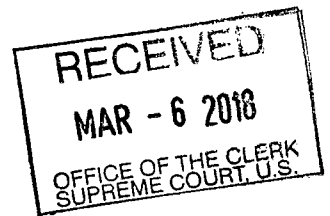


NO. 17-1217

IN THE
SUPREME COURT OF THE UNITED STATES



EUGENE SMITH- PETITIONER

VS

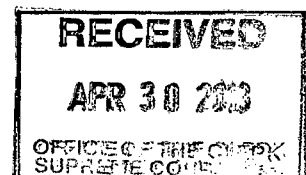
UNITED STATES OF AMERICA- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

EUGENE SMITH- Pro Se Petitioner
FEDERAL CORRECTIONAL INSTITUTION
2680 HWY 301 SOUTH
JESUP, GA 31599



LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTION PRESENTED

ISSUE I: DOES A MOTION TO REOPEN A SENTENCE PURSUANT TO 28 U.S.C. § 2255 PREDICATED ON THE VACATION, ON A CONSTITUTIONAL GROUND, OF A PRIOR STATE CONVICTION THAT ENHANCE PETITIONER'S SENTENCE ASSERTS A CONSTITUTIONAL CLAIM THAT ALLOWS A CERTIFICATE OF APPEALABILITY TO ISSUE?

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TABLE OF AUTHORITIES CITED

CASES:

Adams v. United States, 338 Fed. Appx. 799 (11th Cir. July 6 2009). p. 7.

Brady v. Maryland, 373 U.S. 83, 87-88 S. Ct. 1194, 10 L. Ed. 2d 215, 219 (1963). p. 6.

Custis v. United States, 511 U.S. 485, 497-114 S. Ct. 1732, 128 L. Ed. 2d 517, 529 (1994). p. 7.

Gilbert v. United States, 640 F.3d 1293, 1321 (11th Cir. 2001). p. 8-9.

Johnson v. United States, 544 U.S. 295, 303 125 S. Ct. 1571 1611 L. Ed. 2d 542, 552 (2005). p. 7.

Mateo v. United States, 398 F.3d 126, 127-28 (1st Cir. 2005). p. 8.

Slack v. McDaniel, 529 U.S. 473, 484 120 S. Ct. 1595, 14 L. Ed. 2d 542 (2000).
P. 5.

United States v. Cox, 245 F.3d 126, 130-31 (2d Cir. 2001). p. 8.

United States v Vaughn, 955 F.2d 367 (5th Cir. 1992). p. 8.

United State v. Walker, 198 F.3d 811 (11th Cir. 1999). p. 7.

STATUTES:

28 U.S.C. § 2255. p. 5,6,7.

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPTEMBER 25, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER 22, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5: Criminal actions-Provisions concerning- Due Process of law and just compensation clauses. No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury , except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On January 5, 2003, the victim of Petitioner's battery conviction disclosed to him that she executed a drop charge form approximately 3 months prior to Petitioner's plea of guilt on October 6, 2003, and indicated to the State that she did not wish to press charges and cooperate in the prosecution of Petitioner. Approximately one month prior to Petitioner's plea of guilt, Petitioner requested the State to provide a discovery/Brady material, however, the victim's actions were not provided to Petitioner by the State. Up until the victim's disclosure on January 5, 2003, Petitioner was unaware of such evidence. Armed with the newly discovered Brady evidence, Petitioner moved the State Court for relief pursuant to Fla.R.Crim.P. 3.850. On January 22, 2003, that motion was denied and affirmed on appeal. However, on discretionary review, the Order denying relief was reversed and the conviction vacated. Petitioner then moved in the United States District Court pursuant to 28 U.S.C. § 2255 premised on the vacatur of his predicate state conviction arguing that he was entitled to reopening and reduction of his sentence. Petitioner continued that even if his guideline range remained unchanged after the subtraction of the points assigned to the vacated conviction he was entitled to a reduction of his mid-range guideline sentence up to the low-end of the applicable guideline range. The District Court concluded that it lacked jurisdiction for such a reduction and denied a Certificate of Appealability. Petitioner then moved the Eleventh Circuit Court of Appeals for a Certificate of Appealability but that too was denied on September 25, 2003. Petitioner unsuccessfully moved for rehearing which was denied on November 22, 2003. This Petition for Certiorari follows:

