APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11145

PAULINO GRANDA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cv-21025-DMM

ORDER:

Paulino Granda is a federal prisoner serving life imprisonment for several offenses, including conspiracy to possess with intent to distribute cocaine ("Count One"), and attempted possession with intent to distribute cocaine ("Count Two"). He moves for a certificate of appealability ("COA"), in order to appeal the district court's denials of his *pro se* 28 U.S.C. § 2255 motion and motions to amend. In his § 2255 motion, he claimed that his federal sentence should be corrected, because a prior state conviction used to enhance his sentence on Counts One and Two had been vacated.

To obtain a COA, Granda must demonstrate 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." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the district court's denial of Granda's § 2255 motion. Specifically, the district court correctly determined that he could not demonstrate an entitlement to a sentence correction under § 2255, because he could not show that his now-vacated state conviction influenced the outcome of his total sentence.

Although the district court imposed concurrent life sentences on Counts One and Two because his now-vacated state conviction triggered a statutory minimum life sentence for those charges, it explained that it would have sentenced him to life imprisonment, even if the statutory minimum did not apply.

Importantly, Granda's guideline range subjected him to the same sentence as the statutory minimum required, and his guideline range calculation did not assess any criminal history points for the now-vacated state conviction. Because Granda could not show that he would have received a lesser sentence, but for his now-vacated state conviction, he could not demonstrate an entitlement to a corrected sentence under § 2255.

Likewise, although leave to amend should be "freely given when justice so requires," Granda's motions for leave failed to demonstrate that his unspecified amendment would be proper. *See* Fed. R. Civ. P. 15(a). Not only did he fail to attach a copy of the proposed amendment to his motions for leave, but he also never set forth the substance of any claims that he sought to add. *See Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018).

Accordingly, reasonable jurists would not debate the district court's denials of Granda's § 2255 motion and motions for leave to amend, and his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11145

PAULINO GRANDA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cv-21025-DMM

Before NEWSOM and GRANT, Circuit Judges.

BY THE COURT:

Paulino Granda previously filed a *pro se* motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 22, 2023, order denying his motion for a certificate of appealability, on appeal from the district court's denials of his 28 U.S.C. § 2255 motion and motions for leave to amend. This Court declined to accept his *pro se* filing, however, as Granda is represented by an attorney. Granda's attorney, Richard Klugh, then filed the instant motion for this Court to accept Granda's *pro se* filing, on the ground that Klugh had declined to prepare a motion for reconsideration on Granda's behalf.

Although this Court generally will not accept *pro se* filings from a party who is represented by counsel, *see* 11th Cir. R. 25-1, given that Klugh has declined to file a motion for reconsideration on Granda's behalf, Granda's only means of pursuing reconsideration is on a *pro se* basis. Thus, Klugh's motion for his Court to accept Granda's *pro se* motion for reconsideration is GRANTED. However, because Granda has offered no meritorious arguments to warrant relief, his motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-21025-CV-MIDDLEBROOKS
(CASE NO. 07-20155-CR-MIDDLEBROOKS)

PAULINO GRANDA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING
MOTION TO VACATE - 28 U.S.C. § 2255

THIS CAUSE is before the Court upon the Movant Paulino Granda's ("Movant") *pro se* fourth Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Fourth Section 2255 Motion") challenging his convictions and sentences following entry of a guilty plea in *U.S. v. Granda*, No. 07-20155-Cr-Middlebrooks (S.D. Fla.). (DE 1).[1] Movant claims he is entitled to vacatur of his sentence because a prior state conviction used to enhance his sentence has since been vacated. After careful consideration of the Fourth Section 2255 Motion (DE 1) and pertinent parts of the underlying criminal record, the Section 2255 Motion is **DENIED with prejudice**.

[1] Citations to the civil docket are designated "DE ___." Citations to the criminal docket are designated "CR DE __." The Court also takes judicial notice of the filings in the corresponding criminal case. *See* Fed. R. Evid. 201; *Nguyen v. U.S.*, 556 F.3d 1244, 1259 n. 7 (11th Cir. 2009) (quoting *U.S. v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)).

I. BACKGROUND

A. Criminal Proceedings

In 2007, Movant was charged by Superseding Indictment with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 1), attempted possession with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 2), conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2 (Count 3), attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2 (Count 4); attempted carjacking, in violation of 18 U.S.C. §§ 2119 and 2 (Count 5); conspiracy to use, carry, and possess a firearm during, in relation to, and in furtherance of a crime of violence and drug trafficking crime, as charged in Counts 1, 2, 3, 4, and 5, all in violation of 18 U.S.C. § 924(o) (Count 6); using, carrying, and possessing a firearm during and in relation to a crime of violence and drug trafficking crime, as charged in Counts 1, 2, 3, 4, and 5, all in violation of 18 U.S.C. § 924(c) (Count 7); and, possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 2 (Count 8). (CR DE 61). The court's instructions to the jury indicate as to Count 6, the Section 924(o) offense, that it was required to find that Movant used, carried, or possessed a firearm, during, in relation to, or in furtherance of "one of the federal drug trafficking crimes, or one of the federal crimes of violence, or both, as charged in Counts 1, 2, 3, 4, or 5 of the Superseding Indictment." (CR DE 200 at 24) (emphasis in original). Similarly, as to Count 7, the Section 924(c) offense, the jury was instructed that it would have to find that Movant had "committed one of the drug trafficking offenses or one of the crimes of violence, or both, charged in Counts 1, 2, 3, 4, or 5" of the Superseding Indictment and that he used, carried, or possessed a firearm in connection with a drug trafficking offense or a crime of violence. (*Id.* at 28) (emphasis added). A jury found Movant guilty as charged, but its verdict did not specify the predicate offenses for Counts 6 and 7. (CR

DE 202). As to Counts 1 and 2, the jury made a specific finding that the offenses involved five kilograms or more of cocaine. (*Id.* at 1). Thereafter, I sentenced Movant to a total term of life plus 84 months of imprisonment, consisting of concurrent prison terms of life imprisonment as to Counts 1 and 2, 240 months as to Counts 3, 4, and 6, 180 months as to Count 5, and 120 months as to Count 8, and an 84-month sentence as to Count 7, to be served consecutively. (CR DE 259).

Movant appealed, but his appeal was dismissed for want of prosecution after he failed to timely file a corrected brief. (CR DE 260, 299). On March 10, 2010, Movant filed a Motion for New Trial, which was subsequently denied. (CR DE 301, 312).

B. Motion to Vacate Proceedings

On April 6, 2015, Movant filed his first motion to vacate pursuant to 28 U.S.C. § 2255 ("First 2255 Motion"). (CR DE 355). *See also Granda v. U.S.*, No. 15-21323-MIDDLEBROOKS (S.D. Fla.). The First 2255 Motion was dismissed as time-barred. (CR DE 358).

On June 30, 2016, Movant filed a second motion to vacate pursuant to 28 U.S.C. § 2255 ("Second 2255 Motion"). (CR DE 361). *See also Granda v. U.S.*, No. 16-22825-MIDDLEBROOKS (S.D. Fla.). A Report was entered by Magistrate Judge Patrick A. White recommending that the Section 2255 Motion be dismissed as an unauthorized successive motion, or alternatively, that the case be stayed and administratively closed until Movant's request to file a successive motion was granted by the appellate court. (DE 8). On July 13, 2016, I entered an Order adopting Magistrate Judge White's Report in part, staying and administratively closing the case with instructions to the Movant to file a notice with the Court within ten (10) days of receiving any authorization from the Eleventh Circuit Court of Appeals to file a successive Section 2255 Motion. (CR DE 367). On July 25, 2016, the Eleventh Circuit denied Movant's request to file a second or successive motion, without prejudice, as premature, because the denial of his First

Section 2255 Motion was pending on appeal. (DE 9). On July 29, 2016, I entered an Order dismissing without prejudice Movant's Second 2255 Motion. (DE 10).

