Attachment A

709 Fed.Appx. 676
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Sherman Edward WILLIAMS,
Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 15-15495
|
Non-Argument Calendar
|
(January 23, 2018)

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket Nos. 4:14-cv-00262-HLM; 4:09-cv-00011-HLM-WEJ-2

Attorneys and Law Firms

Nicole Kaplan, Stephanie A. Kearns, W. Matthew Dodge, Federal Defender Program, Inc., Atlanta, GA, for Petitioner-Appellant

Dashene Cooper, Assistant U.S. Attorney, John Andrew Horn, Lawrence R. Sommerfeld, Jill E. Steinberg, U.S. Attorney's Office, Atlanta, GA, for Respondent-Appellee

Before WILSON, JULIE CARNES, and HULL, Circuit Judges.

Opinion

PER CURIAM:

Sherman Williams appeals the denial of his 28 U.S.C. § 2255 motion to vacate his 192-month sentence for armed bank robbery and brandishing a firearm during a crime of violence. 18 U.S.C. § 2113(a), (d); 18 U.S.C. § 924(c)(1)(A). Williams argues that his sentence was illegal because *Johnson v. United States*, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), invalidated the "risk-of-force" clause of 18 U.S.C. § 924(c)(3)(B), and because his armed bank robbery conviction is not a predicate crime of violence under § 924(c)(3)(A). Because we have previously concluded both that *Johnson* did not invalidate 18 U.S.C. § 924(c)(3)(B) and that armed bank robbery is a predicate crime of violence under § 924(c)(3)(A), we affirm.

When we granted Williams a certificate of appealability (COA), we had not yet resolved the question of whether *Johnson*, which invalidated the "residual clause" of the Armed Career Criminal Act (ACCA), also invalidated the "risk-of-force" clause contained in § 924(c)(3)(B). But we have since determined that it did not, and we are bound by this conclusion. *See Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). Thus, in light of *Ovalles*, Williams's first claim is without merit.

We have also previously determined that a conviction for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), "clearly meets the requirement for an underlying felony offense, as set out in § 924(c)(3)(A)." *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016). Williams argues that *In re Hines* "has no precedential effect" here because it was an order on an application for a second or successive *677 § 2255 motion, but we have made it clear that "our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). Thus, our holding in *In re Hines* is binding precedent, and it forecloses Williams's second argument.

Johnson did not invalidate 18 U.S.C. § 924(c)(3)(B), and armed bank robbery is a predicate crime of violence under § 924(c)(3)(A). *Ovalles*, 861 F.3d at 1259; *In re Hines*, 824 F.3d at 1337. Therefore, we affirm the denial of Williams's motion to vacate his sentence.

AFFIRMED.

All Citations

709 Fed.Appx. 676

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Attachment B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15495-EE

SHERMAN EDWARD WILLIAMS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

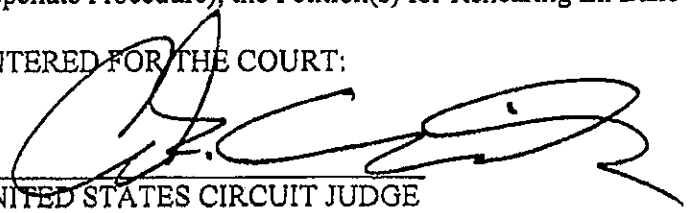
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JULIE CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

Attachment C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA, v. SHERMAN WILLIAMS, Defendant.	CRIMINAL FILE NO. 4:09-CR-011-02-HLM-WEJ

ORDER

This case is before the Court on Defendant's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 599 ("Motion for Reduction of Sentence") [223].

I. Background

On March 17, 2009, a federal grand jury sitting in the Northern District of Georgia returned an indictment against Defendant and a co-defendant. (Indictment (Docket Entry

No. 1).) Count one of the indictment charged Defendant and his co-defendant with armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d) and 2. (Id. at 1.) Count two charged Defendant and his co-defendant with brandishing a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (2). (Id. at 2.)

