A P P E N D I X "A"

U.S. DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KELSEY VIDEL COFFEE,

Petitioner,

v.

Case No: 6:18-cv-988-Orl-22EJK
(6:14-cr-146-Orl-22EJK)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Kelsey Videl Coffee's Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed under 28 U.S.C. § 2255 and Supplement to the Motion to Vacate ("Supplement," Doc. 10). Respondent filed a Response to the Motion to Vacate ("Response," Doc. 8) and a Response to the Supplement ("Response to Supplement," Doc. 15) in compliance with this Court's instruction. Petitioner filed a Reply to the Response and Response to Supplement ("Reply," Doc. 16).

Petitioner asserts ten grounds for relief. For the following reasons, the Motion to Vacate and the Supplement are denied.

I. PROCEDURAL HISTORY

A grand jury charged Petitioner by superseding indictment with two counts of aiding and abetting in Hobbs Act robbery (Counts Two, Four, Five, Six, and Eight) in violation of 18 U.S.C. § 1951(a) and two counts of aiding and abetting in the use of a

firearm that was brandished during and in relation to Hobbs Act robbery (Counts Three and Seven) in violation of 18 U.S.C. § 924(c)(1)(A). (Criminal Case No. 6:14-cr-146-Orl-22EJK, Doc. 78.)[1] A jury acquitted Petitioner of Counts Two and Three and found him guilty of Counts Four through Eight. (Criminal Case, Doc. 127.) The Court sentenced Petitioner to concurrent 150-month terms of imprisonment for Counts Four, Five, Six and Eight a and to a consecutive 84-month term of imprisonment for Count Seven. (Criminal Case, Doc. 196.) Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed. (Criminal Case, Doc. 203.)

II. LEGAL STANDARD

Section 2255 allows federal prisoners to obtain collateral relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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 attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). To obtain this relief, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment). "[I]f the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" *Aron v. United*

[1] Criminal Case No. 6:14-cr-146-Orl-22EJK will be referred to as "Criminal Case."

States, 291 F.3d 708, 714–15 (11th Cir. 2002) (quoting *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989)). In the event a claim is meritorious, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

III. ANALYSIS

A. Grounds One through Four

In Ground One, Petitioner contends trial counsel rendered ineffective assistance by failing to object to the verdict form submitted to the jury. (Doc. Nos. 1 at 4; 1-1 at 2-3.) To support this ground, Petitioner notes that verdict form erroneously indicated he was charged with "robbery in violation of 924(c)" as to Count Seven. (Doc. 1-1 at 2-3.) Petitioner argues that, as a result, the jury returned a guilty verdict on robbery, for which he was not charged, versus the § 924(c) charge, yet the Court sentenced him for the § 924(c) count. (*Id.*) Similarly, in Grounds Two, Three, and Four, Petitioner complains that the § 924(c) conviction violates his right to due process, right to a trial by jury, and right against cruel and unusual punishment.[2] (Doc. Nos. 1 at 5-8.)

Petitioner has not established that prejudice resulted. The Court instructed the jury multiple times about the charges and the parties advised the jury several times that there

[2] It is not clear whether Petitioner intended to raise Grounds Two through Four as claims of ineffective assistance of counsel. The Court will consider them as claims of ineffective assistance of counsel because they are all premised on the erroneous verdict form to which counsel did not object. To the extent Petitioner did not intend to raise them as claims of ineffective assistance of counsel, they are without merit and denied. Petitioner has not shown that he was denied his right to due process or a jury trial or that his conviction and sentence for the § 924(c) charge resulted in cruel and unusual punishment.

were two firearm counts, including Count Seven. As the Eleventh Circuit Court of Appeals reasoned on direct appeal:

