Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10165-C

GILBERTO VILLANUEVA, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Gilberto Villanueva moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Villanueva has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:18-cv-61308-UU

GILBERTO VILLANUEVA, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER ON MAGISTRATE'S REPORT AND RECOMMENDATION

This Cause is before the Court upon the Petitioner's *pro se* Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 (the "Motion") (D.E. 1).

THE COURT has considered the Motion and is otherwise fully advised in the premises.

This matter was referred to Magistrate Judge Patrick A. White, who, on June 20, 2018 issued a Report (the "Report") (D.E. 6) recommending that the Motion be denied, no certificate of appealability issue, and the case be closed. Both parties were given fourteen days to file objections. The Government did not file any objections. *See LoConte v. Dugger*, 847 F.2d 145 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988) (holding that failure to file timely objections bars the parties from attacking factual findings on appeal). Petitioner, following this Court's grant of his Rule 60(b) Motion (D.E. 20 & 22) and several motions for extensions of time (D.E. 24 & 26), filed his objections within the time permitted by the Court. D.E. 27 (the "Objections").

Upon *de novo* review, the Court agrees with Magistrate Judge White's recommendation and concurs in all of his findings. The Court has considered Petitioner's Objections and finds that they were sufficiently addressed by the Report and foreclosed by binding Eleventh Circuit

precedent. *See, e.g.*, Report at 23-27 (noting that Petitioner's arguments are foreclosed by *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014)).

Nor is Petitioner's request for a certificate of appealability due to be granted. *See Cray v. United States*, 2017 WL 5515840, at *3 (11th Cir. Apr. 12, 2017) (denying certificate of appealability as to § 2255 movant's *Descamps* challenge to Fla. Stat. § 893.13(1)(a)); *Moore v. United States*, 2018 WL 582758, at *7-8 (M.D. Fla. Jan. 29, 2018) (same); *see also Jones v. United States*, 650 F. App'x 974, 976-77 (11th Cir. 2016) (declining to reconsider *Smith*). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report, D.E. 6, is RATIFIED, ADOPTED, and AFFIRMED. It is further

ORDERED AND ADJUDGED that Movant's Motion, D.E. 1, is DENIED. It is further

ORDERED AND ADJUDGED that no certificate of appealability issue. It is further

ORDERED AND ADJUDGED that the Clerk shall enter final judgment. It is further

ORDERED AND ADJUDGED that this case is CLOSED.

DONE AND ORDERED in Chambers in Miami, Florida, this _3d_ day of January, 2019.

Ursula Ungaro

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
Gilberto Villanueva, Jr., *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-61308-CIV-UNGARO
CASE NO.: 16-60108-CR-UNGARO
MAGISTRATE JUDGE P. A. WHITE

GILBERTO VILLANUEVA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE
RE RULE 60(b) MOTION
(DE#9)

I. Introduction

This matter is before this Court on the movant's motion for equitable relief, filed pursuant to Fed.R.Civ.P. 60(b), requesting permission to file objections to the Report of the undersigned on the basis that he never received a copy of the Report. (Cv-DE#9).

II. Procedural Background

On June 11, 2018, movant filed a motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his conviction and sentence for felon in possession of a firearm, following the entry of a guilty plea in **Case No. 16-60102-Cr-Ungaro**. (Cv-DE#1). A Report was entered on June 20, 2018, recommending that the motion be denied on the merits, that no certificate of appealability issue, and the case be closed. (Cv-DE#6). When no objections were timely received, by Order entered on **July 11, 2018**, the district court adopted the Report and denied the movant's §2255 motion. (Cv-

DE#7).

On **July 31, 2018,** movant filed the Rule 60(b) motion for equitable relief which is currently before the court for consideration. (Cv-DE#9). The matter was re-referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636; S.D. Fla. Local Rule 1(f) governing Magistrate Judges; and S.D. Fla. Admin. Order 2003-19. (DE#14).

