APPENPIX A

OPINION OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DENYING FEDERAL HABEAS CORPUS, ROBINSON V. UNITED STATES, No 8:19-CV-01466-TGW (AUG 15, 2019)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RASHEED LAMAR ROBINSON a/k/a
Richardo Lascelles Dwight Ashmeade,

Plaintiff,

v. CASE NO. 8:19-cv-1466-T-26TGW

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

After due and careful consideration of the procedural history of Plaintiff's two criminal cases,[1] together with the submissions of the parties,[2] the Court concludes that Plaintiff's timely filed Motion to Vacate filed pursuant to 28 U.S.C. § 2255 is due to be denied based on the following analysis.[3]

Plaintiff pleaded guilty in case number 8:06-cr-366 to conspiracy to possess with intent to distribute 1,000 kilograms or more of marijuana pursuant to a written plea agreement. Prior to his plea, the Government filed an information alleging two prior

[1] See case numbers 8:06-cr-366 and 8:08-cr-539.

[2] The Court, after careful review, finds that Defendant's citations to the record of Plaintiff's underlying criminal cases are accurate so that the Court need not duplicate them in this order.

[3] The Court rejects Defendant's argument that Plaintiff's motion is time-barred.

felony drug convictions, thus subjecting Plaintiff to an enhanced minimum mandatory sentence of twenty (20) years of imprisonment under 21 U.S.C. § 851. Plaintiff's two felony convictions consisted of possession with intent to distribute more than five (5) pounds of marijuana in Henrico County, Virginia, and possession of marijuana for sale in San Diego County, California. These convictions qualified him as a career offender pursuant to U.S.S.G. §4B1.1, thus yielding an offense level of 37. After factoring in a criminal history category of VI and a three-level downward adjustment for acceptance of responsibility, Plaintiff's advisory guideline range was fixed at 262 to 327 months.

In case number 8:08-cr-539, Plaintiff pleaded guilty to illegal reentry after deportation without a plea agreement, which subjected him to a maximum term of imprisonment of twenty (20) years pursuant to 8 U.S.C. §§ 1326(a) and (b)(2). The Court subsequently sentenced Plaintiff to 262 months in the drug case and 240 months in the illegal reentry case followed by periods of supervised release, with those sentences running concurrently. Plaintiff's direct appeal in the drug case was dismissed for failure to pay the filing fee, and he did not file a direct appeal in the illegal reentry case.

Plaintiff has now filed a motion to vacate in both cases challenging his career offender designation based on the fact that a California superior court has reclassified his marijuana conviction from a felony to a misdemeanor under the provisions of Proposition 64, an initiative approved by California voters allowing a court to redesignate a marijuana felony conviction to a misdemeanor. See Cal. Health & Safety Code §11361.8. In light

of that redesignation, Plaintiff contends he is no longer subject to a sentencing enhancement under § 851 nor is he eligible for a career offender classification, thus entitling him to be resentenced. The Court resoundingly rejects this contention.

Based on the cases cited by Defendant, as well as the Court's own independent research, every court to consider Plaintiff's argument has rejected it within the context of Proposition 64. See United States v. Gilmore, 2018 WL 5787305, at *3 (N.D. Cal. 2018); Mejia v. United States, 2018 WL 3629947, at *2 (S.D. Cal. 2018); Ramos v. United States, 321 F. Supp. 3d 661, 666 (E.D. Va. 2018); United States v. Ochoa-Garcia, 2017 WL 4532489, at *3 (D. Nev. 2017). As the Court in Ochoa-Garcia observed, "[a]ll the relevant case law clearly supports the conclusion that a subsequent state-court modification of a prior conviction cannot retroactively change that conviction's effect under the Sentencing Guidelines, unless the modification was due to (1) actual innocence, or (2) legal errors in state-court proceedings." 2018 WL 4532489, at *3 (citing U.S.S.G. § 4A1.2 n. 10). As in Ochoa-Garcia, "the classification of [Plaintiff's] conviction[] under Proposition 64 did not make him innocent of his crime[],and was not the result of legal error; it merely downgraded the offense[] based on recent changes in the law." Id. (citation omitted).

