by the facts found by the jury alone," we find that plain error that warrants correction. *Id.* at 546 . Accordingly, we vacate Burwell's sentence and remand for resentencing.1

In conclusion, although we affirm Burwell's convictions, we vacate his sentence and remand for resentencing consistent with *Hughes*, 401 F.3d at 546 (citing *Booker*, 125 S. Ct. at 764-65, 767) .2 We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Footnotes

Footnotes for Opinion

1 As we noted in *Hughes*, 401 F.3d at 545 n.4 , "we of course offer no criticism of the district judge, who followed the law and procedure in effect at the time" of Burwell's sentencing. *See generally Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (stating that an error is "plain" if "the law at the time of trial was settled and clearly contrary to the law at the time of appeal").

2 Although the Sentencing Guidelines are no longer mandatory, *Booker* makes clear that a sentencing court must still "consult [the] Guidelines and take them into account when sentencing." 125 S. Ct. at 767 . On remand, the district court should first determine the appropriate sentencing range under the Guidelines, making all factual findings appropriate for that determination. *Hughes*, 401 F.3d at 546 . The court should consider this sentencing range along with the other factors described in 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2005) , and then impose a sentence. *Id.* If that sentence falls outside the Guidelines range, the court should explain its reasons for the departure as required by 18 U.S.C.A. § 3553(c)(2) . *Id.* The sentence must be "within the statutorily prescribed range and . . . reasonable." *Id.* at 547 .

APPENDIX

B.

UNITED STATES OF AMERICA v. GREGORY W. BURWELL
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION
2008 U.S. Dist. LEXIS 123962
Criminal No. 3:03cr203
May 29, 2008, Decided
June 2, 2008, Filed

Editorial Information: Subsequent History

Post-conviction proceeding at United States v. Burwell, 304 Fed. Appx. 185, 2008 U.S. App. LEXIS 26057 (4th Cir. Va., 2008)Post-conviction relief dismissed at United States v. Burwell, 2010 U.S. Dist. LEXIS 145187 (E.D. Va., Feb. 4, 2010)

Counsel Gregory W. Burwell, Defendant, Pro se, Inez, KY.

For Gregory W. Burwell, Defendant: Charles Arthur Gavin, Cawthorne Pickard Rowe Deskevich & Gavin PC, Richmond, VA.

For USA, Plaintiff: Michael R. Gill, LEAD ATTORNEY, United States Attorney's Office (Richmond), Richmond, VA.

Judges: Robert E. Payne, Senior United States District Judge.

Opinion

Opinion by: Robert E. Payne

Opinion

MEMORANDUM OPINION

Gregory W. Burwelll filed this motion pursuant to 28 U.S.C. § 2255 attacking his conviction and sentence. The United States responds that Burwell's § 2255 motion is barred by the relevant statute of limitations and lacks merit. The matter is ripe for disposition.

I. PROCEDURAL HISTORY

On August 7, 2003, Burwell was named in a second superseding indictment, which charged Burwell with: three counts of conspiracy to interfere with commerce by threats and violence in violation of 18 U.S.C. § 1951 (the "Hobbs Act") (Counts One, Five, and Seven); three counts of interference with commerce by violence in violation 18 U.S.C. § 1951 (Counts Two, Six, and Eight); two counts of possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Counts Three and Nine); and making false statements to a law enforcement officer in violation of 18 U.S.C. 18 U.S.C. § 1001(a) (Count Four). The Court dismissed Count Six at the arraignment.

Burwell was tried by a jury. At the close of the United States's case, the Court dismissed Count Four. The jury found Burwell guilty of Counts One through Three, Five, Seven, Eight, and Nine. On March 9, 2004, the Court sentenced Burwell to a 552-month term of imprisonment. Burwell appealed. The United States Court of Appeals granted Burwell's appeal with respect to his sentence and remanded the case back to this Court for resentencing. On April 7, 2006, the Court conducted a resentencing

hearing. On April 11, 2006, the Court entered a new Judgment In A Criminal Case and imposed a sentence of 481 months of imprisonment.

On April 16, 2007, Burwell handed his original 28 U.S.C. § 2255 motion to prison officials for mailing to this Court. 1 In that motion, Burwell raised the following claims:

On May 1, 2007, the Court received a motion for leave to amend. On June 26, 2007, the Court received an amended § 2255 motion and brief in support thereof (Docket No. 114). In his June 26, 2007 submissions, Burwell significantly fleshed out the claims in his original § 2255 motion. 2 Burwell also added the following grounds for relief:

Because the United States had not responded by the date Burwell submitted his motions to amend his 28 U.S.C. § 2255 motion, Burwell's motions to amend (Docket Nos. 109, 110 & 113) will be GRANTED. See Fed. R. Civ. P. 15(a).

II. STATUTE OF LIMITATIONS FOR 28 U.S.C. § 2255 MOTIONS

A one year statute of limitations applies to 28 U.S.C. § 2255 motions. Specifically, the statute provides, in pertinent part:

> (f) A 1-year limitation period shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.28 U.S.C. § 2255(f).

III. TIMELINESS OF BURWELL'S § 2255 MOTION

Under 28 U.S.C. § 2255(f)(1), Burwell had one year from the date his judgment of conviction became final to file a § 2255 motion with this Court. Here, because Burwell's cases was remanded for resentencing, the Court looks to when the new judgment of conviction following resentencing became final. See United States v. Dodson, 291 F.3d 268, 274 (4th Cir. 2002). The Court entered the new judgment of conviction on April 11, 2006.

The parties assume that, because Burwell did not appeal his conviction, it became final as of the date it was entered. See United States v. Sanders, 247 F.3d 139, 142 (4th Cir. 2001) (citing United States v. Torres, 211 F.3d 836, 837 (4th Cir. 2000), overruled by Clay v. United States, 537 U.S. 522, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003)). In Clay, the Supreme Court concluded that in the context of postconviction relief, "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." 537 U.S. at 527 (citing cases including Linkletter v. Wlaker, 381 U.S. 618, 622, 85 S. Ct. 1731, 14 L. Ed. 2d 601 n.5 (1965), overruled on other grounds by, Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). "Although the Court was addressing the finality of a conviction from the vantage of a petitioner who had timely, albeit unsuccessfully, pursued a direct appeal but failed to file a petition for certiorari, the reasoning extends to situations in which a

petitioner either fails to pursue a direct appeal or does so in an untimely fashion." Arnette v. United States, No. CRIM.A. 4:01CR16, Civ.A. 4:04CV122, 2005 U.S. Dist. LEXIS 7734, 2005 WL 1026711, at *4 (E.D. Va. May 2, 2005) (citing, Clay, 537 U.S. at 527); see Linkletter, 381 U.S. at 622 n.5 ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed."). Thus, Burwell's judgment of conviction became final on April 25, 2006, when the time for noting an appeal from the April 11, 2006 judgment of conviction expired. Because Burwell's original 28 U.S.C. § 2255 motion was filed within one year of that date, it is timely.

Nevertheless, Burwell's seventh and eighth claims were not filed until, at the earliest, June 19, 2006. See Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988) (concluding inmate's paper was deemed filed on the date he handed it to prison officials). Thus, Claims 7 and 8 are barred by the statute of limitations. Burwell suggests that the Court should equitablly toll the limitation period in light of the lockdowns at his prison, which limited his access to the law library in the year preceding the filing of the instant petition. Equitable tolling only is available if the litigant demonstrates that: "'(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time.'" United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (quoting Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc)). Lockdowns of prisons generally do not constitute an extraordinary circumstance warranting equitable tolling. See Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000). Indeed, the fact that Burwell was capable of filing a timely § 2255 motion refutes his assertion that extraordinary external circumstances prevented him from raising Claims 7 and 8 in a timely fashion. Accordingly, the Court rejects Burwell's request to equitablly toll the limitation period.