Defendant proceeded to a trial before a jury on October 5, 2009. (Minute Entry (Docket Entry No. 52).) On October 7, 2009, the jury found Defendant guilty on counts one and two. (Jury Verdict (Docket Entry No. 57).) On December 18. 2009, Senior United States District Judge Robert L. Vining, Jr. entered a Judgment and Commitment Order sentencing Defendant to 135 months of imprisonment on count one, to be followed by five years of supervised release, and to eighty-four months of imprisonment on count two, to run consecutively with the term of imprisonment imposed on

count one, and to be followed by five years of supervised release, to run concurrently with the supervised release term imposed on count one. (Judgment & Commitment Order (Docket Entry No. 66).) Defendant thus received a total effective sentence of 219 months. (Id.)

Defendant appealed. (Notice of Appeal (Docket Entry No. 68).) The United States Court of Appeals for the Eleventh Circuit affirmed in part, vacated in part, and remanded the case to Judge Vining for resentencing. (Judgment of USCA (Docket Entry No. 87).)

On December 20, 2011, Judge Vining entered another Judgment and Commitment Order sentencing Defendant to 135 months of imprisonment on count one, to be followed by five years of supervised release, and to eighty-four months of imprisonment on count two, to run consecutively to the term of imprisonment imposed on count one, and to be followed

by five years of supervised release, to run concurrently with the supervised release term imposed on count one. (Judgment & Commitment Order (Docket Entry No. 100).) Defendant thus received a total effective sentence of 219 months. (Id.)

Defendant appealed again. (Notice of Appeal (Docket Entry No. 101).) The Eleventh Circuit granted the Government's motion to vacate Defendant's sentence and remanded the matter to Judge Vining. (Order of USCA (Docket Entry No. 130).) On February 30, 2014, Judge Vining issued a Judgment and Commitment Order sentencing Defendant to 108 months of imprisonment on count one, to be followed by five years of supervised release, and to eighty-four months of imprisonment on count two, to run consecutively to the term of imprisonment imposed on count one, and to be followed by five years of supervised

release, to run concurrently with the supervised release term imposed on count one. (Judgment & Commitment Order (Docket Entry No. 153).)[1] Defendant therefore received a total effective sentence of 192 months.

Defendant appealed again. (Notice of Appeal (Docket Entry No. 155).) The Eleventh Circuit affirmed Defendant's convictions and sentences. (Order of USCA (Docket Entry No. 165).)

Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("§ 2255 Motion").

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[1] In the meantime, Defendant filed a petition for a writ of mandamus with the Eleventh Circuit, complaining that Judge Vining had unreasonably delayed resentencing him. (Order of USCA (Docket Entry No. 147).) The Eleventh Circuit found that Defendant's mandamus petition was not frivolous, but held the petition in abeyance for thirty days to allow Judge Vining to schedule a resentencing hearing. (Id. at 2-3.) The Eleventh Circuit, however, found that Defendant was not entitled to mandamus relief to remove Judge Vining from this action. (Id. at 3.)

(§ 2255 Mot. (Docket Entry No. 171).) On that same date, the Clerk reassigned the case to the undersigned in light of Judge Vining's retirement. (Notice of District Judge Reassignment (Docket Entry No. 173).)

On November 12, 2015, the Court adopted a Final Report and Recommendation of United States Magistrate Judge Walter E. Johnson and denied Defendant's § 2255 Motion. (Order of Nov. 12, 2015 (Docket Entry No. 197).) Defendant filed a Motion for Reconsideration, which the Court denied. (Mot. Reconsideration (Docket Entry No. 200); Order of Dec. 1, 2015 (Docket Entry No. 201).) Defendant filed a second Motion for Reconsideration, which the Court also denied. (Mot. Reconsideration (Docket Entry No. 211); Order of Dec. 11, 2015 (Docket Entry No. 211).)

