APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40476

A True Copy
Certified order issued May 23, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

SANTO LEONE,

Defendant–Appellant.

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

O R D E R:

Santo Leone, federal prisoner #27152-379, was convicted of conspiring to possess at least 1000 kilograms of marihuana with intent to distribute and was sentenced to 240 months in prison and a ten-year term of supervised release. Now, following the denial of his 28 U.S.C. § 2255 motion and his motion to amend his § 2255 motion, he moves for a certificate of appealability ("COA"), authorization to proceed *in forma pauperis* ("IFP") on appeal, and appointed counsel.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court's ruling is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, 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).

Because Leone fails to brief the issues whether the district court erred by concluding that his motion to amend should be denied as untimely and whether jurists of reason would debate the propriety of the conclusion that his ineffective-assistance claims lacked merit, he has not met that standard. *See id.* His requests for a COA, to proceed IFP on appeal, and for appointed counsel are DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

SANTO LEONE	§	
	§	
VS.	§	**CIVIL ACTION NO. 5:15-CV-224**
	§	**CRIM. ACTION NO. 5:12-CR-962-1**
UNITED STATES OF AMERICA	§	
	§	

ORDER DENYING SECTION 2255 MOTION

Petitioner SANTO LEONE, USM No. 27152-379, is a federal inmate confined by the Bureau of Prisons. (Dkt. 1 at 1; Cr. Dkt. 303 at 1.)[1] In 2012, he was indicted on one count of conspiring to distribute at least 1,000 kilograms of marijuana (Count 1) and four substantive counts of smuggling marijuana on various dates in 2009 and 2010 (Counts 2–5). (Cr. Dkt. 1.) He ultimately pleaded guilty to the conspiracy charge in Count 1, and the Court sentenced him under 21 U.S.C. § 841(b)(1)(A) to 240 months in prison. (Cr. Dkt. 211 at 1–2.) Although a sentence under section 841(b)(1)(A) normally carries a 10-year mandatory minimum sentence, his sentence was enhanced under that section to a mandatory minimum of 20 years because he had a prior felony conviction for marijuana possession that qualified as a "felony drug offense." (Cr. Dkt. 240 at 7.) He also received a two-level aggravating-role enhancement under U.S.S.G. § 3B1.1(c). (Cr. Dkt. 212 at 1.) Petitioner later appealed his sentence, and on July 17, 2014, the Fifth Circuit summarily dismissed his appeal as frivolous. (Cr. Dkt. 276 at 1.) He did not file a petition for a writ of certiorari. (Dkt. 1 at 2.)

Pending now are two motions: (1) Petitioner's timely filed, *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (Dkt. 1; Cr. Dkt. 303); and (2)

[1] "Dkt." is a citation to the entries in Civil Action No. 5:15-cv-224. "Cr. Dkt." is a citation to the entries in Criminal Action No. 5:12-cr-962.

Petitioner's motion to amend his section 2255 motion so that he can add a new ground for relief (Dkt. 4; Cr. Dkt. 312).

In his section 2255 motion, Petitioner raises three grounds for relief, each alleging ineffective assistance of counsel. He contends that his counsel rendered ineffective assistance by: (1) failing to object to the amount of drugs attributed to him at sentencing; (2) failing to object to a constructive amendment of the indictment; and (3) failing to object to the aggravating-role enhancement.

In his motion to amend, filed on June 20, 2017,[2] Petitioner seeks to add an entirely new ground for relief. He now argues that he should be resentenced in light of the Supreme Court's June 23, 2016 decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). He claims that *Mathis* retroactively bars his prior felony drug conviction from being used to enhance his sentence.

The Court has examined Petitioner's motion to vacate in accordance with Rule 4 of the Rules Governing Section 2255 Proceedings. Upon examination, it plainly appears from the motion and the record of prior proceedings that Petitioner is not entitled to relief. Moreover, Petitioner's proposed amendment would be futile because it is time-barred by the statute of limitations governing section 2255 motions. Thus, for the reasons discussed below, both of Petitioner's motions are denied.

