UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	No. IP 99-CR-83-01-H/F
	)	1:05-cv-307-DFH-VSS
VAN JACKSON,	)	
	)	
Defendant.	)	

Entry Discussing Motion for Relief Pursuant to 28 U.S.C. § 2255

A court may grant relief from a federal conviction or sentence pursuant to 28 U.S.C. § 2255 "upon the ground 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, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. In this case, defendant Van Jackson has failed to make such a showing. Accordingly, his motion for relief pursuant to 28 U.S.C. § 2255 must be **denied.** In addition, he has not shown that an evidentiary hearing should be conducted in this case. These conclusions rest on the following facts and circumstances:

1. Jackson was found guilty of conspiring to possess with intent to distribute more than one kilogram of a substance containing heroin, in violation of 21 U.S.C. § 841(a)(1) and 846, and three counts of distributing heroin, in violation of 21 U.S.C. § 841(a)(1) and 2(a). He was sentenced to an executed term of 360 months of imprisonment, consisting of 360 months for the conspiracy conviction and 240 months on each of the distribution counts. Each of these sentences was to run concurrent with the others. He appealed, but his appointed counsel filed a motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967). The Seventh Circuit found the potential appellate issues and additional issues raised by Jackson to be frivolous, granted counsel's motion and dismissed the appeal. *Jackson v. United States,* 41 Fed.Appx. 848 (7th Cir. 2002).[1]

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[1]The issues that counsel considered included: (1) the district court erred in refusing to suppress evidence obtained through a wiretap on a co-conspirator's cell phone; (2) the district court erred in dismissing juror Whitfield; (3) there was insufficient evidence for a rational jury to convict Jackson of conspiracy; (4) there was sentencing error under the rule established in *Apprendi v. New Jersey,* 530 U.S. 466 (2000); and (5) there was sentencing error based on upward

2. Jackson now seeks relief from his conviction and sentence pursuant to 28 U.S.C. § 2255. The scope of relief available under § 2255 is narrow. A defendant is entitled to relief under § 2255 where the error is jurisdictional, constitutional or is a fundamental defect which inherently results in a complete miscarriage of justice. *Boyer v. United States,* 55 F.3d 296, 298 (7th Cir.), *cert. denied*, 516 U.S. 904 (1995).

3. Jackson first argues that he was improperly sentenced to a term of imprisonment over that permitted by law. This question was considered and rejected by the Court of Appeals in ruling on Jackson's attorney's *Anders* brief: "the conspiracy count alleges and the jury found beyond a reasonable doubt that Jackson conspired to distribute at least a kilogram of heroin; under 21 U.S.C. § 841(b)(1)(A)(i) he could have been sentenced to life, and instead he received 360 months. *Apprendi [v. New Jersey,* 530 U.S. 466 (2000)] required nothing more." *Jackson,* 41 Fed.Appx. at 853.

4. Jackson next argues that an erroneous jury instruction constructively amended the Indictment and modified an essential element of the crime for which Jackson was charged. The court finds no merit to this argument, because there was no "broadening" of the conspiracy alleged in count 1 of the Indictment through the jury instructions and no ineffectiveness on the part of appellate counsel in failing to raise this point. *Lee v. Davis,* 328 F.3d 896, 901 (7th Cir. 2003)(a defendant must show that there is a reasonable probability that appellate counsel's failure to raise an issue would have resulted in the reversal of his conviction or an order for a new trial).

5. Jackson raises the ineffectiveness of his trial counsel in his § 2255 motion. The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684 (1984). The purpose of the right is to ensure a fair trial, and the benchmark for judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In *Strickland,* the Supreme Court held that to prevail on a claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

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adjustments for various factors. After analysis, the Seventh Circuit agreed with counsel that arguing these issues would be frivolous. Jackson also raised additional issues in his Circuit Rule 51(b) brief. The Seventh Circuit examined these issues, found them to be frivolous, and dismissed the appeal.