On July 2, 2020, the Eleventh Circuit granted Movant's application to file a third, successive Section 2255 Motion to challenge his Section 924(o) and Section 924(c) convictions pursuant to *U.S. v. Davis*, 139 S.Ct. 2319 (2019). (CR DE 386). In his application, Movant alleged his convictions and sentences as to Counts 6 and 7, violations of Section 924(o) and 924(c), were unlawful because the jury returned a general verdict and, one of the potential predicate offenses, conspiracy to commit Hobbs Act robbery, did not categorically qualify as a crime of violence under Section 924(c)(3). (CR DE 386). Movant also argued it was possible that the jury could have found him guilty as to the Section 924(c) and Section 924(o) charges based solely on the Hobbs Act conspiracy charge using Section 924(c)'s residual clause, which was invalidated by *Davis*. (*Id.*). The Eleventh Circuit granted Movant leave to file a successive Section 2255 Motion, finding he had made a *prima facie* showing that his claim satisfied the statutory criteria of Section 2255(h)(2) because his Section 924(c) and Section 924(o) convictions in Counts 6 and 7 may be unconstitutional under *Davis*, as he potentially was sentenced under the now-invalid residual clause of Section 924(c)(3). *See Granda v. U.S.*, No. 20-22763-CV-MIDDLEBROOKS (S.D. Fla.), (DE 1).

After being granted permission to do so by the Eleventh Circuit, Movant filed a Third Section 2255 Motion challenging the constitutionality of his Section 924(c) and 924(o) convictions in Count 6 and 7. *Granda v. U.S.*, No. 20-22763-CV-MIDDLEBROOKS (S.D. Fla.), (DE 1). On September 3, 2021, a Report was entered by Magistrate Judge Lisette M. Reid recommending that the Third Section 2255 Motion be denied. (DE 28). On September 29, 2021, I entered an Order adopting Magistrate Judge Reid's Report, overruled Movant's Objections and denied the Third

2255 Motion. (DE 31). Movant appealed, but then filed a motion to voluntarily dismiss the appeal which was granted by the Eleventh Circuit on January 6, 2022. (DE 41).

On March 28, 2022,[2] in accordance with the mailbox rule, Movant filed this Fourth Section 2255 Motion ("Fourth Section 2255 Motion"). (DE 1 at 3).[3]

II. APPLICABLE LEGAL STANDARD

The grounds for relief under 28 U.S.C. § 2255 are extremely limited. An inmate is entitled to relief under Section 2255 if a court imposed a sentence that: (1) violated the Constitution or laws of the United States; (2) exceeded the court's jurisdiction; (3) exceeded the maximum sentence authorized by law; or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *McKay v. U.S.*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). If a Section 2255 claim is meritorious, "the court shall vacate and set the judgment aside and shall discharge [the inmate] or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). Movant, however, bears the burden of proof--not the Government--to establish that vacatur of the judgment is appropriate. *Beeman v. U.S.*, 871 F.3d 1215, 1221 (11th Cir. 2017).

III. DISCUSSION

A. Successive Section 2255 Motion

The Government argues correctly (DE 10 at 8) that this Fourth Section 2255 Motion is not a successive motion to vacate because the vacatur of Movant's prior state court conviction used to enhance his federal sentence triggers a new "fact" because it did not ripen until the state court issued the order vacating the state court conviction which, therefore, triggered a new one-year

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[2] *See Washington v. U.S.*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam) (holding that absent evidence to the contrary, a prisoner's pleading is deemed filed in accordance with the mailbox rule when it is executed and handed to prison officials for mailing).