Additionally, a host of courts have rejected arguments similar to Plaintiff's within the context of California's Proposition 47, which operates in the same fashion as Proposition 64 with regard to reclassifying a felony to a misdemeanor but with respect to

a different set of drug-related offenses.[4] See, e.g., United States v. Sanders, 909 F.3d 895, 900 (7th Cir. 2018) (joining "the Third and Ninth Circuits in holding that a defendant who commits a federal drug offense after previously being convicted of a state felony drug offense is subject to § 841's recidivist's enhancement even if that prior offense was reclassified as a misdemeanor pursuant to Proposition 47.") (citing United States v. London, 747 F. App'x 80, 85 (3rd Cir. 2018) and United States v. Diaz, 838 F.3d 968, 975 (9th Cir. 2016)); United States v. Stiger, 2019 WL 2248266, at *3 (N.D. Okla. 2019); United States v. Mitchell, 2019 WL 2075933, at *2 (W.D. Pa. 2019) (citing London, Sanders, and Diaz); United States v. Munayco, 2018 WL 7050761, at *3-5 (N.D. Fla. 2018) (citing London, Sanders, and Diaz), report and recommendation approved by district judge at docket 46 in case number 3:05-cr-3.

In light of this persuasive precedent, the Court concludes that the mere fact that Plaintiff's California drug conviction was reclassified from a felony to a misdemeanor based on Proposition 64 does not remove the stigma of his career offender designation. Accordingly, his Motion to Vacate (Dkt. 1) is denied. The Clerk is directed to enter judgment for Defendant and to close this case.

Additionally, the Court declines to issue a certificate of appealability because Plaintiff has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Cf. United States v. Holyfield, 752 F. App'x 595

---

[4] See Cal. Penal Code 1170.18.

(10th Cir. 2018) (unpublished). Nor will the Court allow Plaintiff to proceed on appeal *in forma pauperis* because such an appeal would not be taken in good faith. See 28 U.S.C. § 1915(a)(3). Plaintiff shall pay the entire amount of the appellate filing fee pursuant to 28 U.S.C. § 1915(b).

DONE AND ORDERED at Tampa, Florida, on August 15, 2019.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record and Plaintiff, *pro se*

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DENYING MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV P. 60(b); 59(e); AND DECLINING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY, ROBINSON V. UNITED STATES, NO. 8:19-CV-1466-T-26TGW (SEPT 3, 2019)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RASHEED ROBINSON a/k/a
Richardo Cascelles Dwight Ashmeade,

Plaintiff,

v. CASE NO. 8:19-cv-1466-T-26TGW

UNITED STATES OF AMERICA

Defendant.
_____/

ORDER

UPON DUE AND CAREFUL CONSIDERATION of the procedural history of this case, it is **ORDERED AND ADJUDGED** as follows:

1) Plaintiff's *pro se* Motion for Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b)(6) (Dkt. 10) is denied. Plaintiff offers no evidence that Defendant is guilty of "misconduct" in allegedly failing to furnish him a copy of its response to Plaintiff's Motion to Vacate. Defendant's certificate of service on its response reflects that it was forwarded to Plaintiff at the same address listed on his Motion to Vacate. Furthermore, the clerk's display receipt to Defendant's response at docket 7 reflects that the clerk sent a copy of the response to Plaintiff at the same address listed on Plaintiff's Motion to Vacate, and there is no indication on the docket that the response was returned to the clerk. Accordingly, Plaintiff has failed to overcome the rebuttable presumption that a

properly mailed item was received by the recipient. See Watkins v. Plantation Police Dep't, 733 F. App'x 991, 994 (11th Cir. 2018) (unpublished).

2) Plaintiff's *pro se* Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (Dkt. 10) is denied. Plaintiff has not been deprived of due process of law under the Fifth Amendment nor subjected to cruel and unusual punishment under the Eighth Amendment because Plaintiff's California marijuana conviction was not *vacated* or *invalidated* by the California court, it was *reclassified*. Although the Court recognizes the result reached in Clay v. United States, 2018 WL 6333671 (C.D. Cal. 2018), the Court disagrees with its reasoning and continues to adhere to the conclusions reached by the legal precedent cited in its order denying Plaintiff's Motion to Vacate. *See* docket 8.

3) The Court continues to decline to issue a certificate of appealability and to allow Plaintiff to proceed on appeal *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, on September 3, 2019.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record and Plaintiff, *pro se*

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING COA, ROBINSON V. UNITED STATES No. 19-13671-C (JAN 15, 2020); No: 19-13673-C (MARCH 4, 2020)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13671-C; No. 19-13673-C

RASHEED LAMAR ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Rasheed Robinson, a federal prisoner, is serving a total of 262 months' imprisonment after he pled guilty in different criminal cases to illegal re-entry after removal, in violation of 8 U.S.C. § 1326(a) & (b)(2), and conspiracy to possess with intent to distribute 1,000 kilograms or more of marijuana, in violation of 21 U.S.C. § 846. Robinson filed nearly identical *pro se* 28 U.S.C. § 2255 motions to vacate, set aside, or correct his sentence, attacking both of his criminal convictions and sentences, arguing that he was no longer a career offender and that he should be resentenced accordingly. Robinson specified that his prior conviction for felony California possession of marijuana no longer qualified as a predicate offense for the career-offender designation because that conviction had been vacated and reduced to a misdemeanor after he had been sentenced.

The government filed identical responses in both cases, and the government attached a certificate of service to the responses that stated that the government had mailed the responses to

Robinson at the address listed on the district court dockets. The district court then denied the § 2255 motions with identical orders entered in both cases, concluding that, even though Robinson's drug conviction had been reclassified by the state from a felony to a misdemeanor, such a reclassification did not change the career-offender designation.

Robinson subsequently filed identical combined Fed. R. Civ. P. 60(b)(6) and 59(e) motions in both cases. Under Fed. R. Civ. P. 60(b)(6), he argued that the government did not properly serve him with its responses to his § 2255 motions. Under Fed. R. Civ. P. 59(e), Robinson asserted, generally, that he no longer qualified as a career offender because his prior conviction for felony California possession of marijuana had been retroactively changed to a misdemeanor offense.

The district court entered identical orders denying Robinson's combined Rule 60(b)(6) and 59(e) motions. The district court denied Robinson a certificate of appealability ("COA") and leave to procced on appeal *in forma pauperis* ("IFP").

Robinson filed a notice of appeal in both cases and now moves this Court for a COA and IFP status in both cases. He also filed a motion to consolidate his appellate cases, Case No. 19-13671 and Case No. 19-13673.

As an initial matter, Robinson's motion to consolidate his appellate cases is GRANTED because both cases deal with virtually identical filings and arguments made by Robinson, the government, and the district court.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, reasonable jurists would not debate the district court's denial of Robinson's § 2255 motions. First, the government filed its 21 U.S.C. § 851 notice, stating that it would seek an enhanced sentence based on his prior convictions, in October 2008, and Robinson's prior California conviction occurred in June 1998. Consequently, the prior California conviction fell outside the five-year statutory limitation period. *See* 21 U.S.C. § 851(e) (stating that a defendant cannot challenge any prior convictions alleged in the § 851 notice that occurred more than five years before the filing date of the notice). Second, Robinson's prior California conviction had "become final" before the government filed its notice, and, therefore, his sentence was properly enhanced. *See* 21 U.S.C. § 841(a) (stating that a defendant's sentence can be enhanced based on prior convictions when those convictions "have become final").

Furthermore, reasonable jurists would not debate that the district court did not err in denying Robinson's combined Rule 60(b)(6) and 59(e) motions. Robinson failed to rebut the presumption that he received the government's responses to his § 2255 motions, as (1) the government mailed the responses to his address listed on the district court dockets, (2) he only stated that he never received the responses, and (3) the district court dockets do not show that the responses were ever returned as undeliverable. *See Konst v. Fla. East Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996) (stating that, when an item was properly mailed to the addressee, it creates a rebuttable presumption that the addressee received the item); *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1241-42 (11th Cir. 2002) (stating that a party must do more than simply allege that he never received a mailed item in order to rebut the presumption). Additionally, Robinson did not argue that there was new evidence. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (stating that the only reasons for granting a Rule 59 motion are newly discovered evidence or

manifest errors of law or fact). Moreover, the district court did not commit a manifest error of law or fact in denying Robinson's § 2255 motions for the reasons given above.

Accordingly, Robinson's motions for a COA are DENIED. His motions for IFP status on appeal are DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13671-C

RASHEED LAMAR ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 19-13673-C

RASHEED LAMAR ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Rasheed Robinson has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's January 15, 2020, order denying a certificate of appealability and leave to proceed *in forma pauperis* in his consolidated appeal of the district court's denials of his *pro se*

28 U.S.C. § 2255 motions to vacate, set aside, or correct his sentence and his *pro se* Fed R. Civ. P. 59(e) and 60(b)(6) motions to alter or amend the judgments denying his § 2255 motions. Upon review, Robinson's motion for reconsideration in this consolidated appeal is DENIED because he has offered no new evidence or arguments of merit to warrant relief.