Strickland, 466 U.S. 668, 687. The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689 (citing *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)). Furthermore, even if the defendant shows counsel's performance was deficient, "'[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Id.* at 691. Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

a. Jackson asserts that his counsel "failed to extensively cross examine the government witnesses." Jackson has failed to demonstrate, in any respect or with any specific witness, how his trial counsel's examination of such witness was substandard or how such a failure to effectively cross-examine adversely affected the outcome of the trial. A petitioner must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance. *Berkey v. United States,* 318 F.3d 768, 773 (7th Cir. 2003). "[C]onclusory allegations do not satisfy *Strickland's* prejudice component." *United States v. Farr,* 297 F.3d 651, 658 (7th Cir. 2002) (citing *United States v. Boyles,* 57 F.3d 535, 550 (7th Cir. 1995); *United States v. Woody,* 55 F.3d 1257, 1272 (7th Cir. 1995)). In the face of the overwhelming evidence showing Jackson's involvement in the conspiracy, no identified feature of the manner in which government witnesses were cross-examined or were not cross-examined would have changed the outcome at trial. Thus, Jackson has not shown prejudice on this point in the sense required by *Strickland.*

b. Jackson asserts that his trial counsel "failed to set up a defense for counts 13, 22, and 29." As with the previous specification of attorney ineffectiveness, Jackson has failed to point to anything his attorney could or should have done differently. Again, he has not shown prejudice based on this assertion of deficient performance of his attorney at trial.

c. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is . . . whether what [counsel] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland,* 466 U.S. at 689). It was explained in *Holman v. Gilmore,* 126 F.3d 876, 882 (7th Cir. 1997), that:

> [t]he question posed by *Strickland* [is] whether, taking all of the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:05-cv-00307-SEB-TAB
	)	
VAN JACKSON,	)	
	)	
Defendant.	)	

Entry

Van Jackson has filed another motion for relief from judgment pursuant to Rule 60(b) of the *Federal Rules of Civil Procedure*. He asserts error in the resolution of his motion for relief pursuant to 28 U.S.C. § 2255. Jackson again argues that the Court misapplied the law when ruling on his § 2255 motion.

Under *Gonzalez v. Crosby,* 545 U.S. 524 (2005), a Rule 60(b) motion is a second or successive petition if it "in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Spitznas v. Boone,* 464 F.3d 1213, 1215 (10th Cir. 2006). "Conversely, it is a 'true' 60(b) motion if it . . . challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application." *Id.* at 1215-16. Jackson's Rule 60(b) motion challenges the substance of the ruling on his § 2255. He resists the treatment of his Rule 60(b) motion as successive petition arguing that the defect in the § 2255 ruling lies in the Court's failure to consider his argument based on a change in the law as provided in *Blakely v. Washington*, 542 U.S. 256 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), that took place between his direct appeal and the filing of his § 2255 motion. But this argument is a challenge to the substance of the Court's ruling and therefore must be treated as a

successive § 2255 motion. *See Gonzalez*, 545 U.S. at 532 ("alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.").

As before, the Rule 60(b) motion is exactly the type of motion which is to be treated as a second or successive § 2255 motion pursuant to *Gonzalez*. Jackson's disavowal of that fact and his effort to keep the motion on the procedural line of *Gonzalez* are unavailing. Because Jackson's Rule 60(b) motion, dkt. [68], is actually a successive § 2255 motion for which Jackson has not received permission from the Court of Appeals to file, it is **denied**.

IT IS SO ORDERED.

Date: 4/26/2018

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 1, 2019
Decided July 26, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 18-2060

VAN JACKSON,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:05-cv-00307-SEB-TAB

Sarah Evans Barker,
Judge.

ORDER

Van Jackson has filed a notice of appeal from the district court's denial of his post-judgment motion in a long-closed action under 28 U.S.C. § 2255, which we construe as a request for a certificate of appealability. We have reviewed the final order of the district court, the record on appeal, and all of Jackson's filings in this court. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**. Jackson's motion to proceed *in forma pauperis* is **DENIED**. All other motions are **DENIED**.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 27, 2019

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 18-2060

VAN JACKSON,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:05-cv-00307

Sarah Evans Barker,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the petitioner-appellant in the above case on August 12, 2019, no judge in active service has requested a vote thereon* and both judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

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*Circuit Judge David F. Hamilton did not participate in the consideration of this petition for rehearing.