[3] A duplicate of the motion was docketed by the Clerk on April 12, 2022. (DE 5).

limitations period under 28 U.S.C. § 2255(f)(4). *See Stewart v. U.S.*, 646 F.3d 856, 864-65 (11th Cir. 2011) (finding that a prior state court vacatur order gives a defendant both the basis to challenge an enhanced federal sentence and is a new "fact" which triggers a fresh-one-year statute of limitations under Section 2255(f)(4)). *See also Boyd v. U.S.*, 764 F.3d 1298, 1302 (11th Cir. 2014) (a claim based on the vacatur of a conviction which did not exist until after the initial Section 2255 motion concluded is not subject to the second or successive restrictions). Because the Movant claims a prior state court predicate conviction used to enhance his sentence has been vacated following denial of his prior Section 2255 Motions, this is not a successive filing. *Id.*

B. State of Limitations Defense

The Government, however, has asserted the statute of limitations defense. (DE 10 at 8). The Government argues that this Fourth Section 2255 Motion is not timely because the Movant was not diligent in seeking to vacate his state court conviction, having waited approximately fourteen years from the time the state court conviction became final in 1994 until August 2007 to file a motion to vacate the state court conviction in the state forum. (DE 10 at 8, n. 5). Movant disagrees, arguing that, immediately upon learning the state conviction was being used to enhance his federal sentence, and before judgment was entered in his federal case, he returned to the state court, filing a motion to vacate the judgment in Case No. F92-38810.[4] (DE 5 at 1-2). The Government's argument on this issue fails.

[4] In his state motion, Movant argued that his plea was unlawful because he had not been advised that the plea could subject him to deportation. Therein, Movant relied upon the October 26, 2006 Florida Supreme Court decision in *State v. Green*, 944 So. 2d 208 (Fla. 2006) which granted two years from the date of the opinion for defendants whose convictions had already become final to file a motion to vacate the plea.

Title 28 U.S.C. § 2255(f)(4) imposes a one-year statute of limitations for filing a Section 2255 motion, which begins to run following the latest of four possible events, including "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). "In cases involving a state-court vacatur of a federal prisoner's prior state conviction, which was used to enhance a federal prisoner's sentence, the limitations period begins to run on the date that the prison receives notice of the order vacating the predicate conviction." *Arroyo v. U.S.*, 359 F. App'x 118, 121 (11th Cir. 2009) (citing *Johnson*, 544 U.S. at 302, 304-07) (holding that the state-court *vacatur* of a prior conviction which was used to enhance a federal prisoner's sentence, was a new "fact" triggering a fresh limitations period under Section 2255(f)(4), so long as the petitioner exercised due diligence in seeking the *vacatur* of his state-court conviction)). Thus, a prisoner has up to one year from the date on which he receives notice of the order vacating his prior state conviction to file a federal motion to vacate. *Id.* (citing *Johnson*, 544 U.S. at 298).

However, the prisoner is only entitled to the new one-year limitations period if he exercised due diligence in seeking to overturn or vacate the prior state court conviction used to enhance his federal sentence. *Id.* The "due diligence" element of Section 2255(f)(4) requires neither the "maximum feasible diligence" nor the undertaking of repeated exercises in futility, but it does require that a prisoner make "reasonable efforts" in discovering the factual predicate of his claim. *Aron v. U.S.*, 291 F.3d 708, 712 (11th Cir. 2002). A prisoner can establish due diligence by demonstrating he acted promptly "'as soon as he was in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence.'" *Johnson v. U.S.*, 724 F. App'x 917 (11th Cir. 2018) (per curiam) (quoting *Johnson*, 544 U.S. at 308). The U.S. Supreme Court has made clear "that the date which activates the due diligence clock is the

date of the federal sentence which is enhanced by the prior convictions which have been subsequently vacated." *Griffin v. U.S.*, 775 F. App'x 583, 586 (11th Cir. 2019) (per curiam) (citing *Johnson*,[5] 544 U.S. at 399 ("'settling on the date of judgment as the moment to activate due diligence'").

On August 29, 2007, prior to imposition of his federal sentence on September 11, 2007, Movant filed a motion to vacate the state court conviction and sentence in *Granda v. U.S.*, No. 92-38810-Butchko (11th Jud. Cir.) which was being used to enhance his federal sentence. (CR DE 248-1 at 1-3, CR DE 269). Thus, Movant filed his state court motion before the due diligence clock commenced. *Id.* Consequently, I find Movant acted diligently in seeking vacatur of the state court conviction used to enhance his federal sentence. *See Johnson v. United States*, 544 U.S. 295, 298 (2005).[6] Although the state court did not vacate the conviction until 2021, the Government has not provided any evidence that the delay in the state court was attributable to the Movant. *See Johnson*, 544 U.S. at 310 n.8 ("once a petitioner has diligently initiated state-court proceedings, any delay in those proceedings that is not attributable to petitioner will not impair the availability of the paragraph four limitation rule, once those proceedings finally conclude.. . . ").

