

APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AMOS JUNIOR SCOTT,

Petitioner-Appellant,

v.

HERIBERTO H. TELLEZ, Acting Warden,

Respondent-Appellee.

No. 18-55312

D.C. No. 5:17-cv-01188-DOC-KES
Central District of California,
Riverside

ORDER

Before: GRABER and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 4, 5) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMOS JUNIOR SCOTT,

Petitioner,

V.

HERIBERTO H. TELLEZ, Warden,
Respondent.

Case No. 5:17-cv-01188-DOC-KES

ORDER ACCEPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition (Dkt. 1), the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge (Dkt. 17). Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections (Dkt. 20) have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered dismissing the Petition without prejudice as an unauthorized second or successive petition under 28 U.S.C. § 2255.

DATED: January 31, 2018

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMOS JUNIOR SCOTT,
Petitioner,
v.
HERIBERTO H. TELLEZ
Respondent.

Case No. 5:17-cv-01188-DOC-KES

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

1.

INTRODUCTION

24 Amos Junior Scott (“Petitioner”) challenges his life sentence, which was
25 imposed for a federal drug crime after Petitioner was found to be a career offender
26 under the United States Sentencing Guidelines. Petitioner admits that he has filed
27 prior motions attacking this sentence under 28 U.S.C. § 2255. He argues he should
28 be allowed to proceed under § 2241 because he is bringing a claim of actual

1 innocence. As explained further below, it is recommended that his petition be
2 dismissed because his claims do not meet the requirements of the “escape hatch” in
3 § 2255(e), meaning he cannot proceed under § 2241. In order to pursue his claims,
4 Petitioner should seek permission to file a second or successive motion under
5 § 2255 from the United States Court of Appeals for the Fourth Circuit.

6 **II.**

7 **BACKGROUND**

8 **A. Criminal Proceedings.**

9 In 2001, following a jury trial, Petitioner was convicted of conspiring to
10 possess with intent to distribute 5 kilograms or more of cocaine in the United States
11 District Court for the Western District of North Carolina. See United States v.
12 Scott, No. 1:00-cr-00069-MR-5, Dkt. 80. On August 17, 2001, Petitioner was
13 sentenced to life imprisonment. Id., Dkt. 111.

14 On appeal, Petitioner argued that he was improperly sentenced as a career
15 offender under the Sentencing Guidelines because his “California state court
16 conviction under Cal. Penal Code [“Cal. PC”] § 245(a)(1) was a wobbler^[1], and
17 does not qualify as a predicate crime of violence under U.S.S.G. § 4B1.1.”
18 (Petition at 10.) On July 12, 2002, the United States Court of Appeals for the
19 Fourth Circuit affirmed Petitioner’s conviction and sentence, finding in relevant
20 part:

21 [Petitioner] contends that the district court clearly erred in sentencing
22

23 ¹ “Assault with a deadly weapon under California Penal Code section 245(a)
24 is known as a ‘wobbler’ and is punishable either as a felony or a misdemeanor.
25 To determine whether a conviction for a wobbler is an offense punishable by a term
26 of imprisonment exceeding one year under the career offender provisions of the
27 Guidelines, the sentencing court must look to state law: Did the California court’s
28 treatment of the offense convert it into a ‘misdemeanor for all purposes’ under
California Penal Code section 17(b)? If so, then the conviction does not
qualify....” United States v. Bridgeforth, 441 F.3d 864, 870-72 (9th Cir. 2006).

1 him as a career offender. Because Scott had prior felony convictions
2 for assault with a deadly weapon and possession of "rock" cocaine, the
3 district court did not clearly err in sentencing him as a career offender.
4 See United States Sentencing Guidelines Manual § 4B1.2(c) (1998).
5 We further conclude that Scott's claim that he did not receive notice of
6 the assault with a deadly weapon conviction is meritless.

7 United States v. Scott, 40 F. App'x 807 (4th Cir. 2002). Petitioner filed a petition
8 for writ of certiorari in the United States Supreme Court, which was denied on
9 January 13, 2003. Scott v. United States, 537 U.S. 1140 (2003).