> First, it does not appear that the jurors were confused and thought they were convicting the defendants of "robbery" on Count 7. In the absence of any reason to believe otherwise (and none has been suggested), we presume the jury was paying attention when: (a) the district court read the superseding indictment to the jury pool during voir dire, and it correctly sets out that Count 7 was for "using a firearm during and in relation to" robbery of the Sweetbay Market; (b) both the government and defense counsel repeatedly told the jury during their opening statements and closing arguments that the six robbery counts were separate and distinct—and required different kinds of proof—from the two firearm counts in Counts 3 and 7 (the former of which was correctly described on the verdict form); (c) the jurors were given a copy of the superseding indictment and specifically told (by defense counsel) to be sure and "match . . . up" the two groups of offenses; and (d) the district court gave correct final instructions on the law and told the jurors yet again that the two firearm charges "in counts three and seven" were different than the robbery counts (and each juror received a written copy of the jury instructions). Moreover, the jury's question during deliberations ("[Does] the offense of using a firearm which would violate 18 U.S.C. § 924 require the person to have actual physical possession of the firearm?") suggests the jurors understood and appreciated the distinction between a Section 924 firearm violation and a Section 1951 robbery charge. On this record, it is doubtful that the jurors were confused and thought they were convicting the defendants of a "robbery" offense in Count 7. And if the jurors were not confused, and knew they were finding the defendants guilty of a Section 924(c) charge, amending the written judgments to accurately reflect that offense was not a "substantive alteration" of the jury's verdict.
>
> Second, even if we were to agree with the defendants that the record is at least ambiguous with respect to what the jurors found on Count 7, there was no prejudice on the facts of this case.

United States v. Davis, 841 F.3d 1253, 1261-62 (11th Cir. 2016). The Eleventh Circuit concluded that the erroneous verdict form "did not in any way confuse the jury, or, even if it did, . . . could not have possibly prejudiced the defendants." *Id.* at 1265. Consequently, a reasonable probability does not exist that the outcome of the trial would have been

different had counsel sought to correct the verdict form as to Count Seven to reflect the offense was for using a firearm in relation to a crime of violence. Accordingly, Grounds One through Four are denied.

B. Grounds Five, Six, and Seven

In Grounds Five, Six, and Seven, Petitioner asserts his sentence for the § 924(c) conviction is unconstitutional because it is arbitrary, cruel and unusual, and violates the separation of powers doctrine. (Doc. 1 at 9-11.) Respondent argues that these grounds are procedurally barred because they were not raised on appeal. (Doc. 8 at 15.)

"A federal criminal defendant who fails to preserve a claim by objecting at trial or raising it on direct appeal is procedurally barred from raising the claim in a ' 2255 motion, absent a showing of cause and prejudice or a fundamental miscarriage of justice." *Rivers v. United States*, 476 F. App'x 848, 849 (11th Cir. 2012). Procedural default may be excused upon a showing of cause and prejudice or a fundamental miscarriage of justice. *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). To demonstrate cause for failing to raise a claim in an earlier proceeding, a petitioner must establish "'some external impediment preventing counsel from constructing or raising the claim.'" *High v. Head*, 209 F.3d 1257, 1262-63 (11th Cir. 2000) (quoting *McCleskey v. Zant*, 499 U.S. 467, 497 (1991)). To show "prejudice," a petitioner must establish that there is "at least a reasonable probability that the result of the proceeding would have been different." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). A petitioner may demonstrate application of the fundamental miscarriage of justice exception by demonstrating "actual innocence." *McKay*, 657 F.3d at 1196. "'[A]ctual innocence' means *factual* innocence, not mere legal insufficiency." *Id.* at

1197 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)) (emphasis in original).

Petitioner did not raise these grounds on direct appeal. Petitioner has not demonstrated cause or prejudice or actual innocence to overcome his failure to do so. Thus, these grounds are procedurally barred from review.

Alternatively, these grounds are precluded by binding precedent. In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Supreme Court held that the residual clause in 18 U.S.C. § 924(c)(3)(B) related to the crime of violence portion of the statute is unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. Subsequent to *Davis*, the Eleventh Circuit has implicitly recognized the constitutionality of the remainder of § 924(c), reiterating that Hobbs Act robbery under 18 U.S.C. § 1951(a) qualifies as a crime of violence under the elements clause in § 924(c)(3)(A). *In re Cannon*, 931 F.3d 1236, 1242 (11th Cir. 2019) (citing *In re Saint Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016) for the proposition that Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause); *see also United States v. McCain*, 782 F. App'x 860, 862 (11th Cir. 2019) (holding that § 924(c) convictions were valid despite *Davis* because "[o]ur binding precedent holds that Hobbs Act robbery—the statute underlying both of McCain's predicate convictions—qualifies as a 'crime of violence' under § 924(c)(3)(A)'s elements clause."). Furthermore, the Eleventh Circuit has held that "aiding and abetting Hobbs Act robbery categorically qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause." *Mack v. United States*, No. 19-11138-H, 2019 WL 2725846, at *1 (11th Cir. May 22, 2019) (citing *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)). Finally, the mandatory minimum sentence requirements of § 924(c) do not result in cruel

and unusual punishment. *See United States v. Reynolds*, 215 F.3d 1210 (11th Cir. 2000) (rejecting Eighth Amendment challenge to 18 U.S.C. § 924). Accordingly, Grounds Five, Six, and Seven are denied.

C. Grounds Eight, Nine, and Ten[3]

In Grounds Eight, Nine, and Ten, Petitioner maintains that his § 924(c) conviction is unconstitutional in light of *Davis*, he is actually innocent of the offense, and § 924(c) is indivisible. (Doc. 10 at 1-12.) To support these grounds, Petitioner argues that he was convicted of violating § 924(c) during and in relation to the offense of conspiracy to commit Hobbs Act robbery as charged in Count Six. (Doc. 10 at 1-11.)

Grounds Eight and Nine are premised on the fact that the superseding indictment states in Count Seven that the use of the firearm occurred during "the offense of conspiracy to commit robbery." The Eleventh Circuit has held that "conspiracy to commit Hobbs Act robbery does not qualify as a 'crime of violence,' as defined by § 924(c)(3)(A)," and a conviction under 18 U.S.C. § 924(c)(1)(A) predicated solely on conspiracy to commit Hobbs Act robbery is invalid and must be vacated. *Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019).

In this case, the superseding indictment charged in relevant part as follows:

> **COUNT SIX**
>
> On or about August 20, 2013, in Hillsborough County, Florida, in the Middle District of Florida, and elsewhere,

[3] Grounds Eight, Nine, and Ten are the three additional grounds raised in Petitioner's Supplement. *See* Doc. 10. The Court has renumbered the grounds for purposes of this Order.

KEENAN AUBREY DAVIS
and
KELSEY VIDEL COFFEE

the defendants herein, aiding and abetting each other, and other persons known to the grand jury, did knowingly and unlawfully obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce by robbery, as that term is defined in Title 18, United States Code, Section 1951, *in that the defendants did rob a Sweetbay Market establishment by unlawfully taking and obtaining United States currency and property of such business. . . by means of actual and threatened force, violence, and fear of injury, immediate, and future, to the employees.*

All in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT SEVEN

On or about August 20, 2013, in Hillsborough County, Florida, in the Middle District of Florida, and elsewhere,

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the defendants herein, aiding and abetting each other, and other persons known to the grand jury, did knowingly use a firearm of unknown make, model, and caliber, but described as a shotgun, *that was brandished during and in relation to the offense of conspiracy to commit robbery as charged in Count Six above, which allegations are re-alleged and incorporated by reference herein, a crime of violence for which defendants may be prosecuted in a Court of the United States.*

All in violation of Title 18, United States Code, Section 924(c)(1)(A) and Section 2.

(Criminal Case, Doc. 78 at 4-6) (emphasis added).

Although Count Seven of the superseding indictment erroneously referred to the predicate offense in Count Six as "conspiracy to commit robbery," it is clear that

Petitioner was not charged with conspiracy to commit robbery in Count Six. Instead, Count Six alleged the offense of aiding and abetting the robbery of a Sweetbay Market. Moreover, despite Count Six being improperly labeled in Count Seven as conspiracy to commit robbery, Count Seven explicitly provided that the predicate offense was the one "charged in Count Six above, which allegations are re-alleged and incorporated by reference herein." (*Id.* at 6.)

In accordance with the superseding indictment, the Court instructed the jury that it had to determine whether the Government proved all the elements Hobbs Act robbery to find Petitioner guilty. (Criminal Case, Doc. 120 at 13-14.) With respect to the § 924(c) charge, the Court instructed the jury that Petitioner could only be found guilty if it found *inter alia* that Petitioner "committed the violent crime charged in Counts Two and Six of the indictment, respectively. . . ."[4] (*Id.* at 16.) The verdict, consistent with the superseding indictment and jury instructions, reflected that Count Six was for the offense of Hobbs Act robbery, not conspiracy to commit Hobbs Act robbery. Consequently, despite the erroneous label of the predicate offense in Count Seven of the superseding indictment, the offense for which Petitioner was convicted in Count Six, and that served as the predicate offense for Count Seven, was aiding and abetting Hobbs Act robbery. As discussed *supra*, the Eleventh Circuit has held that aiding and abetting Hobbs Act robbery categorically qualifies as a crime of violence. *Mack*, 2019 WL 2725846, at *1. Accordingly, Grounds Eight, Nine, and Ten are denied.

[4] The parties agreed to refer to the superseding indictment as the indictment in the verdict form. *See* Criminal Case, Doc. 188 at 231-32.

Any of Petitioner's allegations not specifically addressed are without merit.

Accordingly, it is **ORDERED** and **ADJUDGED**:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED,** and this case is **DISMISSED** with prejudice.

2. The Clerk of the Court shall enter judgment accordingly and will close this case.

3. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:14-cr-146-Orl-22EJK and to terminate the motion (Criminal Case, Doc. 208) pending in that case.

4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[5] Accordingly, a Certificate of Appealability is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on March 3, 2020.

ANNE C. CONWAY
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

[5] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

A P P E N D I X "B"

U.S. COURT OF APPEALS' OPINION

Appx "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11883-H

KELSEY VIDEL COFFEE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Kelsey Coffee is a federal prisoner serving a 234-month for aiding and abetting Hobbs Act robbery, 18 U.S.C. §§ 1951(a) and 2, and use of a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A). He moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his 28 U.S.C. § 2255 motion to vacate and later Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. To merit a COA, Coffee must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Coffee has failed to make the requisite showing.

In Claims 1 through 4, Coffee argued that trial counsel was ineffective for failing to object to the verdict form, and his 18 U.S.C. § 924(c) conviction violated his rights to due process, trial by jury, and against cruel and unusual punishment. Although the verdict form mistakenly

identified the firearms offense in Count 7 as charging the defendants with "robbery, in violation of 18 U.S.C. § 924(c)," the jurors heard several times throughout the trial that Count 7 was a firearms offense and that the firearms offenses, in Counts 3 and 7,[1] were separate and distinct from the robbery offenses. Moreover, in Coffee's direct appeal, we already determined that the record was devoid of any evidence that jurors were confused and thought that they were convicting the defendants of "robbery" on Count 7.

In Claims 5 through 7, Coffee argued that his sentence for his § 924(c) conviction was unconstitutional because it was arbitrary, cruel and unusual, and violated the separation-of-powers doctrine. Reasonable jurists would not debate the district court's denial of these claims, as they are procedurally defaulted for Coffee's failure to raise them on direct appeal, and he has not shown cause and prejudice or a fundamental miscarriage of justice to excuse his default. *See Jones v. United States*, 153 F.3d 1305, 1307 (11th Cir. 1998).

In Claims 8 through 10, Coffee argued that his § 924(c) conviction was unconstitutional in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), he is actually innocent, and § 924(c) is indivisible. Reasonable jurists would not debate the district court's denial of these claims. Although Count 7 of the superseding indictment erroneously referred to the predicate offense in Count 6 as "conspiracy to commit robbery," the record clearly establishes that Coffee was not charged with conspiracy to commit robbery. Count 7 explicitly provided that the predicate offense was the one charged in Count 6, and the verdict form correctly reflected that Count 6 was for the offense of Hobbs Act robbery, not conspiracy to commit robbery. Despite the erroneous label of

[1] Coffee was charged with five counts of aiding and abetting Hobbs Act robbery in Counts 2, 4 through 6, and 8. He was charged with violations of § 924(c)(1)(A) in Counts 3 and 7. The predicate offense for Count 7 was aiding and abetting Hobbs Act robbery as charged in Count 6. Coffee was convicted of Counts 4 through 8 and acquitted of Counts 2 and 3.

the predicate offense in Count 7, the offense that served as the predicate offense for Count 7 was aiding and abetting Hobbs Act robbery, which qualifies as a crime of violence. *See In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("Accordingly, Colon's conviction for aiding and abetting a Hobbs Act robbery qualifies as a 'crime of violence' under the § 924(c)(3)(A) use-of-force-clause, without regard to the § 924(c)(3)(B) residual clause.").

Finally, reasonable jurists would not debate the district court's denial of Coffee's Rule 59(e) motion, as he did not identify any newly discovered evidence or manifest errors of law or fact warranting reconsideration. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).

Accordingly, Coffee's COA motion is DENIED, and his IFP motion is DENIED AS MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE