IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14239-K

AARON FORD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Aaron Ford is a federal prisoner serving a total 156-month sentence after pleading guilty in 2015 to being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and to possession with the intent to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 841(a)(1). He seeks a certificate of appealability ("COA") to appeal the denial of his *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, in which he challenged his designation as a career offender under the Sentencing Guidelines. In objections to a magistrate judge's report and recommendation, he raised new claims that he received ineffective assistance of counsel. The district court denied the § 2255 motion, determining that Ford's challenge to his career-offender designation was procedurally defaulted and was not cognizable on collateral review. The district court declined to consider the newly raised ineffective-assistance-of-counsel claims because Ford did not seek leave to amend his § 2255 motion and because the claims were not presented to the magistrate judge.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a § 2255 motion on a procedural ground, a COA should issue if the movant shows that reasonable jurists would find debatable whether (1) the motion states a valid claim of the denial of a constitutional right, and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Career-offender guideline

A federal prisoner may file a § 2255 motion if he claims that his "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). An "error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quotation marks omitted). An alleged misapplication of the advisory Sentencing Guidelines—such as an erroneous designation of a defendant as a career offender—is not a fundamental defect that inherently results in a complete miscarriage of justice. *Spencer v. United States*, 773 F.3d 1132, 1138-40 (11th Cir. 2014) (*en banc*) (reasoning that, even if the district court misapplied the Sentencing Guidelines, the court could impose the same sentence again given the Sentencing Guidelines's advisory nature). "A prisoner may challenge a sentencing error as a 'fundamental defect' on collateral review when he can prove that he is either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated." *Id.* at 1139.

Ford may not challenge his designation as a career offender through a § 2255 motion. *See id.* at 1138-40. Because he was sentenced under the advisory Sentencing Guidelines, the

district court had the discretion to vary from the guideline range. He has not argued that he is actually innocent of the crimes to which he pled guilty, nor has he asserted that the prior convictions that led to his career-offender designation have been vacated. *See id.* at 1139. Ford has not alleged a sentencing error that would constitute a fundamental defect, and, thus, reasonable jurists would not debate that the § 2255 motion did not raise a cognizable § 2255 claim. *See Addonizio*, 442 U.S. at 185; *Spencer*, 773 F.3d at 1138-40.

Ineffective assistance of counsel

When a party does not amend a pleading within 21 days of its service, the party may amend the pleading "only with the opposing party's written consent or the court's leave." *See* Fed. R. Civ. P. 15(a)(1), (2); *see also* 28 U.S.C. foll. § 2255, Rule 12 (stating that the Federal Rules of Civil Procedure apply in § 2255 proceedings "to the extent that they are not inconsistent with any statutory provisions or these rules"). A "district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." *Williams v. McNeil*, 557 F.3d 1287, 1288, 1292 (11th Cir. 2009).

Ford raised his ineffective-assistance-of-counsel claims for the first time in his objections to the magistrate judge's report and recommendation. He did not file an amended § 2255 motion or seek leave to file an amended motion. Reasonable jurists would not debate that the district court acted within its discretion by declining to consider the ineffective-assistance-of-counsel claims as a result.

Because reasonable jurists would not debate that the district court properly denied Ford's § 2255 motion, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61261-CIV-ZLOCH

AARON FORD,

Movant,

vs. **FINAL JUDGMENT**

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). For the reasons expressed in this Court's Order denying said Motion, entered separately, and pursuant to Federal Rule of Civil Procedure 58, it is

ORDERED AND ADJUDGED as follows:

1. Final Judgment be and the same is hereby **ENTERED** in favor of Respondent United States of America and against Movant Aaron Ford upon the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) filed herein. Movant shall take nothing by this action and said Respondent shall go hence without day; and

2. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of August, 2017.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

See Attached Mailing List

AARON FORD v. UNITED STATES OF AMERICA, Case No. 17-61261-CIV-ZLOCH

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61261-CIV-ZLOCH

AARON FORD,

Movant,

vs.

