

JOINT APPENDIX

JAMES ROBINSON

REG. NO. 49839-044

FCI OXFORD

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James Robinson, Appellant v. United States of America, Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2024 U.S. App. LEXIS 24413
No: 24-2068
September 25, 2024, Decided

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis. (4:23-cv-00707-SRC).Robinson v. United States, 2024 U.S. Dist. LEXIS 78564, 2024 WL 1885586 (E.D. Mo., Apr. 30, 2024)

Counsel James Robinson Petitioner - Appellant, Pro se, Oxford, WI.
For United States of America, Respondent - Appellee: Jennifer Szczucinski, Assistant U.S. Attorney, Cassandra J. Wiemken, U.S. ATTORNEY'S OFFICE, Saint Louis, MO.

Opinion

ORDER

The petition for rehearing by the panel is denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2068

James Robinson

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:23-cv-00707-SRC)

JUDGMENT

Before BENTON, GRASZ, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

August 13, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

JAMES ROBINSON, Petitioner, v. UNITED STATES, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN
DIVISION
2024 U.S. Dist. LEXIS 78564
Case No. 4:23-cv-00707-SRC
April 30, 2024, Decided
April 30, 2024, Filed

Editorial Information: Subsequent History

Appeal filed, 05/22/2024

Editorial Information: Prior History

United States v. Robinson, 2022 U.S. App. LEXIS 14837, 2022 WL 1741068 (8th Cir. Mo., May 31, 2022)

Counsel {2024 U.S. Dist. LEXIS 1}James Robinson, Petitioner, Pro se, Oxford, WI.

For USA, Respondent: Cassandra Jane Wiemken, Jennifer Lauren Szczucinski, LEAD ATTORNEYS, UNITED STATES ATTORNEYS OFFICE - St. Louis, St. Louis, MO.

Judges: STEPHEN R. CLARK, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: STEPHEN R. CLARK

Opinion

Memorandum and Order

In 2021, a jury found James Robinson guilty of possessing a firearm as a felon, and the Court sentenced him to 120 months of imprisonment. Robinson now asks the Court to vacate his sentence under 28 U.S.C. § 2255, claiming that his appellate counsel ineffectively represented him because counsel did not meaningfully develop an argument on appeal. But Robinson's counsel did what all appeals counsel must do: winnow out arguments and present those most likely to succeed on appeal. Because Robinson has not demonstrated that his appellate counsel was ineffective, the Court holds that Robinson is not entitled to relief under section 2255.

I. Statement of facts

After a jury found Robinson guilty of possessing a firearm as a felon, docs. 1, 94, the United States Probation Office prepared a presentence report that included, among other things, a summary of the relevant facts underlying Robinson's offense, doc. 101. The {2024 U.S. Dist. LEXIS 2} PSR summarized the relevant facts as follows:

6. On November 26, 2019, officers were dispatched for a burglary at 4959 Northland Place in St. Louis, Missouri. The call notes indicated the caller stated a former friend had used his key and

stolen items from the caller's house, as well as stole the caller's vehicle and a firearm. Upon arrival, the officers met with the caller, victim R.F., who stated he had left his residence for approximately one hour and came home to find his rear basement door ajar. Further inspection of his residence revealed a black semiautomatic firearm missing from his kitchen table. The keys to his 2005 tan Lincoln Towncar were also missing. R.F. advised that an acquaintance, later identified as Robinson, was the only other person with keys to the residence. Robinson had briefly resided at the residence and moved out following a disagreement between R.F. and Robinson. R.F. stated Robinson refused to return his keys and was not welcome at the residence.

7. Later that same day, R.F.'s tan Lincoln Towncar was observed by officers on patrol. The officers attempted to initiate a traffic stop and the vehicle pulled to a curb. As the officers exited the patrol vehicle{2024 U.S. Dist. LEXIS 3} to approach the Lincoln, the driver of the vehicle drove away. The officers pursued the Lincoln until the Lincoln pulled into the driveway at 4220 Dressell in St. Louis, Missouri. As the officers approached the stopped vehicle, the driver, identified as James Robinson, attempted to exit the vehicle and flee on foot. One of the officers deployed a department-issued Taser and Robinson continued to struggle until he was placed in handcuffs. A search of the vehicle revealed a handgun located on the driver's side floorboard in plain view.