10 **B. Prior Post-Conviction Motions.**

11 **1. § 2255 Motion Challenging Sentencing as Career Offender.**

12 In October 2003, Petitioner filed a motion in the sentencing court to vacate,
13 set aside, or correct his sentence under 28 U.S.C. § 2255. Scott, 1:00-cr-00069-
14 MR-5, Dkt. 135 (motion), Dkt. 138, 141, 144, 147 (motions to supplement).
15 Petitioner argued, in relevant part, that his counsel was ineffective for failing to
16 show that his probationary sentence for the California assault conviction was never
17 revoked, leading to Petitioner being erroneously sentenced as a career offender.
18 See id., Dkt. 148 at 5; (Petition at 5 ¶ 11(a).)²

19 The court denied relief on November 7, 2005. Scott, 1:00cr-00069-MR-5,
20 Dkt. 148. The court reviewed state court records submitted by Petitioner and
21 determined that, in fact, his probationary sentence for assault had been revoked:

22 The Petitioner does not deny, and did not at sentencing, that he was
23 convicted in 1987 in California for assault with a deadly weapon and
24 sentenced to four years' imprisonment with a suspended sentence of
25 five years. Presentence Report, dated April 19, 2001, at 7. The

27

28 ² All page citations refer to the pagination imposed by the courts' electronic
filing systems.

1 Probation Officer found that the Petitioner's probation was revoked on
2 April 23, 1989, and an active sentence of two years imprisonment was
3 imposed. Id. Because his probationary sentence was revoked, in
4 calculating the Petitioner's criminal history points, the Probation
Officer counted the points attributable to this sentence. See, U.S.S.G.
5 §§ 4A1.1 and 4A1.2(k). Because the Probation Officer counted these
6 points, it placed the Petitioner into a career offender category.
7

8 In an effort to avoid this status, the Petitioner claims that his
9 probation was never revoked. It appears, based on documents provided
10 by the Petitioner, however, that he is confused. On October 25, 1986,
11 the Petitioner was arrested in San Joaquin County, California and
12 charged with first degree murder in the case of California v. Amos
13 Scott, Case No. 39348.² [n.2: On October 25, 1986, the Petitioner shot
14 and killed Paul Saucier in Stockton, California. His co-conspirator in
15 the present case, George McBride, was present when Saucier was
16 killed.] Presentence Report, supra. On July 13, 1987, he pled guilty to
17 a reduced charge of a violation of California Penal Code § 245(a),
18 assault with a deadly weapon of [sic] force likely to produce great
19 bodily injury, and was sentenced to four years imprisonment,
20 suspended for five years. Id.

21 On March 8, 1989, the Petitioner appeared in state court in
22 California in the case of California v. Amos Scott, Case No. 442255, in
23 which he was charged with felony drug violation, possession of rock
24 cocaine. Appendix 1, attached to Petitioner's § 2255 Motion
25 ("Petitioner's Motion"). The Petitioner entered a guilty plea to that
26 charge and was advised by the judge that he would be sentenced to a
27 two-year term of imprisonment. Appendix 2, attached to Petitioner's
28 Motion. The Petitioner's attorney noted on the record that the plea

1 agreement for the drug charge included a provision that if the
2 Petitioner's probationary sentence in "the 245 case," i.e., the above case
3 for a violation of California Penal Code § 245, assault with a deadly
4 weapon, was revoked due to his conviction for the drug offense,
5 Petitioner's prison sentence in Case No. 44225, the drug case, would
6 run concurrently to any active term ultimately imposed in "the 245
7 case," the assault case. Appendix 2-3, attached to Petitioner's Motion.
8 In other words, both defense counsel and the California court
9 anticipated that the Petitioner's conviction and sentence to two years
10 imprisonment for the drug charge would result in a revocation of his
11 probationary sentence in the assault case.