ORDER DENYING
CERTIFICATE OF APPEALABILITY

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court sua sponte and the Court having carefully reviewed the entire court file herein and after due consideration, it is

ORDERED AND ADJUDGED that the Court having denied the Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1), finds that the Movant Aaron Ford has failed to demonstrate the deprivation of a Federal constitutional right. Accordingly, the issuance of a Certificate Of Appealability be and the same is hereby **DENIED** for the reasons set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of August, 2017.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

All Counsel Of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61261-CIV-ZLOCH

AARON FORD,

Movant,

vs. **O R D E R**

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 10) filed herein by United States Magistrate Judge Patrick A. White, Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1), Movant's Appeal Of 7/24/2017 Magistrate's Denial Of The Report And Recommendation To The Honorable U.S. District Court Judge (DE 5), and the Government's Objections To The Report Of The Magistrate Judge (DE 7). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

In his underlying criminal case, Movant pled guilt to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g), and possession of a controlled substance with intent to deliver, in violation of 21 U.S.C. § 841(a)(1). Because Movant was at least eighteen years old at the time of his offense, which was a felony controlled substance offense, Movant was eligible to be considered a Career Offender under the United States

Sentencing Guidelines. Based on two prior convictions—one for possession of marijuana with intent to sell, one for possession of cocaine with intent to sell—the Court applied the Career Offender enhancement to Movant at the time of his sentencing. The Court entered judgment against Movant on February 22, 2016. Movant filed a direct appeal but voluntarily dismissed it on May 5, 2016.

Movant then filed the instant Motion (DE 1) seeking relief from his conviction pursuant to 28 U.S.C. § 2255 on June 19, 2016. In that Motion (DE 1), Movant raised one claim: that he does not qualify for a Career Offender enhancement because one of his predicate convictions for that enhancement no longer qualifies as a "controlled substance offense."

Even assuming that his Motion (DE 1) is timely, Movant's claim is not cognizable in a § 2255 proceeding in this Circuit. In Spencer v. United States, an en banc panel of the Eleventh Circuit held that a federal prisoner "cannot collaterally attack his sentence based on misapplication of the advisory guidelines." 773 F.3d 1132, 1135 (11th Cir. 2014) (en banc). There are only two exceptions to this rule and Movant relies on neither. He does not claim that he is actually innocent of the two crimes to which he pled guilty and he does not contend that either of the predicate offenses for his Career Offender enhancement have been vacated. See id. at 1139-40. His sentence, being well below the statutory maximum, is therefore "lawful" and not subject to challenge based

on the sentencing error he alleges. Id. at 1144.

Magistrate Judge White also concluded that Movant's Motion (DE 1) must be denied because Movant procedurally defaulted the claim by voluntarily dismissing his direct appeal. The Court adopts Magistrate Judge White's rationale as an addition reason why Movant's Motion (DE 1) is due to be denied.

Lastly, the Court notes that Movant's Appeal Of 7/24/2017 Magistrate's Denial Of The Report And Recommendation To The Honorable U.S. District Court Judge (DE 5) purports to raise an ineffective assistance of counsel claim not raised in his initial Motion (DE 1). Movant has not sought leave to amend his Motion (1) to include this claim, it was not presented to the Magistrate Judge, and the Court therefore declines to consider it. See Daniel v. Chase Bank USA, N.A., 650 F. Supp. 2d 1275, 1278 (N.D. Ga. 2009) (citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Movant's Appeal Of 7/24/2017 Magistrate's Denial Of The Report And Recommendation To The Honorable U.S. District Court Judge (DE 5) be and the same is hereby **OVERRULED** and **DENIED;**

2. The Government's Objections To The Report Of The Magistrate Judge (DE 7) be and the same are hereby **SUSTAINED;**

3. The Report Of Magistrate Judge (DE 10) filed herein by United States Magistrate Judge Patrick A. White be and the same is

hereby approved, adopted, and ratified by the Court;

4. Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) be and the same is hereby **DENIED**; and

5. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of August, 2017.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CIV-61261-ZLOCH
(15-CR-60223-ZLOCH)
MAGISTRATE JUDGE P.A. WHITE

AARON FORD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF THE MAGISTRATE JUDGE

Introduction

The movant has filed a motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 15-Cr-60223-Zloch.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts. The Court has reviewed the motion [CV-DE#1], and all pertinent portions of the underlying criminal file. No order to show cause has been issued because, on the face of the motion, it is evident the movant is entitled to no relief. See Rule 4(b), Rules Governing Section 2255 Proceedings.[1]

[1]Rule 4(b) of the Rules Governing Section 2255 Proceedings, provides, in pertinent part, that "[I]f it plainly appears from the motion and any attached exhibits, and the record of prior proceeding that the movant party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party...."

Claims

Movant's sole claim in this proceeding is that his Career Offender sentence under the Federal Sentencing Guidelines is unlawful in light of the Supreme Court's decision in Mathis v. United States, — U.S. —, 136 S. Ct. 2243 (2016). Specifically, Movant argues that Mathis demonstrates that his conviction under Florida Statute § 893.13(1)(A) no longer qualifies as a "controlled substance offense" for purposes of the enhancement under the Guidelines.