Defendant requested leave to file a second or successive § 2255 Motion, but the Eleventh Circuit denied

that request. (Order of USCA (Docket Entry No. 216).) The Eleventh Circuit, however, granted Defendant's request for a certificate of appealability on the issue of whether Johnson v. United States applied to sentences under § 924(c). (Order of USCA (Docket Entry No. 217).) The Eleventh Circuit later dismissed another application by Defendant to file a second or successive § 2255 Motion. (Order of USCA (Docket Entry No. 218).) The Eleventh Circuit ultimately affirmed the denial of Defendant's § 2255 Motion. (USCA Opinion (Docket Entry No. 221).) Defendant filed yet another application for leave to file a second or successive § 2255 Motion, which the Eleventh Circuit denied. (Order of USCA (Docket Entry No. 222).)

On April 2, 2018, the Court received Defendant's Motion for Reduction of Sentence. (Mot. Reduction Sentence (Docket Entry No. 223).) In that Motion, Defendant argued

that the Court should reduce his sentence under Amendment 599 to the United States Sentencing Guidelines because the Court improperly applied a sentencing enhancement under 18 U.S.C. § 924(c)(1)(A). Defendant later filed a Motion to Supplement that Motion, which the Court granted. (Mot. Suppl. (Docket Entry No. 225); Order of Apr. 9, 2018 (Docket Entry No. 226).) In the Motion to Supplement, Defendant argued that the Court gave erroneous jury instructions, and seeks immediate release. The Government filed a response to Defendant's Motion as directed by the Court. (Resp. Mot. Reduction Sentence (Docket Entry No. 228).) The time period in which Defendant could file a reply in support of his Motion has expired, and the Court finds that the matter is ripe for resolution.

II. Discussion

Defendant seeks to reduce his sentence under Amendment 599, arguing that Judge Vining erred in applying a Sentencing Guidelines enhancement under § 924(c)(1)(A). 18 U.S.C. § 3582(c) provides, in relevant part:

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> . . .
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c). United States Sentencing Guideline § 1B1.10(d) lists amendments that may be implied

retroactively, and includes Amendment 599. U.S. Sentencing Guidelines Manual § 1B1.10(d). Section 1B1.10(a) further provides:

> (a) Authority
>
> (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
>
> (2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
>
> (A) none of the amendments listed in subsection (d) is applicable to the defendant; or

> (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.
>
> (3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitue a full resentencing of the defendant.

Id. § 1B1.10(a).

Here, Defendant's request for relief under Amendment 599 fails because he did not receive an enhancement for possessing a firearm. See United States v. Enright, 260 F. App'x 155, 157 (11th Cir. 2007) (per curiam) ("Amendment 599 was intended to prevent double counting for firearm use in a single criminal count, but does not apply when the defendant's sentence was not increased because of possession of a firearm." (citations omitted)). In any event, Defendant is not entitled to a retroactive sentence modification under § 3582(c)(2) based on Amendment 599

because that amendment was effective long before Defendant's sentencing, and his Sentencing Guidelines range was not subsequently lowered as a result of Amendment 599. See United States v. Garcon, 580 F. App'x 767, 769-70 (11th Cir. 2014) (per curiam) (noting that, where Amendment 599 took effect in November 2008, before the defendant's July 2008 sentencing, the defendant "was not 'sentenced to a term of imprisonment based upon a sentencing range that has subsequently been lowered by the Sentencing Commission.'" (quoting § 3582(c)(2)). The Court therefore denies Defendant's Motion for Reduction of Sentence.

The arguments that Defendant raises in his Supplement to the Motion for Reduction of Sentence are arguments that should be contained in a § 2255 Motion. Defendant, however, has already filed a § 2255 Motion, and the

Eleventh Circuit has not granted him permission to file a second or successive § 2255 Motion. The Court therefore lacks jurisdiction to consider the arguments contained in Defendant's Supplement, and denies that portion of Defendant's Motion. See Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003) ("The AEDPA provides that, to file a second or successive § 2255 motion, the movant must file an application with the appropriate court of appeals for an order authorizing the district court to consider it. Without authorization, the district court lacks jurisdiction to consider a second or successive petition." (citations and footnote omitted)). Because the Court's conclusion that the Court lacks jurisdiction to consider Defendant's arguments is not debatable among jurists of reason, the Court declines to issue a certificate of appealability to Defendant.