Nor do Claims 7 and 8 relate back to the claims in the original § 2255 motion. The Supreme Court has stated that, "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). Nevertheless, an amended claim "does not relate back (and thereby escape [the] one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650. In this regard, it is not sufficient that the new claim simply has the same form as the original claims, if the new claim "arises out of wholly different conduct." United States v. Pittman, 209 F.3d 314, 318 (4th Cir. 2000). Thus, "a petitioner does not satisfy the Rule 15 'relation back' standard merely by raising some type of ineffective assistance in the original petition, and then amending the petition to assert another ineffective assistance claim based upon an entirely distinct type of attorney misfeasance." United States v. Ciampi, 419 F.3d 20, 24 (1st Cir. 2005) (citing Davenport v. United States, 217 F.3d 1341, 1346 (11th Cir. 2000); United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999)), cert. denied, 547 U.S. 1217, 126 S. Ct. 2906, 165 L. Ed. 2d 936 (2006). Here, Burwell's amended claims pertaining to the deficiency of trial counsel with respect to Counts Three and Nine and general deficiency of appellate counsel, arise from "different conduct and transactions" than challenged in the original motion. Pittman, 209 F.3d at 318; see United States v. Hernandez, 436 F.3d 851, 858 (8th Cir. 2006) (concluding that an amended claim alleging that counsel was ineffective on cross-examination did not relate back to an original claim alleging the counsel was ineffective for failing to object to the admission of evidence), cert. denied, 547 U.S. 1172, 126 S. Ct. 2341, 164 L. Ed. 2d 856 (2006). Accordingly, Claims 7 and 8 are barred by the statute of limitations and will be DISMISSED.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate the ineffective assistance of counsel, a defendant must show first that counsel's representation was deficient and then that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Satisfying the deficient performance facet of Strickland requires the defendant to overcome the "'strong presumption' that counsel's strategy and tactics fall 'within the wide range of reasonable professional assistance.'" Burch v. Corcoran, 273 F.3d 577, 588 (4th Cir. 2001) (quoting Strickland, 466 U.S. at 689). The prejudice component requires a defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Furthermore, in analyzing ineffective assistance of counsel claims, it is not necessary to determine whether counsel's performance was deficient if the claim is readily dismissed for lack of prejudice. Id. at 697.

A. Alleged Deficient Communication (Claims 1 And 3)

Burwell initially was represented by Amy L. Austin and Charles Lewis. On August 21, 2003, the Court received a letter from Burwell complaining that his counsel were attempting to trick him into confessing or pleading guilty, "when I did not commit any of the alleged crimes." (Docket No. 34.) The Court directed counsel to respond to the letter. Based upon counsels' representation that the attorney-client relationship had broken down, the Court appointed Charles Gavin to represent Burwell at his trial.

In support of Claims 1 and 3, Burwell swears "that his counsels' failure to communicate with him or to discuss or consult with him on any aspects of this case, proves that counsel neglected his duty and responsibility to him." (Docket No. 114 at 4.) Burwell further avers that "[c]ounsel failed to provide Burwell with any material in this case, such as discovery material or Jencks Act material, . . . material that would have assisted Burwell in making an informed decision regarding a settlement offer or which would have helped Burwell in assisting in his own defense . . . ." (Docket No. 114 at 6.) Burwell states, "that every decision made in this case, was made entirely by counsel alone." (Docket No. 114 at 10.)

In response to the above accusations, Gavin submitted a lengthy affidavit wherein he swears that he met with Burwell on four separate occasions to discuss his case and prepare for trial. During these discussions, counsel swears that he discussed the elements of the offenses, the discovery material, and the possibility of any evidence that could help the defense. Counsel further avers that "Mr. Burwell was desirous of proceeding to trial, which was against my advice." (Govt.'s Mot. to Dismiss Ex. 4, 1-2.) On September 15, 2003, counsel wrote Burwell a letter wherein he attempted to persuade Burwell to change his mind. The letter states, in pertinent part:

> Pursuant to your instructions, I am going to prepare for trial. Should you wish to change your mind in the meantime, please advise in writing. As advised in our meeting, in my opinion, the facts against you are so overwhelming that you would benefit by trying to enter some type of negotiation with the government which would include a cooperation provision. This cooperation, in my experience, if complete and truthful, would result in a greatly decreased sentence.(Govt.'s Mot. to Dismiss, Ex. 4, Ex. B.) Burwell did not change his mind. Thereafter, at the beginning of trial, after the jury had been empaneled, counsel wrote Burwell a note stating "[j]ury not good. Do you want to proceed." (Govt.'s Mot. to Dismiss Ex. 4, Ex. B.) Burwell advised counsel that he wished to proceed with the jury trial.

In response to the above statements from counsel, Burwell swears that, inter alia, counsel only met with him twice to discuss the case and he never received the September 13, 2003 letter from counsel. Conspicuously absent from all of Burwell's submissions is any plausible explanation as to why a more fulsome discussion between he and counsel would have yielded information that could have resulted in an acquittal. See Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (citing

Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990)). Furthermore, Burwell does not identify, as he must, any information counsel failed to provide him, which would have caused him to forego a jury trial and plead guilty. See id. Indeed, the record before the Court, including Burwell's correspondence, the affidavit of counsel, and Burwell's current assertions that he is not guilty of the crimes for which he stands convicted, conclusively refute any possibility that Burwell would have pled guilty if counsel had provided him with any additional information. See Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991); see also Raines v. United States, 423 F.2d 526, 531 (4th Cir. 1970) (quoting Machibroda v. United States, 368 U.S. 487, 495, 82 S. Ct. 510, 7 L. Ed. 2d 473, (1962)). Accordingly, Claims 1 and 3 will be DISMISSED because Burwell has not demonstrated prejudice.

B. Alleged Insufficiency of the Evidence with Respect to the Interstate Commerce Element (Claims 2 And 5)

In Claim 2, Burwell "contends, that in count One, Two, Five, Seven, and Eight, defense counsel failed" to challenge the insufficiency of the evidence on the grounds that Burwell did not "know that his actions would indeed interfere with commerce." (Docket No. 113 at 7.) Burwell asserts that he could not be found guilty of the charged offense unless the Government proved that Burwell and his coconspirators had "known before . . . they attempted to rob any place or establishment, that the items in that place or establishment . . . did travel in interstate commerce . . . or the items in that place or establishment would indeed affect interstate commerce." (Docket No. 113 at 7.) Burwell's arguments in this regard lack merit.

On his direct appeal, the United States Court of Appeals for the Fourth Circuit rejected a similar argument with respect to the crimes of conspiracy to interfere with commerce by threats and violence (Counts One, Five, and Seven). United States v. Burwell, 162 F. App'x 203, 205 (4th Cir. 2006) (No. 04-4200), available at 2006 WL 10891 at *2. "[T]here is no need to prove that the defendant specifically intended to obstruct, delay or affect commerce. The crime is committed if the defendant commits a robbery or conspires to commit robbery, the natural consequence of which is an obstruction of commerce, even if that effect is minimal." Id. (citing United States v. Williams, 342 F.3d 350, 353-54 (4th Cir. 2003)). Burwell's argument that the Government was required to prove some sort of specific intent to affect interstate commerce has no more merit with respect to Counts Two and Eight. As noted in Williams, a conviction under 18 U.S.C. § 1951 for interference with commerce by violence "does not require proof that a defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions." 342 F.3d at 354 (citing United States v. Spagnolo, 546 F.2d 1117, 1118-19 (4th Cir. 1976)). "Commerce is sufficiently affected under 18 U.S.C. § 1951] where a robbery depletes the assets of a business that is engaged in interstate commerce." Id. at 354-55 (citing United States v. Buffey, 899 F.2d 1402, 1404 (4th Cir. 1990)). Thus, Burwell has failed to demonstrate that counsel was deficient or that he was prejudiced by the failure to pursue before the trial court any argument that the Government was required to prove that he knowingly or intentionally affected interstate commerce in conjunction with the Hobbs Act convictions. Accordingly, Claim 2 will be DISMISSED.

In Claim 5, Burwell contends that, in light of United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Government failed to prove that his conduct had a sufficient impact on commerce to invoke federal jurisdiction and sustain his convictions on Counts One, Two, Five, Seven, and Eight. Burwell faults trial counsel for failing to pursue such a challenge and for failing to require the Government to provide greater documentary support for the impact of the robberies on interstate commerce. Counsel challenged the Government's proof of the interstate commerce element at trial and on appeal. Counsel's challenges did not succeed because, as discussed below,

under the relevant law, the evidence introduced at trial amply supported this element with respect to each of the three robberies at issue.

In order to sustain a conviction for a violation of the Hobbs Act, "[t]he effect on commerce need not be a material effect; rather, [this] element may be satisfied by even a minimal effect on commerce." Burwell, 162 F. App'x at 204, available at 2006 WL 10891, at *1 (citing Williams, 342 F.3d at 354). Furthermore, "the Supreme Court's decisions in Lopez did "not disturb [the] continued application of this 'minimal effects' standard." Williams, 342 F.3d at 354. Unlike the statute in Lopez, "'the Hobbs Act contains a jurisdictional requirement that the [particular offense] be connected to interstate commerce." Id. (quoting, United States v. Castleberry, 116 F.3d 1384, 1387 (11th Cir. 1987)).