12 That is, in fact, what occurred, as the documents submitted by
13 the Petitioner show. The Judgment entered on April 24, 1989,
14 sentenced the Petitioner to two years imprisonment for the drug
15 conviction and cross-referenced his assault case, Case No. 39348.
16 Appendix 4-5, attached to Petitioner's Motion. His probation was
17 revoked and he was sentenced to a concurrent term of two years
18 imprisonment on April 24, 1989.

19 ... Moreover, this same issue was raised and rejected on direct
20 appeal. ... Since this issue was raised and determined on direct appeal,
21 the Petitioner may not use a collateral attack to relitigate the same
22 claim.

23 ... Instead of proving that the Petitioner's probationary sentence
24 was never revoked, the documents provided by Petitioner prove that it
25 was, in fact, revoked. The Petitioner's claim of ineffective assistance
26 of counsel on this issue is, therefore, rejected.

27 Id. at 5-9.

28 Petitioner also argued that his 1987 California assault conviction was

1 improperly used to enhance his federal sentence because it was suspended and it
2 was outside the 15-year time period specified in the Sentencing Guidelines. Id. at
3 10. The court rejected these arguments, finding that the sentence at issue qualified
4 because “when that suspended [1987] sentence was later revoked in 1989 and the
5 two year sentence imposed, the original conviction then qualified as a prior adult
6 felony conviction imposed within 15 years of the 1999 commencement of this
7 offense.” Id. at 11.

8 Petitioner moved for reconsideration, which was denied on December 9,
9 2005. Id., Dkt. 150, 151. The Fourth Circuit denied Petitioner’s requests for a
10 certificate of appealability and rehearing en banc. Id., Dkt. 153, 156, 157, 158.

11 **2. § 2254 Petition Challenging the California Convictions.**

12 In January 2008, Petitioner filed a petition for writ of habeas corpus under 28
13 U.S.C. § 2254 in the United States District Court for the Eastern District of
14 California in case no. 08-cv-00238-GEB-GGH. Scott, 1:00-cr-00069-MR, Dkt.
15 161. This petition attacked his California convictions for assault and possession of
16 cocaine, on the basis that they were entered in violation of a plea agreement. Id. at
17 3. Finding the petition should have been brought under § 2255, the California court
18 transferred it to the sentencing court in North Carolina. Id., Dkt. 161-1.

19 On September 3, 2008, the sentencing court dismissed the petition with
20 prejudice, finding:

21 [I]t does not matter whether his petition his construed under § 2254 or
22 § 2255, as the federal courts cannot consider his request for relief under
23 either statute. In 2001, in companion cases, the United States Supreme
24 Court ruled that neither § 2254 or § 2255 is a proper vehicle for
25 challenging a prior conviction, if that conviction was used to enhance
26 the defendant’s federal sentence but is no longer open to direct or
27 collateral attack in its own right. Lackawanna County Dist. Attorney
28 v. Coss, 532 U.S. 394, 401-03 (2001) (barring challenges to prior

convictions under § 2254); Daniels v. United States, 532 U.S. 374, 382-83 (2001) (barring challenges to prior convictions under § 2255). ...

[T]here is no statute enabling the Court to reach the merits of the petition.

5 *Id.*, Dkt. 164 at 3-5. Petitioner moved for reconsideration, which was denied. *Id.*,
6 Dkt. 165, 166.

3. Request to File a Second or Successive Motion under § 2255.

8 In March 2016, Petitioner filed a motion in the Fourth Circuit seeking
9 authorization to file a second or successive § 2255 motion based on the Supreme
10 Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015). In Re Scott,
11 No. 16-211 (9th Cir.), Dkt. 2-1. Petitioner argued, “The assault conviction under
12 California law which was tendered based upon a no contest plea no longer
13 qualifies] as a crime of violence in light of Johnson....” Id., Dkt. 2-2 at 4
14 (proposed § 2255 motion). He also noted that he had “two more claims of ‘possible
15 merit,’” including that “he is actually innocent of the drug trafficking predicate.”
16 Id. at 15. The Fourth Circuit denied the motion, finding, “We have reviewed the
17 relevant materials and case law and conclude that, even if applied retroactively to
18 cases on collateral review, Johnson would entitle Scott to no relief.” Id., Dkt. 7.

4. Motion to Correct Presentence Investigation Report.

20 In May 2016, Petitioner filed a motion to correct the Presentence
21 Investigation Report (“PSR”) in the sentencing court. Scott, 1:00-cr-00069-MR-5,
22 Dkt. 192. Petitioner alleged that the PSR erroneously stated that (1) he was
23 previously convicted of assault with a deadly weapon, and (2) he was once
24 affiliated with a gang. Id., Dkt. 193 at 2. He alleged that these errors were
25 adversely affecting his security classification and eligibility for certain programs
26 while incarcerated. Id.

27 On June 9, 2016, the court denied the motion, finding that to the extent
28 Petitioner was “asserting a substantive challenge to the information presented in the

1 PSR, ... the time for making such objections [had] long since passed," and the court
2 "lack[ed] jurisdiction to entertain the Defendant's motion." Id. at 3. The court also
3 found that, to the extent Petitioner was challenging his underlying sentence, the
4 motion was an authorized second or successive motion under § 2255. Id. at 4.

5 **III.**

6 **CLAIMS RAISED IN THIS ACTION**

7 On May 30, 2017, Petitioner constructively filed the instant habeas petition
8 in this Court under 28 U.S.C. § 2241. (Dkt. 1 ["Petition"].)³ The Petition raises
9 four claims:

10 (1) Whether [Petitioner] is factually innocent of being convicted of
11 AWDW [assault with a deadly weapon]? (2) Whether in light of
12 Mathis [v. United States, 136 S.Ct. 2243 (2016)], [Cal. PC] § 245 is
13 indivisible, overbroad, and fails to qualify as a crime of violence [for
14 purposes of career offender sentencing under U.S.S.G. § 4B1.1]?
15 (3) Whether in light of Mathis, [California Health and Safety Code]
16 § 11351 [under which Petitioner was convicted for possession of "rock"
17 cocaine] is indivisible, overbroad, and fails to qualify as a controlled
18 substance offense [for purposes of career offender sentencing under
19 U.S.S.G. § 4B1.1]? and (4) Whether § 841[the federal statute under
20 which Petitioner was convicted] was indivisible at the time of the
21 conspiracy?

22 (Petition at 16 ["Summary of Issues"].) Regarding the first claim, Petitioner argues
23 that the sentencing court incorrectly found that he was convicted of assault "with a
24 deadly weapon," because he was actually convicted of assault "by any means of

25
26 ³ Petitioner filed a completed district-approved form for § 2241 petitions, as
27 well as a memorandum of law. Both are at Dkt. 1. The Court refers to these
28 collectively as "the Petition," and cites to the pagination imposed by the CM/ECF
electronic filing system.

1 force likely to produce great bodily injury.” (Id. at 16-17.)

2 Petitioner alleges that his prior motions under § 2255 were inadequate or
3 ineffective to test the legality of his detention because:

4 At the time of conviction, [neither Petitioner] nor his attorneys had
5 access to his state court documents to verify or prove that he had never
6 been convicted of AWDW. In addition ... subsequent to [Petitioner’s]
7 direct appeal and initial 2255 motion, substantive law changed and
8 Petitioner cannot satisfy the gatekeeping provisions of § 2255(h)
9 because even though he is factually innocent of the AWDW prior, his
10 other claims fall under Mathis which is not a new rule of constitutional
11 law. In re Jones, 226 F.3d 328, 334 (4th Cir. 2000).

12 (Petition at 6 ¶ 12.)

13 On September 22, 2017, Respondent moved to dismiss the Petition. (Dkt. 13
14 [“Motion to Dismiss”].) Respondent argues that the Petition should be dismissed as
15 an unauthorized second or successive motion under § 2255. (Id.) Petitioner filed a
16 response to the motion on October 23, 2017. (Dkt. 15 [“Reply”].) The Petition is
17 now ripe for review.