REASONS FOR GRANTING THE PETITION

ISSUE: DOES A MOTION TO REOPEN A SENTENCE PURSUANT TO 28 U.S.C. § 2255 PREDICATED ON THE VACATION, ON A CONSTITUTIONAL GROUND, OF A PRIOR STATE CONVICTION THAT ENHANCED PETITIONER'S SENTENCE ASSERTS A CONSTITUTIONAL CLAIM THAT ALLOWS A CERTIFICATE OF APPEALABILITY TO ISSUE?

Argument

Petitioner asserts that the Eleventh Circuit erred in concluding that he failed to make a showing of a denial of a constitutional right where Petitioner's successfully attacked his prior state conviction because of a due process violation which is of constitutional dimension and the District Court's assessment that it lacked jurisdiction to reduce his sentence up to the low end of the guideline range is wrong or debatable. There is currently a circuit split on the issue of whether a petitioner asserts a constitutional claim where he obtains a vacatur of a predicate state conviction on constitutional grounds which makes Petitioner's issue one of national importance affecting others similarly situated.

"When a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2255(c) is straightforward: The petitioner must demonstrate that reasonable jurist would find the district court assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 120 S. Ct. 1595, 14 L. Ed 2d 542 (2000).

Petitioner asserts a constitutional claim

Petitioner asserts his claim is cognizable under the first prong of 28 U.S.C. § 2255(a) "that the sentence was imposed in violation of the constitutional or laws of the United States", giving the district court

jurisdiction to reduce his sentence, because his claim was predicated on the vacation of his prior state conviction due to the State's failure to turn over favorable evidence in violation of Brady v. Maryland, 373 U.S. 83, 87-88 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), such a claim is one of constitutional dimension, particularly, the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. See Brady, 373 U.S. at 87-88. Moreover, Petitioner's Brady claim if raised in a § 2255 motion in district court is cognizable under the first prong of § 2255(a) and recognized as an issue that asserts a constitutional claim. The District Court findings did not refute Petitioner's claim that his prior state conviction was vacated due to a Brady error. Thus, Petitioner asserts a constitutional claim.

The District Court's assessment of the constitutional claim is wrong or debatable

Petitioner argued to the District Court that if the Court finds that his guideline range did not change he contended, among other issues, that he would see a reduction of three criminal history points and requested that the Court reduce his sentence to the low end of the guideline range. See Appendix D. The District Court concluded "Therefore, Defendant asks that if the court disagrees with his position that the Guidelines range decreased as a result of the arguments contained within his motion, that the Court 'grant a sentence reduction to the low-end of the current guideline range'. No valid jurisdictional basis exists for the court to grant the requested reduction." See Appendix B at 8.

A district court may "reopen and reduce" a prisoner sentence once the prisoner has, "in state court, successfully attacked a prior conviction." that was previously used to enhance his federal sentence. United States v.

Walker, 198 F.3d 811 (11th Cir. 1999); Johnson v. United States, 544 U.S. 295, 303 (2005)("a defendant who successfully attacked his conviction in state court or on federal habeas review could then 'apply for reopening of any federal sentence enhanced by the state sentences")(citing Custis v. United States, 511 U.S. 485, 497 (1994)); Adams v. United States, 338 Fed. Appx. 799 (July 6th 2009)(explicitly affirming the district court's reduction of Adams' sentence to the low end of the guideline range following his successful attack on his prior conviction); 28 U.S.C. § 2255(a)("a federal prisoner may move the court which imposed the sentence to vacate, set aside or correct the sentence for, among other grounds, that the sentence was imposed in violation of the Constitution or laws of the United States").

As established above, Petitioner's claim in State Court was one of constitutional dimension that resulted in his prior conviction being vacated making his claim cognizable under the first prong of § 2255(a), "that the sentence was imposed in violation of the constitution or laws of the United States". Hence, the District Court had jurisdiction to reduce Petitioner's sentence up to the low end of the applicable guideline range where the guideline range remained unchange despite the subtraction of his prior conviction. See Johnson, 544 U.S. at 303; Walker, 198 F.3d at 813; 28 U.S.C. 2255(a).

Therefore, a Certificate of Appealability should have been granted where Petitioner has shown that he has a constitutional claim and the assessment of the constitutional claim by the District Court was debatable or wrong.

Circuit split

Gilbert v. United States, 640 F.3d 1293, 1321 (11th Cir. 2011) (stating that " Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation). Petitioner asserts that successfully attacking his prior conviction on constitutional grounds is not a sentencing error nor a technical misapplication of the sentencing guidelines and should not be grouped as such. Petitioner beseech this Court take action and adopt the First Circuits approach that allows a petitioner who successfully attacks his prior conviction based on a constitutional ground assert a constitutional claim which would allow him and others similarly situated to apply for a Certificate of Appealability.

This Court did not explicitly state in Custis v. United States, 511 U.S. 485, 114 S. Ct. 1732 178 L. Ed. 2d 517 (1994), or in Johnson v. United States, 544 U.S. 295, 125 S. Ct. 1571 161 L. Ed. 2d 542 (2005), that a motion to reopen a federal sentence after predicate state conviction has been vacated asserts a constitutional claim. Hence, there's currently a circuit split on the issue pitting the First Circuit Court of Appeals against the Second Circuit Court of Appeals.

The First Circuit has characterized a federal resentencing claim based on the vacation of a predicate state conviction on constitutional grounds as a constitutional claim under § 2255. In Mateo v. United States, 398 F.3d 126, 127-28 (1st Cir. 2005), the State Court vacated the defendant's plea because it was "premised on a constitutionally insufficient colloquy" Id at 128. The First Circuit "described such a violation as one of constitutional dimension, and, in any event, as a claim cognizable under § 2255 on the basis of which a district court may properly reopen a federal sentence." Id. at 136.

However, the Second Circuit in United States v. Cox, 245 F.3d 126, 130-31 (2d Cir. 2001), concluded, theoretically, that a dismissal of a prior state conviction on account of constitutional invalidity would involve "an incorrect application of the sentencing guidelines," which the court characterized as a "nonconstitutional ...sentencing issue." Id. at 131.

The Eleventh Circuit adopted the Second Circuit's approach when it denied Petitioner's application for certificate of appealability. The Second Circuit's approach analyzes Petitioner's issue akin to a sentencing error or a technical misapplication of the sentencing guidelines. See United States v. Vaughn, 955 F.2d 367 (5th Cir. 1992)("a technical misapplication of the sentence guidelines does not create a constitutional issue"); See also

2

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eugene Smith

Date: February 21, 2018

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11666-H

EUGENE SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

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

ORDER:

Eugene Smith moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion. Smith also moves to proceed *in forma pauperis* on appeal and for appointment of counsel. His motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Smith's motions to proceed *in forma pauperis* and for appointment of counsel are DENIED AS MOOT.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 3:06cr27/RV/EMT
3:16cv44/RV/EMT

EUGENE JEROME SMITH

ORDER, REPORT AND RECOMMENDATION

This case is before the court upon Defendant's "Amended Motion under § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" and supporting memorandum of law (ECF No. 371), to which the Government responded and Defendant replied (ECF Nos. 376, 377). Defendant has also filed a "Motion to Expand the Record Pursuant to Rule 7," a "Motion to Strike the Government's Response in Part," and a "Motion to Supplement Petitioner's Motion to Strike" (ECF Nos. 381, 384, 386). The case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2; *see also* 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

Defendant's "Motion to Expand the Record Pursuant to Rule 7," is hereby granted, and his "Motion to Strike the Government's Response in Part" and "Motion to Supplement Petitioner's Motion to Strike" are denied, except that the court has

taken the arguments into consideration in making its recommendation. After a review of the record and all arguments presented, it is the opinion of the undersigned that Defendant has not raised any issue requiring an evidentiary hearing and that the § 2255 motion should be denied. *See* Rules 8(a) and (b), Rules Governing Section 2255 Cases.

PROCEDURAL BACKGROUND and ANALYSIS

Defendant was convicted after a jury trial of three controlled substance offenses and sentenced to a term of 300-months imprisonment (ECF Nos. 57, 89). His conviction and sentence were affirmed on appeal, and the Supreme Court denied certiorari (ECF Nos. 146, 165). He filed numerous post-conviction motions, including two motions for a new trial, a motion for bond, a motion to vacate pursuant to 28 U.S.C. § 2255, and a motion to vacate pursuant to Fed. R. Civ. P. 60(b)(3), all of which were denied (*see* ECF Nos. 164, 167, 168, 169, 213, 234, 236, 240, 246, 249, 267, 272, 328, 335). His appeals were likewise unsuccessful. In July of 2015, Defendant's sentence was reduced from 300 months to 242 months, pursuant to a retroactive guidelines amendment (ECF No. 357). In February of 2016, Defendant filed a motion to vacate pursuant to § 2255 and a motion for bond (ECF

Nos. 364, 366). The instant amended § 2255 motion is now before the court (ECF No. 371).

Defendant claims that he is entitled to re-sentencing because one of the state court convictions used to calculate his criminal history was vacated in December of 2015. The undersigned notes that such a claim is not considered to be a “second or successive” claim, and § 2255(h)’s gatekeeping provision does not apply. *See Stewart v. United States*, 646 F.3d 856, 865 (11th Cir. 2011).

In its response to Defendant’s motion, the Government agrees that the battery conviction in paragraph 54 of Defendant’s Presentence Investigation Report (“PSR”) (ECF No. 387) has been vacated, and that, if Defendant were sentenced today, no criminal history points would be assessed for this conviction (*see* ECF No. 376 at 1). The Government also agrees that the “recency points” provision of U.S.S.G. § 4A1.1(e) would no longer apply if Defendant were sentenced today (ECF No. 376 at 2; PSR ¶ 60).

Defendant’s PSR reflects that he had a total of 17 criminal history points (ECF No. 387, PSR ¶ 61). Thirteen or more criminal history points establishes a criminal history category of VI. As such, even with the elimination of the two criminal

history points assessed for the offense in Paragraph 54, and the one additional “recency point,” Defendant would still have 14 criminal history points.

Defendant also challenges the assessment of points for the offenses listed in both Paragraph 53 and 55 of the PSR.¹ He claims that because these two cases were consolidated for sentencing, criminal history points should be assessed for only one of the convictions (ECF No. 371 at 21–22). Section 4A1.2(a)(2) of the United States Sentencing Guidelines provides that “[p]rior sentences are always counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). U.S.S.G. § 4A1.2(a)(2). The offense conduct in Paragraph 53 occurred on December 22, 2002. Defendant was arrested on February 24, 2003 (*see* ECF No. 387, PSR ¶ 53; ECF No. 381 at 5). The offense conduct at issue in Paragraph 55 occurred on April 14, 2003, two months after the arrest for the offense conduct in Paragraph 53. The PSR reflects that the conduct

¹ Defendant asserts that he did not raise this issue in his initial § 2255 motion for two reasons. First, he acknowledges that the misapplication of the sentencing guidelines is not a constitutional claim. Second, he notes that even if he had attributed the failure to raise this issue to ineffective assistance of counsel, he could not have shown prejudice because, at the time, removing the points attributable to this alleged error would not have reduced his criminal history category below category VI (*see* ECF No. 371 at 22–23). It is only now, after the removal of the other three points, that correction of this alleged error could impact his sentence.

described in Paragraph 55 was originally a misdemeanor for which Defendant was arrested on April 14, 2003, but that the case was transferred to the felony docket and Defendant was arrested on June 20, 2003 (*see* ECF No. 387, PSR ¶ 55; ECF No. 381 at 11). Defendant pleaded nolo contendere to both offenses on July 22, 2003, but they were separated by an intervening arrest.

