

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15342-J

JONATHAN JAVIER ALEMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jonathan Aleman, a federal prisoner, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, correct, or set aside his sentence. Aleman is serving a sentence of 151 months' imprisonment after he pled guilty to the receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1).

In his § 2255 motion, Aleman argued that (1) the sentencing court erred by denying his motion for a psychiatric examination; (2) his sentencing counsel was ineffective for allowing the court to enhance his sentence for the distribution of pornography, pursuant to U.S.S.G. § 2G2.2(b)(3)(F), when the file-sharing program he used automatically allowed others to download and transfer materials without his knowledge; and (3) his appellate counsel was ineffective for advising him to dismiss the direct appeal of his sentence. Following a response and

reply, the district court denied the § 2255 motion. The district court determined that Aleman's first claim was procedurally defaulted because he did not raise it in his direct appeal, and, additionally, it was frivolous because he received a psychiatric examination, albeit at his own expense, and its conclusions were presented to the sentencing court in the presentence investigation report and at the sentencing hearing. The court also denied his second claim because the plea agreement and then-binding precedent from this Court would allow reasonably competent counsel to decide that it would be futile to object to the enhancement under § 2G2.2(b)(3)(F). Finally, the court denied his third claim because he failed to show that his appellate counsel was deficient, as the claims he wished to present were barred by his sentence-appeal waiver, were without merit, or were more appropriately raised under a § 2255 motion.

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). Where the district court rejects a constitutional claim on procedural grounds, a petitioner must show that jurists of reason would find it debatable whether (1) the district court was correct in its procedural ruling, and (2) the petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the petitioner fails to satisfy either prong of this two-part test, a court should deny a COA. *Id.* Where the district court has denied a § 2255 motion on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

Reasonable jurists would not debate the district court's finding that Aleman's first claim is procedurally barred because he did not raise it on direct appeal. Further, he has not shown (1) cause and prejudice for failing to raise the claim on direct appeal or (2) his actual innocence, such that a fundamental miscarriage of justice would result if his claim was not considered on the

merits. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2001) (holding that a defendant is barred from raising a claim in § 2255 motion that he did not raise on direct appeal unless he can show cause and prejudice or actual innocence). Consequently, no COA is warranted on this claim. Furthermore, the district court correctly denied his second claim that his sentencing counsel was ineffective for not objecting to the § 2G2.2(b)(3)(F) enhancement, as then-binding precedent from this Court stated that the enhancement did not require the defendant to knowingly distribute the pornography. *See U.S.S.G. § 2G2.2(b)(3)(F)* (2015); *United States v. Creel*, 783 F.3d 1357, 1359-60 (11th Cir. 2015) (stating that § 2G2.2(b)(3)(F) had no *mens rea* element), *superseded by amendment to the Sentencing Guidelines U.S.S.G. § 2G2.2(b)(3)(F)* (2016); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (stating that counsel is not ineffective for failing to raise meritless issues). Therefore, no COA shall issue as to this claim. Finally, the district court properly denied his third claim, as his appellate counsel was not ineffective for deciding not to raise meritless claims on appeal related to the denial of his motion for a psychiatric examination, the ineffectiveness of his sentencing counsel, or other claims barred by his sentence-appeal waiver. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (stating appellate counsel cannot be ineffective for failing to raise meritless issues). Thus, no COA is warranted as to this claim.

Accordingly, Aleman's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE