

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11013-F

KIRBY GANT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Kirby Gant is a federal prisoner serving a 260-month total sentence for possession with intent to distribute crack cocaine and hydrocodone, possession of a firearm in furtherance of a drug-trafficking crime, and being a felon in possession of a firearm and ammunition. In the instant, *pro se* 28 U.S.C. § 2255 motion, he argued that:

(1) his conviction and sentence for the felon-in-possession charge were unconstitutional under *Rehaif v. United States*, 139 S. Ct. 2191 (2019),

(2) his prior convictions were insufficient to support his classification as an armed career criminal, pursuant to *Shular v. United States*, 140 S. Ct. 779 (2020); and

(3) counsel committed cumulative errors by failing to (a) object to the indictment's failure to allege a specific drug quantity for the drug possession charge, and (b) raise a double jeopardy issue regarding the felon-in-possession charge and the possession of a firearm charge involving the same firearm.

As to Claim 1, Gant argued that he was actually innocent of the felon-in-possession charge under *Rehaif*, given that the indictment did not charge, and the government did not prove, that he knew that he was a felon when he possessed the firearm. As to Claim 2, he argued that, under *Shular*, none of his prior state convictions could be used to classify him as an armed career criminal because they did not require a *mens rea* element. He further asserted that counsel was ineffective by failing to raise this issue in any of the below proceedings.

As background, in 2016, a grand jury indicted Gant for: (1) possession with intent to distribute crack cocaine and hydrocodone (“Count 1”), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); (2) possession of a firearm in furtherance of a drug-trafficking crime, namely, the offense charged in Count 1 (“Count 2”), in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (3) being a felon and knowingly possessing a firearm and ammunition (“Count 3”), in violation of 18 U.S.C. § 922(g)(1) and § 924(e). Count 3 was based on Gant’s prior Florida convictions, including: (1) a 1985 conviction for robbery with a firearm or deadly weapon; (2) a 1987 conviction and a 1993 conviction for sale or purchase of cocaine; (3) two 2000 convictions and a 2005 conviction for sale/delivery of cocaine; and (4) a 2015 conviction for possession of cocaine.

After a bench trial, a district court judge found Gant guilty as charged. The presentence investigation report (“PSI”) designated him as an armed career criminal under § 924(c), which subjected him to a mandatory minimum of 15 years’ imprisonment as to Count 3. Ultimately, the court sentenced him to 200 concurrent months’ imprisonment as to Counts 1 and 3, and 60 consecutive months’ imprisonment as to Count 2. On appeal, Gant argued that the district court erred by denying his pre-trial motion to suppress the evidence, and this Court affirmed. In January 2020, Gant filed the instant § 2255 motion.

The district court denied Gant's motion, finding that Claims 1 and 2 were procedurally defaulted, and Claim 3 was meritless. As to Claims 1 and 2, the district court found that they were procedurally defaulted because he failed to raise them on direct appeal. The court further found that Gant had not demonstrated cause and prejudice to excuse the procedural default. As to Claim 1, the court found that his *Rehaif* claim was not novel, as other defendants had been "unsuccessfully litigating the issue for years." Counsel also was not ineffective for failing to raise this claim, as counsel is not deficient for failing to anticipate a change in the law. Accordingly, the court found that Gant had not demonstrated cause to excuse the procedural default of Claim 1.

As to Claim 2, the court found that Gant could not establish prejudice to excuse the procedural default, as the Supreme Court eventually decided *Shular* adversely to him,² confirming that his prior drug convictions were sufficient to support an armed career criminal designation. Accordingly, the court found, counsel was not ineffective for failing to raise a meritless argument. Moreover, the court found, Gant had not shown actual innocence, but rather, his *Rehaif* and *Shular* claims merely challenged the legal sufficiency of his convictions.

As to Claim 3, the district court found that his claims of ineffective assistance of counsel were meritless because: (1) a crack cocaine violation under § 841(b)(1)(C) did not require the government to plead or prove any particular drug quantity; and (2) the felon-in-possession and possession of firearm charges did not constitute double jeopardy violations because they required proof of different elements. Accordingly, the district court denied Gant's motion, denied him leave to proceed *in forma pauperis* ("IFP") on appeal, and denied him a certificate of appealability ("COA"). Gant now seeks IFP status and a COA from this Court.

² Gant relied upon the arguments made in *Shular* on appeal, which the Supreme Court ultimately rejected.

DISCUSSION:

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) (quotation marks omitted). Where the district court denied a motion to vacate on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Id.*

To establish ineffective assistance of counsel, a defendant must show both that (1) his counsel’s performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because counsel’s performance is presumed to be reasonable, the movant must demonstrate that no competent counsel would have taken the action that counsel took. *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). “[R]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.” *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994) (quotation marks omitted). Further, counsel is “not ineffective for failing to raise a nonmeritorious issue.” *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001).

In 2019, the Supreme Court, in *Rehaif*, interpreted the statutory language of § 922(g) as requiring a defendant to know both that he possessed a firearm and that he had been convicted of a crime punishable by imprisonment for more than one year. 139 S. Ct. at 2200. We have since held that *Rehaif* “did not announce a ‘new rule of constitutional law,’ but, instead, clarified that, in prosecuting an individual under 18 U.S.C. § 922(g) and 18 U.S.C. § 924(a)(2) . . . the

government must prove that the defendant knew he violated each of the material elements of § 922(g).” *In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019) (emphasis omitted).

Ordinarily, a defendant convicted of being a felon in possession of a firearm, in violation of § 922(g)(1), faces a maximum sentence of ten years’ imprisonment. 18 U.S.C. § 924(a)(2). However, if the offender’s prior criminal record includes at least three convictions for “serious drug offense[s]”, the Armed Career Criminal Act (“ACCA”) mandates a minimum sentence of 15 years’ imprisonment. *Id.*, § 924(e)(1).

In February 2020, the Supreme Court in *Shular* held that the definition of “serious drug offense” does not require that the state offense match the elements of certain generic offenses, but instead, requires only that the state offense involve the specific conduct identified in the federal statute. *Shular*, 140 S. Ct. at 788. In doing so, the Supreme Court rejected the movant’s argument that his prior Florida convictions—for selling, manufacturing, delivering, or possessing with intent to sell, manufacture, or deliver cocaine—did not constitute serious drug offenses because they did not require a specific *mens rea*, unlike other generic sale and possession of narcotic offenses. *Id.* at 787-88.

A § 2255 claim may be procedurally defaulted if the movant failed to raise the claim on direct appeal. *Bousley v. United States*, 523 U.S. 614, 622 (1998). A defendant can overcome this procedural bar by establishing either: (1) cause for the default and actual prejudice from the alleged error; or (2) actual innocence of the crimes for which he was convicted. *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004).

“The novelty of a claim may constitute cause for excusing the procedural default, but only when the claim is truly novel, meaning that its legal basis [was] not reasonably available to counsel.” *United States v. Bane*, 948 F.3d 1290, 1296-97 (2020) (quotation marks omitted,

alteration in original). Unlike claims based on new rules of constitutional law, claims based on purely statutory interpretations are not novel, as “[a]n argument for an interpretation of a statute that is consistent with its ordinary meaning and structure is not something that counsel would not be aware of or that courts would reject out of hand.” *Id.* at 1297 (quotation marks and alteration omitted). Accordingly, we recently determined that “*Rehaif* was not ‘truly novel’ in the sense necessary to excuse procedural default.” *Innocent*, 977 F.3d at 1084.

Additionally, “[i]neffective assistance of counsel may satisfy the cause exception to a procedural bar,” if the ineffective assistance of counsel claim has merit. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000). As to the actual innocence exception, a movant must establish that, in light of new reliable evidence that was not presented at trial, “it is more likely than not that no reasonable juror would have convicted him.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Here, the district court properly found that Claims 1 and 2 were procedurally defaulted, given that Gant failed to raise either claim on direct appeal. *See Bousley*, 523 U.S. 614, 622. As to Claim 1, the district court properly found that Gant had failed to establish cause to excuse the procedural default, as a *Rehaif* claim involves a purely statutory interpretation of § 922(g) and § 924(a), rather than a new rule of constitutional law, and thus is not “truly novel.” *See Howard*, 374 F.3d at 1072; *Rehaif*, 139 S. Ct. at 2200; *Palacios*, 931 F.3d at 1315; *Bane*, 948 F.3d at 1296-97; *Innocent*, 977 F.3d at 1084. Moreover, counsel’s failure to raise this claim previously does not constitute cause, as counsel was not ineffective for failing to object to the indictment based on predictions of how the law may develop. *See Spaziano*, 36 F.3d at 1039.

The district court also properly found that Gant had not established cause to excuse the procedural default of Claim 2. His argument regarding the lack of *mens rea* element for his prior

state convictions is foreclosed by the Supreme Court's decision in *Shular*, and thus, counsel was not ineffective for failing to raise this nonmeritorious issue. *See Shular*, 140 S. Ct. at 787-88; *Chandler*, 240 F.3d at 917. Moreover, Gant's claims of factual innocence are not sufficient to excuse his procedural default of either Claims 1 or 2, as he merely challenges the legal sufficiency of his convictions and does not provide any evidence of his actual innocence. *See Schlup*, 513 U.S. at 327 (1995).

As to Claim 3(a), the indictment was not required to charge a specific drug quantity amount, given that the statutory minimum for that offense was not increased based on any drug amount. *See Apprendi v. New Jersey*, 530 U.S. 466, 484, 490 (2000) (holding that any fact, other than the fact of a prior conviction, that increases the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime and must be found by a jury beyond a reasonable doubt); *see also Alleyne v. United States*, 570 U.S. 99, 111, 116 (2013) (extending the holding in *Apprendi* to conclude that facts that increase mandatory minimum sentences must also be submitted to the jury).

As to Claim 3(b), Counts 2 and 3 did not implicate double jeopardy concerns. An indictment only violates double jeopardy when it charges a single offense in more than one count. *United States v. Gonzalez*, 834 F.3d 1206, 1219 (2016). An indictment does not charge a single offense in more than one count where each count requires proof of a fact which the other does not. *Id.* Here, a conviction under § 922(g)(1) requires proof that the defendant was a felon prior to possessing the firearm, while a conviction under § 924(c) requires no such element, and a conviction under § 924(c) requires proof that a defendant possessed a firearm in furtherance of a drug-trafficking crime, while a conviction under § 922(g)(1) does not. See 18 U.S.C. § 922(g)(1);

18 U.S.C. § 924(c). Thus, counsel was not ineffective for failing to raise either of the nonmeritorious arguments presented in Claim 3.

Accordingly, Gant's motion for a COA is DENIED, and his motion to proceed IFP is DENIED as MOOT.



Barbara Lagoa
UNITED STATES CIRCUIT JUDGE

Appendix B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

KIRBY GANT,

Petitioner,

v.

Case No: 8:20-cv-34-T-30CPT
Crim. Case No: 8:16-cr-531-T-30CPT

UNITED STATES OF AMERICA,

Respondent.

ORDER

This cause is before the Court upon Kirby Gant's Motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255 (Civ. Dkt. 1¹). Also, before the Court is Gant's Memorandum of Law in Support of his Motion (Civ. Dkt. 2), the Government's Response (Civ. Dkt. 4), and Gant's Reply (Civ. Dkt. 5). Having reviewed the pleadings and considered the relevant case law, the Court concludes that the Motion fails because it lacks merit and is procedurally defaulted.

FACTUAL BACKGROUND

The facts surrounding Gant's arrest are as follows:

On December 5, 2016, at approximately 3:48 a.m., several Bradenton Police Department (BPD) officers were on patrol on foot in Bradenton, Florida.

The officers then walked into the rear of the lot located behind 312 12th Ave. W. in Bradenton, Florida.

The officers saw a green SUV with a single occupant, later identified as the defendant, Kirby Gant, in the vehicle.

The officers approached the vehicle. Officer Christopher Capdarest approached the driver's side, where Mr. Gant was located inside the

¹ Case No.: 8:20-cv-34-T-30CPT

vehicle. Officer Bryan Stay approached the passenger side window.

Officer Capdarest said "Hey bud," to Mr. Gant when he approached the driver's side. Simultaneously, Officer Stay observed a gun from the passenger side window and announced the presence of the firearm to the other officers by yelling out "Gun."

Mr. Gant attempted to force his way past the officers. Gant was then arrested.

Police then searched Mr. Gant's person. On Gant's person, officers found 9.6 grams of marijuana, 7.2 grams of hydrocodone, and \$1192 in cash.

Police also searched the vehicle and found 7.5 grams of cocaine base and a Hi-Point 9mm handgun together in the cup holder. The handgun had one 9mm bullet in the chamber and eight 9mm bullets in the magazine. It also had an obliterated serial number.

After the searches, Officer Capdarest contacted BPD dispatch, which searched Mr. Gant's record for felony convictions. That search came back positive. Mr. Gant is a convicted felon who has not had his right to own or possess a firearm or ammunition restored.

ATF Special Agent Nicholas Vouvalis, an interstate nexus expert, examined the firearm and ammunition to determine where the items had been manufactured. SA Vouvalis determined that the firearm was manufactured in Ohio. He also determined that the ammunition was manufactured in Yugoslavia.

The Manatee County Sheriff's Office Forensic Chemistry prepared a report finding 5.543 grams of cocaine base and 6.369 grams of hydrocodone and acetaminophen.

Crim. Dkt. 61-1².

A Grand Jury indicted Gant on three counts:

Count One: Possession with Intent to Distribute Cocaine Base in violation of 21 U.S.C. § 841(a)(1),

Count Two: Possession of a Firearm in Furtherance of a Drug-Trafficking Crime in violation of 18 U.S.C. § 924(c), and

Count Three: Possession of a Firearm after being Convicted of a Felony in violation of 18 U.S.C. § 922(g)(1).

Crim. Dkt. 1. The Indictment also listed seven of Gant's twenty-two prior felony

² Case No.: 8:16-cr-531-T-30CPT

convictions and alleged that he was subject to a 15-year mandatory-minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Gant filed a motion to suppress the evidence located during his arrest. The Court denied the motion. In order to preserve his rights to appeal the suppression ruling, Gant agreed to a bench trial upon stipulated facts (Crim. Dkt. 51). And Gant stipulated to the essential elements of each offense. Gant admitted that he knowingly possessed a firearm despite having prior felony convictions. The Court found him guilty on all counts. (Crim. Dkt. 60).

At sentencing, the Presentence Report showed Gant's advisory guidelines to be 322 to 387 months' imprisonment (PSR, Crim. Dkt. 66, ¶¶ 148-150). Because of his prior conviction, Count Three, the felon-in-possession count, carried a mandatory-minimum sentence of 15 years' imprisonment. 18 U.S.C. §§ 922(g), 924(e). Because he carried a firearm to further his drug trafficking offense, Count Two had a mandatory-minimum consecutive sentence of 5 years' imprisonment. 18 U.S.C. § 922(c). The Court sentenced Gant to a below guideline sentence of 260 months imprisonment, 200 months on Counts One and Three, and 60 months consecutive on Count Two.

Gant appealed, not his sentence but the Court's denial of his motion to suppress. The 11th Circuit affirmed and the Supreme Court denied cert. on April 1, 2019. (Crim. Dkt. 81 at 7, Crim. Dkt. 83).

Gant timely filed this § 2255 motion on January 6, 2020. He raised three arguments (other than his timeliness argument) why his convictions and sentences should be vacated:

Ground One: his conviction and sentence is unconstitutional as to the felon-in-possession of a firearm charge because the Government did not plead and prove that he *knew* that he

was a felon when he possessed a firearm and he is “actually innocent” of that knowledge based on *Rehaif v. United States*, 139 S.Ct. 2191, 204 L. Ed. 2nd 549 (2019) (*Rehaif* claim),

Ground Two: his prior drug convictions were insufficient to support his classification as an Armed Career Criminal based on *Shular v. United States*, 140 S. Ct. 779, 206 L. Ed. 2nd 81 (2020) (*Shular* claim), and

Ground Three: his counsel committed cumulative errors constituting ineffective assistance of counsel.

DISCUSSION

Gant’s claims fail because they are procedurally defaulted. He defaulted them twice: once by failing to raise them before this Court and secondly by failing to raise them on direct appeal.

A motion to vacate under § 2255 is not a substitute for direct appeal. Claims that were available for direct appeal, but not raised, are procedurally defaulted and barred from consideration on collateral review unless one of two narrow exceptions are met. *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998). To overcome a procedurally defaulted claim, a movant must (1) demonstrate either cause and actual prejudice, or (2) actual innocence. *Bousley*, 523 U.S. at 622-23. Gant does not meet either of these exceptions.

1. The Cause and Prejudice Exception

To meet the cause and prejudice exception, a convicted defendant must show both (1) cause excusing his procedural default, and (2) actual prejudice. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982). That is, a claimant “must show cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error.” *Lynn v.*

United States, 365 F. 3d. 1225, 1234 (11th Cir. 2004) (emphasis in original).

To show cause for failing to raise the claim at trial and on direct appeal, Gant must show that something prevented him from raising it. Futility, by itself, is not sufficient. *Bousley*, 523 U.S. at 623. The novelty of a claim may constitute cause to excuse a procedural default but only if the claim is so unusual that the petitioner's counsel lacked the tools to make the claim. *Pitts v. Cook*, 923 F. 2d. 1568 (11th Cir. 1991). And, a claimant can establish cause in some circumstances by showing that the default resulted from constitutionally ineffective assistance of counsel.

Here, Gant has not established the novelty required to satisfy the cause requirement, nor has he shown ineffective assistance of counsel. As to novelty, Gant's *Rehaif* claim was not novel. Other defendants have been unsuccessfully litigating the same issue for years. See, e.g., *United States v. Jackson*, 120 F. 3d. 1226 (11th Cir. 1997) (citing *United States v. Langley*, 62 F. 3d. 602 (4th Cir. 1995), and *United States v. Dancy*, 861 F. 2d 77 (5th Cir. 1988)). As to ineffective assistance of counsel, an attorney does not perform deficiently by failing to anticipate a change in the law. *Viers v. Warden*, 605 F. App'x 933, 942 (11th Cir. 2015). The 11th Circuit has held many times that effective legal representation does not include a requirement to predict how the law may develop. *Spaziano v. Singletary*, 36 F. 3d 1028, 1039 (11th Cir. 1994). So, in this case, neither novelty nor ineffective assistance of counsel will serve to excuse Gant's procedural default.

Because Gant has failed to meet the cause prong, the Court need not examine the prejudice prong, but Gant would fail on that prong as well. To establish prejudice, a claimant must show that an error worked not to his possible prejudice, but "to his *actual* and substantial disadvantage, infecting his entire [proceeding] with error of constitutional

dimension.” *Frady*, 456 U.S. at 170 (emphasis in the original). Prejudice must be evaluated in the total context of the events in the trial court. *Id.* at 169 (stating that a challenged jury instruction is but one out of many events in a trial process).

A review of the entire record to determine whether Gant has been prejudiced is similar to that made recently on a *Rehaif* claim in a direct appeal by the 11th Circuit. *United States v. Reed*, 941 F. 3d. 1018 (11th Circuit 2019). In *Reed*, as here, a defendant claimed his indictment failed to allege, and the jury was not instructed to find, that he knew he was a felon when he possessed a firearm. Although *Reed* established *Rehaif* error, both in his indictment and at his trial, his appeal was denied because he failed to show a reasonable probability that, but for the errors, the outcome of his trial would have been different. The 11th Circuit concluded that *Reed*’s jury could have inferred that he knew that he was a felon based on his stipulations, admissions, eight prior felony convictions, and service of 18 years in prison before possessing the firearm.

If a *Rehaif* error does not warrant reversal on direct appeal on *Reed*’s record, Gant’s record certainly is insufficient to constitute prejudice on collateral review. “To obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.” *United States v. Frady*, 456 U.S. 152, 166 (1982).

While Gant has shown a *Rehaif* error – the indictment did not allege and the stipulation of facts at trial did not prove he knew he was a felon when he possessed the firearm – a review of his record shows that he was not prejudiced. The record contains overwhelming evidence that Gant knew he was a convicted felon at the time he possessed the firearm. Gant had twenty-two prior felony convictions, seven of which were listed in his indictment to support his armed career criminal status. One of his prior felony convictions

legal, not factual, innocence. So, Gant fails to demonstrate his factual innocence and does not overcome his procedural default.

Gant does address his factual innocence in one respect when he claims he had not previously been convicted for possession of a firearm while being a felon:

Movant has never in the past been convicted for possession of a firearm, nor charged in the past for possession of a firearm. The Government is misleading the Court by stating that Movant was in the past arrested for a firearm, Movant has never ever in the past been arrested for firearm possession. The Government is mistaken.

(Gant's Reply, Civ. Dkt. 5, p. 14). But this contention is belied by Gant's factual admission at sentencing.

At his sentencing, Gant admitted the facts contained in the Presentence Report were correct. (Crim. Dkt. 88, p. 4). In doing so, Gant admitted that he was previously convicted of possession of a firearm by a convicted felon on April 29, 1991. The facts underlying that conviction are:

12/26/1990	1) Assault;	04/29/1991: Cts. 1-3 4A1.2(e) 0
(Age 29)	2) Possession of Firearm by Convicted Felon; and	Pled <i>nolo contendere</i> , adjudicated guilty, Cts. 1 & 3: Time served jail; 3) Culpable Negligence and Ct. 2: 364 days jail Circuit Court sentence consecutive to Manatee County, FL 89CF3200

According to the probable cause affidavit, on December 24, 1990, at approximately 5:25a.m., a Bradenton Police Department officer met with the victim, B.P. at Manatee Memorial Hospital. B.P. advised that he was exiting an apartment when Gant ran up to him while holding a handgun in his right hand. Gant then demanded that B.P. give him his money. A fight ensued, and Gant and B. P. began to wrestle. During the altercation, one shot was fired from the gun. B.P. then fell to the ground and realized that he had been shot on the inside of his right thigh. Gant also stood up, demanded B.P.'s money once again, and struck B.P. in the head with the gun, causing a deep laceration. Gant then fled the scene.

B.P. was hospitalized until December 26, 1990. During that time, the bullet was removed from his thigh. B.P.'s girlfriend also witnessed the assault and provided a sworn witness statement to law enforcement.

Gant was ultimately arrested on December 26, 1990, at approximately 1:45 p.m.

On January 23, 1991, the Assistant State Attorney filed a Notice of Case Action indicating that charges would not be filed as to Attempted Armed Robbery and Aggravated Battery.

(PSR, Crim. Dkt. 66, pp. 13-14).

So, this factual argument is refuted by the record.

3. Gant's Cumulative Error Argument

As his final argument, Gant contends his counsel's cumulative errors constituted ineffective assistance of counsel. He argues that his counsel should have (1) objected to the Indictment's failure to allege a specific drug quantity in the 21 U.S.C. § 841 (a)(1) charge and (2) counsel should have raised a double jeopardy issue because the felon-in-possession of a firearm charge under 18 U.S.C. § 922(g)(1) and the use of a firearm in furtherance of a drug trafficking charge pursuant to 18 U.S.C. § 924(c) relied on his possession of the same firearm. (Civ. Dkt. 2, pp. 27-28).

These arguments lack merit. A crack cocaine violation under 21 U.S.C. § 841(b)(1)(C) does not require the United States to plead or prove any particular drug quantity and the two firearm charges do not constitute double jeopardy because they do not require proof of the same elements. If proof of the offenses requires proof of a different element, there is no double jeopardy. *Blockburger v. United States*, 284 U.S. 299 (1932). A conviction under § 922(g)(1) requires proof that a defendant was a felon prior to possessing the firearm while a conviction under § 924(c) does not. A conviction under §

924(c) requires proof that a defendant possessed a firearm in furtherance of a drug trafficking crime while a conviction under § 922(g)(1) does not. Therefore, there is no double jeopardy violation.

CONCLUSION

Since all of Gant's claims are procedurally defaulted, his § 2255 motion must be dismissed. It is therefore ORDERED AND ADJUDGED that:

1. Petitioner's Motion, under 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct Sentence (Civ. Dkt. 1) is DISMISSED WITH PREJUDICE.
2. The Clerk is directed to close this case.
3. The Clerk is directed to terminate from pending status the motion to vacate found at Dkt. 84 in the underlying criminal case, case number 8:16-cr-531-T-30CPT.

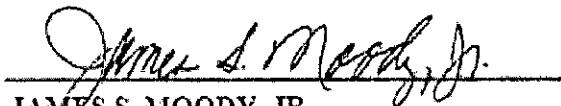
CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). A district court must first issue a certificate of appealability ("COA"). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 7484 (2000)), or that "the issues presented were adequate to deserve encouragement to

proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted). Petitioner has failed to meet this burden.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

DONE and **ORDERED** in Tampa, Florida, this 4th day of January, 2021.


JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record