

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

UNITED STATES OF AMERICA

CASE NO. 3:18-CR-00154-01

VERSUS

JUDGE TERRY A. DOUGHTY

THOMAS J M GOODIN (01)

MAGISTRATE JUDGE HAYES

RULING

Pending before the Court is Defendant Thomas J. M. Goodin's ("Goodin") *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence [Doc. No. 278]. Goodin based his motion on two claims of ineffective assistance of counsel. First, Goodin claims that trial counsel was constitutionally ineffective for failing to move to suppress evidence obtained from a warrantless search. Second, Goodin claims that appellant counsel was constitutionally ineffective for failing to challenge the use of his prior state convictions which were used to enhance his federal sentence. Goodin requests that the Court appoints counsel, holds an evidentiary hearing, vacate Count I, and resentence Goodin without the career offender designation. For the following reasons, the Motion is **DENIED**.

I. FACTUAL AND PROCEDURAL HISTORY

Goodin shipped a package containing methamphetamine on October 4, 2017, from California to Monroe, Louisiana. [Doc. No. 230, ¶¶ 8, 10]. The next day, a drug dog alerted agents to the package. [Id. ¶ 8]. Agents applied for and received a state search warrant to search the contents of the package. [Id. ¶ 9]. The package contained a box wrapped in birthday wrapping paper. The agents discovered a makeup bag containing 435.6 grams of methamphetamine within the box. [Id.].

Later, an agent disguised as a parcel delivery driver executed a controlled delivery of the package to the address listed on the package. [Id. ¶ 10]. The agent delivered the package to the apartment of Britanny Gix (“Gix”). [Id.]. After a verbal confrontation on a phone call, Goodin advised Gix that he was sending someone else over to retrieve the package and deliver it to a different address. [Id.]. Goodin sent Meko Walker (“Walker”) two text messages with the picture of the package label and receipt. [Id.]. Later that day, Walker arrived at Gix’s apartment, walked up to the apartment, and took the package to his vehicle. [Id.]. Once Walker was in his car and tried to leave the parking lot, he was taken into custody. [Id. ¶ 11].

Seven weeks later, officers apprehended Goodin during an unrelated traffic stop in Monroe, Louisiana. [Id. ¶ 24]. After refusing to consent to a search of his vehicle, a K-9 unit arrived on the scene. [Id. ¶ 28]. The K-9 unit alerted the officers to the presence of narcotics, and, upon searching the trunk of Goodin’s car, the officers discovered more boxes wrapped in wrapping paper, which contained 92.8 grams of phencyclidine (“PCP”) and 343.1 grams of methamphetamine. [Id. ¶ 32]. The officers arrested Goodin and took him in for further questioning. [Id.].

A federal grand jury returned a four-count indictment against Goodin, Walker and Gix. The indictment charged Goodin with conspiracy to distribute and to possess with intent to distribute fifty (50) grams or more of methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1); possession with intent to distribute fifty (50) grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 2; and possession with intent to distribute ten (10) grams or more of PCP in violation of §§ 841(a)(1) and 2. [Doc. No. 1]. Walter M. Caldwell (“Caldwell”) was appointed to represent Goodin. [Doc. No. 20].

Goodin filed motions to suppress the traffic stop and the FedEx seizure. [Doc. Nos. 51, 52]. In the motion to suppress the contents of the FedEx package, Goodin asserted that the affidavit

in support of the search warrant was based on inaccurate facts. [Doc. No. 52]. After a hearing, the United States Magistrate Judge issued a Report and Recommendation [Doc. No. 111] which recommended denying both of Goodin's motions. [Doc. Nos. 86, 106, 111, 112]. The Court adopted the Report and Recommendation by its Judgment [Doc. Nos. 125, 126] and denied Goodin's motions [Doc. Nos. 114, 118, 125, 126].

On June 16, 2019, a federal grand jury returned a superseding indictment which added a sentencing enhancement based on a prior conviction as to Goodin. [Doc. No. 135]. After a four-day-trial, all defendants were found guilty as charged. [Doc. Nos. 178, 187]. The sentence enhancement phase of the trial as to Goodin was held on July 19, 2019, and the jury returned a verdict of guilty. [Doc. Nos. 189, 196]. Four days later, Goodin filed a motion to vacate the enhancement under 21 U.S.C. § 851, which the Court granted in part on September 23, 2019. [Doc. Nos. 169, 208]. The Court held that Goodin would receive an enhancement for only one prior conviction. [Id.].

Goodin was sentenced on November 6, 2019. At the sentencing hearing, Goodin presented evidence concerning the prior conviction. He called his attorney who represented him in the proceeding. The previous attorney testified that the fee had be returned to Goodin, but that the attorney could not remember why. [Doc. No. 251, Sentencing Transcript, p. 19]. The attorney did recall, however, that the fee dispute "was not directed towards incompetency or ineffective assistance of counsel" because the bar association would not have allowed the return of a fee to settle an issue dealing with effectiveness of counsel. [Id. p. 16, 19].

Goodin filed a number of objections to the PSR [Doc. No. 230 (objections are noted within the PSR)]. The Court ruled on those objections at the sentencing hearing. All of those objections were denied. The Court noted that Goodin had two attorneys and that the exception to the rule that

prior convictions cannot be challenged collaterally did not apply. [Id. p. 68]. Goodin was sentenced to 504 months and as to the three counts followed by 10 years of supervised release. [Id. p. 79] [Doc. No. 218].

Caldwell filed a motion to withdraw on November 8, 2019, which was granted. [Doc. Nos. 227, 236]. Mark Plaisance was appointed to represent Goodin on appeal. [Doc. No. 257]. The United States Court of Appeals for the Fifth Circuit affirmed Goodin's conviction and sentence on February 10, 2021. The judgment was entered into the Court record on March 15, 2021, and Goodin's § 2255 motion was timely filed thereafter. [Doc. Nos. 261, 278].

The issues are briefed, and the Court is prepared to issue a ruling.

II. LEGAL STANDARD

Section 2255 of Title 28 of the United States Code provides that a federal prisoner serving a court-imposed sentence "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Only a narrow set of claims are cognizable on a Section 2255 motion. The statute identifies four bases on which a motion may be made: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is "otherwise subject to collateral attack." *Id.* A claim of error that is neither constitutional nor jurisdictional is not cognizable in a Section 2255 proceeding unless the error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice."

United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

When a Section 2255 motion is filed, the district court must first conduct a preliminary review. "If it plainly appears from the motion, any attached exhibits, and the record of prior

proceedings that the moving party is not entitled to relief, the judge must dismiss the motion....”

Rules Governing Section 2255 Proceedings, Rule 4(b).

An evidentiary hearing must be held “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). No evidentiary hearing is required if the prisoner fails to produce any “independent indicia of the likely merit of [his] allegations.” *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) (quoting *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998)).

Defendants challenging the performance of their attorneys may bring those challenges under 28 U.S.C. § 2255 without overcoming the procedural bar. In *Massaro v. United States*, 538 U.S. 500, 509 (2003) the Supreme Court held that “ineffective-assistance-of-counsel claims may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.” *Id.* at 504. See *United States v. Ramos*, 801 F. App’x 216, 226 (5th Cir. 2020) (citing *Massaro* for proposition that “[t]he Supreme Court has emphasized that a 28 U.S.C. § 2255 motion is the preferred method for raising allegations of ineffective assistance of counsel).

To prevail on a claim that legal representation fell short of the assistance guaranteed by the Sixth Amendment, a convicted defendant must meet the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show that his attorney’s actions were objectively unreasonable and that his attorney’s unreasonable actions resulted in prejudice. *United States v. Valdez*, 973 F.3d 396, 402 (5th Cir. 2020) (reiterating two-prong *Strickland* test); *United States v. Phea*, 953 F.3d 838, 841 (5th Cir. 2020) (same).

The former component of the test authorizes only “highly deferential” judicial scrutiny, requiring the defendant to overcome the presumption that, under the circumstances, the challenged

action might be considered sound trial strategy. *Anderson v. Collins*, 18 F.3d 1208, 1215 (5th Cir. 1994) (citing *Strickland*, 466 U.S. at 689). To meet the second prong of *Strickland*, the defendant must show that counsel's deficient performance resulted in actual prejudice to the defendant. Thus, the defendant must show there is a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. The defendant must establish both prongs of this test. *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim."); *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one.").

III. ANALYSIS

The Court agrees that Goodin's allegations of ineffective assistance of counsel are not procedurally barred, but nonetheless finds these claims to be meritless. Each will be analyzed below.

A. Effective assistance of counsel

Goodin argues that his trial counsel was ineffective for not challenging the fact that there was no search warrant for the search of the FedEx package and that his appellate counsel was ineffective for failing to collaterally attack his prior conviction which was used to enhance his sentence. Failure to attack a warrantless search can give rise to ineffective assistance of counsel in certain scenarios. Here, however, such a claim would have been meritless because there was a search warrant executed for the FedEx package, and because the agents had probable cause to search the package. Similarly, failure to pursue an argument that would result in a reduced sentence can also give rise to a claim for ineffective assistance of counsel. Again, however, pursuit of such

an argument would have been frivolous because Goodin was represented by counsel throughout his prior conviction. Each issue will be analyzed in further detail below.

1. Failure to Challenge Search

Goodin argues that his attorney was ineffective for not challenging the existence of a search warrant for the search of the FedEx package. The filing of pre-trial motions is considered trial strategy. *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985). A strategic decision is viewed with “deference commensurate with the reasonableness of the professional judgment on which [it] is based.” *Strickland*, 466 U.S. at 681. Additionally, counsel cannot be deficient for failing to raise a frivolous point. *United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995).

The existence of a search warrant can be proven by the presentation of other evidence. *See* *United States v. Pratt*, 438 F.3d 1263, 1271 (11th Cir. 2006) (“We hold that other evidence of a search warrant’s existence and descriptive language may be used in a suppression hearing to prove that a search was conducted with a warrant that particularly described the place to be searched and the persons or items to be seized.”).

Goodin’s arguments are frivolous because there was a search warrant executed for the search of the FedEx package. While it is true that the actual search warrant was not attached to the motion to suppress, the government introduced the application for the search warrant and the return during the hearing for the motion to suppress. [Doc. No. 87]. Had Goodin asserted that there was no search warrant, the government could have easily presented the actual search warrant. Additionally, proof of the existence of the search warrant (if the government could not produce the original search warrant) could have readily been established. The return of the search warrant as well as the testimony of the agent who executed the warrant indicate that a search warrant was issued. [Doc. No. 92, Suppression Hearing Transcript, p. 71, 95, 103, 109].

An officer may detain packages for investigative purposes when there is reasonable suspicion of criminal activity, such as when the package “meets a drug package profile.” “In such cases where a temporary detention for further investigation is involved based on reasonable suspicion, including to permit examination by [a] drug-detecting dog, there is no Fourth Amendment violation prior to a warrant being issued.” *Id.* Additionally, a K-9 sniff is not a search within the meaning of the Fourth Amendment, but a K-9’s positive alert to the presence of narcotics establishes probable cause for a search. *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003).

Even assuming that there was no search warrant, the agents had probable cause to search the package once the K-9 unit alerted agents to the presence of narcotics. The Court adopted a report and recommendation of the United States Magistrate Judge. [Doc. No. 111]. In that report, the Magistrate Judge determined that notification of the positive alert by the K-9 unit “established probable cause to search the [FedEx] package.” [Id. p.2]. Therefore, Goodin’s arguments concerning his counsel’s failure to dispute the search of the FedEx package as a warrantless search, and his argument about the contents of the search warrant and/or the application for the search warrant containing inaccurate information, are frivolous because the agents had probable cause to conduct a warrantless search of the FedEx package.

For the reasons stated above, the Court finds that Goodin’s arguments are frivolous, and therefore, counsel acted properly in choosing to raise these frivolous arguments.

2. Failure to Challenge Prior State Conviction

Goodin argues that his counsel was ineffective for failing to challenge his prior state conviction on appeal. The two-part *Strickland* test applies to claims of ineffective assistance of counsel on appeal. *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000). To render effective

assistance of counsel, appellate counsel need not raise every non-frivolous issue on appeal. *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). “Instead, to be deficient, the decision not to raise an issue must fall ‘below an objective standard of reasonableness.’” *Phillips*, 210 F.3d at 348 (quoting *Strickland*, 466 U.S. at 688). To determine whether appellate counsel was deficient, the Court thus must consider whether the omitted challenge “would have been sufficiently meritorious such that [the attorney] should have raised it on appeal.” *Phillips*, 210 F.3d at 348; *Higgins v. Cain*, 720 F.3d 255, 265 (5th Cir. 2013) (finding that appellate attorney was not ineffective “given the weaknesses in those arguments, it is at least arguable that a competent attorney could decide to forgo raising them”).

A defendant cannot collaterally challenge a prior conviction unless the defendant did not have an attorney during the prior proceedings. *See United States v. Longstreet*, 603 F.3d 275, 277 (5th Cir. 2010). (“Absent an allegation that the defendant was denied counsel in the prior proceeding, a district court sentencing a defendant may not entertain a collateral attack on a prior conviction used to enhance the sentence unless such an attack is otherwise recognized by law.”)

The record clearly demonstrates that Goodin had counsel for the prior proceeding. His prior counsel testified at the sentencing. Additionally, as noted by the Court during the sentencing hearing, Goodin received the benefit of a plea agreement. [Doc. No. 251, Sentencing Hearing, p. 68-69]. The existence of a plea agreement demonstrates that Goodin received a substantial benefit from his prior counsel and that Goodin was not even constructively denied assistance of counsel. Therefore, had his attorney argued this issue on appeal, the argument would have been meritless.

Again, as stated above, an attorney has an ethical obligation to refuse to prosecute frivolous appeals. *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 436, (1988). The Court

finds that Goodin's arguments are frivolous, and therefore, his counsel acted properly in choosing not to raise these arguments on appeal.

B. Whether Goodin is entitled to an evidentiary hearing and appointment of counsel.

Goodin requests an evidentiary hearing. Evidentiary hearings on § 2255 motions are not necessary unless the defendant shows some indicia of viable issues in his motion. *United States v. Harrison*, 910 F.3d 824, 826-827 (5th Cir. 2018) (holding that an evidentiary hearing as to a § 2255 motion is not required “if (1) the movant’s claims are clearly frivolous or based upon unsupported generalizations, or (2) the movant would not be entitled to relief as matter of law, even if his factual assertions were true.”) *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (holding that no hearing is necessary as to a § 2255 motion if “the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief”).

The Court finds that Goodin has presented nothing showing that there are viable issues within his motion. As discussed above, Goodin’s claims of ineffective assistance of counsel are frivolous because there was no warrantless search and because his prior charge is not subject to collateral attack. Accordingly, Goodin will not be granted an evidentiary hearing.

Additionally, Goodin requests appointment of an attorney. This Court has already denied Goodin’s motion to appoint counsel in a separate order [Doc. No. 287] but will address the issue again briefly. A defendant filing a § 2255 motion is generally not entitled to appointment of an attorney. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no further.”); *United States v. Garcia*, 689 F.3d 362, 364 (5th Cir. 2012) (“[T]here is no constitutional entitlement to appointed counsel in postconviction relief proceedings....”). Accordingly, the Court will not appoint an attorney for Goodin.

IV. CONCLUSION

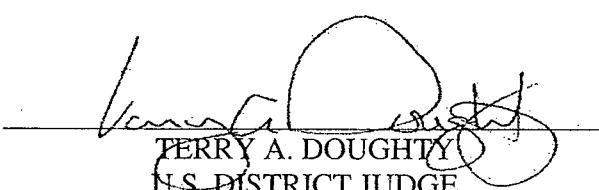
For the reasons stated above,

IT IS ORDERED that Defendant Thomas Goodin's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence [Doc. No. 278] is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Goodin's request for an evidentiary hearing is **DENIED**.

IT IS FURTHER ORDERED that Goodin's Motion to Appoint Counsel is **DENIED**.

MONROE, LOUISIANA, this 11th day of August 2022.



TERRY A. DOUGHTY
U.S. DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

UNITED STATES OF AMERICA

CASE NO. 3:18-CR-00154-01

VERSUS

JUDGE TERRY A. DOUGHTY

THOMAS J M GOODIN (01)

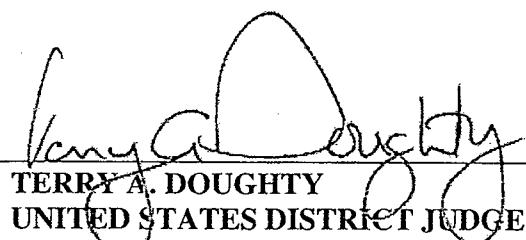
MAGISTRATE JUDGE HAYES

CERTIFICATE OF APPEALABILITY

A final order having been filed in the above-captioned *habeas* case, the Court, considering the record in this case and the requirements of 28 U.S.C. § 2253, hereby finds that:

The certificate of appealability is **DENIED** because the applicant has failed to make a substantial showing of the denial of a constitutional right.

MONROE, LOUISIANA, this 11th day of August 2022.



TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

APPENDIX C



United States Court of Appeals for the Fifth Circuit

Certified as a true copy and issued
as the mandate on Jan 19, 2023

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 22-30507

United States Court of Appeals
Fifth Circuit

FILED

November 14, 2022

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

THOMAS J. M. GOODIN,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Western District of Louisiana
USDC Nos. 3:22-CV-2091, 3:18-CR-154-1

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Thomas J. M. Goodin, federal prisoner #20647-035, seeks a certificate of appealability (COA) to appeal the district court's dismissal and denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. His § 2255 motion challenged his convictions and sentences for conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and possession with intent to distribute phencyclidine. He also moves for the appointment of counsel, for an evidentiary hearing, for permission to appeal, and to supplement the record.

Goodin argues that his trial counsel was ineffective for failing to move to suppress an allegedly warrantless search of a FedEx package and that his appellate counsel was ineffective for failing to challenge the district court's enhancement of his sentence based on a prior conviction in which he was allegedly constructively denied the assistance of counsel. As to these arguments, Goodin has not shown that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253. First, the package search was not warrantless; the record is clear that a warrant was issued. Trial counsel was not ineffective for failing to move to suppress evidence on this ground. Second, Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance. Appellate counsel was not ineffective for failing to challenge the prior-conviction enhancement.

Goodin argues for the first time on appeal that, while a search warrant had been issued, it covered only a residence and not the FedEx package; that an additional search of the package occurred two and a half hours before the search at issue; that the K-9 officer involved in the search was off duty; and that, for various reasons, there was no probable cause to search the package. We will not consider these new arguments. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

For these reasons, Goodin's COA motion is DENIED. All outstanding motions are also DENIED. As Goodin fails to make the required showing for a COA, we do not reach his contention that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

The denial of his motion for the appointment of counsel is AFFIRMED.

APPENDIX D

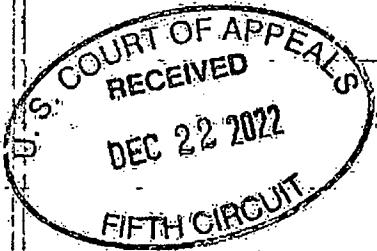
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-30507

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

THOMAS J. M. GOODIN,
Defendant-Appellant.

APPELLANT GOODIN'S PETITION FOR
REHEARING EN BANC
(Fed. R. App. P. 35)



AMH

Thomas J. M. Goodin
Reg. No. 20647-035
U.S.P. Pollock
P.O. Box 2099
Pollock, LA 71467
PRO SE

CERTIFICATE OF INTEREST

United States v. Thomas J.M. Goodin

No. 22-30507

I, Thomas J.M. Goodin, defendant - appellant certifies that the following listed persons and entities described in Local Rule 26.1.1 have an interest in the outcome of this case.

Caldwell, Hon. Walter M.

Campbell, Jim, George Mennon

Doughty, Hon. Terry A.

Gix, Brittany S.

Goff, Shelley Ann

Goodin, Thomas J.M.

Griffing, Carol Mignonne

Hayes, Hon. Karen L.

O'Mara, Fredrick Michael

Pearce, James Inman

Plaisance, Mark David

Walker, Hon. Cristina

Walker, Meko R.

Winston, Samuel Hatfield

Thomas J.M. Goodin

Thomas J.M. Goodin

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CERTIFICATE OF SERVICE

COPY OF OPINION OR ORDER SOUGHT TO BE
REVIEWED

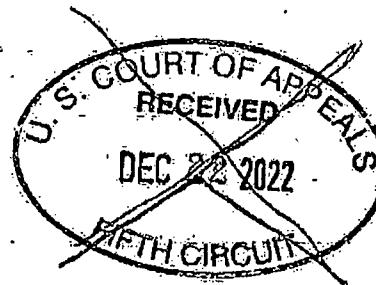


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REQUIRED STATEMENT
(Fed. R. App. P. 35(b)(1))
(Local Rules, 5th Cir. L.R. 35.2.2)

Mr. Goodin believes that the panel decision, attached as the Appendix of this Petition is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full circuit is necessary to secure and maintain uniformity of decisions in this court:

The first case that conflicts with panel decision, Buck v. Davis, 137 S. Ct. 759, 773-74 (2017);

Second case that conflicts with panel decision, Miller-El v. Cockrell, 537 U.S. 322, 327, 335-36 (2003);

Third case that conflicts with panel decision, Yee v. City of Escondido, 503 U.S. 519, 534 (1992);

Fourth case that conflicts with panel decision, N. Alamo Water Supply Coop v. City of San Juan, 90 F.3d 910, 916 (5th Cir. 1996).

Mr. Goodin also believes that this appeal involves one question of exceptional importance:

The first question of importance: Whether the panel decision, affirming the denial of Goodin's motion for the appointment of counsel, seriously diminishes

the legitimacy, fundamental fairness, integrity, and public reputation of judicial proceedings.

Dated: December 19, 2022

Thomas J.M. Goodin

Thomas J.M. Goodin

SUMMARY OF PROCEEDINGS

The panel decision denied Mr. Goodin's C.O.A., on the grounds that his claims lacked merit; declined to consider "new arguments", pursuant to Black v. Davis, 902 F.3d 541, 545 (5th Cir. 2018); declined to reach his contentions that the district court erred by failing to conduct an evidentiary hearing; and affirmed the denial of his motion to appoint counsel.

Unless this Court grants a rehearing en banc, and sets aside the panel decision, the panel decision will seriously diminish the legitimacy, fundamental fairness, integrity, and public reputation of judicial proceedings.

STATEMENT OF FACTS

Thomas J.M. Goodin, federal prisoner #20647-035, sought a certificate of appealability (COA) to appeal the district court's dismissal and denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. His § 2255 motion challenged his convictions and sentences for conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and possession with intent to distribute phencyclidine. See Doc. No. 278. He also moved for the appointment of counsel, an evidentiary hearing, for permission to appeal, and to supplement the record.

Goodin argued that his trial counsel was ineffective for failing to move to suppress a warrantless search of a FedEx package and that his appellate counsel was ineffective for failing to challenge the district court's enhancement of his sentence based on a prior conviction in which he was constructively denied the assistance of counsel. Doc. No. 278.

In denying Goodin's motion for a COA, the panel decision states, "First, the package search was

Docket Entries refer to United States v. Goodin, No. 3:18-CR-00154-OL (W.D. La.).

not warrantless; the record is clear that a warrant was issued. Trial counsel was not ineffective for failing to move to suppress evidence on this ground. Second, Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance. Appellate counsel was not ineffective for failing to challenge the prior-conviction enhancement.¹¹ See Appendix at 2.

Goodin argued for the first time on appeal that, while a search warrant was issued, it covered only a residence and not the FedEx package; that an additional search of the package occurred two and a half hours before the search at issue; that the k-9 officer involved in the search was off duty; and that there was no probable cause to search the package. See Appendix at 2. The panel declined to consider these "new arguments" citing Black v. Davis, 902 F.3d 541, 545 (5th Cir. 2018).

Goodin now seeks to have this case reheard en banc.

SUMMARY OF ISSUES ARGUED

By deciding first, that the package search was not warrantless (instead of whether its debatable the package search was warrantless); and second,

that Goodin had counsel on his prior convictions (instead of whether its debatable Goodin had counsel on his prior convictions); the panel sidestepped the threshold C.O.A. process and first decided the merits of Goodin's appeal, and then justified its denial of a C.O.A. based on its adjudication of the actual merits, thereby in essence deciding the appeal without jurisdiction.

The panel declined to consider new arguments citing Black, 902 F.3d at 545. However, Black concerned this Court's jurisdiction to issue a C.O.A. on new issues — not new arguments in support of an issue previously raised — therefore, the panel erred as a matter-of-law in declining to consider Goodin's new arguments.

Finally, the panel decision forecloses all opportunities, in the ordinary case, for a prisoner to present a claim that trial counsel was ineffective — and to present it with the assistance of effective counsel — seriously diminishing the legitimacy, fundamental fairness, integrity, and public reputation of judicial proceedings.

ARGUMENT

I. The panel decision conflicts with Buck v. Davis, 137 S. Ct. 759, 773-74 (2017), and Miller-El v. Cockrell, 537 U.S. 322, 327, 335-36 (2003), by sidestepping the threshold C.O.A. process.

A. Legal standard and foundational law.

To determine if a C.O.A. applicant "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), this Court ask a "threshold question": has the applicant shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further"? Buck v. Davis, 137 S. Ct. 759, 773 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)). This is not a "full consideration of the factual or legal basis adduced in support of the claims." Miller-El, 537 U.S. at 336. Instead, this Court "ask 'only if the District Court's decision was debatable.'" Buck, 137 S. Ct. at 774 (quoting Miller-El, 537 U.S. at 327).

B. Analysis

1. The FedEx Package

First, Mr. Goodin requested a COA on his claim "that trial counsel was ineffective for failing to move to suppress an allegedly warrantless search of a FedEx package." Appendix at 2.

In Support of this Issue, Goodin provided new arguments: first, that the Government failed to meet the initial burden at the suppression hearing of establishing the existence of a valid warrant that complies with Louisiana Revised Statutes 9:2603.1²; the record evidence of the warrant issued is void a date or time stamp (which would cause any competent attorney to question the validity of the warrant issued); Goodin provided the actual search warrant that was attached to the Application for Warrant and Receipt - which only covered a residence and not the FedEx package; an additional search of the package occurred two and a half hours before the search at issue; that the k-9 officer involved in the search was off-duty; and that,

² The electronic warrant must comply with the relevant state statute, which has specific requirements for warrants that are issued electronically. Allegedly obtained through WarrantNow.

for various reasons, there was no probable cause to search the package. Appendix at 2.

In reviewing this issue, the motions panel inverted the statutory order of operations by deciding the merits of this appeal by stating, "First, the package search was not warrantless; the record is clear that a warrant was issued." Appendix at 2. Then the panel denied the COA based on this adjudication of the "actual merits," stating, "Trial counsel was not ineffective for failing to move to suppress evidence on this ground." Appendix at 2.

For COA purposes, Mr. Goodin has made a substantial showing that trial counsel was ineffective for failing to move to suppress an allegedly warrantless search of a FedEx package, had the panel considered the totality of the evidence and correctly applied the statutory order of operations — with respect to the COA analysis.

2. Constructive Denial of Counsel

Next, Goodin ~~requested~~ a COA on his claim that ~~appellate~~ counsel was ~~ineffective for~~ failing to challenge the district court's enhancement of his sentence based on a prior conviction in which he was allegedly

denied the assistance of counsel. Appendix at 2.

In reviewing this issue, the motion panel inverted the statutory order of operation by deciding the merits of this appeal by stating, "Second, Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance." Appendix at 2. Then the panel denied the COA based on this adjudication of the actual merits, stating, "Appellate counsel was not ineffective for failing to challenge the prior conviction enhancement." Appendix at 2.

The record evidence conclusively establishes that Goodin was constructively denied counsel on his prior conviction. These facts are uncontested:

1) Goodin's counsel of choice, Hon. Steven Hansen enrolled in the prior state proceeding as co-counsel even though he was under contract to represent Mr. Goodin as full-fledged counsel.

2) Mr. Goodin did not knowingly waive his right to have full-fledged counsel represent him in the prior proceeding.

3) Mr. Hansen failed to subject the prosecution's case to any meaningful testing.

4.) Mr. Hansen did not know the facts of Goodin's case or how the law applied to those facts.

"A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. We have found constructive denial in cases involving the absence of counsel from the courtroom, conflicts of interest between defense counsel and the defendant, and official interference with the defense; and have stated that constructive denial will be found when counsel fails to subject the prosecution's case to any meaningful testing."¹¹ Gochicoa v. Johnson, 238 F.3d 273, 284 (5th Cir. 2000). By enrolling as co-counsel (retained) counsel, Mr. Hansen created a conflict of interest because he enrolled in a capacity different in scope to what he was hired. It is uncontested that Mr. Goodin filed a bar complaint against Mr. Hansen and had his attorney fees refunded. Mr. Hansen did not put the prosecution's case to any meaningful testing.

For COA purposes, Mr. Goodin has made a substantial showing that appellate counsel was ineffective for failing to challenge the district court's enhancement of his sentence based on a prior

conviction in which he was allegedly denied the assistance of counsel, had the panel correctly applied the statutory order of operations – with respect to the COA analysis.

II. The panel decision misapplied Black v. Davis, 902 F.3d 541 (5th Cir. 2018), to foreclose consideration of Goodin's "new arguments."

A. Legal standard and foundational law.

"[T]his Court has no jurisdiction to issue a COA on an issue on which the district court did not deny a COA." Black, 902 F.3d at 545. However, "there is a difference between raising new issues and making new arguments on appeal. If an issue is properly presented, a party can make any argument in support of that issue; parties are not limited to the precise arguments they made below." See In re Home Depot Inc., 931 F.3d 1065, 1086 (11th Cir. 2019) (quoting Yee v. City of Escondido, 503 U.S. 519, 534 (1992)).

B. Analysis.

For the first time on appeal, Goodin raised new arguments in support of his claim that trial counsel

was ineffective for failing to move to suppress an allegedly warrantless search of a FedEx package." Appendix at 2. However, the motions panel found incorrectly – that it did not have jurisdiction to consider these new arguments citing Black, 902 F.3d at 545. This is clearly erroneous in light of Yee, 503 U.S. at 543; see also N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 916 (5th Cir. 1996) (under this circuit's general rule, arguments not raised before the district court are waived and will not be considered on appeal unless the party can demonstrate "extraordinary circumstances").

In light of Trevino v. Thaler, 133 S.Ct. 1911 (2013), and Martinez v. Ryan, 566 U.S. 1, 17 (2012), "extraordinary circumstances" exists excusing Goodin's procedural default because he did not have counsel during his initial collateral review proceeding: 1) the general rule of this circuit is that a claim of ineffective-assistance-of-trial-counsel will not be resolved on direct appeal. See United States v. Cantwell, 470 F.3d 1087, 1091 (5th Cir. 2006); see also United States v. Tsgar, 739 F.3d 829, 841 (5th Cir. 2014); and 2) Goodin did not have counsel during the 28 U.S.C. § 2255 proceeding.

In this case, the initial-§ 2255 proceeding is the first designated proceeding for Mr. Goodin to raise the ineffective-assistance-of-trial-counsel claim. This collateral proceeding is the equivalent of Goodin's

direct appeal as to that claim, and defendant's "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. Halbert v. Michigan, 545 U.S. 605, 617 (2005).

III. Whether the panel decision affirming the denial of Goodin's motion for the appointment of counsel, seriously diminished the legitimacy, fundamental fairness, integrity, and public reputation of judicial proceedings.

A. Legal Standard

The proper functioning of our criminal justice system depends in large part on its legitimacy, fundamental fairness, integrity, and public reputation. See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908, 1910 (2018) (noting that "the public legitimacy of our criminal justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair," and that, "a sentence [or conviction] that lacks reliability because of unjust procedures may well undermine public reputation of the proceedings").

B. Analysis

In this case, a reasonable jurist could debate whether Goodin's trial counsel was ineffective when considering the totality of the evidence, a reasonable jurist could also debate whether Goodin was constructively denied counsel during his prior state proceeding. Based on this alone, Goodin was entitled to an evidentiary hearing in the district court. And, with the entitlement of an evidentiary hearing attaches the assistance of counsel.

Notwithstanding, Goodin's right to counsel on his claim that trial counsel was ineffective automatically attaches on collateral review because the rule of this court forecloses the possibility for Goodin to raise this claim on direct appeal.

In this case, Goodin's trial counsel failed to move to suppress evidence of a warrantless search and his appellate counsel failed to challenge a sentence enhancement based on prior convictions that were uncounseled. On appeal, the motions panel inverts the statutory order of operations by deciding the merits of this appeal and then denying a COA based on adjudication of the actual merits; in effect, deciding this appeal without jurisdiction. What's more, the motions panel makes a merits assessment without considering all the arguments raised.

What reasonable person wouldn't have a diminished view of judicial proceedings after reviewing the totality of the evidence in this case?

CONCLUSION

Based on the reasons above, this court should hear this case en banc, set aside the order of the motions panel, and issue a COA on all issues raised.

Dated December 19, 2022.

Thomas J.M. Goodin

Thomas J.M. Goodin

R 20647-035

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition for Rehearing En Banc was mailed to:

Christina Walker
Assistant United States Attorney
300 Fannin St., Ste. 3201
Shreveport, LA 71101

Executed on: December 19, 2022

Thomas J.M. Goodin

Thomas J.M. Goodin

AMH

APPENDIX

COPY OF ORDER OR OPINION TO BE REHEARD EN BANC

United States Court of Appeals for the Fifth Circuit

No. 22-30507

United States Court of Appeals
Fifth Circuit

FILED

November 14, 2022

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

THOMAS J. M. GOODIN,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Western District of Louisiana
USDC Nos. 3:22-CV-2091, 3:18-CR-154-1

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Thomas J. M. Goodin, federal prisoner #20647-035, seeks a certificate of appealability (COA) to appeal the district court's dismissal and denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. His § 2255 motion challenged his convictions and sentences for conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and possession with intent to distribute phencyclidine. He also moves for the appointment of counsel, for an evidentiary hearing, for permission to appeal, and to supplement the record.

No. 22-30507

Goodin argues that his trial counsel was ineffective for failing to move to suppress an allegedly warrantless search of a FedEx package and that his appellate counsel was ineffective for failing to challenge the district court's enhancement of his sentence based on a prior conviction in which he was allegedly constructively denied the assistance of counsel. As to these arguments, Goodin has not shown that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253. First, the package search was not warrantless; the record is clear that a warrant was issued. Trial counsel was not ineffective for failing to move to suppress evidence on this ground. Second, Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance. Appellate counsel was not ineffective for failing to challenge the prior-conviction enhancement.

Goodin argues for the first time on appeal that, while a search warrant had been issued, it covered only a residence and not the FedEx package; that an additional search of the package occurred two and a half hours before the search at issue; that the K-9 officer involved in the search was off duty; and that, for various reasons, there was no probable cause to search the package. We will not consider these new arguments. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

For these reasons, Goodin's COA motion is DENIED. All outstanding motions are also DENIED. As Goodin fails to make the required showing for a COA, we do not reach his contention that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

The denial of his motion for the appointment of counsel is AFFIRMED.

APPENDIX E

United States Court of Appeals for the Fifth Circuit

No. 22-30507

United States Court of Appeals
Fifth Circuit

FILED

January 11, 2023

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

THOMAS J. M. GOODIN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:22-CV-2091

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.