Counts One and Three arose from the robbery of the J&D Supermarket. The Government introduced evidence which demonstrated that, "[t]he J&D Supermarket sells products that were made in Mexico and products purchased from distributors in Maryland and the District of Columbia." Id. at 204, available at 2006 WL 10891, at *1. The offense charged in Count Five pertained to Burwell's participation in the robbery of a McDonald's. The evidence adduced at trial showed that Burwell's coconspirator stole $662 from a cash register. The evidence demonstrated that "[t]he restaurant purchased food and products from outside of Virginia. The McDonald's closed for an hour or two following the robbery." Id. at 205, available at 2006 WL 10891, at *1. Burwell's convictions on Counts Seven and Eight arose from his robbery of the Steady Flow Clothing Store in Richmond, Virginia. The robbery of that store netted $1500 and some vintage jerseys, which the store had purchased from a company in Pennsylvania. The foregoing evidence abundantly supported the interstate commerce element for each of the relevant Counts. Id. ("Commerce is sufficiently affected under the Hobbs Act where a robbery depletes the assets of a business that is engaged in interstate commerce." (quoting Williams, 342 F.3d at 354-55)). Burwell has failed to demonstrate any deficiency on the part of counsel. Furthermore, Burwell has failed to demonstrate any reasonably probability that he would have been acquitted had counsel questioned whether the Government's testimonial evidence was supported by documentation. Accordingly, Claim 5 will be DISMISSED.

C. Recusal (Claim 4)

In Claim 4, Burwell faults counsel for not moving for the recusal of the undersigned. Prior to trial, the Court informed the parties that undersigned owned stock in McDonalds Corporation and a McDonalds restaurant was the subject of one of the robberies. Under the pertinent statute, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Contrary to Burwell's assertion, recusal is not required any time the judge owns a small percentage of shares in the crime victim. United States v. Rogers, 119 F.3d 1377, 1384 (9th Cir. 1997); United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977). Rather, recusal would be appropriate "where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality." United States v. Lauersen, 348 F.3d 329, 336 (2d Cir. 2003), vacated on other grounds, 543 U.S. 1097, 125 S. Ct. 1109, 160 L. Ed. 2d 988 (2005). Neither the undersigned's interest in McDonalds Corporation, nor the amount the local franchise might recover in restitution was such that an objective observer would question the undersigned's impartiality. See Sellers, 566 F.2d at 887. Accordingly, counsel reasonably eschewed moving for the recusal of the undersigned. 3 Claim 4 will be DISMISSED.

D. Allegedly Improper Jury Instructions (Claim 6)

In Claim 6, Burwell contends that counsel was deficient for failing to object to the Court's instructions on Count Two. First, Burwell asserts that "the Court's jury instructions substantially amended the indictment, by broadening the basis for Burwell to be convicted . . . ." (Docket No. 114 at 19.) Burwell

fails to explain in any coherent manner how the given instructions broadened the basis for his conviction for the crime charge in Count Two. See Call v. Polk, 454 F. Supp. 2d 475, 499 (W.D.N.C. 2006) ("When a habeas petitioner claims that trial counsel was ineffective without explaining in what manner the performance was lacking, the reviewing court is not obliged to supply the grounds for relief."), aff'd, 254 F. App'x 257 (4th Cir. 2007) (No. 06-27), available at 2007 WL 4115934. Therefore, Burwell has not demonstrated that counsel was deficient for failing to challenge the instructions on the grounds that they were over-broad.

Next, Burwell asserts that counsel was deficient because "the attempted robbery charge instructions did not cover the content of the section 1951 offense, therefore allowing the jury to convict him on faulty instructions, or an improper charge." (Docket No. 114 at 19.) Although Burwell did not initially explain why the instructions did not cover the offense, in his response to United States's motion to dismiss Burwell finally explains that:

> [H]e was charged with aiding and abetting in [Count Two] and the Court failed to instruct the jury on this Count. . . . The instructions that this Court gave to the jury, did not instruct the jury as to aiding and abetting, but to the actual crime of interference with commerce by violence.(Docket No. 122 at 18.) With respect to Count Two, Burwell was charged as the principle. 4 Thus, there was no need for an aider and abettor instruction for Count Two. Burwell has not demonstrated any deficiency on the part of counsel. Accordingly, Claim 6 will be DISMISSED.

The Government's motion to dismiss (Docket No. 119) will be GRANTED. Burwell's 28 U.S.C. § 2255 motion (Docket No. 112) will be DENIED.

The Clerk is DIRECTED to mail a copy of the Memorandum Opinion to Burwell and counsel of record.

And it is so ORDERED.

/s/ Robert E. Payne

Robert E. Payne

Senior United States District Judge

Date: May 29, 2008

Richmond, Virginia

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Burwell's motions to amend (Docket Nos. 109, 110 & 113) are GRANTED;
2. Burwell's claims are DISMISSED;
3. The motion of the United States to dismiss (Docket No. 119) is GRANTED; and,
4. Burwell's motion under 28 U.S.C. § 2255 (Docket No. 112) is DENIED.

