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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 29, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE H. WILLIAMS, JR.,

Defendant-Appellant.

No. 18-20800

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-1912

Before: OWEN, SOUTHWICK, and
WILLETT, Circuit Judges.

PER CURIAM*

Eugene H. Williams, Jr., former federal prisoner # 66170-179, appeals the denial of his writ of error coram nobis wherein he sought to challenge his con-

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

viction for three counts of possession of a firearm not registered to him, one count of possession of an unlawfully transferred firearm, one count of possession of a firearm not identified by serial number, and one count of unlawful storage of explosive materials. Williams argues that he is actually innocent of the charges and that his conviction results in a complete miscarriage of justice. Specifically, he contends that the devices he was found to possess do not constitute destructive devices or firearms under the National Firearms Act. He also asserts that counsel was ineffective for failing to raise this issue at trial in the form of an affirmative defense or by requesting a jury instruction. Finally, Williams argues that the Government failed to prove the requisite mens rea.

In reviewing the denial of a writ of error coram nobis, we review the district court's "factual findings for clear error, questions of law de novo, and the district court's ultimate decision to deny the writ for abuse of discretion." *Santos-Sanchez v. United States*, 548 F.3d 327, 330 (5th Cir. 2008), *vacated on other grounds*, 559 U.S. 1046 (2010). "The writ of coram nobis is an extraordinary remedy" that may be used by "a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief." *United States v. Esogbue*, 357 F.3d 532, 534 (5th Cir. 2004) (quoting *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996)). The writ is not a substitute for an appeal and "will issue only when no other remedy is available and when 'sound reasons exist[ ] for failure to seek appropriate earlier relief.'"

United States v. Dyer, 136 F.3d 417, 422 (5th Cir. 1998) (quoting *United States v. Morgan*, 346 U.S. 502, 512 (1954)).

Williams's arguments consist of claims that he could have raised in his initial 28 U.S.C. § 2255 motion. As such, he is not entitled to coram nobis relief. *See Esogbue*, 357 F.3d at 535. Furthermore, Williams has not provided this court with sound reasons justifying his failure to seek appropriate relief earlier. *See Dyer*, 136 F.3d at 422. The inability to satisfy the requirements for filing a successive § 2255 motion is not a sound reason for failing to seek relief earlier. *Esogbue*, 357 F.3d at 535. Because Williams has not demonstrated that the district court abused its discretion by denying his writ of error coram nobis, *see Santos-Sanchez*, 548 F.3d at 330, the judgment of the district court is AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF TEXAS (NOVEMBER 16, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EUGENE H. WILLIAMS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil Action No. H-4-17-1912
Criminal Action No. H-06-237-2

Before: David HITTNER, United States District Judge.

Pending before the Court is Petitioner Eugene H. Williams Jr.' s First Amended Petition for Writ of Coram Nobis Pursuant to 28 U.S.C. § 1651(a) and Memorandum of Law in Support (Document No. 8). Having considered the motion, submissions, and applicable law, the Court determines the motion should be denied.

I. Background

On August 17, 2006, a grand jury returned a six-count indictment against Petitioner Eugene H. Williams Jr. ("Williams"). The indictment charged Williams with one count of receipt and possession of unregistered firearms and destructive devices, one count of receipt and possession of unlawfully transferred firearms, two counts of possession of a firearm not registered to Williams, one count of possession of one or more firearms not identified by serial number, and one count of aiding and abetting. On December 12, 2006, after a seven-day jury trial, the jury convicted Williams on all counts. On April 20, 2007, the Court imposed a sentence of 120 months imprisonment, followed by two years of supervised release. Williams timely appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed Williams's conviction and sentence.[1] On February 26, 2010, Williams filed a motion under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. On July 1, 2010, the Court denied the § 2255 motion. On April 6, 2017, Williams was discharged from supervised release. On August 1, 2018, Williams filed a petition for a writ of *coram nobis.*

II. Standard of Review

Coram nobis is a common law writ of error that asks the Court to review its own judgment based upon alleged errors of fact resulting in a complete miscarriage of justice. *United States v. Grant*, No. H-17-1498, 2017 WL 6765364, at *3 (S.D. Tex. Sept. 11, 2017) (Atlas,

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[1] *United States v. Williams*, 303 F. App'x 231, 232 (5th Cir. 2008) (per curiam).

J.). A writ of *coram nobis* is made available by the All Writs Act, 28 U.S.C. § 1651(a).[2] A petitioner may file a petition for a writ of *coram nobis* to collaterally attack a prior conviction "when the petitioner has completed his sentence and is no longer 'in custody' for purposes of seeking relief under either 28 U.S.C. § 2241 or § 2255." *United States v. Dyer*, 136 F.3d 417, 422 (5th Cir. 1998). The writ of *coram nobis* will issue only when no other remedy is available and when sound reasons exist for failing to seek appropriate earlier relief. *United States v. Esogbue*, 357 F.3d 532, 535 (5th Cir. 2004). The writ of *coram nobis* is an "extraordinary remedy" that is only employed to correct errors "of the most fundamental character" and cannot be used as a substitute for appeal. *United States v. Morgan*, 346 U.S. 502, 511-12 (1954). The petitioner bears the burden of overcoming the presumption that previous judicial proceedings were correct. *Id.* at 512.

III. Law & Analysis

Williams contends he is entitled to a writ of *coram nobis* because he is innocent of the charges of which he was convicted. The Government contends Williams's petition for a writ of *coram nobis* should be denied because Williams fails to provide "sound reasons" for failing to seek appropriate earlier relief and thus fails to show errors resulting in a complete miscarriage of justice. In support of his innocence, Williams contends: (1) the items he possessed do not

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[2] 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

constitute "destructive devices" under the National Firearms Act ("NFA"); (2) counsel rendered ineffective assistance at trial by failing to raise an affirmative defense that the items Williams possessed did not constitute destructive devices under the NFA; (3) the items Williams possessed were in fact registered; and (4) the Government failed to prove the *mens rea* requirement under the NFA. Williams does not allege these contentions were unavailable at an earlier time. Nor does Williams offer any reason as to why he did not raise these contentions at an earlier time. The Court finds Williams fails to show sound reasons for failing to seek appropriate earlier relief. *See Esogbue*, 357 F.3d at 535 (explaining a petitioner fails to show sound reasons for failing to seek appropriate earlier relief when the petitioner fails to explain why contentions, even though previously available, were never raised). Thus, the Court finds Williams is not entitled to a writ of *coram nobis.* Accordingly, Williams's petition for a writ of *coram nobis* is denied.[3]

IV. Conclusion

Accordingly, the Court hereby

ORDERS that Petitioner Eugene H. Williams Jr.'s First Amended Petition for Writ of Coram Nobis Pursuant to 28 U.S.C. § 1651(a) and Memorandum of Law in Support (Document No. 8) is DENIED.

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[3] The Government further contends Williams's petition for a writ of *coram nobis* should be denied because: (1) the items Williams possessed are "destructive devices" under the NFA; and (2) United States Supreme Court authority forecloses Williams's *mens rea* contention. However, in light of the Court's holding, the Court need not address these contentions.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 16 day of November, 2018.

/s/ David Hittner
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (JUNE 24, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EUGENE H. WILLIAMS,

Petitioner,

v.

SUSAN MCCLINTOCK, ET AL.,

Respondents.

No. CV 14-2285-TUC-RM(JR)

Before: Honorable Rosemary MARQUEZ, United States District Judge.

Petitioner Eugene H. Williams, who is confined in the Federal Correctional Institute-Safford in Safford, Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) and has paid the $5.00 filing fee.

I. Background

Petitioner was convicted following a jury trial in the United States District Court for the Southern District of Texas of six counts of firearms offenses under various sections of 26 U.S.C. § 5801, *et seq*,

case #CR-H-06-237-02-S. All counts stemmed from Petitioner's handling of "Noise Flash Diversionary Devises" ("NFDDs"), also known as "flash bangs" or "stun grenades." Petitioner was sentenced on April 20, 2007 to a 120-month term of imprisonment. Petitioner appealed his conviction on the grounds that the statute under which he was convicted was unconstitutionally vague. The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction and sentence on December 18, 2008. On February 26, 2010, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 alleging ineffective assistance of counsel because his appellate counsel failed to present what Petitioner believed to be the strongest ground for reversal (a ground not raised in the current Petition). The Southern District of Texas dismissed Petitioner's § 2255 motion with prejudice on July 1, 2010, and the Fifth Circuit Court of Appeals denied Petitioner's application for certificate of appealability on February 10, 2011.

II. Petition

In his § 2241 Petition, Petitioner names Susan McClintock as Respondent. Petitioner raises two grounds for relief. In Ground One, Petitioner claims actual innocence of the crimes for which he was convicted. He alleges that although the government presented evidence at trial that the NFDDs in his possession were "explosive devices," it failed to present any evidence showing that they were "designed or redesigned" for use as a weapon, and, he alleges, this is a necessary element of those crimes. He further contends that the NFDDs were not designed or redesigned for use as a weapon and that he is accordingly

actually innocent. In Ground Two, Petitioner alleges ineffective assistance of counsel because both Petitioner's trial and appellate counsel "completely failed to object to the Government's failure to prove the element."

III. Law

Generally, a motion to vacate sentence under 28 U.S.C. § 2255 is the appropriate way to challenge a federally-imposed conviction or sentence on the basis that "the 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." 28 U.S.C. § 2255(a); *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). A § 2241 petition for writ of habeas corpus is not a substitute for a motion under § 2255. *McGhee v. Hanberry*, 604 F.2d 9, 10 (5th Cir. 1979).

A court will not consider a § 2241 petition by a prisoner "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). This exception is sometimes referred to as the "savings clause" or "escape hatch." *See Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011).

The savings clause under § 2255(e) is narrow. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003) (citing *Pirro*, 104 F.3d at 299). A § 2255 remedy is not inadequate or ineffective to test the legality of a

petitioner's detention merely because the statute of limitations bars the petitioner from filing a motion under § 2255, the sentencing court has denied relief on the merits, or § 2255 prevents the petitioner from filing a second or successive petition. *See id.*; *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999); *Charles v. Chandler*, 180 F.3d 753, 757-58 (6th Cir. 1999); *Tripati*, 843 F.2d at 1162. Rather, a § 2255 remedy is only inadequate or ineffective to test the legality of a petitioner's detention when the petitioner claims (1) to be factually innocent of the crime for which he has been convicted, and (2) to have never had an "unobstructed procedural shot at presenting that claim." *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)); *see also Alaimalo*, 645 F.3d at 1047 ("A petitioner is actually innocent when he was convicted for conduct not prohibited by law.").

The burden of coming forward with evidence affirmatively showing the inadequacy or ineffectiveness of a remedy under § 2255 rests with the petitioner. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001); *Charles*, 180 F.3d at 756; *McGhee*, 604 F.2d at 10; *Redfield v. United States*, 315 F.2d 76, 83 (9th Cir. 1963); *see also Santivanez v. Warden FCC Coleman-USP II*, 416 Fed. Appx. 833, 835 (11th Cir. 2011). Still, "[c]ourts have a duty to construe pro se pleadings liberally." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 925 (9th Cir. 2003); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

In the Ninth Circuit, a § 2241 petitioner asserting "a claim of actual innocence for purposes of the escape hatch of § 2255 is tested by the standard articulated by the Supreme Court in *Bousley v. United States*,

523 U.S. 614, 623 (1998)." *Stephens*, 464 F.3d at 898. In *Bousley*, the Supreme Court held that "'[t]o establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *Id.* (quoting *Bousley*, 523 U.S. at 523).

To assess whether a petitioner had an unobstructed procedural shot to pursue his claim, the court considers "(1) whether the legal basis for petitioner's claim 'did not arise until after he had exhausted his direct appeal and first § 2255 motion;' and (2) whether the law changed 'in any way relevant' to petitioner's claim after that first § 2255 motion." *Harrison*, 519 F.3d at 960 (quoting *Ivy*, 328 F.3d at 1060-61). "In other words, it is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion." *Ivy*, 328 F.3d at 1060. Unless Petitioner meets these criteria, he must seek relief under § 2255 in the sentencing court or seek certification to file a successive § 2255 motion, rather than in a § 2241 Petition.

IV. Petitioner's Actual Innocence Claim

As a preliminary matter, Petitioner is mistaken regarding the effect of the absence of any evidence about the design intention of NFDDs during his trial. As Petitioner states in his Petition, "[t]he legislative history of the National Firearms Act, 26 U.S.C. §§ 5801 et seq., specifically states that the exception of 'designed or redesigned as a weapon' is an affirmative defense. *See* Senate Judiciary Committee Report, S.Rep.No. 1501, 90th Cong., 2d Sess. 47[, 558] (1968)." (Doc. 1 at 8.) In line with the current understanding of which

party bears the burden of proof of elements of an affirmative defense, the Senate Judiciary Committee Report goes on to state that "[t]he government is not required to allege or prove that exception is inapplicable." *Id.*; *see also, e.g., United States v. La Cock*, 366 F.3d 883, 889 (10th Cir. 2004) (citing *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971)) ("Along with several other circuits, we have previously held that the determination as to whether a device was 'designed [or] redesigned for use as a weapon" is an affirmative defense, not an element of the crime that must be alleged in the indictment." (emphasis in original)). Accordingly, Petitioner's claim of constitutional error based upon the government's failure to prove a necessary element of the charge does not withstand scrutiny.

This does not, however, entirely eliminate Petitioner's actual innocence claim. The Ninth Circuit has previously held that the satisfaction of an affirmative defense can serve as a valid argument for actual innocence. In *Smith v. Baldwin*, the court considered whether a petitioner's claim that his conviction was a miscarriage of justice because he was actually innocent was sufficient to overcome his procedural default. 510 F.3d 1127, 1139-41 (9th Cir. 2007). The Court held that to make a successful claim that his innocence should overcome his default, petitioner must prove that "it is more likely than not that no reasonable juror would have found that he failed to establish any of the . . . elements of the affirmative defense by a preponderance of evidence." *Id.* (citing *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963-64 (9th Cir. 2003)). Here, at this screening stage, this Court must con-

sider whether Petitioner has alleged facts that would support such a finding. Petitioner contends that NFDDs are "light/sound diversionary device[s] (not destructive device[s]) designed to emit a brilliant light and loud noise upon detonation." (Doc. 1 at 12 (emphasis in original).) He alleges that their purpose is to "stun, disorient, and temporarily blind its target, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." (*Id.*) This Court finds that these allegations sufficiently to state a claim of actual innocence by use of an affirmative defense.

V. Petitioner's Unobstructed Procedural Shot Claim

Petitioner does not allege that the legal basis of his claim did not arise until after he had exhausted his direct appeal and § 2255 motion. Petitioner instead states that he did not discover the legal basis of that claim until he reviewed his case in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013). But Petitioner does not allege that *Descamps* changed the law in any way relevant to his claim. Rather, he asserts that *Descamps* focused on the elements of a criminal statute, thus causing him to consider for the first time whether the government had proven all of the elements of the statute in his case. Petitioner cites a number of additional cases for the proposition that the government must prove every element of a crime at trial and for the proposition that evidence showing that something is an "explosive device" does not, of itself, show that it was "designed or redesigned for use as a weapon." With few exceptions, however, the cases upon which Petitioner relies existed well before he went to trial and were available before February 2010 when he filed his first § 2255 motion. Thus, Petitioner has not

shown, nor can he show, that the basis for his actual innocence claim did not exist until after he had exhausted his direct appeal and first § 2255 motion.[1]

Because Petitioner has failed to show that a remedy under § 2255 is inadequate or ineffective, the Petition and this action will be summarily dismissed for lack of jurisdiction. *See* 28 U.S.C. § 2255(a); *Tripati*, 843 F.2d at 1163.

IT IS ORDERED:

(1) Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) and this case are dismissed.

(2) The Clerk of Court must enter judgment accordingly and close this case.

(3) Although Petitioner has brought his claims in a § 2241 petition, a certificate of appealability is required where a § 2241 petition

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[1] Petitioner's claim of ineffective assistance of counsel rests on allegations that neither his trial nor his appellate counsel objected that the government failed to prove a necessary element of his convictions. As noted above, it was not the Government's burden to prove whether the NFDDs were designed for use as a weapon. To the extent that Petitioner alleges ineffective assistance of counsel to show that he lacked an unobstructed procedural shot to pursue his actual innocence claim, counsel's alleged errors at trial and direct appeal do not show that § 2255 is an inadequate remedy. Even where a petitioner retains counsel when filing a § 2255 motion, an ineffective assistance claim based on counsel's alleged failure to raise an actual innocence claim at that juncture does not satisfy the narrow savings clause of § 2255(e). *See Abdullah v. Hedrick*, 392 F.3d 957, 963-64 (8th Cir. 2004) (finding that failure of retained counsel to raise an actual innocence claim in Petitioner's § 2255 motion did not show that Petitioner was denied an adequate procedure for presenting that claim).

attacks the petitioner's conviction or sentence. *See Porter v. Adams*, 244 F.3d 1006 (9th. 2001). Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, in the event Movant files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 24th day of June, 2015.

/s/ Honorable Rosemary Marquez
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY (FEBRUARY 9, 2011)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE H. WILLIAMS, JR.,

Defendant-Appellant.