18 **IV.**

19 **LEGAL STANDARD**

20 28 U.S.C. § 2255 provides that a federal prisoner “may move the court which
21 imposed [his] sentence to vacate, set aside or correct the sentence” on the ground
22 that the sentence “was imposed in violation of the Constitution or laws of the
23 United States, or that the court was without jurisdiction to impose such sentence, or
24 that the sentence was in excess of the maximum authorized by law, or is otherwise
25 subject to collateral attack....” 28 U.S.C. § 2255(a). Generally, § 2255 provides
26 the exclusive procedural mechanism by which a federal prisoner may test the
27 legality of his detention. Alaimalo v. United States, 645 F.3d 1042, 1046 (9th Cir.
28 2011).

1 Federal prisoners are generally limited to one motion under § 2255; in order
2 to file a second or successive § 2255 motion, the petitioner must obtain a certificate
3 from a U.S. Circuit Court of Appeal finding that the new motion contains:

4 (1) newly discovered evidence that, if proven and viewed in light of the
5 evidence as a whole, would be sufficient to establish by clear and
6 convincing evidence that no reasonable factfinder would have found
7 the movant guilty of the offense; or
8 (2) a new rule of constitutional law, made retroactive to cases on
9 collateral review by the Supreme Court, that was previously
10 unavailable.

11 28 U.S.C. § 2255(h); see also United States v. Buenrostro, 638 F.3d 720, 726 (9th
12 Cir. 2011).

13 “However, a federal prisoner may file a habeas petition under § 2241 if the
14 remedy provided by § 2255 is ‘inadequate or ineffective to test the legality of his
15 detention.’ Alaimalo, 645 F.3d at 1046 (quoting 28 U.S.C. § 2255(e)). “This is
16 called the ‘savings clause’ or ‘escape hatch’ of § 2255.” Id. at 1047. “A petition
17 meets the escape hatch criteria where a petitioner ‘(1) makes a claim of actual
18 innocence, and (2) has not had an unobstructed procedural shot at presenting that
19 claim.’” Id. (quoting Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006)).

20 To establish actual innocence for purposes of habeas relief, a petitioner ‘must
21 demonstrate that, in light of all the evidence, it is more likely than not that no
22 reasonable juror would have convicted him.’” Id. (quoting Stephens, 464 F.3d at
23 898). “A petitioner is actually innocent where he was convicted for conduct not
24 prohibited by law.” Id. In considering whether the petitioner had an unobstructed
25 procedural shot at presenting his claim, courts consider: “(1) whether the legal basis
26 for petitioner’s claim did not arise until after he had exhausted his direct appeal and
27 first § 2255 motion; and (2) whether the law changed in any way relevant to
28 petitioner’s claim after that first § 2255 motion.” Id. at 1047.

1 A habeas petitioner “may not avoid the limitations imposed on successive
2 petitions by styling his petition as one pursuant to 28 U.S.C. § 2241....” Moore v.
3 Reno, 185 F.3d 1054, 1005 (9th Cir. 1999). “Petitioner’s remedy under § 2255 is
4 not rendered inadequate or ineffective [for purposes of the ‘escape hatch’] because
5 his previous collateral attacks have been unsuccessful or because he cannot meet
6 the strict procedural requirements for filing a successive § 2255 petition.” Fisher v.
7 Schultz, No. 15-00388, 2005 U.S. Dist. LEXIS 49028 at *7, 2005 WL 1554639 at
8 *3 (E.D. Cal. June 27, 2005). “Similarly, § 2255 is not inadequate or ineffective
9 merely because a particular petitioner’s § 2255 motion is procedurally barred” or
10 “because a petitioner misses the statute of limitations.” Id.

V.

DISCUSSION

13 As described above in the Background section of this Report and
14 Recommendation, Petitioner has already filed at least one motion under § 2255
15 challenging the same conviction that he now challenges. He also unsuccessfully
16 sought permission from the Fourth Circuit to file a second or successive § 2255
17 motion. However, Petitioner argues that his current Petition should be allowed to
18 proceed under § 2241 pursuant to the “escape hatch” provision in § 2255(e). In
19 order to do so, Petitioner must (1) make a claim of actual innocence, and (2) show
20 that he has not had an unobstructed procedural shot at presenting that claim.

21 The Petition purports to bring an actual innocence claim. Petitioner alleges
22 that he is “factually innocent” of the California assault “with a deadly weapon”
23 conviction that was used to sentence him as a career offender under the Sentencing
24 Guidelines. (Petition at 3 ¶ 9(a).) He argues, “The actual charge that he pled no
25 conte[s]t to was ‘assault with means likely to produce a great bodily harm’....”
26 (*Id.*, citing transcript of state court plea hearing.) He argues that this error led to
27 him being improperly sentenced as a career offender. (*Id.* at 13, 16.)

28 The claim that Petitioner's sentence was improperly enhanced is not an

1 “actual innocence” claim for purposes of the § 2255(e) escape hatch. “[A]
2 petitioner generally cannot assert a cognizable claim of actual innocence of a
3 noncapital sentencing enhancement.” Marrero v. Ives, 682 F.3d 1190, 1193 (9th
4 Cir. 2012) (collecting cases from other circuits). In Marrero, the Ninth Circuit held,
5 “[P]urely legal argument that a petitioner was wrongly classified as a career
6 offender under the Sentencing Guidelines is not cognizable as a claim of actual
7 innocence under the escape hatch.” Id. at 1195. That is precisely the claim that
8 Petitioner brings in this case.

9 Marrero did note that some circuits “have recognized exceptions to the
10 general rule that a petitioner cannot be actually innocent of a noncapital sentence
11 under the escape hatch,” including if the petitioner “was *factually* innocent of the
12 crime that served as the predicate conviction for the enhancement.” Id. at 1194
13 (collecting cases). Petitioner attempts to invoke this exception. (See Reply at 3,
14 arguing, “Marrero left open the door to a narrow class of individuals such as
15 [Petitioner] that can prove he is factually innocent of the state offense.”) He argues
16 that he is “factually innocent” of assault “with a deadly weapon” because he was
17 actually convicted of assault “by means of force likely to produce great bodily
18 injury.” (Id. at 6-7.) See Cal. PC § 245(a)(1) (1987) (criminalizing “assault upon
19 the person of another with a deadly weapon or instrument other than a firearm or by
20 any means of force likely to produce great bodily injury”).⁴

21 The distinction Petitioner draws is not one of factual innocence. In the
22

23 ⁴ At the time of Petitioner’s conviction in 1987, Cal. PC § 245(a) contained
24 only two subsections: (1) assault “with a deadly weapon or instrument other than a
25 firearm or by any means of force likely to produce great bodily injury,” and
26 (2) assault “with a firearm.” Cal. PC § 245(a) was later amended so that separate
27 subsections address (1) assault “with a deadly weapon or instrument other than a
28 firearm,” (2) assault “with a firearm,” (3) assault “with a machine gun ... or an
assault weapon ... or a .50 BMG rifle,” and (4) assault “by means of force likely to
produce great bodily injury.”

1 relevant California criminal case, Petitioner was charged with a first degree murder
2 in which the victim was shot and killed; pursuant to a plea agreement, he pled no
3 contest to a reduced charge of assault under Cal. PC § 245(a). See Scott, 1:00cr-
4 00069-MR-5, Dkt. 148 at 6 n.2 (“On October 25, 1986, the Petitioner shot and
5 killed Paul Saucier in Stockton, California. His co-conspirator in the [federal drug]
6 case, George McBride, was present when Saucier was killed.”); (Petition at 52-54,
7 64-69 [transcript of state court plea hearing]). Petitioner does not claim that he was
8 not the shooter, that a deadly weapon was not used, or that he was otherwise
9 “convicted for conduct not prohibited by law.” Alaimalo, 645 F.3d at 1047.
10 Rather, the gravamen of his claim is that he was improperly sentenced as a career
11 offender in his subsequent federal criminal case. (See Petition at 86-87 ¶¶ 11, 16
12 [affidavit from Petitioner arguing, “I am suffering adversely by the mistaken belief
13 that I have been convicted of assault with a deadly weapon because under state and
14 federal law it is considered a violent felony and it has caused me to receive a life
15 sentence. ... [T]he actual charge that I pled no contest to was, ‘assault likely’ which
16 is categorically classified as a nonserious nonviolent offense compare to the charge
17 of assault with a deadly weapon, ... I have never been convicted of a violent felony
18 under federal or state law.”].)⁵

19 Because this is not a claim of actual innocence for purposes of the § 2255(e)
20

21 ⁵ Case law does not appear to distinguish between convictions for assault
22 “with a deadly weapon” and “by any means of force likely to produce great bodily
23 injury” for purposes of demonstrating a “crime of violence” under the career
24 offender Sentencing Guideline. See United States v. Rodgers, No. 08-00716, 2016
25 WL 7337230 at *4, 2016 U.S. Dist. LEXIS 175281 at *9 (N.D. Cal. Dec. 19, 2016)
26 (“assault under California Penal Code § 245(a) is a crime of violence under the
27 Career Offender Guideline’s force clause” even after Johnson); United States v.
28 Gonzalez, No. 16-1577, 2016 U.S. Dist. LEXIS 149275, *8-9 (S.D. Cal. Oct. 27,
2016) (finding that conviction for “Assault with a Deadly Weapon: Likely to Cause
Great Bodily Injury” under Cal. PC § 245(a) was a crime of violence under the
Career Offender Guideline).

1 "escape hatch," Petitioner cannot bring this Petition under § 2241. The appropriate
2 procedure is to seek permission from the Fourth Circuit to file a second or
3 successive motion under § 2255 raising these claims. Because Petitioner has not
4 obtained such permission, this Court lacks jurisdiction to consider his claims.

5 **VI.**

6 **RECOMMENDATION**

7 IT IS THEREFORE RECOMMENDED that the District Court issue an
8 Order: (1) approving and accepting this Report and Recommendation; (2) granting
9 Respondent's Motion to Dismiss (Dkt. 13); and (3) dismissing the Petition as an
10 unauthorized second or successive motion under § 2255.

11 DATED: December 15, 2017



12
13 KAREN E. SCOTT
14 United States Magistrate Judge

15 **NOTICE**

16 Reports and Recommendations are not appealable to the Court of Appeals,
17 but are subject to the right of any party to timely file Objections as provided in the
18 Federal Rules of Civil Procedure and the instructions attached to this Report. This
19 Report and any Objections will be reviewed by the District Judge whose initials
20 appear in the case docket number.

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APPENDIX C

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AMOS JUNIOR SCOTT, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AMOS JUNIOR SCOTT, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

40 Fed. Appx. 807; 2002 U.S. App. LEXIS 14032

No. 01-4099, No. 01-4663

June 25, 2002, Submitted

July 12, 2002, 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

Writ of certiorari denied: Scott v. United States, 2003 U.S. LEXIS 498 (U.S. Jan. 13, 2003). Decision reached on appeal by, Sub nomine at United States v. McBride, 42 Fed. Appx. 629, 2002 U.S. App. LEXIS 15886 (4th Cir. N.C., Aug. 7, 2002)Writ of certiorari denied Scott v. United States, 537 U.S. 1140, 123 S. Ct. 937, 154 L. Ed. 2d 836, 2003 U.S. LEXIS 498 (Jan. 13, 2003)Writ of habeas corpus denied Scott v. United States, 2005 U.S. Dist. LEXIS 44473 (W.D.N.C., Nov. 7, 2005)Writ of habeas corpus dismissed Scott v. United States, 2008 U.S. Dist. LEXIS 79981 (W.D.N.C., Sept. 3, 2008)Post-conviction proceeding at, Motion denied by Scott v. United States, 2009 U.S. Dist. LEXIS 8999 (W.D.N.C., Jan. 26, 2009)Motion granted by, in part, Motion denied by, in part, Motion denied by, Without prejudice United States v. Rutherford, 2011 U.S. Dist. LEXIS 102640 (W.D.N.C., Sept. 12, 2011)Writ dismissed by, Motion denied by, Certificate of appealability denied Scott v. United States, 2017 U.S. Dist. LEXIS 183133 (W.D.N.C., Nov. 4, 2017)Magistrate's recommendation at, Post-conviction proceeding at Scott v. Tellez, 2017 U.S. Dist. LEXIS 216559 (C.D. Cal., Dec. 15, 2017)

Editorial Information: Prior History

Appeals from the United States District Court for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge. (CR-00-69).

Disposition:

Affirmed.

Counsel

Reita P. Pendry, Charlotte, North Carolina, for Appellant.

Robert J. Conrad, Jr., United States Attorney, Thomas R. Ascik,
Assistant United States Attorney, Asheville, North Carolina, for Appellee.

Judges: Before WIDENER, KING, and GREGORY, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: From the United States District Court for the Western District of North Carolina, at Asheville, defendant appealed his conviction and life sentence for conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C.S. §§ 846, 851. The judgment was affirmed. Because defendant had prior felony convictions for assault with a deadly weapon and possession of "rock" cocaine, the district court did not clearly err in sentencing him as a career

offender.

OVERVIEW: Defendant argued the district court improperly admitted: (1) character evidence of his affiliation with a street gang; (2) hotel registrations and telephone records in violation of the rule against hearsay; and (3) the bolstering testimony of a federal agent. Because defendant did not object to the admission of this evidence at trial, review was for plain error. Defendant next argued that the district court clearly erred in sentencing him as a career offender. The court found that because defendant had prior felony convictions for assault with a deadly weapon and possession of "rock" cocaine, the district court did not clearly err in sentencing him as a career offender. The court further held that defendant's claim that he did not receive notice of the assault with a deadly weapon conviction was meritless. Lastly, the court held that the district court did not clearly err in applying a two-level enhancement to defendant's sentence for his role in the offense.

OUTCOME: The judgment was affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Evidence

Where a defendant did not object to the admission of this evidence at trial, an appellate court's review is for plain error.

Criminal Law & Procedure > Sentencing > Imposition > Factors

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview

An appellate court reviews a district court's determination of a defendant's role in the offense for clear error.

Opinion

{40 Fed. Appx. 808} PER CURIAM:

Amos Junior Scott appeals his conviction and life sentence for conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 846 and 851 (1994). Finding no error, we affirm.

Scott contends the district court improperly admitted: (1) character evidence of his affiliation with a street gang; (2) hotel registrations and telephone records in violation of the rule against hearsay; and (3) the bolstering testimony of an FBI Agent. Because Scott did not object to the admission of this evidence at trial, our review is for plain error. *United States v. Olano*, 507 U.S. 725, 731-32, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Our review of the record convinces us that the district court did not plainly err.

Scott next contends that the district court clearly erred in sentencing him as a career offender.

Because Scott had prior felony convictions for assault with a deadly weapon and possession of "rock" cocaine, the district court did not clearly err in sentencing him as a career offender. See *United States Sentencing Guidelines Manual* § 4B1.2(c) (1998). We further conclude that Scott's claim that he did not receive notice of the assault with a deadly weapon conviction is meritless. See *United States v. Foster*, 68 F.3d 86, 89 (4th Cir. 1995).

Scott also contends the district court erred in applying a two-level enhancement to his sentence for his role in the offense. We review a district court's determination of a defendant's role in the offense for clear error, *United States v. Perkins*, 108 F.3d 512, 518 (4th Cir. 1997), and we find no clear error here.

We have also reviewed the claims raised in Scott's pro se supplemental brief and find them meritless. * Accordingly, we affirm Scott's under 28 U.S.C.A. § 2255 (West Supp. 2001), rather than on direct appeal. *United States v. King*, 119 F.3d 290 (4th Cir. 1997).

AFFIRMED

Footnotes

To permit adequate development of the record, Scott must bring his claims of ineffective assistance of counsel in a post-conviction motion for conviction and sentence. 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.