Burwell is advised he may appeal the decision of the Court. Failure to file a notice of appeal with the Clerk of the Court within sixty (60) days of the date of entry hereof may result in the loss of the right to appeal.

The Clerk is DIRECTED to send a copy of this Order to Burwell and counsel for the United States.

It is so ORDERED.

/s/ Robert E. Payne

Robert E. Payne

Senior United States District Judge

Date: May 29, 2008

Richmond, Virginia

Footnotes

1

The motion is deemed filed for statute of limitations purposes as of that date. See Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

2

For ease of reference, the Court will cite Burwell's submissions by their Docket Number.

3

Burwell does not suggest, nor does the relevant law support, the conclusion that recusal was appropriate under 28 U.S.C. § 455(b)(4). That statute provides, in pertinent part, that a judge shall recuse himself if "he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding." 28 U.S.C. § 455(b)(4). That statute is not applicable to present circumstances, because the victim of crime, McDonalds, is not a party under this section, see Sellers, 566 F.2d at 887, and stock ownership in a corporate victim is not deemed a financial interest in the matter in controversy. Rogers, 119 F.3d at 1384 (citing United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982)).

4

Count Two of the Second Superseding Indictment charged that Burwell, "aided and abetted by Jorrel Toler, . . . did knowingly . . . affect commerce by attempting to rob the J & D Market . . . ." (Second Superseding Indictment at 1-2).

APPENDIX

C.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7190

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY W. BURWELL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge (3:03-cr-00203-REP-1; 3:03-cv-00274-REP)

Submitted: December 16, 2008 Decided: December 23, 2008

Before WILKINSON, MICHAEL and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Gregory W. Burwell, Appellant Pro Se. Michael Ronald Gill, Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gregory W. Burwell seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2000) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). 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) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Burwell 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 the court and argument would not aid the decisional process.

DISMISSED

FILED: December 23, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7190
(3:03-cr-00203-REP-1)
(3:03-cv00274-REP)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GREGORY W. BURWELL,

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: February 17, 2009

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 08-7190
(3:03-cr-00203-REP-1)
(3:03-cv00274-REP)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GREGORY W. BURWELL,

Defendant - Appellant

M A N D A T E

The judgment of this Court, entered 12/23/08, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

APPENDIX

D.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

GEORGE WAYNE BURWELL,	)	
	)	
Petitioner,	)	Civil No. 6:09-CV-386-GFVT
	)	
V.	)	
	)	
KAREN F. HOGSTEN, Warden,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Respondent.	)	

** ** ** ** **

George Wayne Burwell is in the custody of the Federal Bureau of Prisons ("BOP") and confined in the Federal Correctional Institution in Manchester, Kentucky. He has initiated the instant habeas proceeding pursuant to 28 U.S.C. § 2241 and paid the District Court filing fee. The Petition is now before the Court for screening. 28 U.S.C. § 2243; *Harper v. Thoms*, 2002 WL 31388736, *1 (6th Cir. 2002).[1] For the reasons set forth below, this matter will be dismissed.

I.

According to the Fourth Circuit in *United States v. Burwell*, 162 F. App'x 203, 2006 WL 10891, **1 (4th Cir. 2006) (unpublished), a jury convicted Gregory W. Burwell of three counts of conspiracy to interfere with commerce by violence, in violation of 18 U.S.C. § 1951, two counts of actual interference with commerce by violence, in violation of 18 U.S.C. § 1951, and two

[1] As Burwell is appearing *pro se*, his Petition is held to less stringent standards than those drafted by attorneys. *Burton v. Jones*, 321 F.3d 569, 573 (6th Cir. 2003); *Hahn v. Star Bank*, 190 F.3d 708, 715 (6th Cir. 1999). During screening, the allegations in his petition are taken as true and liberally construed in his favor. *Urbina v. Thoms*, 270 F.3d 292, 295 (6th Cir. 2001). But if the Court determines that the petition fails to establish adequate grounds for relief, it may dismiss the petition or make such disposition as law and justice require. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

counts of use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C.A. § 924(c). The district court sentenced Burwell under the federal sentencing guidelines to 168 months of incarceration on the § 1951 charges and consecutive sentences of 84 months and 300 months on the two firearm charges, for a total sentence of 552 months.

On appeal, Burwell challenged the sufficiency of the evidence to support his convictions and challenged his sentence on the ground that it was erroneously enhanced by facts found by the district court judge, in violation of *United States v. Booker,* 543 U.S. 220 (2005). The appellate court affirmed the convictions but vacated his sentence and remanded for resentencing. The Petitioner alleges that on April 7, 2006, he was resentenced to 481 months imprisonment.