Legal Standard

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show two things: (1) that counsel's performance was so deficient that it fell below an "objective standard

[2] "Under the prison mailbox rule, a prisoner's pleading is deemed to have been filed on the date that the *pro se* prisoner submits the pleading to prison authorities for mailing." *Stoot v. Cain*, 570 F.3d 669, 671 (5th Cir. 2009) (per curiam). Thus, although the motion was file-stamped on June 26, 2017, the motion is deemed filed on June 20, 2017 because Petitioner certified that he mailed the motion on that date. (Dkt. 4 at 6.)

of reasonableness"; and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). Prejudice exists when there is a "reasonable probability" that counsel's errors changed the outcome of the case. *Id.* at 694. Thus, counsel does not render ineffective assistance by not making a "futile" objection. *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990).

Discussion

A. Section 2255 Motion

In his first ground, Petitioner argues that his counsel rendered ineffective assistance by failing to object to the amount of drugs attributed to him at sentencing. (Dkt. 1 at 4–6; Dkt. 2 at 2–5.) The Court held Petitioner accountable for 1,441 kilograms of marijuana, but he argues he should have been held accountable for only 968 kilograms, which would have resulted in a lower sentence under 21 U.S.C. § 841(b)(1)(B).[3] (Cr. Dkt. 240 at 24; Dkt. 2 at 5.) He states that he personally weighed the marijuana that the Government seized and that he could testify based on his personal knowledge that the marijuana weighed less than 1,000 kilograms. (Dkt. 2 at 5.)

This first ground fails because Petitioner had already admitted at his plea colloquy that he was accountable for more than 1,000 kilograms of marijuana. When a defendant admits at his plea colloquy that a specific quantity of drugs was involved in his offense, he must be held accountable for that quantity of drugs. *United States v. Alvarez-Salinas*, 292 F. App'x 368, 371 (5th Cir. 2008) (per curiam). A court does "not have discretion at sentencing to find new facts in order to undo [the defendant's] admissions or avoid application of the mandatory minimum." *Id.* Thus, once the defendant admits under oath his accountability for a specific quantity of drugs, he

[3] Section 841(b)(1)(B) applies to offenses involving between 100 and 1,000 kilograms of marijuana. *See* 21 U.S.C. § 841(b)(1)(B)(vii).

has "sealed his fate with respect to the statutory penalties under § 841(b)." *Id.*

At Petitioner's plea colloquy, a prosecutor read aloud the factual basis for Petitioner's plea agreement. (Cr. Dkt. 239 at 28–35.) The factual basis set forth facts showing that Petitioner conspired to distribute 283.2 kilograms of marijuana on June 19, 2009; 329.5 kilograms on June 29, 2009; 480.8 kilograms on February 16, 2010; and 348.41 kilograms on August 6, 2010. (Cr. Dkt. 175 at 9–14.) The factual basis concluded: "The defendant hereby confesses and judicially admits to conspiring to possess 1000 kilograms or more of marijuana with the intent to distribute the said marijuana." (*Id.* at 14.) After the prosecutor finished reading the factual basis, the Court asked Petitioner if it was correct. (Cr. Dkt. 239 at 35.) Under oath, Petitioner answered, "Yes, it is." (*Id.*) Petitioner also acknowledged that because he conspired to distribute more than 1,000 kilograms of marijuana he faced a mandatory minimum sentence of 20 years. (*Id.* at 26.)

Thus, Petitioner "sealed his fate" by unequivocally admitting at his plea colloquy that he was accountable for more than 1,000 kilograms of marijuana. There is therefore no "reasonable probability" that his lawyer could have changed the outcome by objecting to the amount of drugs at sentencing. Accordingly, Petitioner's first ground is without merit.

In his second ground, Petitioner argues that his counsel rendered ineffective assistance by failing to object to a "constructive amendment" of the indictment. (Dkt. 1 at 7–8; Dkt. 2 at 6–9.) A constructive amendment occurs when a defendant is found guilty on the basis of conduct outside the scope of his indictment. *United States v. St. Gelais*, 952 F.2d 90, 94–95 (5th Cir. 1992). Petitioner argues that the factual basis for his guilty plea amounted to a constructive amendment because it stated that he conspired to smuggle marijuana on June 19, 2009. (Dkt. 2 at 6.) Yet Counts 2 to 5 of his indictment do not allege that he smuggled marijuana on June 19, 2009. (Cr. Dkt. 1 at 2–3.) Rather, Counts 2 to 5 allege that he smuggled marijuana on June 29,

2009, February 15, 2010, August 6, 2010, and December 14, 2010. (*Id.*) In his view, the "charge and theory of the indictment" was that the conspiracy alleged in Count 1 encompassed only the marijuana-smuggling incidents specifically alleged in Counts 2 to 5. (Dkt. 2 at 7.) Thus, he argues, his indictment was constructively amended because his guilty plea included a date not specifically included in the indictment, and his counsel rendered ineffective assistance by failing to object.

But a constructive-amendment objection would have been futile. "Conspiracy and the related substantive offense which is the object of the conspiracy are separate and distinct crimes." *United States v. Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam). Thus, the fact that a defendant is not charged with the substantive offense does not preclude him from being convicted for a related conspiracy. *See id.* ("It is well established that acquittal on the substantive count does not foreclose prosecution and conviction for a related conspiracy."). Here, the conspiracy charge—the charge for which he was actually convicted and sentenced—alleged that his conspiracy lasted from June 1, 2009 to December 14, 2010. (Cr. Dkt. 1 at 1.) As Petitioner himself admits, his conspiracy to transport marijuana on June 19, 2009—as stated in his guilty plea—"technically fit[s] within the timeframe charged in the indictment." (Dkt. 2 at 6.) Thus, there was no constructive amendment, and it would have been futile to object on that ground. Petitioner's second ground for relief is therefore without merit.

In his third ground, Petitioner argues that his counsel rendered ineffective assistance by failing to object when the Court gave him a two-level aggravating-role enhancement under U.S.S.G. § 3B1.1 for conduct Petitioner claims is "outside the scope of the charged conspiracy." (Dkt. 1 at 9–10.)

This ground fails under both *Strickland* prongs. First, Petitioner cannot show deficient

performance because his lawyer did in fact object to the enhancement. (Cr. Dkt. 240 at 24, 33.) Second, even if his lawyer had failed to object, he suffered no prejudice because he still would have been subject a mandatory minimum sentence of 240 months whether or not he received the enhancement. (*See id.* at 26.) His 240-month sentence was the lowest sentence he could have received. Thus, this last ground for relief also fails.[4]

B. Motion to Amend

In his motion to amend, Petitioner seeks to add a new ground for relief based on the Supreme Court's 2016 decision in *Mathis*. Under *Mathis*, he argues, his prior felony conviction for marijuana possession no longer qualifies as a predicate offense that can be used to enhance his sentence under 21 U.S.C. § 841(b)(1)(A). (Dkt. 4 at 3.)

However, a district court may deny leave to amend a section 2255 motion when the amendment would be futile. *United States v. Gonzalez*, 592 F.3d 675, 681 (5th Cir. 2009) (per curiam). An amendment is futile if it is time-barred. *Id.* Here, Petitioner's proposed amendment would be futile because it is barred by the one-year statute of limitations governing section 2255 motions.

A motion under 28 U.S.C. § 2255 must be filed within one year of (1) the date on which the judgment of conviction becomes final;[5] (2) the date on which a government-created impediment to filing the motion is removed, if that impediment prevented the movant from filing

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[4] Petitioner's three grounds for relief are also barred by the waiver in his plea agreement of his right to collateral review. (Cr. Dkt. 175 at 5.) Ineffective-assistance claims survive a valid plea waiver only where the ineffective assistance is claimed to have "directly affected the validity of that waiver or the plea itself." *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002).

[5] When a defendant loses his appeal but does not file a petition for a writ of certiorari, the judgment of conviction becomes final 90 days after the judgment of the court of appeals is entered. *United States v. Gentry*, 432 F.3d 600, 604 n.2 (5th Cir. 2005).

the motion; (3) the date on which the right asserted in the motion 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 motion's claims could have been discovered through due diligence. 28 U.S.C. § 2255(f).

Even if a section 2255 motion is timely, an amendment to the motion may be time-barred. *Gonzalez*, 592 F.3d at 678, 680. An amendment filed outside the one-year limitations period in 28 U.S.C. § 2255(f) is time-barred unless it "relates back" to the filing date of the original, timely filed section 2255 motion. *Id.* at 678–79 (quoting Fed. R. Civ. P. 15(c)(1)). An amendment relates back to the date of the original motion if it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original [motion]." Fed. R. Civ. P. 15(c)(1)(B). An amendment does not relate back if it asserts a new ground for relief supported by facts that differ in both "time and type" from those set forth in the original motion. *Gonzalez*, 592 F.3d at 680.

Here, Petitioner did not file his motion to amend within one year of any of the four dates listed in section 2255(f). First, his motion to amend is not timely under (f)(1) because it was filed more than one year after his judgment of conviction became final. His judgment became final on October 15, 2014—90 days after his appeal was dismissed—yet he filed his motion to amend on June 20, 2017, almost three years later. Second, he does not allege any government-created impediment under (f)(2). Third, section 2255(f)(3)—the exception for rights newly recognized by the Supreme Court and made retroactively applicable—also does not apply. Although Petitioner filed his motion to amend within one year of *Mathis*, the Supreme Court did not announce any new rule of law in that case that has been made retroactively applicable. *In re Lott*,

838 F.3d 522, 523 (5th Cir. 2016) (per curiam); *Lopez v. United States*, 2017 WL 1284946, at *2–3 (W.D. Tex. Apr. 5, 2017). Finally, he does not allege any newly discovered facts under (f)(4).

Moreover, the proposed amendment does not relate back to the original section 2255 motion because it asserts a new ground for relief different in "time and type" from the grounds set forth in the original motion. The grounds in the original motion are about the alleged ineffective assistance of Petitioner's counsel; the ground in the motion to amend has nothing to do with ineffective assistance. Further, the grounds in the original motion address the offense charged—conspiracy to distribute marijuana—whereas the motion to amend addresses the prior offense of marijuana possession used to enhance his sentence.

Thus, the proposed amendment is time-barred under section 2255(f). The Court therefore denies the motion to amend as futile.[6]

Conclusion

Petitioner's motion under 28 U.S.C. § 2255 (Dkt. 1; Cr. Dkt. 303) and motion to amend (Dkt. 4; Cr. Dkt. 312) are hereby DENIED. Civil Action 5:15-cv-224 is hereby DISMISSED with PREJUDICE.

The Clerk of Court is DIRECTED to mail Defendant a copy of this Order at the address indicated in his most recent filing. The Clerk is further DIRECTED to TERMINATE this case.

IT IS SO ORDERED.

[6] The proposed amendment is meritless anyway. *Mathis* does not affect whether an offense is a "felony drug offense" that can be used to enhance a defendant's sentence under 21 U.S.C. § 841(b)(1)(A). *United States v. Smith*, 2017 WL 3528954, at *5–6 (W.D. La. July 11, 2017), *report and recommendation adopted*, 2017 WL 3528915 (W.D. La. Aug. 14, 2017).

SIGNED this 5th day of April, 2018.

Diana Saldaña
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

SANTO LEONE	§	
	§	
VS.	§	CIVIL ACTION NO. 5:15-CV-224
	§	CRIM. ACTION NO. 5:12-CR-962-1
UNITED STATES OF AMERICA	§	
	§	

FINAL JUDGMENT

For the reasons stated in the Court's Order signed on today's date, Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Dkt. 1; Cr. Dkt. 303)[1] is hereby DENIED. Civil Action No. 5:15-cv-224 is hereby DISMISSED with PREJUDICE.

Because the Court also finds that Petitioner makes no substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2). For this reason, the Court certifies that any appeal from this decision would not be taken in good faith and therefore should not be taken *in forma pauperis*. *See* 28 U.S.C. § 1915(a)(3); *see also* Fed. R. App. P. 24(a).

The Clerk of Court is DIRECTED to mail Petitioner a copy of this Final Judgment at the address indicated in his most recent filing.

This is a FINAL JUDGMENT.

SIGNED this 5th day of April, 2018.

Diana Saldaña
United States District Judge

[1] "Dkt." is a citation to the docket entries in Civil Action No. 5:15-cv-224. "Cr. Dkt." is a citation to the docket entries in Criminal Action No. 5:12-cr-962.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40476

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

SANTO LEONE,

Defendant - Appellant

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

ON PETITION FOR REHEARING EN BANC

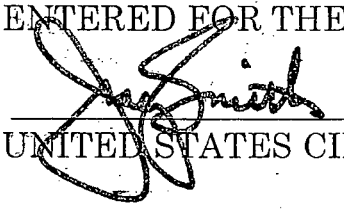
Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

(✓) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40476

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

SANTO LEONE,

Defendant–Appellant.

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

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

A judge on this panel denied appellant's motions for certificate of appealability, to proceed *in forma pauperis*, and for appointment of counsel. Appellant's motion for reconsideration is DENIED.

Additional material from this filing is available in the Clerk's Office.