Following receipt of the Rule 60 motion, movant was ordered to file a notice attaching a redacted prison log evidencing whether movant had received incoming mail from the court between June 21, 2018 and July 11, 2018. (Cv-DE#13). Movant complied with this court's order, filing a notice with attachments, in which he claims he did not receive any correspondence from the district court between June 21, 2018 and July 11, 2018. (Id.). Thereafter, an order was entered directing the government to file a response to the movant's notice, including therein whether or not prejudice would result from granting the motion. (Cv-DE#17). The government has complied, stating in its response that it has contacted the Federal Correctional Institution in Marianna, and has confirmed that the movant did not, in fact, receive any correspondence from the court between June 21, 2018 and July 11, 2018. (Cv-DE#17:2). The government further concedes that granting the Rule 60(b) "would not appear to prejudice the government." (Id.:3).

III. Discussion

The law is clear that the "[f]ailure to object to the magistrate [judge's] factual findings after notice precludes a later attack on these findings." Council v. Sutton, 366 Fed.Appx. 31, 37 (11th Cir. 2010), quoting, Lewis v. Smith, 855 F.2d 736, 738

(11th Cir. 1988)(*per curiam*)(citation omitted); see also United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988)(same); Stewart v. Dep't of Health & Human Servs., 26 F.3d 115, 115 (11th Cir. 1994)(citation omitted) ("As a general principle, this court will not address an argument that has not been raised in the district court.").

The Report of the undersigned, entered on June 20, 2018, reveals that movant was cautioned that he had fourteen days to file objections with the district court. (Cv-DE#6). Timely objections thereto were due to be filed with the court on or before July 5, 2018. (Id.). Nothing of record reveals that the movant's copy of the Report was returned as undeliverable. However, following additional filings by the movant, it appears he never received a copy of the Report, and has provided verification of that fact from prison officials. Moreover, the government has confirmed with the facility whereat the movant is confined that he did not, in fact, receive any correspondence from the court during the relevant time period.

The movant seeks Rule 60(b) relief. Rule 60(b) provides a basis, but only a limited basis, for a party to seek relief from a final judgment in a habeas case. Williams v. Chatman, 510 F.3d 1290, 1293 (11th Cir. 2007). Rule 60, like all Federal Rules of Civil Procedure, apply only to civil actions and proceedings in the United States District Court. See Fed.R.Civ.P. 1.

Under Rule 60(b), a court may relieve a party of a final order or judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not previously have been discovered with reasonable diligence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void

judgment; (5) a judgment that has been satisfied, released, or discharged, that is based on an earlier judgment that has been reversed or vacated, or that it would no longer be equitable to apply prospectively; or (6) any other reason that justifies relief. See Fed. R. Civ. P. 60(b).

The general rule is that a motion under Rule 60(b) must be made "within a reasonable time—and for reasons (1), (2), and (3), no more than a year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c). Evidently, the Rule 60(b) motion was filed shortly after entry of the judgment in this case, and certainly well before the one-year period suggested by the Rule.

Pursuant to Gonzalez v. Crosby, 545 U.S. 524 (2005), a Rule 60(b) motion is proper if it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Under such circumstances, the motion is properly brought under Rule 60(b), and the district court need not obtain prior authorization from the appellate court to entertain the claims for relief. Gonzalez, supra at 532; United States v. Sowers, 2007 WL 2302426 (11 Cir. 2007).

Under Fed. R. Civ. P. 60(b)(1), relief is warranted when a mistake, attributable to the district court, resulted in a "defect in the integrity of the proceedings." See Wims v. United States, 663 Fed.App'x 836, 838 (11th Cir. 2016)(relying upon Gonzalez, 545 U.S. at 535-36). See also Parks v. U.S. Life & Credit Corp., 677 F.2d 838, 839 (11th Cir. 1982) (explaining that Fed. R. Civ. P. 60(b)(1) applies to mistakes of judges).

In light of the movant's filings, together with the government's response thereto, it is evident that the movant has demonstrated a defect in the integrity of the proceedings, as he has provided objective proof that he never received a copy of the undersigned's Report. Therefore, he was not able to timely file objections thereto prior to the court's entry of judgment in this case.

Given the proof provided by the movant, coupled with the government's concession, absent evidence to the contrary, it appears that "a defect in the integrity of the federal habeas proceedings" exists. Relief is, therefore, warranted under Rule 60(b). Accordingly, the district court's Order adopting the Report of the undersigned should be vacated, and the movant permitted to file Objections thereto

IV. Conclusion

For the foregoing reasons, it is recommended that the Rule 60(b) motion (Cv-DE#9) be GRANTED, pursuant to Fed. R. Civ. P. 60(b)(1). It is further recommended that the Order (Cv-DE#7) adopting the Report of the undersigned be VACATED, and the case REOPENED, permitting the movant to file Objections to the Report of the undersigned within 14-days from the date of the court's order reopening this case.

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to file timely objections shall bar petitioner from a *de novo* determination by the district judge of an issue covered in this Report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon

grounds of plain error or manifest injustice. See 28 U.S.C. §636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790,794 (1989); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

Signed this 1st day of October, 2018.

UNITED STATES MAGISTRATE JUDGE

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Appx. A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10412
Non-Argument Calendar

D.C. Docket No. 0:16-cr-60102-UU-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO VILLANUEVA, JR.,
a.k.a. Wito,

Defendant-Appellant.

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

(March 26, 2018)

Before WILLIAM PRYOR, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

Gilberto Villanueva, Jr., appeals his 180-month sentence for possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On appeal, Villanueva argues that his predicate convictions for his Armed Career Criminal Act ("ACCA") enhancement should not have counted as separate offenses because they were committed over a relatively short time span; he concedes that his argument is barred by our binding precedent. Villanueva further argues that his ACCA-enhanced sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment; he concedes that this argument also is barred by our binding precedent.

I.

We review *de novo* whether a defendant's predicate offenses meet the ACCA's different-occasions requirement. *United States v. Longoria*, 874 F.3d 1278, 1281 (11th Cir. 2017).

A defendant who is convicted under § 922(g) is subject to the ACCA's enhanced penalties if he has three prior convictions for violent felonies or serious drug offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Crimes occur on different occasions, for purposes of

§ 924(e), if they are committed successively, rather than simultaneously. *Longoria*, 874 F.3d at 1281.

The district court did not err in applying Villanueva's ACCA enhancement: he had at least three prior convictions for serious drug offenses that were committed on different days, that is, successively. *See id.*

II.

We review *de novo* whether a sentence violates the Eighth Amendment. *United States v. Mozie*, 752 F.3d 1271, 1290 (11th Cir. 2014). Where a defendant fails to object to his sentence on Eighth Amendment grounds, we review only for plain error. *Id.* For relief under plain-error review, a defendant must identify an error that (1) is plain; (2) affects the defendant's substantial rights; and (3) seriously affects the fairness, integrity, or reputation of the judicial proceedings. *United States v. George*, 872 F.3d 1197, 1207 (11th Cir. 2017). To show that an error is plain, a defendant must point to a contrary explicit statutory provision or on-point precedent from this Court or the Supreme Court. *United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013).

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. In evaluating an Eighth Amendment challenge in a non-

capital case, we must determine whether the sentence imposed is grossly disproportionate to the offense committed. *United States v. Bowers,* 811 F.3d 412, 431-32 (11th Cir.), *cert. denied*, 125 S. Ct. 2401 (2016). We have determined that the ACCA's 15-year mandatory minimum sentence does not violate the Eighth Amendment's prohibition on cruel and unusual punishment and is not grossly disproportionate to possessing a firearm as a thrice-convicted felon. *United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000).

District courts may impose a sentence below a mandatory minimum only (1) upon a substantial-assistance motion from the government; or (2) in the case of certain drug offenses, if statutory criteria are met. *See* 18 U.S.C. § 3553(e)-(f).

The district court did not plainly err in imposing Villanueva's 180-month sentence because the ACCA's mandatory minimum sentence was neither cruel and unusual punishment nor grossly disproportionate to Villanueva's possession of a firearm and ammunition as a thrice-convicted felon. *See Reynolds*, 215 F.3d at 1214. Also, the district court could not have imposed a sentence below the mandatory minimum sentence: neither of the exceptions to mandatory minimum sentences was present here. *See* 18 U.S.C. § 3553(e)-(f).

AFFIRMED.