Procedural History

Movant pled guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g), and one count of possession with intent to deliver a controlled substance in violation of 21 U.S.C. §841(a)(1). (CR-DE#23). A PSI was prepared in anticipation of sentencing. The base offense level for this violation of § 841(a)(1) was 24. (PSI, ¶14). Two levels were then added because the firearm at issue in the §922(g) count was stolen, and another four were added because the firearm was possessed in connection with a drug trafficking felony offense. (Id. at ¶¶15-16). This resulted in an adjusted offense level of 30. (Id. at ¶20). However, Movant was considered to be a Career Offender under the Federal Sentencing Guidelines, because he was at least 18 years old at the time of the instant offense, the instant offense is a felony controlled substance offense, and he has at least two prior felony convictions for either a crime of violence or a controlled substance offense. (Id. at ¶21). His offense level was thus enhanced to 34. (Id.). As the prior convictions qualifying Movant for the Career Offender enhancement under the Guidelines, the PSI listed a conviction for possession of marijuana with intent to sell in case number 01-020493 CF10A, and a conviction for possession of cocaine with intent to deliver or sell in case number 10-017726

CF10A. (Id. at ¶¶21, 32 & 45). Three points were deducted for timely acceptance of responsibility, resulting in a total offense level of 31. (Id. at ¶¶22-24).

Movant also had a total of 22 criminal history points, resulting in a criminal history category of VI. (PSI, ¶50). And regardless, because Movant was considered a Career Offender, Movant's criminal history category was enhanced to a category VI. (Id.). Based on a total offense level of 31 and a criminal history category of VI, Movant's guideline sentencing range was 188-235 months' imprisonment. (Id. at ¶65).

Counsel for Movant filed a sentencing memorandum, wherein counsel objected to Movant's Career Offender designation and requested a downward variance. (CR-DE#29). Pertinent here, counsel argued that Movant's prior convictions for possession with intent to sell in violation of Florida Statute § 893.13 did not qualify as "controlled substance offenses" for purposes of the Career Offender enhancement because the Florida statute at issue does not require proof of the defendant's knowledge. (Id.). Counsel acknowledged that the Eleventh Circuit had expressly rejected this argument in United States v. Smith, 775 F.3d 1262 (11th Cir.), *reh'g en banc denied* (11th Cir. 2015), but contended that Smith was wrongly decided and contrary to various Supreme Court precedent, and raised the issue to preserve it for appellate review. (Id.).

Movant appeared for sentencing on February 19, 2016, at which time the district court adopted the PSI without change, but did grant Movant's motion for downward variance and sentenced Movant to 156 months' imprisonment. (CR-DE#34, Court's Statement of Reasons).

Judgment was entered on February 22, 2016. (CR-DE#34). Movant filed a direct appeal, but then moved to voluntarily dismiss

it. (CR-DE#35, 42). The motion was granted by the Eleventh Circuit on May 5, 2016. (CR-DE#42).

Thereafter, on June 19, 2016, Movant filed the instant motion to vacate pursuant to 28 U.S.C. § 2255 pursuant to the "prison mailbox rule."[2]

Statute of Limitations

Pursuant to § 2255(f), a one-year period of limitation applies to motions under that section. The limitations period runs 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 such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that 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 presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f).

Here, Petitioner contends that the statute of limitations runs pursuant to § 2255(f)(3) from the date of the Supreme Court's decision in Mathis, supra, and that his motion is timely because it was filed within one year of that decision.

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[2]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule").

In cases where the constitutional right asserted is a newly recognized right made retroactively applicable to cases on collateral review, the AEDPA's one-year limitations period runs from the date of that decision. See Dodd v. United States, 545 U.S. 353 (2005). Here, Mathis was decided on June 23, 2016, and Movant's motion was in fact filed within one year of Mathis. The problem for Movant, however, is that Mathis did not announce a newly-recognized constitutional right made retroactively applicable to cases on collateral review. See United States v. Taylor, 672 F. App'x 860 (10th Cir. 2016)((holding, "Because Mathis did not announce a new rule, Mr. Taylor cannot rely on it in a § 2255 petition filed nearly fifteen years after the judgment in his criminal case became final. Mr. Taylor's petition is time-barred."); see also Dawkins v. United States, 829 F.3d 549, 551 (7th Cir. 2016); In re Lott, 838 F.3d 522, 523 (5th Cir. 2016). Indeed, the Supreme Court itself noted in Mathis that, "[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition." --- U.S. at ----, 136 S. Ct. at 2257. Accordingly, Mathis does not establish a newly recognized rule that is retroactively applicable to cases on collateral review. See Holt v. United States, 843 F.3d 720, 722 (7th Cir. 2016) (noting the Mathis decision interprets the "statutory word 'burglary' and does not depend on or announce any novel principle of constitutional law[ ]").

The statute of limitations in this case, therefore, runs pursuant to § 2255(f)(1), from the date that Movant's judgment of conviction became "final." 28 U.S.C. § 2255 ¶ f(1). When a defendant appeals, but does not seek certiorari review in the

Supreme Court, his conviction becomes "final" when the 90-day period for seeking certiorari review expires. See Clay v. United States, 537 U.S. 522, 525 (2003)("For purposes of starting the clock on § 2255's one-year limitation period, ... a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction."); see also Close v. United States, 336 F.3d 1283, 1285 (11th Cir. 2003)(same); Kaufman v. United States, 282 F.3d 1336, 1339 (11th Cir. 2002)(same). However, as set forth above, in this case, Movant voluntarily dismissed his direct appeal.

"The Eleventh Circuit has not addressed the issue of the date a conviction becomes final when a direct appeal is voluntarily dismissed." Adair v. Tucker, No. 5:12-cv-346-MP-GRJ, 2014 WL 2805227, at *2 (N.D. Fla. June 20, 2014). There are of course only two ways to resolve the issue. The first option is to use the date on which the appeal is voluntarily dismissed as the date marking finality for purposes of triggering the AEDPA's limitations period, while the second option is to use the date of ninety days thereafter, upon the expiration of the period to seek certiorari in the United States Supreme Court. Id. In the present case, the instant motion is time-barred if one uses the former date, but timely if one uses the latter.[3] The Court need not resolve this unsettled issue. That is because, even assuming Movant's motion is timely filed, the claim he raises therein is also procedurally barred. See Sallie v. Humphrey, No. 5:11-CV-75 MTT, 2012 WL 3871906, at *1 (M.D. Ga. Sept. 6, 2012)("because the statute of limitations is not a jurisdictional bar to habeas review, a federal court can, in the interest of judicial economy, proceed to the

[3]Because, as set forth above, the Eleventh Circuit dismissed Movant's appeal in May of 2015, and Movant filed the instant motion in June of 2016. Thus, in this case, the 90 days is dispositive of the limitations issue.

merits of the habeas petition") (*citing* Day v. McDonough, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006).

Procedural Bar

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, yet another avenue exists for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional

violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). However, that did not occur here. Rather, as set forth above, Mathis merely applied a long-standing rule in a slightly different context and, as such, did not establish any new rule of constitutional law. See Taylor, 672 F. App'x at 862; Dawkins, 829 F.3d at 551; Holt, 843 F.3d at 722. Moreover, no actual prejudice would result from finding a procedural default here because, as set forth *supra*, Movant's claim that his prior drug convictions cannot be predicate offenses because the Florida statute at issue does not have a *mens rea* requirement was explicitly rejected in Smith, supra. And as the Eleventh Circuit has repeatedly emphasized, even after Mathis, "We are not persuaded by Defendant's argument that his prior drug convictions cannot be predicate offenses because the Florida statute does not have a *mens rea* requirement, as we explicitly rejected this argument in Smith. . . . Under the prior precedent rule, we are bound by the holding in Smith 'unless and until it is overruled by

this court *en banc* or by the Supreme Court.'" United States v. McKenzie, No. 16-15936, 2017 WL 2492032, at *2 (11th Cir. June 9, 2017); see also United States v. Lott, No. 16-11993, 2017 WL 1857238, at *1 (11th Cir. May 8, 2017) ("Although Mr. Lott believes Smith and Hill were wrongly decided, we are bound by those decisions."); United States v. Robinson, No. 16-16176, 2017 WL 1314843, at *1 (11th Cir. Apr. 10, 2017) ("[W]e previously have held that a prior conviction under § 893.13 is a 'controlled substance offense' under U.S.S.G. Â§ 4B1.2(b). See United States v. Smith, 775 F.3d 1262, 1267-68 (11th Cir. 2014) . . . [W]e are bound to follow that precedent unless and until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court."). Accordingly, Movant cannot establish cause-and-prejudice overcome the procedural bar.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate

whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant's claims are barred on procedural grounds, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

Conclusion

Based on the foregoing, it is hereby it is recommended that the motion to vacate be summarily DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

DONE AND ORDERED in Chambers in Miami, Florida this 24th day of July, 2017.

UNITED STATES MAGISTRATE JUDGE

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