No. 10-20522
USDC No. 4:10-CV-667
USDC No. 4:06-CR-237-2

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

Before: Eugene DAVIS, United States Circuit Judge.

Eugene H. Williams, Jr., federal prisoner # 66170-179, seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2255 motion challenging his convictions for three counts of possession of a firearm not registered to him, one count of possession of an unlawfully transferred firearm, one count of possession of a firearm not identified by serial

number, and one count of unlawful storage of explosive materials. Williams argues that he was denied the effective assistance of trial counsel because counsel failed to present issues challenging the validity of the statutes of conviction, to challenge the lack of evidence to support his convictions, to argue that he did not knowingly possess firearms without serial numbers, and to argue that the explosive materials were properly stored. Williams fails to renew his claim that he was denied the effective assistance of counsel because counsel failed to argue that the district court erred in refusing to instruct the jury on the public authority defense. Thus, the argument is abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A movant satisfies the COA standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Williams has failed to make this showing.

Williams's motion for a COA is DENIED.

/s/ W. Eugene Davis
United States Circuit Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF TEXAS DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY (AUGUST 25, 2010)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,

v.

EUGENE H. WILLIAMS, JR.,

Defendants.

C.R. Action No. 4:06-237 (02)

Before: David HITTNER, United States District Judge.

Pending before the Court is Defendant's Request for a Certificate of Appealability (Document No.__). Having considered the motion and the applicable law, the Court determines that the motion should be denied. Accordingly, the Court hereby

ORDERS that the Request for a Certificate of Appealability (Document No.__) is DENIED.

Signed the 25 day of August, 2010.

/s/ David Hittner

United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF TEXAS (JULY 1, 2010)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EUGENE H. WILLIAMS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal Action No. H-06-237-2
Civil Action No. H-10-667

Before: David HITTNER, United States District Judge.

Pending before the Court are Petitioner Eugene H. Williams's, Jr. Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. 1, Criminal Document No. 173) and Respondent United States of America's Response to Petitioner's Motion for Relief Under 28 U.S.C. § 2255 and Motion to Dismiss (Civil Document No. 2, Criminal Document No. 175). Having considered the motions, submissions, and applicable law, the Court determines Petitioner's motion should be denied and Respondent's motion should be granted.

Background

On August 17, 2006, a grand jury charged Petitioner Eugene H. Williams, Jr. ("Williams") by a six count superseding indictment. Count one of the indictment charged Williams with receipt and possession of one or more firearms, listing 39 stun grenades not registered to Williams in the National Firearms Registration and Transfer Record ("NFRTR"), in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Count two charged Williams with receipt and possession of unlawfully transferred firearms, listing 34 destructive devices, in violation of 26 U.S.C. §§ 5812, 5861(b) and 5871. Count three charged Williams with possession of a firearm, listing one precision ordinance tactical blast stun grenade not registered to Williams in the NFRTR, in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871. Count four charged Williams with possession of a firearm, listing one destructive device not registered to Williams in the NFRTR, in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871. Count five charged Williams with possession of one or more firearms, listing five destructive devices not identified by a serial number, in violation of 26 U.S.C. §§ 5842(c), 5861(i) and 5871. Count six charged Williams with aiding, abetting, counseling, and assisting in the unlawful storage of high explosives, listing 78 destructive devices, in violation of 18 U.S.C. §§ 2, 842(j) and 844(b), and 27 C.F.R. § 55.201 (1987).

On September 21, 2006, Williams entered a plea of not guilty to all charges against him. On November 6, 2006, Williams filed notice of a Public Authority Defense declaring he acted with public authority during the time period of the charged offenses. Williams listed four law enforcement agencies he was involved

with and four agency members on whose behalf he acted, while naming 22 witnesses he intended to rely upon in support of his claim to the public authority defense. The Government responded on November 14, 2006 denying that Williams "possessed any requisite public authority in fact to negate his guilt." The Government argued that the Cypress Creek Emergency Medical Services ("CCEMS"), an agency Williams claimed to be involved with, is a private paramedical business and thus does not have the ability to grant public authority according to Rule 12.3 of the Federal Rules of Criminal Procedure. The Government further contested that while it is true that Williams was employed as a reserve officer with the Hempstead Police Department, the agency was not the registered possessor of any of the charged destructive devices and thus could not have granted public authority to Williams. Moreover, the Government stated that Williams had never been an employee of the other two law enforcement agencies that he claimed to be involved with; therefore, any transfer to him by these agencies would still require registration in the NFRTR. The Government further proffered that none of the agency members Williams claimed he acted on behalf of would testify that they granted any public authority upon Williams for the charged violations.

During a pre-trial conference held on November 30, 2006, the Court discussed the issue of a public authority defense indicating that it would allow Williams to present evidence of a defense but noted that a jury instruction on the defense may not be established. On December 4, 2006, Williams proceeded to a jury trial. During trial, the Government inquired several times as to the basis for establishing the defense of public

authority. At the close of the case, the jury was excused and Williams's counsel presented evidence justifying the establishment of a jury instruction on the public authority defense. After hearing the Government's position, the Court denied the request to provide a jury instruction on the public authority defense. On December 14, 2006, the jury returned a verdict convicting Williams as charged.

On April 20, 2007, Williams was sentenced to a total of 120 months imprisonment under all counts. On the same day, Williams's trial counsel filed a notice of appeal. Shortly thereafter, Williams's attorney successfully moved to withdraw and attorney David Adler was appointed to represent Williams on appeal. On December 18, 2008, the Fifth Circuit affirmed the judgment of the Court.

On February 26, 2010, Williams timely filed the instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 ("§ 2255"). Williams asserts that his appellate counsel rendered ineffective assistance by failing to raise "the best issue on appeal: that the district court erred by refusing to instruct the jury on the defense of public authority."[1] The Government contends Williams's counsel was not deficient for failing to raise on appeal the denial of an

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[1] In an attachment to his § 2255 motion, Williams makes a secondary claim of ineffective assistance of trial counsel. The attachment identifies facts that Williams claims were not included in trial that allegedly demonstrate his trial counsel rendered ineffective assistance. However, Williams does not specify how trial counsel's assistance was ineffective, but merely makes conclusory statements. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (holding that "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding.").

instruction on the public authority defense because an attorney's failure to pursue a meritless argument "cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue." Accordingly, the Court must determine whether Williams establishes that he received ineffective assistance of counsel because appellate counsel allegedly failed to raise the best issue on appeal.

Standard of Review

To maintain a successful collateral attack under § 2255, a petitioner must overcome a considerably more stringent standard of review than would exist on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982); *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). Once a defendant has waived or exhausted his opportunity to appeal, a court is entitled to presume the defendant stands fairly and finally convicted. *Frady*, 456 U.S. at 164-65. After a conviction becomes final, on collateral attack a defendant may only raise issues of constitutional or jurisdictional magnitude. *Shaid*, 937 F.2d at 232. In addition, once issues in a particular case have been raised and decided on a direct appeal, they are barred from collateral review under § 2255. *United v. Rocha*, 109 F.3d 225, 229 (5th Cir. 1997); *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, 476 U.S. 1118 (1986).

Law & Analysis

Williams contends his conviction and sentence should be vacated because he was deprived of his Sixth

Amendment right to effective assistance of counsel. Williams asserts he received ineffective assistance because his appellate counsel failed to raise what Williams believed to be the best issue on appeal: that the Court erred by refusing to instruct the jury on the defense of public authority. The appellate counsel instead argued that the statute Williams violated was unconstitutionally vague, which Williams believed to be a weaker argument.

A claim of ineffective assistance of counsel is properly raised in a § 2255 motion because it raises issues of constitutional magnitude, which generally cannot be resolved on direct appeal. *See United v. Bass*, 310 F.3d 321, 325 (5th Cir. 2002). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate: (1) the counsel's performance was deficient; and (2) the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005). Generally, to prove deficient performance, a petitioner must show: (1) "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment;" and (2) the attorney's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. To prove prejudice, the petitioner must show that his or her attorney made such serious errors that the petitioner was deprived of a fair trial. *Id.* at 687. Stated differently, a petitioner must show that "but for counsel's errors, there is a reasonable probability that the final result would have been different . . ." *Ramirez v. Dretke*, 398 F.3d 691, 698 (5th Cir. 2005) (citing *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir.

1998)). A failure to establish either prong of the *Strickland* test "will defeat an ineffective assistance of counsel claim." *Ramirez*, 398 F.3d at 698 (citing *Green v. Johnson*, 160 F.3d 1029, 1035 (5th Cir. 1998)).