8. According to St. Louis, Missouri Metropolitan Police Department firearms laboratory reports, the firearm possessed by Robinson was determined to be a HS Produkt make, XDM-40 model, .40 caliber, semi-automatic pistol. The seized firearm was analyzed by an expert firearms examiner. It was test-fired and deemed operable. The firearm had traveled in interstate commerce prior to the defendant's possession. It was determined the firearm was stolen. Investigation further revealed Robinson had a prior felony conviction punishable by a term of imprisonment exceeding one year.Doc. 101 at ¶¶ 6-10 (emphases removed).

II. Procedural history

A. Criminal proceedings²

In January 2020, a federal grand jury returned a one-count indictment against Robinson, charging him with "knowingly possess[ing] a firearm" that "previously traveled in interstate or foreign commerce during or prior to being in [Robinson's] possession," in violation of 18 U.S.C. § 922(g)(1). Doc. 1. The case proceeded to trial, at which the jury found Robinson guilty. Doc. 94. The Probation Office then prepared the PSR, in which it calculated Robinson's total offense level as 26 and his criminal history category as VI. Doc. 101 at ¶ 69. Under the federal guidelines, Robinson's total offense level and criminal-history category rendered him eligible for an imprisonment range of 120 months to 150 months. *Id.* By statute, however, the maximum term of imprisonment was 120 months. *Id.* at ¶¶ 68-69; 18 U.S.C. § 924(a)(2) (2018). At the sentencing hearing, the Court denied Robinson's pro-se objections to the presentence report and adopted its contents without change. Docs. 105. The Court then sentenced Robinson to 120 months of imprisonment followed by a term of three years of supervised release. Doc. 106 at 2-3.3 Robinson appealed his sentence, and the Eighth Circuit affirmed. Doc. 124.

B. Civil proceedings{2024 U.S. Dist. LEXIS 5}4

In May 2023, Robinson timely filed a motion to vacate, set aside, or correct his sentence under section 2255. Doc. 1. After the United States filed its response, doc. 10, Robinson moved for leave to file an amended petition, doc. 21. The proposed amended petition raises three ineffective-assistance-of-appellate-counsel claims: (1) appellate counsel did not meaningfully

develop or argue Robinson's Fifth-Amendment-due-process claim regarding identification of the accused at trial; (2) appellate counsel failed to raise an insufficiency-of-the-evidence claim; and (3) appellate counsel failed to raise a prosecutorial-misconduct claim. See doc. 21-1. The Court ordered the United States to respond to Robinson's motion for leave to file the amended petition, doc. 22, and the United States did so, doc. 26. The Court construed the United States' response as both a response to Robinson's motion and an answer to the amended petition and accordingly allowed Robinson to file a reply to the United States' response/answer. Doc. 27. Robinson did so. Doc. 33. In his reply, Robinson withdrew two of the three claims he asserted in the proposed amended petition. *Id.* at 1. Thus, Robinson's proposed amended{2024 U.S. Dist. LEXIS 6} petition asserts only an ineffective-assistance-of-appellate-counsel claim for failure to meaningfully develop or argue Robinson's Fifth-Amendment-due-process claim regarding misidentification. See *id.*; doc. 21-1.

III. Standard of review

Under section 2255, a federal prisoner "may move the court which imposed [his] sentence to vacate, set aside or correct the sentence" on the grounds that the court imposed "the sentence . . . in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). If a petitioner claims his sentence violates the Constitution or laws of the United States, the petitioner must establish that the violation constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Gomez*, 326 F.3d 971, 974 (8th Cir. 2003) (first quoting *United States v. Boone*, 869 F.2d 1089, 1091 n.4 (8th Cir. 1989); and then citing Fed. R. Crim. P. 32(d) advisory committee notes to the 1983 amendments). Generally, to obtain section 2255 relief based on a claim, a petitioner must have raised the underlying error on direct appeal. See *Roundtree v. United States*, 885 F.3d 1095, 1097 (8th Cir. 2018). If a petitioner failed to do so, the Court considers the claim procedurally defaulted, rendering it ineffective{2024 U.S. Dist. LEXIS 7} in establishing a right to section 2255 relief. See *id.*

