Appendix A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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September 03, 2019

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

No. 18-11498 USA v. Cedric Edney
USDC No. 3:16-CV-3541

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Peter A. Conners, Deputy Clerk
504-310-7685

cc w/encl:
Mr. Cedric Edney
Ms. Leigha Amy Simonton

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11498

A True Copy
Certified order issued Sep 03, 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CEDRIC EDNEY,

Defendant-Appellant

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

O R D E R:

Cedric Edney, federal prisoner # 48680-177, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging the sentence imposed following his 2015 conviction for one count of possession with intent to distribute less than 50 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D), and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Relying on *Mathis v. United States*, 136 S. Ct. 2243 (2016), *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), and *United States v. Tanksley*, 848 F.3d 347 (5th Cir.), *supplemented by*, 854 F.3d 284 (5th Cir. 2017), Edney contends that the sentencing court erred in determining that his prior convictions under Texas Health & Safety Code § 481.112(a) qualified as

controlled substance offenses for purposes of the career offender enhancement and the assessment of a base offense level under U.S.S.G. § 2K2.1(a)(2).

By failing to address the bases for the district court's denial of his § 2255 motion, Edney has waived the only issues cognizable in this court. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Moreover, Edney cannot show that reasonable jurists would find the district court's denial of his claim debatable or wrong or that the issue presented deserves encouragement to proceed further. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, his COA motion is DENIED. Edney's motion for leave to proceed in forma pauperis on appeal is also DENIED.

KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11498

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CEDRIC EDNEY,

Defendant - Appellant

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

Before HAYNES, GRAVES, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's Motion for a Certificate of Appealability and Motion for IFP. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CEDRIC EDNEY (BOP Register No. 48680-177), Movant, V. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § §	No. 3:16-cv-3541-N

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that Movant's motion to vacate, set aside, or correct his federal sentence under 28 U.S.C. § 2255 is DENIED.

The Clerk shall transmit a true copy of this Judgment and the Order adopting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge to Movant.

SIGNED this 26th day of October, 2018.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CEDRIC EDNEY (BOP Register No. 48680-177), Movant, V. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § §	No. 3:16-cv-3541-N

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. An objection was filed by Movant. The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that the Petitioner

has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).[1]

In the event Movant will file a notice of appeal, the Court notes that Movant must pay the filing fee ($505.00) or file a motion for leave proceed *in forma pauperis* on appeal.

SO ORDERED this 26th day of October, 2018.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

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[1] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CEDRIC EDNEY (BOP Register No. 48680-177), Movant, V. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § §	No. 3:16-cv-3541-N-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Movant Cedric Edney, a federal prisoner proceeding *pro se*, filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence asserting that he should be resentenced based on *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). *See, e.g.*, Dkt. No. 1 at 4 (requesting "that this Court will offer him an opportunity to be resentenced absent the *Hinkle* violations"). This resulting action has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge David C. Godbey. The government filed a response opposing relief, *see* Dkt. No. 5, and Edney filed a reply brief, *see* Dkt. No. 6. The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should deny Edney's Section 2255 motion.

Applicable Background

Edney was convicted of possession of a controlled substance with intent to

distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D), [Count 1] and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), [Count 2], and he was sentenced to 60 months of imprisonment as to Count 1 and to a consecutive 120 months as to Count 2, but the Court limited his total aggregate sentence to 144 months in custody and determined that his federal sentence shall run concurrently with any state sentence imposed in Case Nos. F12-41301 and F12-40626, then pending in the 282nd Judicial District Court of Dallas County, Texas. *See United States v. Edney*, No. 3:14-cr-366-N (01), Dkt. No. 43 (N.D. Tex. Dec. 17, 2015).

There was no direct appeal.

And, pertinent to the claim in Edney's Section 2255 motion, the Guidelines sentence for his firearm conviction was enhanced because it was determined that Edney was a Career Offender under USSG § 4B1.1 based on two prior Texas controlled-substance convictions. *See, e.g., id.*, Dkt. No. 30-1 (presentencing report or PSR), ¶¶ 30, 37, 48, & 49.

Legal Standards and Analysis

Although Edney believes he should be resentenced in light of *Hinkle*, a decision of the United States Court of Appeals for the Fifth Circuit handed down after the United States Supreme Court decided *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Fifth Circuit did not overturn *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007) – the controlling precedent at the time of Edney's sentencing that justified his career-offender enhancement under the Guidelines – until it decided *United States v. Tanksley*, 848 F.3d 347 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017).

Tanksley held that *Mathis* overturned *Ford*, in which the Court of Appeals had "held that a conviction for possession with intent to deliver a controlled substance under section 481.112(a) of the Texas Health and Safety Code ... qualifies as a 'controlled substance offense' under the [Guidelines]." *Tanksley*, 848 F.3d at 349; *see id.* at 352 ("*Mathis* is more than merely illuminating with respect to the case before us; it unequivocally resolves the question in favor of Tanksley. *Ford* cannot stand. Section 481.112(a) is an indivisible statute to which the modified categorical approach does not apply." (citations and internal quotation marks omitted)).

As such, Tanksley's prior conviction under Section 481.112(a) could not count as "a controlled substance offense" under the career offender provision of the sentencing guidelines, under which

> [a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). And today, a prior conviction under Section 481.112(a) does not count as "a controlled substance offense" under Section 4B1.1. *See, e.g., United States v. Hott*, 866 F.3d 618, 621 (5th Cir. 2017) ("This court recently held that Texas possession with intent to deliver a controlled substance does not qualify as a controlled substance offense under the Guidelines. Based on *Tanksley*, the Government concedes error in calculation of the Guidelines range." (citation omitted)).

But, unlike *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the

Supreme Court held that an aspect of the Armed Career Criminal Act ("ACCA") was subject to a constitutional vagueness challenge, neither *Hinkle* nor *Tanksley* is a decision of the Supreme Court that is "substantive [ ] and so has retroactive effect under *Teague[v. Lane*, 489 U.S. 288 (1989),] in cases on collateral review," *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). In sum, then, Edney is merely challenging on collateral review his Guidelines calculation. And

> [a]ny claim that the Court erred when it calculated his guideline sentence ... "attacks head-on the sentencing Court's application" of the Sentencing Guidelines. *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). [Such a] claim is not cognizable in this collateral proceeding. *See id.*
>
> "Section 2255 motions may raise only constitutional errors and other injuries that could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed," and "[m]isapplications of the Sentencing Guidelines fall into neither category and hence are not cognizable in [Section] 2255 motions." *Id.* (citation omitted). [Mr. Wheeler] cannot here argue that the Court erred in relying on his prior Texas convictions when it calculated his Guideline sentence. *See, e.g., Fisher v. United States*, No. 4:17-cv-50, 2017 WL 3781855, at *2 (E.D. Tex. July 13, 2017), *rec. adopted* 2017 WL 3725295 (E.D. Tex. Aug. 28, 2017) ("[R]elief is unavailable under § 2255 based on *Mathis*, *Hinkle*, and *Tanksley*" because "the technical application of the Sentencing Guidelines does not raise an issue of constitutional dimension for purposes of § 2255 proceedings."); *see also Reeves v. United States*, No. 4:17-cv-268-O, Dkt. No. 3 at 3 (N.D. Tex. Dec. 4, 2017) (same).

Villa-Sanchez v. United States, No. 3:17-cv-3457-D-BN, 2017 WL 7804729, at *1 & *2 (N.D. Tex. Dec. 22, 2017), *rec. adopted*, 2018 WL 1083854 (N.D. Tex. Feb. 28, 2018), *mot. to amend judgment denied*, 2018 WL 2299057 (N.D. Tex. May 21, 2018); *see also Beckles v. United States*, 137 S. Ct. 886, 892 (2017) ("Unlike the ACCA, ... the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the

statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause."); *Herrod v. United States*, Nos. 4:16cv782 & 4:11cr00176-001, 2017 WL 4076120, at *1 (E.D. Tex. Sept. 14, 2017) ("Since *Beckles* was decided, the Fifth Circuit has repeatedly rejected cases by inmates trying to extend *Johnson* to the Sentencing Guidelines. Moreover, the Fifth Circuit has repeatedly held that the technical application of the United States Sentencing Guidelines does not raise an issue of constitutional dimension for purposes of § 2255 proceedings. The type of claim Herrod is bringing in this case is not cognizable in a § 2255 proceeding." (citations omitted)); *Strecker v. United States*, Nos. 4:17-cv-986-A & 4:15-cr-063-A, 2018 WL 705308, at *3 (N.D. Tex. Feb. 1, 2018) ("The arguments would fail in any event, as the cases upon which movant relies do not support his position. *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis* ... concern convictions under the Armed Career Criminal Act, which played no role in movant's case. Rather, movant is seeking to extend their holdings to application of the sentencing guidelines, but the Supreme Court has made clear that the guidelines are not subject to a vagueness challenge under the Constitution. And challenges to application of the guidelines are not cognizable under [Section] 2255." (citations omitted)).

Recommendation

The Court should deny Movant Cedric Edney's 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these

findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: October 1, 2018

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS - DALLAS DIVISION

CEDRIC EDNEY;
Movant;

v.

THE UNITED STATES OF AMERICA;
Respondent;

Case No. 3:16-CV-3541-N

Notice Of Appeal

To the Honorable Judge of said Court - Notice is hereby given that Cedric Edney, Movant, in the above entitled matter, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 26th day of October, 2018.

Respectfully;

Cedric Edney

Cedric Edney
Date: November 14, 2018