Defendant maintains that the offense listed in Paragraph 53 of the PSR, identified as "Fleeing or Attempting to Elude Police Officer," is inaccurate (ECF No. 377 at 2-4). He notes that Escambia County Court records reflect that he was convicted of "Fleeing/Eluding LEO in Patrol Vehicle with Siren and Lights Activated," a more serious offense (*see* ECF No. 377 at 18). Defendant states that although the PSR lists the case number as DKT #2003-CF-978, with "CF" denoting it as a felony, the named offense was "clearly a misdemeanor at the time of his arrest" (ECF No. 377 at 3). Defendant represents that he was initially charged with misdemeanor fleeing and eluding in case 2003 MM 21172, but that the misdemeanor was dropped after the State opted to pursue felony charges. Significantly, Defendant argues, he was not re-arrested on the felony charges until April 16, 2003, two days after the offense conduct charged in Paragraph 55. Thus, he claims, the two offenses were not separated by an intervening arrest. He also asserts that

Paragraph 53 of the PSR should have reflected this misdemeanor-to-felony procedural history, as was done in Paragraph 55, which also involved what was originally a misdemeanor offense that was ultimately charged as a felony.

The procedural background of the offense charged in Paragraph 53 could have provided a more complete picture. However, Defendant's argument that it alters the outcome of his case is unpersuasive. Defendant's original arrest on the conduct charged in Paragraph 53 of the PSR occurred on February 24, 2003, regardless of how the offense conduct was either initially or ultimately characterized. There was no additional conduct that occurred or was incorporated into the case prior to his re-arrest. Rather, the offense conduct, as Defendant freely states, was merely "upgraded" by the State. Therefore, the fact that Defendant was not re-arrested on the felony fleeing and eluding charges until April 16, 2003, is of no moment. The fact remains that there was an intervening arrest between the date of the law violation charged in Paragraph 53 and the date of the law violation charged in Paragraph 55. Defendant's assertion that points should be assessed for only one of these offenses is incorrect.

In light of the court's conclusions above, Defendant's contention regarding his criminal history score—that the Government began its criminal history recalculation from an improper starting point—is both moot and without merit.

Defendant also claims that his PSR was corrected and that he only had a total of 16 criminal history points, rather than the 17 points cited by the Government. While Defendant is correct that there was a post-sentencing correction made to Paragraph 48 of his PSR, this change affected only the description of the adjudication of the offense and not the criminal history points attributed to him (*see* ECF Nos. 132–135; ECF No. 387, PSR ¶ 48). Thus, his criminal history category remains properly calculated at VI.

In a final effort to obtain sentencing relief, Defendant contends that even if his calculation of his criminal history points is incorrect, the court should still consider him for a reduction in his sentence (ECF No. 377 at 7–8). He notes that seven of his criminal history points come from three separate convictions for driving while license suspended, which he concedes are “serious” but contends are nevertheless “glorified traffic violations” (ECF No. 377 at 7; ECF No. 387, PSR ¶¶ 51, 55, 57). He also argues that the conviction in paragraph 55 was in error because at the time of his arrest and conviction, he actually had a valid driver's license (ECF

No. 377 at 25, Exh. G). In further support of his request for a sentence reduction, Defendant references a daily living report which describes him as a "valuable worker" who has "set the example for newly arriving inmates" and who is "remorseful for his past mistakes and has shown great steps to being rehabilitated" (ECF No. 377 at 28). He also reports that he has obtained a technical degree in computer fundamentals. Therefore, Defendant asks that if the court disagrees with his position that the Guidelines range decreased as a result of the arguments contained within his motion, that the court "grant a sentence reduction to the low-end of the current guideline range" (ECF No. 377 at 8). No valid jurisdictional basis exists for the court to grant the requested reduction.

CONCLUSION

For all of the foregoing reasons, the court finds that Defendant has failed to show that he is entitled to a reduction in the calculated guidelines range, or an evidentiary hearing. Therefore Defendant's motion, to the extent it is a request for sentencing relief, should be denied. However, amendment of the record to reflect that Defendant has a total of 14, rather than 17 criminal history points may be appropriate in the event of future adjustments.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant,” and if a certificate is issued “the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), § 2255 Rules.

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: “Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.” If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is **ORDERED**:

1. Defendant's "Motion to Expand the Record Pursuant to Rule 7" (ECF No. 381) is **GRANTED**.
2. Defendant's "Motion to Strike the Government's Response in Part" and "Motion to Supplement Petitioner's Motion to Strike" (ECF Nos. 384, 386) are **DENIED**, except that the court has considered the arguments contained therein in making its recommendation.

And it is respectfully **RECOMMENDED** that:

1. The amended motion to vacate, set aside, or correct sentence (ECF No. 371) be **DENIED**, but that the record be amended to reflect an adjustment to the number of criminal history points attributable to Defendant.
2. A certificate of appealability be **DENIED**.

At Pensacola, Florida, this 9th day of February 2017.

/s/ Elizabeth M. Timothy

ELIZABETH M. TIMOTHY

CHIEF UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11666-H

EUGENE SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

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

Before: TJOFLAT and HULL, Circuit Judges.

BY THE COURT:

Eugene Smith has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 25, 2017, order denying a certificate of appealability, and denying as moot his motions to proceed *in forma pauperis* and for appointment of counsel, in his underlying motion to vacate, 28 U.S.C. § 2255. He has also filed a motion to remand. Upon review, Smith's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. As such, his motion to remand is also DENIED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 22, 2017

Eugene Smith
FCI Jesup - Inmate Legal Mail
2680 HWY 301 S
JESUP, GA 31599

Appeal Number: 17-11666-H
Case Style: Eugene Smith v. USA
District Court Docket No: 3:16-cv-00044-RV-EMT
Secondary Case Number: 3:06-cr-00027-RV-EMT-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

Petitioner's point total at 17. However, Petitioner asserts that he had his PSR amended on June 21, 2007, which reduced his criminal history point total to 16 because ¶48 inaccurately attributed a point. See doc. 134 and Exhibit F.

Reduction is proper even if guideline range remains the same

While Petitioner remains steadfast in his opinion that the guideline range changes and his sentence should be vacated, he nonetheless find it prudent for his reply to be comprehensive and state his position in response to the Government's position that since Petitioner's guideline range doesn't change the Court can resentence Petitioner without a hearing or if the Court don't alter it judgment after recalculation it can deny Petitioner's § 2255 motion.

Petitioner asserts that he would see a reduction of three points and would have a total of 13 points which is the lowest permissible point total for criminal history VI. Petitioner also asserts that seven points come from three convictions for driving while license suspended which are serious but glorified traffic violations. One of the driving while license suspended convictions, case no. 2003 CF 2748, listed at paragraph 55 of the PSR has been recognized by the court that it was obtained erroneously because at the time of arrest and conviction Petitioner had a valid driver license. See Exhibit G at 2. Petitioner was assessed three points for that conviction. Two additional points was assessed from being on probation for the DWLS conviction which put a total of nine points deriving from traffic violations. Nevertheless, Petitioner contends that he has demonstrated that he is worthy of a second opportunity live in society and operate within the laws of

society. Petitioner has been a model inmate for the ten years that he has been incarcerated on his current sentence. Erudition has its limits without practice and in turn Erudition is limited due to circumstances. Petitioner has obtained a computer fundamental degree from the local community college, Altamaha Technical College, maintaining 3.5 gpa. Petitioner understands that education is the key to success in life, therefore, he prays that this Court allow him the opportunity to be eligible for a reduction and to ultimately be release to pursue his family, education, and career goals. Case Managaer, David Wingate, has observed that "Inmate Smith is a valuable worker in Unicor and has set the example for newly arriving inmates. He shows leadership for other inmates in the unit and on his work detail....He is remorseful for his past mistakes and has shown great steps to being rehabilitated." See Exhibit H. Petitioner contends that the Court can consider Petitioner's post-sentence conduct in prison at resentencing. See United States v Pepper, 131 S. Ct. 1229 179 L. Ed. 2d 196 (2011). Therefore, if this Court disagrees with Petitioner's position that the guideline range don't change, as set out above Petitioner requests that this Court grant a sentence reduction to the low-end of the current guideline range.