A short time later, Petitioner brought a Motion to vacate his sentence pursuant to 28 U.S.C. § 2255. The trial court denied the Motion and also denied him a certificate of appealability, which the appellate court affirmed. *United States v. Burwell*, 304 F. App'x 185, 2008 WL 5377895 (4th Cir. 2008) (unpublished), *cert. denied*, 129 S. Ct. 2067 (2009). There is no indication of the issues raised in that proceeding.

II.

In his Petition and lengthy Memorandum of Law [Record No. 2] herein, Burwell acknowledges that it would be difficult to bring a successive Section 2255 Motion to the trial court. Therefore, he states, he seeks to use this Court's 28 U.S.C. § 2241 jurisdiction to challenge his convictions. He contends that this use of Section 2241 is appropriate under highly exceptional circumstances, which he claims to present in this case, as he is purportedly actually innocent of criminal conduct.

Burwell specifically states that it is his intent "to challenge counts Three and Nine of the

superseeding [sic] indictment and [the] subject matter jurisdiction" of the trial court. He insists that Counts Three and Nine, *i.e.*, the counts charging firearms violations under 18 U.S.C. § 924(c) in relation to a crime of violence, are insufficient to charge him with a criminal offense and he attaches copies of these portions of the indictment. He has written, "Possession of a firearm during and in relation to a crime of violence is an erroneous, non-existent-crime." Therefore, he concludes, the trial court lacked jurisdiction to convict or sentence him.

III.

Contrary to Petitioner's arguments, the Court finds that he has not met the threshold for using Section 2241 to attack his conviction or sentence. The general rule is that 28 U.S.C. § 2241 permits challenges to official action affecting execution of sentence, such as the computation of sentence credits or parole eligibility. *United States* v. *Jalili,* 925 F.2d 889, 894 (6th Cir. 1999). It is 28 U.S.C. § 2254 for state prisoners or § 2255 for federal prisoners which relate to conviction and/or imposition of sentence. *See DeSimone v. Lacy,* 805 F.2d 321, 323 (8th Cir. 1986) (per curiam); *Cohen v. United States,* 593 F.2d 766, 770-71 (6th Cir. 1979).

Accordingly, a federal prisoner, such as the instant Petitioner, must ordinarily challenge the legality of his conviction or sentence by filing a post-conviction motion under 28 U.S.C. § 2255 with the trial court. *Capaldi* v. *Pontesso,* 135 F.3d 1122, 1123 (6th Cir. 2003). However, a portion of Section 2255, commonly called "the savings clause," permits a prisoner to seek habeas corpus relief from the court in the district where he is confined under Section 2241, if he can demonstrate that his remedy under Section 2255 "is inadequate or ineffective" to test the legality of his detention. 28 U.S.C. § 2255(e).

Case law has developed interpreting the language in the savings clause. *See Charles v.*

Chandler, 180 F.3d 753, 756-58 (6th Cir. 1999). Section 2255 is not rendered an "inadequate and ineffective" remedy where the prisoner had an earlier unsuccessful Section 2255 motion, or after he has been denied permission to bring a successive motion, or when he has let the one-year statute of limitations run before bringing a Section 2255 motion. *Id.* at 757. Nor is the remedy under Section 2241 an additional, alterative or supplemental remedy to a remedy under Section 2255. *Id.* at 758. Moreover, it is the Petitioner's burden to demonstrate the ineffectiveness or inadequacy of the Section 2255 remedy. *Id.*; *see also United States v. Prevatte,* 300 F.3d 792, 800 (7th Cir. 2002).

Further, in addition to demonstrating that the remedy via Section 2255 is inadequate or ineffective, the appellate court in this circuit has imposed another requirement for use of the savings clause, a requirement which is also not met in this case. The prisoner seeking to use Section 2241 must also have a claim of "actual innocence." *Martin v. Perez,* 319 F.3d 799 (6th Cir. 2003). Actual innocence means factual innocence, which is also explained by the Sixth Circuit to mean innocence of criminal conduct. *Id.* at 805.

An actual innocence claim arises when a prisoner was convicted under a criminal statute whose terms were thereafter interpreted by the United States Supreme Court in such a way that there is a risk that the Petitioner was convicted of conduct that the law does not make illegal. *Id.* Hence, it is only by an intervening Supreme Court decision defining the criminal statute that a petitioner can be rendered "actually innocent" of the crime for which he was convicted, so as to qualify to use Section 2241 jurisdiction.