The movant bears the burden of proving that he is entitled to relief. *Moya v. Estelle*, 696 F.2d 329, 332 (5th Cir. 1983). Moreover, in determining whether counsel's performance is constitutionally deficient, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Strickland*, 466 U.S. at 689. Scrutiny of counsel's performance should be highly deferential, and a court should be careful not to second-guess counsel's legitimate strategic choices. *Id.* at 694; *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). Representation is not ineffective merely because, with the benefit of hindsight, the reviewing court disagrees with counsel's strategic choices. *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill-chosen that it permeates the entire trial with obvious unfairness." *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983) (citing *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1975)). Moreover, "an attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue." *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999).

Williams contends his counsel was deficient for failing to attack the Court's refusal to instruct the jury on the defense of public authority. Williams asserts

he "reasonably believed [he] had the authority to possess the devices at issue." Therefore, Williams must prove that but for his attorney's failure to raise this issue on appeal, there is a reasonable probability that the case would not have been affirmed by the Fifth Circuit. *See United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000). Williams cannot make such a showing.

Williams's counsel's failure to raise this issue would not have changed the outcome of the appeal and thus was not deficient because Williams was unable to meet the required elements to establish the affirmative defense of public authority.[2] "The public authority defense is available when the defendant is engaged by a government official to participate or assist in covert activity." *United States v. Spires*, 79 F.3d 464, 466 n.2 (5th Cir. 1996). Any claims Williams makes giving him the right to engage in the conduct he was charged with is belied by the record in this case.

First, there was no evidence that a government official had the authority to empower Williams to engage in the acts to which he was found guilty. In his pre-trial notice of a public authority defense, Williams identified Royce Glenn Smith, Charles A. Malouff, Jr., Charlie Jones, and Brad England as the authorizing government agents on whose behalf he acted. However, during trial, all four agents testified

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[2] Williams claims that the facts identified in his attachment to his § 2255 motion were excluded from his appeal by his appellate counsel. However, even assuming these facts are true, Williams does not meet the elements of the affirmative defense of public authority.

that they had no authority and did not empower Williams to engage in the charged conduct.[3] Thus, Williams already failed to meet one element of the defense. Moreover, there was no evidence of a covert activity that Williams was involved in which required an authorizing government official to empower Williams to engage in the criminal acts with which he was convicted. Thus, Williams failed to meet another element of the defense.

Williams also testified that he relied upon an understanding between the Federal Bureau of Investigation, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the Texas National Guard, and the Texas Department of Public Safety, and the Cypress Creek Advanced Tactical Team ("CCATT") of CCEMS, an agency Williams was involved with, to establish the defense of public authority. Williams supplied letters illustrating agreements between the agencies and CCATT. However, not only were the letters written by Williams while he was employed by ATF between 1989 and 1998,

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[3] In his rebuttal to the Government's response, Williams admits that Smith testified that he gave no authority for Williams to engage in the charged conduct. However, Williams asserts that the testimony is inconsistent with the "police departments sponsorship of the tactical training programs" and that his trial counsel failed to address this fact. However, Williams's subjective belief that his counsel should have made certain arguments or used evidence in a particular way, but failed to do so, does not render his counsel's performance deficient. *See United States v. Nguyen*, 504 F.3d 561, 576 (5th Cir. 2007). Moreover, the Court cannot construe the arguments trial counsel failed to make as anything other than trial strategy, and this strategy cannot be said to be "so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002).

but the letters also did not indicate that CCATT was authorized to possess or transfer any flash bang or stun grenades thereafter.

Williams cannot prove that his appellate counsel was ineffective—that the outcome would have been different absent counsel's alleged deficiencies. *See Strickland*, 466 U.S. at 693. Williams's appellate counsel did not provide ineffective assistance by failing to attack the district court's denial to instruct the jury of the public authority defense because Williams did not meet the elements of the defense. Thus, the Court finds Williams's claims are without merit, his § 2255 motion should be denied, and his petition should be dismissed.[4] Accordingly, the Court hereby

ORDERS that Petitioner Eugene H. Williams's, Jr. Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. I, Criminal Document No. 57) is DENIED. The Court further

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[4] In his rebuttal to the Government's response, Williams also contends that his trial counsel rendered ineffective assistance by failing to address the congressional intent of the statute. Again, representation is not ineffective merely because, with the benefit of hindsight, counsel's strategic trial choices proved ineffective. Moreover, the Fifth Circuit expressly affirmed the Court's judgment and addressed the constitutionality and application of the statute, thus, the issue is not subject to consideration in the instant proceeding. *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, 476 U.S. 1118 (1986) (citing *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980)) (explaining that the court is not required to deal with issues disposed of on direct appeal). Therefore, because Williams has produced no evidence that his counsel's performance fell below an objective standard of reasonableness, Williams's claim for ineffective assistance of trial counsel fails.