III. Conclusion

ACCORDINGLY, the Court **DENIES** Defendant's Motion for Reduction of Sentence [223], as supplemented [225]. The Court **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED, this the 24th day of May, 2018.

SENIOR UNITED STATES DISTRICT JUDGE

Attachment D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

SHERMAN WILLIAMS,	:	MOTION TO VACATE
BOP No. 60439-019,	:	28 U.S.C. § 2255
Movant pro se,	:	
	:	CRIMINAL ACTION NO.
v.	:	4:09-CR-11-HLM-WEJ-2
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	4:14-CV-262-HLM-WEJ

FINAL REPORT AND RECOMMENDATION

Movant, Sherman Williams, submitted a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [171] ("Motion to Vacate"). The government filed a Response in opposition [181], and movant filed a Reply [184]. For the reasons stated below, the undersigned **RECOMMENDS** that the Motion to Vacate be **DENIED** and a certificate of appealability be **DENIED**.

I. BACKGROUND

The United States Court of Appeals for the Eleventh Circuit summarized the facts of movant's criminal case as follows:

> [Movant] owned a business that provided cleaning services to a bank. Evidence adduced at trial established that [movant] and his co-defendant, Arthaniel Smith, gained late-night access to the bank using a key that [movant] obtained for purposes of cleaning the bank. [Movant] and Smith waited overnight in the bank and then forced a teller to open the

> vault in the morning. [Movant] and Smith took $219,180 from the vault and left the bank. Police apprehended [movant] and Smith shortly thereafter. Both [movant] and Smith spoke with police and admitted committing the robbery.
>
> [Movant] was indicted on two counts: armed bank robbery and brandishing a firearm during a crime of violence. At trial, [movant] testified that Smith forced him to commit the robbery against his will by threatening to kill [movant] if he did not participate. The jury convicted [movant] on both counts.

United States v. Williams, 437 F. App'x 792, 794 (11th Cir. 2011) (per curiam).

On December 17, 2009, the District Court sentenced movant to a total effective term of 219 months of imprisonment, followed by five years of supervised release [66]. Movant appealed, and the Eleventh Circuit affirmed his convictions but remanded the case for resentencing [87]. Williams, 437 F. App'x at 795. On December 6, 2011, the District Court imposed the same sentence as it had two years beforehand [100]. Movant appealed, and the Eleventh Circuit again remanded the case for resentencing [130]. On February 20, 2014, the District Court sentenced movant to a total effective term of 192 months of imprisonment, followed by five years of supervised release [153]. Movant appealed, and the Eleventh Circuit affirmed the sentence on September 17, 2014 [168]. See United States v. Williams, 579 F. App'x 954 (11th Cir. 2014) (per curiam).

Movant executed his Motion to Vacate on October 15, 2014. (Mot. Vacate 7.) The government does not dispute that the Motion to Vacate is timely pursuant to 28 U.S.C. § 2255(f).

II. STANDARD OF REVIEW

A motion to vacate, set aside, or correct sentence may be made "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." 28 U.S.C. § 2255(a). "[C]ollateral review is not a substitute for a direct appeal . . . ." Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). Section 2255 relief "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Id. (quoting Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988) (per curiam)) (internal quotation marks omitted).

A § 2255 movant "has the burden of sustaining his contentions by a preponderance of the evidence." Tarver v. United States, 344 F. App'x 581, 582 (11th Cir. 2009) (per curiam) (quoting Wright v. United States, 624 F.2d 557, 558 (5th Cir.

1980)). The Court need not conduct an evidentiary hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." 28 U.S.C. § 2255(b).

The undersigned **REPORTS** that an evidentiary hearing is not needed because the Motion to Vacate and record in this case conclusively show that movant is not entitled to relief.

III. DISCUSSION

Movant asserts three grounds in his Motion to Vacate: (1) he received ineffective assistance of trial counsel (ground one); (2) the District Court improperly enhanced movant's sentence (ground two); and (3) the government suppressed evidence favorable to him (ground three). (Mot. Vacate 5.)