Three exceptions to this general rule exist. First, "if the error is jurisdictional, the error may be raised on collateral review without being subjected to procedural default analysis." *United States v. Mooring*, 287 F.3d 725, 727 (8th Cir. 2002). Second, if a petitioner raises a constitutional claim, the Court does not consider the claim procedurally defaulted if the petitioner shows cause for the default and actual prejudice. See *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994); *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992). This "cause and prejudice exception does not apply to nonconstitutional or nonjurisdictional claims that could have been but were not raised on direct appeal." *Anderson*, 25 F.3d at 706 (first citing *Brennan v. United States*, 867 F.2d 111, 120 (2d Cir. 1989); and then citing *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988)). Finally, the Court "will consider a claimed error that could have been raised at trial or on direct appeal if the alleged error was a fundamental miscarriage of justice." *Id.* (citing *Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam)). This exception, however, "applies only when a petitioner shows by clear and convincing evidence that, but for an alleged constitutional error, no reasonable juror would have found the petitioner guilty," *id.* at 706-07 (citing *Wallace v. Lockhart*, 12 F.3d 823, 827 (8th Cir. 1994)), and extends only to claims of factual innocence, *id.* at 707 (first citing *Narcisse v. Dahm*, 9 F.3d 38, 40 (8th Cir. 1993); and then citing *Ramey*, 8 F.3d at 1314).

If the petitioner's claims are not procedurally barred, the Court must hold an evidentiary{2024 U.S. Dist. LEXIS 8} hearing to consider the claims "[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); see also *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994). A petitioner is entitled to an evidentiary hearing "when the facts alleged, if true, would entitle [the petitioner] to relief." *Payne v. United States*, 78

F.3d 343, 347 (8th Cir. 1996) (quoting *Wade v. Armontrout*, 798 F.2d 304, 306 (8th Cir. 1986)). However, a court may dismiss a claim without a hearing "if the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *Shaw*, 24 F.3d at 1043 (citing *Larson v. United States*, 905 F.2d 218, 220-21 (8th Cir. 1990)).

IV. Discussion

Below, the Court first considers Robinson's motion for leave to file an amended section 2255 motion. The Court then considers the merits of Robinson's motion to vacate, set aside, or correct his sentence.

A. Motion for leave to file an amended section 2255 motion

Robinson filed a motion for leave to file an amended petition that raises three grounds for relief, docs. 21, 21-1, but later withdrew two of the three grounds, doc. 33 at 1. Accordingly, Robinson seeks leave to file an amended petition that raises only one claim: ineffective-assistance-of-appellate-counsel for failure to meaningfully develop Robinson's Fifth-Amendment-due-process claim regarding identification of the accused at trial. See doc. 33 at 1; doc. {2024 U.S. Dist. LEXIS 9} 21-1.

Generally, section 2255(f) imposes a one-year period of limitation for filing a motion to vacate, set aside, or correct a sentence. That limitation period begins to run from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* If a petitioner does not file his motion or an amended motion within those time periods, the Court considers the motion or amended motion untimely filed.