Regardless of whether the Petitioner's claims have any merit, they cannot go forward for examination by the Court because the Petitioner has not demonstrated that his remedy via

Section 2255 is inadequate or ineffective. Nor has he demonstrated that he is actually innocent of the challenged firearm offenses under an intervening Supreme Court opinion interpreting the terms of the criminal statute. The Court, therefore, finds that the instant Petitioner fails to reach the high threshold of *Charles* and *Martin*.

IV.

Accordingly, in light of the foregoing, **IT IS ORDERED** as follows:

(1) George Wayne Burwell's Petition for Writ of Habeas Corpus is **DENIED**;

(2) This action is **DISMISSED**, *sua sponte*, from the docket of this Court; and

(3) Judgment shall be entered contemporaneously with this Memorandum Opinion and Order in favor of the Respondent.

This the 17th day of December, 2009.

Signed By:
Gregory F. Van Tatenhove
United States District Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OF JUDGEMENT
ON 12-17-09
LESLIE G. WHITMER, CLERK
BY: _____ D.C.

APPENDIX

E.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA

v.

GREGORY BURWELL

Criminal No. 3:03cr203
Civil Action No. 3:10CV076

MEMORANDUM OPINION

By Memorandum Opinion and Order entered on June 2, 2008, the Court denied a 28 U.S.C. § 2255 motion by Burwell. The matter is before the Court on a motion for relief from Burwell, wherein he contends that, under Federal Rule of Civil Procedure 60(b), he is entitled to have his conviction and sentence set aside.

The Antiterrorism and Effective Death Penalty Act of 1996 restricted the jurisdiction of the district courts to hear second or successive applications for federal habeas corpus relief by prisoners attacking the validity of their convictions and sentences by establishing a "'gatekeeping' mechanism." Felker v. Turpin, 518 U.S. 651, 657 (1996). Specifically, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The United States Court of Appeals for the Fourth Circuit has held "that district courts *must* treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to 'evade the bar against relitigation of claims presented in a

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prior application or the bar against litigation of claims not presented in a prior application.'" United States v. Winestock, 340 F.3d 200, 206 (4th Cir. 2003) (quoting Calderon v. Thompson, 523 U.S. 538, 553 (1998)). The Fourth Circuit provided the following guidance in distinguishing between a proper Fed. R. Civ. P. 60(b) motion or an improper successive § 2255 motion:

> [A] motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application, while a motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to reconsider. Thus, a brand-new, free-standing allegation of constitutional error in the underlying criminal judgment will virtually always implicate the rules governing successive applications. Similarly, new legal arguments or proffers of additional evidence will usually signify that the prisoner is not seeking relief available under Rule 60(b) but is instead continuing his collateral attack on his conviction or sentence.

Winestock, 340 F.3d at 207 (internal citation omitted). Here, Burwell does not raise procedural defects in this Court's § 2255 review process. Rather, Burwell contends that he is entitled to relief because the Court lacked subject matter jurisdiction. Thus, the motion is an unauthorized, successive § 2255 motion. Id. The motion will be DISMISSED for want of jurisdiction.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion to Burwell and counsel for the United States.

An appropriate Order shall issue.

/s/ Robert E. Payne
United States District Judge

Date: February 4, 2010
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA

v.

Criminal No. 3:03cr203
Civil Action No. 3:10CV076

GREGORY BURWELL

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Burwell's Rule 60(b) motion, received on January 12, 2010, is in fact an unauthorized successive 28 U.S.C. § 2255 motion.

2. The Clerk is DIRECTED to file the action solely for the administrative convenience of the Clerk.

3. The motion is DISMISSED for want of jurisdiction.

Burwell is advised he may appeal the decision of the Court. Failure to file a notice of appeal with the Clerk of the Court within sixty (60) days of the date of entry hereof may result in the loss of the right to appeal.

The Clerk is DIRECTED to send a copy of this Order to Burwell and counsel for the United States.

It is so ORDERED.

/s/ Robert E. Payne
United States District Judge

Dated: February 4, 2010
Richmond, Virginia

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APPENDIX

F.

FILED: March 10, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-124
(3:03-cr-00203-REP-1)

In re: GREGORY W. BURWELL,

Movant

O R D E R

Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2255.

The Court denies the motion.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Michael and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX

G.

FILED: April 28, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4200
(CR-03-203)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GREGORY W. BURWELL

Defendant - Appellant

O R D E R

Upon consideration of submissions relative to the motion to recall the mandate, the Court denies the motion.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

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