A. Ground One

In order to demonstrate ineffective assistance of counsel, a convicted defendant must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). As to the first prong, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged

action might be considered sound trial strategy." Id. at 689 (internal quotation marks omitted). As to the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court may consider either prong first and need not address the other "if the defendant makes an insufficient showing on one." Id. at 697.

Movant claims that trial counsel provided ineffective assistance by "failing to investigate and present all mitigating evidence" to establish that movant acted under the duress of co-defendant Smith. (Mot. Vacate 8-9.) Specifically, movant cites (1) a Federal Bureau of Investigation ("FBI") summary of an interview with the victim bank teller, and (2) a Paulding County Sheriff's Office report. (Id. at 8-9, 25-28, 29-30.) Neither the FBI summary nor the Sheriff's Office report establishes that movant acted under Smith's duress.[1] Therefore, trial counsel did not perform deficiently with respect

[1] In addition, neither document establishes that movant is actually innocent, as he claims. (Mot. Vacate 11-12.) Movant incorrectly states that the bank teller "could not associate [movant] with" a handgun. (Id. at 9.) In fact, the FBI summary states that the teller "saw that both [movant and Smith] had black handguns." (Id. at 25.) Movant notes that the Sheriff's Office report states that he did not possess a gun at the time of his arrest in a vehicle with Smith. (Id. at 9, 29-30.) However, two guns were later found in the vehicle. (Tr. [167] 10.) See Williams, 437 F. App'x at 794.

to those documents. The undersigned notes the Eleventh Circuit's determination that there was sufficient evidence against movant:

> Evidence adduced at trial established that [movant] pointed a gun at the bank teller and instructed her to open the vault; walked the teller to the security panel to disarm the vault alarm; and drove the getaway car. Police found loaded guns, a glove covered in dye from the bank's dye pack, and an identification card for [movant] in the getaway car. [Movant] stated in his police interview that he carried a gun during the robbery, exercised free will in choosing to participate in the crime with [Smith], knew the bank's schedule because he used to clean it, and participated in planning the robbery with [Smith].
>
> [Movant] testified at trial that he did not carry a gun and was coerced into participation by [Smith]. But when a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true. . . . The jury had sufficient evidence from which to conclude that [movant] committed the charged offenses . . . .

Williams, 437 F. App'x at 794 (citation and internal quotation marks omitted).[2] In light of the evidence cited by the Eleventh Circuit, the FBI summary and the Sheriff's Office report would not have affected the outcome of movant's criminal case.

[2] Movant may not challenge the sufficiency of the evidence via the Motion to Vacate. "[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) (quoting United States v. Natelli, 553 F.2d 5, 7 (2d Cir. 1977)).

Movant also claims that trial counsel provided ineffective assistance by failing to file a motion for judgment of acquittal in order to obtain a more favorable standard of review of the sufficiency of the evidence on appeal. (Mot. Vacate 9-10.) If trial counsel had filed that motion and the District Court denied it, the Eleventh Circuit would have "view[ed] the evidence in the light most favorable to the prosecution [and examined whether] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Because trial counsel did not file a motion for judgment of acquittal, the Eleventh Circuit reviewed movant's claim of insufficient evidence only for "a manifest miscarriage of justice." Williams, 437 F. App'x at 794 (citation omitted). The Eleventh Circuit determined that movant had failed to show a manifest injustice. Id.

Even if trial counsel should have filed a motion for judgment of acquittal in order to obtain a more favorable standard of review of the sufficiency of the evidence on appeal, movant has not shown a reasonable probability of a different outcome. Considering the evidence as summarized by the Eleventh Circuit, the jury rationally found movant guilty beyond a reasonable doubt. Therefore, trial counsel's failure to file a motion for judgment of acquittal did not constitute ineffective assistance.

Accordingly, the undersigned **RECOMMENDS** that ground one of the Motion to Vacate be **DENIED**.