The Court, however, will consider an untimely filed amended claim timely filed if it relates back to the original motion. Fed. R. Civ. P. 15(c). To relate back to the original motion, a claim must arise out of the same conduct, transaction, {2024 U.S. Dist. LEXIS 10} or occurrence as the claims raised in the original motion. See Fed. R. Civ. P. 15(c)(1)(B); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). "To arise out of the same conduct, transaction, or occurrence, the claims must be "tied to a common core of operative facts.'" *Taylor v. United States*, 792 F.3d 865, 869 (8th Cir. 2015) (quoting *Dodd v. United States*, 614 F.3d 512, 515 (8th Cir. 2010)). In the section 2255 context, "it is not enough that both an original motion and an amended motion allege ineffective assistance of counsel." *Dodd*, 614 F.3d at 515 (citing *United States v. Ciampi*, 419 F.3d 20, 24 (1st Cir. 2005)). "The allegations of ineffective assistance 'must be of the same "time and type" as those in the original motion, such that they arise from the same core set of operative facts.'" *Id.* (quoting *United States v. Hernandez*, 436 F.3d 851, 857 (8th Cir. 2006)). This means that claims do not relate back to the original motion if the petitioner bases them "on distinct types of attorney error." *Smith v. Buckner*, Case No. 1:18-cv-00220-RLW, 2021 U.S. Dist. LEXIS 43989, 2021 WL 876906, at *10 (E.D. Mo. Mar. 9, 2021) (citing *Dodd*, 614 F.3d at 515).

Here, the United States does not object to Robinson filing an amended motion that asserts his ineffective-assistance-of-appellate-counsel claim for failure to meaningfully develop his Fifth-Amendment-due-process claim regarding identification of the accused at trial. See doc. 26 at 5. This is so because the United States agrees that this claim relates back to Robinson's original motion. Doc. 26 at 5. Having considered Robinson's original motion, doc. 1, and his proposed amended motion, doc. 22-1, the Court agrees. Accordingly, {2024 U.S. Dist. LEXIS 11} the Court grants Robinson's [21] Motion for Leave to File an Amended § 2255 Petition. In accordance with Robinson's withdrawal of grounds two and three, the Court strikes those grounds from his amended motion, doc. 21-1. Further, the Court denies Robinson's original [1] Motion to Vacate, Set Aside, or Correct Sentence as moot in the light of the amended section 2255 motion. See *Schlafly v. Eagle Forum*, 970 F.3d 924, 933 (8th Cir. 2020) ("[A]n amended complaint supersedes an original complaint and renders the original complaint without legal effect." (quoting *Acuity v. Rex*, 929 F.3d 995, 999 (8th Cir. 2019))).

B. Merits of Robinson's amended section 2255 motion

Robinson's sole claim in his amended petition argues that his appellate counsel was ineffective because counsel failed to meaningfully develop Robinson's Fifth-Amendment-due-process claim regarding identification of the accused at trial. See doc. 21-1 at 4. The United States disagrees, arguing that courts in "the Eight [sic] Circuit assume 'appellate counsel's failure to raise a claim was an exercise of sound appellate strategy' absent evidence to the contrary," doc. 26 at 6 (quoting doc. 10 at 8, 12, 13), and that counsel reasonably declined to pursue Robinson's claim on appeal because the claim lacked merit, *id.* at 5-6; doc. 10 at 12 & n.11. The Court agrees with the United {2024 U.S. Dist. LEXIS 12} States.

To establish ineffective assistance of counsel, a petitioner "faces a heavy burden." *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000) (quoting *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996)). He must show both that his counsel's performance was deficient and that the deficient performance prejudiced the petitioner's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Sera*, 267 F.3d 872, 874 (8th Cir. 2001). An attorney's performance is deficient only if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88; see also *Sera*, 267 F.3d at 874. Two substantial impediments exist to making such a showing. First, "a 'strong presumption'" exists "that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006) (quoting *Strickland*, 466 U.S. at 689). Second, "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* (quoting *Strickland*, 466 U.S. at 690).

Robinson has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). On appeal, Robinson's counsel raised a claim that the United States failed to prove the identity of the accused at trial because one witness was unable to identify him in court. See *United States v. Robinson*, 2021 WL 5066531, at *9-11 (8th Cir. 2021). Although his appellate counsel "fail[ed] to 'meaningfully develop or argue'" the claim, doc. 124 at 6 (quoting *United States v. Ruzicka*, 988 F.3d 997, 1006 (8th Cir. 2021)),⁵ Robinson has not pointed to anything suggesting that appellate {2024 U.S. Dist. LEXIS 13} counsel's decision not to develop the argument was unreasonable.

Moreover, Robinson has failed to demonstrate that he was prejudiced by appellate counsel's failure to raise his identification-of-the-accused argument. Robinson's appellate counsel did what all appellate counsel must do: sort through arguments that an appellant can raise on appeal and determine which claims are most likely to result in success on appeal. Robinson's identification-of-

the-accused argument, however, was unlikely to succeed on appeal: two witnesses unequivocally identified Robinson during trial, and one said that Robinson appeared to be the man sitting at the defense table. Doc. 115 at 242; doc. 116 at 29, 776-77.6

Accordingly, "[a]bsent contrary evidence, [the Court] conclude[s] that appellate counsel was exercising sound appellate strategy in the 'process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail.' *Sidebottom v. Delo*, 46 F.3d 744, 759 (8th Cir. 1995) (quoting *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986)). "[F]ar from being evidence of incompetence, [this] is the hallmark of effective appellate advocacy." *Smith*, 477 U.S. at 536 (citing *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). The Court therefore holds that Robinson failed to establish that his appellate counsel was{2024 U.S. Dist. LEXIS 14} ineffective.

V. Conclusion

Accordingly, the Court grants Robinson's [21] Motion for Leave to File an Amended § 2255 Petition. In accordance with Robinson's withdrawal of grounds two and three, the Court strikes grounds two and three from the amended petition. Further, the Court finds that the record conclusively establishes that Robinson is not entitled to relief. The Court denies Robinson's [21-1] Amended Motion to Vacate, Set Aside, or Correct Sentence. A separate Order of Dismissal accompanies this Memorandum and Order.

VI. Certificate of appealability

For the Court to issue a certificate of appealability, Robinson must make a substantial showing that he suffered the denial of a constitutional right. See *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). A substantial showing is one indicating that reasonable jurists could debate the issues, a court could resolve the issues differently, or the issues deserve further proceedings. *Id.* But as described in the discussion above, Robinson has not made such a showing. Accordingly, the Court declines to issue a certificate of appealability in this case.

So ordered this 30th day of April 2024.

/s/ Stephen R. Clark

STEPHEN R. CLARK

CHIEF UNITED STATES DISTRICT JUDGE

Footnotes

1

The "doc." citations in this section refer to docket entries in *United States v. Robinson*, 4:20-cr-00023-SRC-1.

2

The "doc." citations in this section refer to docket entries in {2024 U.S. Dist. LEXIS 4} *United States v. Robinson*, 4:20-cr-00023-SRC-1.

3

The Court cites to page numbers as assigned by CM/ECF.

4

The "doc." citations in this section and the remainder of this order refer to docket entries in this case-*Robinson v. United States*, 4:23-cv-00707-SRC-unless otherwise noted.

5

This "doc." citation refers to a docket entry in *United States v. Robinson*, 4:20-cr-00023-SRC-1.

6

These "doc." citations refer to docket entries in *United States v. Robinson*, 4:20-cr-00023-SRC-1.

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United States of America, Appellee v. James Robinson, Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2022 U.S. App. LEXIS 25093
No: 21-2945
September 7, 2022, Decided

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis.
(4:20-cr-00023-SRC-1).United States v. Robinson, 2022 U.S. App. LEXIS 14837, 2022 WL 1741068 (8th Cir. Mo., May 31, 2022)

Counsel For United States of America, Plaintiff - Appellee: Cassandra J. Wiemken, U.S. ATTORNEY'S OFFICE, Eastern District of Missouri, Saint Louis, MO.
James Robinson, Defendant - Appellant, Pro se, Marion, IL.

Opinion

REVISED ORDER

The petition for rehearing by the panel is denied as untimely.

United States of America, Plaintiff - Appellee v. James Robinson, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2022 U.S. App. LEXIS 14837
No. 21-2945
April 15, 2022, Submitted
May 31, 2022, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Rehearing denied by United States v. Robinson, 2022 U.S. App. LEXIS 25093 (8th Cir. Mo., Sept. 7, 2022) Post-conviction relief denied at, Motion granted by, Certificate of appealability denied Robinson v. United States, 2024 U.S. Dist. LEXIS 78564, 2024 WL 1885586 (E.D. Mo., Apr. 30, 2024)

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from United States District Court for the Eastern District of Missouri - St. Louis.

Counsel For United States of America, Plaintiff - Appellee: Cassandra J. Wiemken, U.S. ATTORNEY'S OFFICE, Saint Louis, MO.

For James Robinson, Defendant - Appellant: Joseph Mark Hogan, HOGAN LAW FIRM, Clayton, MO.

James Robinson, Defendant - Appellant, Pro se, Marion, IL.

Judges: Before COLLTON, MELLOY, and GRUENDER, Circuit Judges.

CASE SUMMARY Defendant's conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C.S. § 922(g)(1), was affirmed because Government explained that it struck venire person at issue as she had visited her brother in prison and was previously employed at an organization that worked with young men in the criminal justice system.

OVERVIEW: HOLDINGS: [1]-Defendant's conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C.S. § 922(g)(1), was affirmed because contrary to defendant's argument that district court clearly erred in permitting the Government to strike venire person at issue, the Government articulated two valid race-neutral reasons to rebut defendant's *prima facie* showing. It explained that it struck venire person at issue as she had visited her brother in prison and was previously employed at an organization that worked with young men in the criminal justice system. Even though said venire person had not worked at the organization for several years, past employment is a valid, race-neutral reason to strike a potential juror.

OUTCOME: Conviction affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Appellate Review
Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Burdens of Proof
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Procedures
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Application to Ethnicity

Ordinarily, the appellate courts review for clear error a district court's finding that a peremptory strike was not based on race. Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race. First, the party objecting to the strike must make a *prima facie* showing that the strike has been exercised on the basis of race. Second, if that showing has been made, the opposing party must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the objecting party has shown purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the party opposing the strike.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Procedures

The standard that a party defending a Batson challenge must meet is extremely low.

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Race-Neutral Strikes

Past employment is a valid, race-neutral reason to strike a potential juror. Numerous valid factors may influence a prosecutor to strike a particular potential juror, including current and past employment. The inference that a juror's employment might make the juror more sympathetic to a criminal defendant is a valid, race-neutral reason for striking a juror. Working at an organization with a goal of rehabilitating criminals following their release from prison is a valid, race-neutral reason for striking a potential juror. So is a family member's criminal history.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Fair Cross-Section Challenges > Sixth Amendment Guarantee

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Bias & Prejudice > Right to an Unbiased Jury

Normally, an appellate court reviews *de novo* a claim that a defendant's Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community was violated. But when this claim was not raised to the district court, an appellate court reviews for plain error.

Opinion

PER CURIAM.

A08CASES

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James Robinson was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). *Voir dire* for Robinson's trial consisted of forty-three venirepersons. Only two venirepersons were black, venirepersons 10 and 25.

During *voir dire*, the district court¹ asked, "Have any of you or a close friend or relative ever been arrested for or charged with a crime or placed on probation in state or federal court where the punishment was one year or more?" Venirepersons 1, 9, 10, 14, and 15 answered affirmatively. Venirepersons 1, 14, and 15 had family members or friends with a criminal history but did not indicate that they had visited them in prison. Venireperson 9's father and close friend had been in prison or on probation, and venireperson 9 had visited his friend when he was² 2022 U.S. App. LEXIS 2 in prison ten to twelve years before Robinson's trial. Similarly, venireperson 10's "brother and other family and friends . . . ha[d] been in federal prison for narcotics distribution." Venireperson 10 had visited her brother several times while he was incarcerated, and the last visit was more than ten years before Robinson's trial. When asked, "Would your brother's situation cause you in any way not to be able to fairly and impartially decide this case based on the evidence presented here?" she responded, "No." She said her brother's most recent prison sentence was "about two years ago."

The Government exercised peremptory strikes on venirepersons 3, 5, 8, 9, 10, 14, and 31. Venireperson 10 was black. Robinson objected to the strike of venireperson 10 on the ground that it was motivated by a discriminatory purpose. The Government responded that it moved to strike venireperson 10 because she had visited a relative in prison and had also been previously employed by a charitable organization that works with young men in the criminal justice system. The Government also noted that it had moved to strike another venireperson who had visited a close family member in prison.

The district court³ permitted the strike because it concluded that the Government provided legitimate nondiscriminatory reasons for striking venireperson 10 and that there was not a similarly situated venireperson the Government did not strike. At trial, the jury found Robinson guilty. Robinson appeals and makes three arguments.²

First, Robinson argues that the district court clearly erred in permitting the Government to strike venireperson 10. "Ordinarily, we review for clear error a district court's finding that a peremptory strike was not based on race." *United States v. Hill*, 31 F.4th 1076, 1080 (8th Cir. 2022). "Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race." *Snyder v. Louisiana*, 552 U.S. 472, 476, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

First, the party objecting to the strike must make a *prima facie* showing that the strike has been exercised on the basis of race. Second, if that showing has been made, the opposing party must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the objecting party has shown purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the party opposing the⁴ strike. *Hill*, 31 F.4th at 1080 (internal quotation marks, brackets, and citations omitted).

The district court did not clearly err in permitting the Government to strike venireperson 10. "The standard that a party defending a *Batson* challenge must meet is extremely low." *Moran v. Clarke*, 443 F.3d 646, 652 (8th Cir. 2006). The Government articulated two valid race-neutral reasons to rebut Robinson's *prima facie* showing. It explained that it struck venireperson 10 because she had visited her brother in prison and was previously employed at an organization that worked with young men in the criminal justice system. Even though venireperson 10 had not worked at the organization

for several years, past employment is a valid, race-neutral reason to strike a potential juror.³ See *United States v. Grandison*, 885 F.2d 143, 149 (4th Cir. 1989) ("Numerous valid factors may influence a prosecutor to strike a particular potential juror, including current *and past* employment . . ." (emphasis added) (internal quotation marks omitted)); *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) ("The inference that a juror's employment might make the juror more sympathetic to a criminal defendant is a valid, race-neutral reason for striking a juror."). In fact, we have previously held that working at an organization "with a goal of rehabilitating criminals following their release from prison"⁴ {2022 U.S. App. LEXIS 5} is a valid, race-neutral reason for striking a potential juror. *United States v. Young*, 753 F.3d 757, 780-81 (8th Cir. 2014). So is a family member's criminal history. See, e.g., *United States v. Rodriguez*, 581 F.3d 775, 791-92 (8th Cir. 2009); *United States v. Brooks*, 2 F.3d 838, 840-41 (8th Cir. 1993).

Robinson also argues that the Government failed to strike similarly situated venirepersons who had close friends or relatives with a criminal history, though he did not raise this argument below. Our precedent is unclear about whether this argument gets no review or plain-error review. See *Hill*, 31 F.4th at 1082-84. But even if we apply plain-error review, we find no plain error. One of the Government's reasons for striking venireperson 10 was that she had visited her brother in prison, and the Government also moved to strike the other venireperson who had visited someone in prison, venireperson 9. Thus, there is no similarly situated venireperson whom the Government did not move to strike.

Additionally, Robinson asserts that the Government's strike was motivated by a desire to eliminate the only black venireperson. The record belies this claim because there was another black venireperson whom the Government did not move to strike and who served on the jury.

Second, Robinson argues that the Eastern District of Missouri's jury management plan discriminated against him⁵ {2022 U.S. App. LEXIS 6} because jurors are chosen from a single division within the Eastern District of Missouri rather than from the entire district. Normally, we review *de novo* a claim that a defendant's Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community was violated. *United States v. Reed*, 972 F.3d 946, 953 (8th Cir. 2020). But because this claim was not raised to the district court, we review for plain error. See *United States v. Olano*, 62 F.3d 1180, 1187 (9th Cir. 1995). Robinson has not met his burden to show that the plan violated his Sixth Amendment rights because he has not shown (1) that "the representation of [black persons] in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community" and (2) "that the underrepresentation of [black persons], generally and on his venire, was due to their systematic exclusion in the jury-selection process." See *Duren v. Missouri*, 439 U.S. 357, 364, 366, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). Therefore, the district court did not plainly err.

Finally, Robinson claims that his Fifth Amendment due process rights were violated because the Government failed to establish the identity of the accused at trial. However, Robinson has waived this issue by failing to "meaningfully develop or argue" it. See *United States v. Ruzicka*, 988 F.3d 997, 1006 (8th Cir. 2021) (alteration omitted).

For the foregoing reasons, we affirm Robinson's conviction.

Footnotes

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The Honorable Stephen R. Clark, United States District Judge for the Eastern District of Missouri.

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Robinson also filed a *pro se* motion to remand the action to state court under 28 U.S.C. § 1447(c), arguing that his case was improperly removed from state court. We deny this motion because Robinson's case was not removed from state court.

Robinson argues that venireperson 10's employment history is not part of the record because it was found only in a jury questionnaire and not inquired about during *voir dire*. But Robinson's counsel referred to the questionnaires during *voir dire*, and we have previously held that the district court did not clearly err in permitting the Government to strike a venireperson based in part on his answer to a question on a jury questionnaire. See *United States v. Ortiz*, 315 F.3d 873, 896-97 (8th Cir. 2002). Therefore, the Government was permitted to rely on venireperson 10's questionnaire answer as a reason for striking her.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA

§ JUDGMENT IN A CRIMINAL CASE

v.

JAMES ROBINSON

§ Case Number: 4:20-CR-00023-SRC(1)
§ USM Number: 49839-044
§ Joseph M. Hogan
§ Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/> pleaded guilty to count(s)	
<input type="checkbox"/> pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/> pleaded nolo contendere to count(s) which was accepted by the court	
<input checked="" type="checkbox"/> was found guilty on count(s) after a plea of not guilty	to count 1 of a one-count Indictment on April 7, 2021.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
<u>18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) Felon In Possession Of A Firearm</u>	<u>11/26/2019</u>	<u>1r</u>

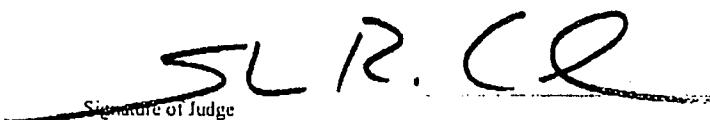
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 25, 2021

Date of Imposition of Judgment


Signature of Judge

STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

August 25, 2021

Date

TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES

§ 540.19 Legal correspondence.

(a) Staff shall mark each envelope of incoming legal mail (mail from courts or attorneys) to show the date and time of receipt, the date and time the letter is delivered to an inmate and opened in the inmate's presence, and the name of the staff member who delivered the letter. The inmate may be asked to sign as receiving the incoming legal mail. This paragraph applies only if the sender has marked the envelope as specified in § 540.18.

(b) The inmate is responsible for advising any attorney that correspondence will be handled as special mail only if the envelope is marked with the attorney's name and an indication that the person is an attorney, and the front of the envelope is marked "Special Mail — Open only in the presence of the inmate". Legal mail shall be opened in accordance with special mail procedures (see § 540.18).

(c) Grounds for the limitation or denial of an attorney's correspondence rights or privileges are stated in part 543, subpart B. If such action is taken, the Warden shall give written notice to the attorney and the inmate affected.

(d) In order to send mail to an attorney's assistant or to a legal aid student or assistant, an inmate shall address the mail to the attorney or legal aid supervisor, or the legal organization or firm, to the attention of the student or assistant.

(e) Mail to an inmate from an attorney's assistant or legal aid student or assistant, in order to be identified and treated by staff as special mail, must be properly identified on the envelope as required in paragraph (b) of this section, and must be marked on the front of the envelope as being mail from the attorney or from the legal aid supervisor.

Please address all mail to James Robinson in accord with 28 C.F.R. § 540.19 above, and before the name of the court give the name of the clerk and title:

e.g. "John or Jane Doe- Clerk of the U.S. Supreme Court".

Please comply with the special mail requirement in subsection "b". Thank you.

Respectfully,

James Robinson

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SUPREME COURT, U.S.