Evidentiary Hearing warranted

This Court opined that an evidentiary hearing will not be required unless consideration of disputed evidence outside the record appears necessary to the Court. Petitioner contends that the offense listed on ¶53 of the PSR is disputed as inaccurate by Petitioner and the arrest date for ¶53 of the PSR, case no. 2003 CF 978 A is also disputed. Petitioner contends that

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 3:06cr27/RV/EMT
3:16cv44/RV/EMT

EUGENE JEROME SMITH

ORDER

This cause comes on for consideration upon the chief magistrate judge's Report and Recommendation, dated February 9, 2017 (ECF No. 388) (Report). The parties have been furnished with a copy of the Report and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of all timely filed objections.

Having considered the Report, and the timely filed objections thereto (doc. 391-392), I have determined that the Report should be adopted in all respects. I have only one thing to add.

As detailed in the Report, the defendant challenges, *inter alia*, the assessment of points for the offenses listed in Paragraphs 53 and 55 of his PSR. He was arrested for the offense in Paragraph 53 on February 24, 2003 (for conduct that occurred on December 22, 2002), after which he was arrested for the offense in Paragraph 55 on April 14, 2003 (for conduct that occurred on April 14, 2003). He argues that because

the two cases were consolidated for sentencing, criminal history points should have been assessed for only one of the convictions because they were not separated by an intervening arrest. *See* U.S.S.G. § 4A1.2(a)(2) (“Prior sentences are always counted separately *if* the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)” (emphasis supplied)). The two convictions were not separated by an intervening arrest, the defendant contends, because the first case (the offense charged in Paragraph 53) was originally charged as a misdemeanor, but it was subsequently upgraded to a felony *after* his arrest for the second case (the offense charged in Paragraph 55). The Report states that “regardless of how the offense conduct was either initially or ultimately characterized . . . [t]he fact remains that there was an intervening arrest between the date of the law violation charged in Paragraph 53 and the date of the law violation charged in Paragraph 55.” I agree, and note that the Fourth Circuit has held similarly. In *United States v. Crawford*, 552 Fed. Appx. 240 (4th Cir. 2014) (unpublished decision), the defendant objected to his designation as a career offender based on the fact that he was arrested for misdemeanor assault on January 20, 2009, after which he was arrested for a separate charge on February 10, 2009, and, thereafter, on April 6, 2009, the initial misdemeanor charge was upgraded to a felony. The Fourth Circuit said in that case:

Appellant argues there was no intervening arrest between the two qualifying offenses in this case because, while he was ultimately convicted of felony assault based on his January 20, 2009 misdemeanor arrest, he was not charged with a *felony* for that offense until April 6, 2009, which was *after* his February 10, 2009 arrest, and he was not rearrested following the April 6, 2009 felony indictment. Appellant's argument is basically one of semantics. He urges that even though he was ultimately charged and convicted of a felony, because his initial arrest was based on a misdemeanor charge at the time of arrest, it should not count for the purpose of the career offender calculus.

Although we have not addressed this precise issue, our analysis need go no further than the plain language of the Sentencing Guidelines provision itself. Under a plain reading of U.S.S.G. § 4A1.2(a)(2), whether or not an intervening arrest has occurred is solely a matter of *timing*; offenses are separated by an intervening arrest occur when "the defendant is arrested for the first offense *prior to committing the second offense*." (emphasis supplied). Nothing in the plain language of the Sentencing Guidelines gives any weight to the *nature* of the crime with which the defendant is initially charged. This comports with a common-sense interpretation of the definition of an "intervening arrest" because, as a practical matter, the nature and scope of charges often change between the time an individual is initially arrested and the point at which a full investigation is conducted and the individual is formally charged. See *United States v. Coleman*, 38 F.3d 856, 860 (7th Cir. 1994) ("Once arrested, the defendant was 'arrested' for all charges that might have been filed relating to his conduct. When looking for an intervening arrest [under the Guidelines], we concentrate on the defendant's conduct.").

Id. at 247-48 (emphasis in the original).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

VS

CASE NO. 3:06cr27-RV/EMT
3:16cv44-RV/EMT

EUGENE JEROME SMITH

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the defendant, EUGENE JEROME SMITH'S
motion to vacate, set aside, or correct sentence is DENIED.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

March 15, 2017
DATE

/s/ Paula Cawby
Deputy Clerk