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[5] In *Johnson*, the Supreme Court held that "Johnson fell far short of reasonable diligence in challenging the state conviction" because he waited more than three years after entry of his federal sentence before filing a state habeas petition seeking to vacate the prior convictions which were used to enhance his federal sentence. *Johnson*, 544 U.S. at 311.

[6] In *Johnson*, the Supreme Court held that the one-year limitation period set forth in Section 2255(f)(4) runs from the date the prisoner receives notice of the state court vacatur of a prior conviction, provided the movant acted diligently in seeking relief in state court. *Johnson*, 544 U.S. at 298. Further, the Supreme Court held that the due diligence inquiry regarding a defendant's efforts to seek vacatur of a prior state court conviction used to enhance a federal sentence commences upon the date the federal court judgment is entered, not before. *Id.* at 1581-82. Thus, the Government's argument here that the Movant was not diligent because he could have sought vacatur of his state court conviction years before his federal sentencing hearing is meritless.

Moreover, following the state's May 21, 2021 Order vacating the 1993 conviction and dismissing the charges, Movant returned to this Court filing this Section 2255 Motion less than a year later on March 28, 2022. (DE 1 at 3). Given the foregoing, I find this Section 2255 Motion timely under Section 2255(f)(4).

C. Applicability of 21 U.S.C. § 851 and Merits of Claim

Next, the Government misinterprets Movant's claim as one challenging the Government's Section 851 Notice, arguing that such a claim must be rejected pursuant to 21 U.S.C. § 851(e)'s five-year statute of limitations. (DE 10 at 8). In fact, Movant argues correctly that he is not challenging the validity of the Section 851(e) Notice. (DE 5 at 1-4; DE 8 at 7-10). Instead, Movant argues he is entitled to vacatur of his enhanced sentence and a resentencing hearing because the vacatur of a prior state court conviction makes his enhanced sentence unlawful. (DE 5 at 1-4; DE 8 at 7-10).

Prior to sentencing, the probation officer prepared a PSI which established the base offense level at 36 under U.S.S.G. § 2D1.1(a)(3), (c)(2), because the case involved an attempted drug rip-off of 70 kilograms of cocaine. (PSI ¶ 44). Six levels were added to the base offense level based on Movant's role in the offense and for obstruction of justice, resulting in a total offense level of 42. (PSI ¶¶ 47-48, 52). Based on a total offense level 42 and a criminal history category VI, Movant faced a minimum of 360 months and up to a maximum lifetime term of imprisonment under the guidelines, plus a consecutive sentence of at least seven years as to Count 7. (PSI ¶ 129). However, the PSI noted as to Counts 1 and 2 that Movant faced a lifetime term of imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A) and the enhanced penalties of 21 U.S.C. § 851. (PSI ¶ 128). Also, because of the Section 851 enhancement, as to Count 7, Movant faced a consecutive minimum term of seven years and up to a maximum term of life imprisonment for violation of 18

U.S.C. § 924(c)(1)(A)(ii). (PSI ¶ 128). Although the guidelines calculations gave rise to an imprisonment range of 360 months at the low end and a term of life imprisonment at the high end, the PSI found the statutory minimum of a lifetime term of imprisonment applied. (PSI ¶ 129). Therefore, the statutory minimum penalty became the applicable guideline range. (*Id.*). Movant filed Objections to the PSI challenging, in relevant part, the validity of the prior convictions used to support the Section 851 Notice. (CR DE 246).

On September 11, 2007, Movant appeared for sentencing. (CR 258, 281). At that time, Movant renewed his objections to the PSI, including his challenge to the prior convictions used to support the Section 851 Notice. (CR DE 281 at 14, 35-36). I ultimately overruled Movant's Objections to the use of the prior convictions because the Movant had not demonstrated that the prior convictions were invalid, and I adopted the findings of the PSI. (*Id.* at 14, 36, 44). In so ruling, I acknowledged that the Government's 851 Notice mandated the imposition of a life sentence as to Counts 1 and 2, plus a consecutive seven-year sentence as to Count 7. (*Id.* at 44). After I considered the statutory factors under 28 U.S.C. § 3553, I also made a specific finding that, given Movant's extensive criminal history of violence and firearms, even if the Section 851 enhancement were later found to be unlawful or inapplicable, Movant's sentence would remain the same. (*Id.*). Thereafter, I sentenced Movant to two concurrent mandatory terms of life imprisonment as to Count 1 and 2, 240 months of imprisonment as to Counts 3, 4, and 6, 180 months of imprisonment as to Count 5, and 120 months of imprisonment as to Count 8, all to run concurrently, to be followed by a consecutive seven-year term of imprisonment as to Count 7. (*Id.* at 45).

Movant maintains he is entitled vacatur of his sentence and to a resentencing hearing because one of the state court convictions relied upon in the 851 Notice vacated post-sentencing

affects the validity of his enhanced sentence, the applicable guideline criminal history points and resulting advisory sentencing guideline range. (DE 11 at 10).

It is well settled that once a movant successfully attacks in the state forum his prior state conviction used to enhance his federal sentence, he may then seek to reopen and reduce the federal sentence. *See United States v. Walker,* 198 F.3d 811, 813 (11th Cir. 1999) ("[A] district court may reopen and reduce a federal sentence once a federal defendant has, in state court, successfully attacked a prior state conviction, previously used in enhancing the federal sentence."); *United States v. Hofierka,* 83 F.3d 357, 364 (11th Cir. 1996) (noting that, if the defendant's state-court conviction "is reversed, he may seek appropriate modification of his supervised release revocation sentence at that time").[7]

[7] In its Response, the Government argues that the Movant cannot challenge the lawfulness of his enhanced sentence based on a state court conviction that has since been vacated because the state court conviction was obtained more than five years before the Government filed its Section 851 Notice. (DE 10 at 9). The Government relies upon the Eleventh Circuit's decision in *Valentine* which found that the defendant was not entitled to relief from his Section 851 enhanced sentence because Section 841(b)(1)(A) applies where a prior conviction for a serious drug felony "has become final" more than five years before the Government's filing of a Section 851 Information. *United States v. Valentine*, 816 F. App'x 381, 384 (11th Cir. 2020). In *Valentine*, the defendant argued that one of the qualifying predicate convictions was reduced from a felony to a misdemeanor and, therefore, his mandatory minimum sentence should have been ten years rather than twenty years of imprisonment. *Id.* at 382-383. In his Reply, Movant argues that the Government's reliance on *Valentine* and other cases are factually distinguishable because the Court in those cases "never grappled with the statutory interpretation nor conducted a comprehensive analysis of the statutory text distinguishing between challenging the validity of a prior conviction versus disputing the fact (the very existence) of a prior conviction." (DE 11 at 9). Regardless of whether Movant is entitled to challenge his enhanced sentence now that the state court conviction has been vacated, I find Movant is not entitled to relief because he cannot demonstrate that I would impose a lesser sentence now that the prior conviction has been vacated. As I found at sentencing, even if Movant were now sentenced without the Section 851 enhancement, I would still impose a lifetime term of imprisonment based on the statutory factors and the advisory guideline range. Therefore, Movant has not demonstrated entitlement to relief.

At the time of Movant's original sentencing, it was proper for me to have enhanced Movant's sentence based on his prior convictions and the Section 851 Notice. Under the advisory guidelines, without the Section 851 enhancement, Movant faced a minimum guideline range of 360 months and up to a lifetime maximum term of imprisonment. (PSI ¶ 129). First, Movant erroneously suggests that the PSI assessed criminal history points for the now vacated state court conviction in Case No. F92-38810. (DE 11). The PSI did not assess any criminal history points for this prior conviction, therefore the total criminal history points (19 points) and resulting criminal history category VI remain unchanged. *See* (PSI ¶ 61). However, even if, as Movant suggests, the statutory minimum lifetime term of imprisonment was no longer applicable because he no longer had the required three qualifying predicate offenses, Movant has not demonstrated prejudice resulting from such error.

A collateral attack under Section 2255 will be granted only if the Movant establishes that the trial court error at sentencing resulted in actual prejudice to the movant. *United States v. Estelan*, 156 F. App'x 185, 200-01 (11th Cir. 2005)[8] (stating that a Section 2255 movant must show that the trial court error during sentencing resulted in substantial prejudice) (citing *cf. United States v. Richardson*; 166 F.3d 1360, 1361-62 (11th Cir. 1999) (finding plain error occurred where difference in the defendant's enhanced guideline range of 180 to 188 months was much greater than his unenhanced range of 70 to 87 months of imprisonment)); *see also Spencer v. United States*, 773 F.3d 1132, 1140 (11th Cir. 2014) (en banc). Because Movant's prior 1988 state court

[8] The Court in *Estelan* explained it had considered the Section 3553(a) factors and had looked carefully at the defendant's prior convictions when imposing a post-*Booker* 135-month term of imprisonment. *Id.*

conviction was vacated post-sentencing, he is entitled to challenge the enhancement in this collateral proceeding. *Stewart v. United States*, 646 F.3d 856, 864-65 (11th Cir. 2011). However, to be entitled to relief, the Movant must demonstrate actual prejudice because the now vacated prior state court conviction had a substantial and injurious effect or influence in determining Movant's sentence. *Johnson*, 544 U.S. at 303; *see also Rivers v. United States,* 777 F.3d 1306, 1316 (11th Cir. 2015). Movant has not demonstrated that he has been prejudiced by the 851 Notice and resulting enhanced sentence. At sentencing, I specifically found that, even if the Section 851 enhancement were later found to be invalid, I would still impose a lifetime term of imprisonment given the Section 3553(a) statutory factors and Movant's criminal history and computation of the advisory guidelines without the 851 enhancement. Thus, I find Movant's sentence is not affected by the vacatur of one of the qualifying prior state court convictions. Consequently, Movant has not met his burden of demonstrating entitlement to relief in this Section 2255 proceeding. *Rivers v. U.S.*, 777 F.3d 1306, 1316 (11th Cir. 2015); *see also Beeman*, 871 F.3d at 1221–23.

D. Conclusion

For the foregoing reasons, Movant's Fourth Section 2255 Motion is hereby DENIED.

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying a Section 2255 motion to vacate has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. §2253 (c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (2005)). A Court may issue a certificate of appealability only if the Movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §2253 (c)(2). Where a district court has rejected a movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, the movant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record and for the reasons mentioned in Section II, this Court denies a certificate of appealability.

V. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Movant PAULINO GRANDA's 28 U.S.C. § 2255 Motion (DE 5) is **DENIED;**
2. Judgment in favor of the Respondent will be entered separately in accordance with Fed. R. Civ. P. 58(a);
3. A Certificate of Appealability is **DENIED;** and,
4. All pending motions are **DENIED AS MOOT**.

SIGNED in Chambers at West Palm Beach, Florida, this 9th day of February, 2023.

Donald M. Middlebrooks
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-21025-CV-MIDDLEBROOKS
(CASE NO. 07-20155-CR-MIDDLEBROOKS)

PAULINO GRANDA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

Pursuant to the Court's Order denying Movant Paulino Granda's Motion to Vacate pursuant to 28 U.S.C. § 2255, it is hereby **ORDERED AND ADJUDGED** that:

1. Judgment is **ENTERED** in favor of the Respondent;

2. All pending motions are **DENIED AS MOOT;** and

3. The Clerk of Court shall **CLOSE THIS CASE.**

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of February, 2023.

Donald M. Middlebrooks
United States District Judge

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