ORDERS that Respondent United States of America's Response to Petitioner's Motion for Relief Under 28 U.S.C. § 2255 and Motion to Dismiss (Civil Document No. 2, Criminal Document No. 175) is GRANTED. The Court further ORDERS that Petitioner's claims are DISMISSED WITH PREJUDICE.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 1 day of July, 2010.

/s/ David Hittner
United States District Judge

LETTER FROM LAW OFFICE OF ATTORNEY JEREMY GORDON TO EUGENE WILLIAMS (FEBRUARY 9, 2015)

Jeremy Gordon
Attorney at Law
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Mansfield, TX 76063

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Via Certified Mail,
Receipt No. 7013 1710 0000 7919 3603

Mr. Eugene Williams
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LEGAL MAIL—OPEN ONLY IN FRONT OF INMATE

Re: Case Review

Dear Mr. Williams:

You requested our advice and counsel to determine your potential options for seeking relief in *United States v. Williams*, Case No. 4:06-cr-00237-2 (S.D. Tex.).

I have fully and carefully reviewed the salient records in your case, including; indictment; Motion to Dismiss Based on Void for Vagueness; Motion to Quash along with the Government's Response; Motion for

Discovery; all documents related to the Jury Trial, including the Transcripts; Transcript of Sentencing; Judgment. I have also reviewed all of the documents related to your direct appeal and your Motion to Vacate Pursuant to 28 U.S.C. § 2255.

On August 17, 2006, you were charged in a six-count superseding indictment relating to the possession of unregistered destructive devices, most of them stun grenades. You pled not guilty and proceeded to jury trial. The chief defense strategy was a public authority defense. However, at the close of the case, the judge denied your request to provide a jury instruction on the public authority defense. The jury ultimately found you guilty on all counts and, on April 20, 2007, you were sentenced to an aggregate 120 months imprisonment. Your direct appeal was affirmed by the Fifth Circuit on December 18, 2008.

During my review of your case, I focused primarily on what arguments, if any, could you bring forth in a collateral review proceeding.

As a preliminary matter, the primary method of collaterally attacking a Sentence, especially on the basis of ineffective assistance of counsel, is a 28 U.S.C. § 2255 motion. A Motion to Vacate. Set Aside, or Correct Sentence under § 2255 must be filed in the sentencing court and must he brought within one year of your judgment becoming "final". 28 U.S.C. § 2255(e); *see also Clay v. United States*, 537 U.S. 522, 527 (2003). You filed your first § 2255 motion on February 26, 2010, which the District Court denied on July 1, 2010.[1]

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[1] Additionally, you applied for a certificate of appealability to appeal the dismissal of your § 2255 motion, which was denied on February 9, 2011.

Unfortunately, any further or subsequent tiling under 28 § 2255 would be deemed "second or successive motion," which is only permissible under very narrow circumstances. 28 U.S.C. § 2255(h) provides that a "second or successive motion" must be certified to contain:

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

28 U.S.C. § 2255(h), in your case, there is no "newly discovered evidence" to present that would allow you to certify a second or successive petition. Additionally, there is no retroactively applicable rule of constitutional law that could be raised on your behalf to certify a second or successive petition. Thus, the possibility of a second § 2255 motion is unavailable.

Despite this bar "second or successive motions," in some instances inmates can bring habeas claims through 28 U.S.C. § 2255(e), which is commonly referred to as the "savings clause." Section 2255(e) allows petitioners to bring claims under 28 U.S.C. § 2241 that would otherwise be required to be brought under § 2255, but only if the remedy under § 2255 is "inadequate or ineffective to test the legality" of the detention. Claims under § 2241 are filed in the judicial district in which the inmate is incarcerated.

In your case, a petition under § 2241 must be filed in the United States District Court for the Western District of Texas. The Fifth Circuit, unfortunately, has held that:

> [T]he savings clause applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a non-existent offense and that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

Reyes-Requena v. United States, 24 F.3d 893, 904 (5th Cir. 2001). In your case, there is no retroactively applicable Supreme Court decision that altered the substantive law in your case. Thus, we would not be able to meet the Fifth Circuit's § 2255 savings clause standard.

SUPREME COURT
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