B. Ground Two

Movant claims that his sentence violates Alleyne v. United States, 133 S. Ct. 2151 (2013), in which the United States Supreme Court determined that "any fact that increases [a] mandatory minimum [sentence] is an 'element' that must be submitted to the jury." Alleyne, 133 S. Ct. at 2155. (Mot. Vacate 10-11.) Movant argues that his sentencing enhancement for physically restraining the bank teller is an element that should have been submitted to the jury. (Id.)[3]

"Generally, if a challenge to a conviction or sentence is not made on direct appeal, it will be procedurally barred in a 28 U.S.C. § 2255 challenge" unless the movant "overcome[s] this procedural default by showing both cause for his default as well as demonstrating actual prejudice suffered as a result of the alleged error." Black v. United States, 373 F.3d 1140, 1142 (11th Cir. 2004). "[T]o show cause for procedural default, [a § 2255 movant] must show that some objective factor external

[3] Movant also states that he "should never have received a mandatory 84 months for brandishing a gun . . . ." (Mot. Vacate 11.) Movant is incorrect because the jury convicted him of brandishing a firearm during a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), and that crime carries a mandatory minimum sentence of seven years. See Williams, 437 F. App'x at 794.

to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [his] own conduct." Lynn, 365 F.3d at 1235. To demonstrate actual prejudice, a movant must show that the alleged error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Reece v. United States, 119 F.3d 1462, 1467 (11th Cir. 1997) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

As an alternative to showing cause and actual prejudice, a § 2255 movant may overcome a procedural default if "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Lynn, 365 F.3d at 1234-35 (quoting Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994) (per curiam)) (internal quotation marks omitted). "[A]ctual innocence means factual innocence, not mere legal innocence." Id. at 1235 n.18 (citing Bousley v. United States, 523 U.S. 614, 623 (1998)) (internal quotation marks omitted).

Ground two is procedurally defaulted because movant failed to raise the alleged violation of Alleyne on direct appeal. In attempting to show cause for the default, movant claims that appellate counsel provided ineffective assistance by refusing to raise Alleyne. (Reply 15.) However, appellate counsel did not perform deficiently by declining to raise Alleyne. Movant's sentence does not violate Alleyne because the

challenged enhancement for physically restraining the bank teller is not a "fact that increases [a] mandatory minimum [sentence] . . . ." Alleyne, 133 S. Ct. at 2155. The enhancement applies to movant's bank robbery conviction under 18 U.S.C. § 2113(a) & (d), for which there is no mandatory minimum sentence. (See Tr. [79] 16; Tr. [167] 3.) "A lawyer cannot be deficient for failing to raise a meritless claim." Frederick v. Dep't of Corr., 438 F. App'x 801, 803 (11th Cir. 2011) (per curiam) (citing Freeman v. Att'y Gen. 536 F.3d 1225, 1233 (11th Cir. 2008)). Therefore, movant did not receive ineffective assistance of appellate counsel. Movant fails to overcome the procedural default of ground two because he neither (1) shows cause and actual prejudice, nor (2) presents proof of actual innocence.

Accordingly, the undersigned **RECOMMENDS** that ground two of the Motion to Vacate be **DENIED**.

C. Ground Three

Movant claims that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by suppressing the FBI summary and the Sheriff's Office report, which are allegedly favorable to him. (Mot. Vacate 12.) However, as the government points out, (1) there is no evidence of suppression, and (2) those documents are not favorable to

movant. (Resp. 20-22.) The undersigned has already determined that those documents would not have affected the outcome of movant's criminal case. See supra Part III.A.

Accordingly, the undersigned **RECOMMENDS** that ground three of the Motion to Vacate be **DENIED**.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Section 2253(c)(2) states that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion to vacate] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

> When the district court denies a [motion to vacate] on procedural grounds without reaching the prisoner's underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner

> shows both that jurists of reason would find it debatable whether the [motion] 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.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing Slack, 529 U.S. at 484) (internal quotation marks omitted).

The undersigned **RECOMMENDS** that a certificate of appealability be denied because the resolution of the issues presented is not debatable. If the District Court adopts this recommendation and denies a certificate of appealability, movant is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2255, Rule 11(a).

V. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that the Motion to Vacate [171] be **DENIED** and a certificate of appealability be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

SO RECOMMENDED, this 26th day of October, 2015.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE