IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10126-D

CHARLIE VERNON, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Charlie Vernon is a federal prisoner serving a 280-month sentence after a jury found him guilty of possession with intent to distribute and distribution of 28 grams or more of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(B)(iii), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 924(e) and 922(g). The jury acquitted him of possessing a firearm in furtherance of a drug trafficking crime, in violation of § 924(c).

In March 2016, Mr. Vernon filed the present *pro se* motion to vacate, pursuant to 28 U.S.C. § 2255, raising the following claims for relief:

(1) Appellate counsel failed to respond to the government's motion for summary affirmance, effectively denying him the assistance of counsel;

(2) The district court violated his due process rights when it sentenced him under the Armed Career Criminal Act ("ACCA"), as the government failed to prove that his prior convictions occurred on separate occasions;

(3) The district court violated the Sixth Amendment by providing a coercive jury instruction, and counsel was ineffective for failing to object;

(4) His trial was fundamentally unfair, as his physical infirmities impaired his ability to assist counsel; and

(5) His imprisonment, as a severely physically handicapped individual, violates the Eighth Amendment.

The government responded and attached an affidavit from Mr. Vernon's counsel, who represented him at trial and on appeal, which explained his strategy during trial and his actions on appeal. Counsel's affidavit will be discussed in greater detail below, when analyzing each of Mr. Vernon's claims. After Mr. Vernon replied, the district court denied Mr. Vernon's § 2255 motion, in part on the merits, in part as procedurally defaulted, along with a certificate of appealability ("COA"). Mr. Vernon now seeks a COA and *in forma pauperis* ("IFP") status from this Court.

BACKGROUND

In this case, law enforcement received an anonymous tip that drugs were being trafficked at a residence, which turned out to be Vernon's mother's residence. Law enforcement set up surveillance and observed heavy pedestrian traffic, and also collected trash outside the residence, which contained marijuana residue, cocaine residue, marijuana stems and blunts, and other items. Mail and food containers belonging to Vernon were found during this trash pull. Law enforcement subsequently obtained a search warrant to search the residence, and in executing the warrant, found Mr. Vernon with roughly $2,000 on him, located near cocaine and a digital scale. According to law enforcement, Mr. Vernon confessed to selling drugs and having four firearms.

While represented by his initial counsel, Stephen Baer, Mr. Vernon moved to suppress the fruits of the search, including evidence seized and any statements. Mr. Vernon argued that the search warrant was not supported by probable cause, as the search warrant affidavit mentioned pedestrian traffic coming to and from the residence, and specifically mentioned the driveway, but did not mention anyone entering the residence. He argued that the trash pulls did not support probable cause, as the residence was located in a high crime area, and the trashcan was accessible to the general public. He argued that the good-faith exception to suppression did not apply.

After an evidentiary hearing, the trial court denied the motion to suppress, ruling that the search warrant was supported by probable cause or, alternatively, the good-faith exception to the warrant requirement was satisfied. Mr. Vernon subsequently proceeded to trial with new counsel, who Mr. Vernon claims was ineffective in the present § 2255 motion. At the beginning of trial, counsel informed the court that Mr. Vernon had a medical condition that required him to need to use the bathroom regularly, and that it was often a matter of urgency. The court informed the parties that it would accommodate the condition. In relevant part, Mr. Vernon testified, on his own behalf, that during February 2013, he was going back and forth from his girlfriend's house to his mother's house, the residence that was the subject of the search warrant.

During jury deliberations, the jury informed the trial court that it had reached a unanimous decision on two counts, but was having difficulty reaching a unanimous decision on the remaining count. The trial court then gave the following instruction:

> I'm going to ask you to continue with your deliberations in an effort to agree upon a verdict so we can completely dispose of the case.
>
> This is an important case, needless to say. The trial has been expensive in time, the effort, money, and emotional strain on both the defense and the prosecution. If you fail to agree on a verdict with regard to that third count, the case will be left open and may have to be tried again. Obviously another trial would only increase the cost to both sides, and there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has before you. Any future jury would have to be selected in the same manner and from the same source as you were chosen. There's no reason to believe that the case could be submitted to 12 people more – more impartial or more conscientious than you are.

> So, if a substantial majority of you are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression on the minds of the others.
>
> And if a majority or even the smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again, and very thoughtfully, whether you should accept the weight and sufficiency of evidence that fails to convince your fellow jurors beyond a reasonable doubt.
>
> So, remember at all times, no juror is expected to give up an honest belief about the weight and the effect of the evidence; but after considering the evidence in the case, you must agree upon a verdict, if you can.
>
> If the evidence fails to establish guilt beyond a reasonable doubt, the defendant must have a unanimous verdict of not guilty.
>
> You should not be hurried in your deliberations and should take as much time as you feel necessary; but with regard to the question of time, we will not be permitted to go beyond 5:00 this evening; and if we do not reach a verdict by 5:00 this evening – a unanimous verdict by 5:00 this evening, we will be obliged to continue the matter until Tuesday or Wednesday of next week.

After the court read this instruction, defense counsel verified that the trial judge had read the modified *Allen*[1] charge and confirmed that there was nothing further that he believed should be communicated to the jury. Approximately 20 minutes later, the jury returned with a verdict on all 3 counts. The jury found Mr. Vernon guilty of possession with intent to distribute and distribution of cocaine, and possession of a firearm by a convicted felon, but acquitted him of possessing a firearm in furtherance of a drug trafficking crime. At sentencing, Mr. Vernon confirmed that the facts in the presentence investigation report ("PSI") were accurate, beside that he maintained his innocence. Counsel confirmed that Mr. Vernon had four qualifying ACCA offenses. The court imposed 280-month concurrent sentences.

Mr. Vernon directly appealed, arguing that the trial court erred when it denied his motion to suppress. Mr. Vernon argued only that the trial court erred in concluding that the search

[1] *Allen v. United States*, 164 U.S. 492 (1896).

warrant was supported by probable cause, and did not argue that the trial court erred by concluding that the good-faith exception existed. The government moved for summary affirmance because Mr. Vernon failed to challenge the alternative basis for the trial court's denial of his motion to suppress. Mr. Vernon did not respond. This Court granted the government's motion for summary affirmance, as Mr. Vernon did not mention the good-faith exception in his initial brief, and had the burden to prove that each stated ground for the district court's judgment was incorrect.

DISCUSSION:

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, the movant 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (quotation omitted). A procedural default may be excused, however, if the movant establishes (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) a fundamental miscarriage of justice, which means actual innocence. *Id.* (quotation and emphasis omitted).

To establish ineffective assistance of counsel, a petitioner must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

"Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). In order to establish prejudice, this Court must review the merits of the unraised claim. *Id.* at 1264-65. Counsel's performance is prejudicial if this Court holds that the neglected claim would have a reasonable probability of success on appeal. *Id.* at 1265. However, appellate counsel is not required to raise every non-frivolous issue, provided that counsel uses professional judgment in deciding not to raise an issue. *Eagle v. Linahan*, 279 F.3d 926, 940 (11th Cir. 2001). In considering the reasonableness of counsel's decision not to raise a particular issue, this Court considers all of the circumstances, and gives great deference to counsel's judgments. *Id.*

Claim 1

In Claim 1, Mr. Vernon argued that appellate counsel was ineffective for failing to respond to the government's motion for summary affirmance, effectively denying him the assistance of counsel. He asserted that appellate counsel did not understand that, if he failed to challenge on appeal one of the trial court's grounds for judgment, he abandoned any challenge to that ground. Because appellate counsel failed to mention the good-faith exception to the suppression claim, the government was entitled to summary affirmance. He argued that evidence showed that the searched residence was not his house, and therefore, law enforcement lacked good faith in searching and seizing him and his property.

In counsel's affidavit, he stated that he had reviewed the motion to suppress, a supplemental motion, the government's response, and the order denying the suppression motion, and concluded that Baer had done all that he could do based on the facts, and the court came to the correct conclusion. Counsel stated that he explained his conclusion and reasons to Mr. Vernon, provided him with copies of all cases cited and relevant journal excerpts, and informed him that the court's order denying his motion to suppress would not be overturned by this Court. Counsel stated that, when he was drafting Mr. Vernon's appeal, he was presented with the fact that, even if the search warrant affidavit was insufficient to support probable cause, the trial court alternatively found that law enforcement acted in good faith. Counsel performed Westlaw searches and consulted other authorities and colleagues, but could not find any case with similar facts on which he could rely to make a non-frivolous argument that any of the exceptions to the good-faith rule existed.

The district court denied relief, finding that Mr. Vernon could not establish that counsel's performance was deficient, or that he was prejudiced. Counsel was aware that he needed to respond to the government's motion for summary affirmance in order to prevent this Court from affirming the denial of the motion to suppress, but determined that he had no basis on which to contest the court's good-faith ruling, and therefore, decided not to pursue the issue. The court found that Mr. Vernon had not rebutted counsel's sworn affidavit establishing that his actions were reasonable, and therefore, failed to establish that counsel was deficient. The court further found that Mr. Vernon could not show prejudice, as he had not raised an argument that would have merit on appeal. Mr. Vernon's sole basis for having the court's alternative ruling overturned was that he did not own the residence that was searched, but this did not address whether law enforcement had a good-faith basis to believe that the search warrant was supported by probable cause.

Reasonable jurists would not debate the district court's resolution of Claim 1. Reasonable jurists would not debate whether counsel's performance was deficient, as counsel decided not to respond to the government's motion for summary affirmance, as he had no basis on which to contest the court's good-faith ruling. *See Eagle*, 279 F.3d at 940. Reasonable jurists also would not debate whether Mr. Vernon showed prejudice from counsel's behavior, as he does not explain how law enforcement lacked good faith to believe that the warrant was supported by probable cause. It is unclear how any evidence showing that Mr. Vernon did not own the searched residence would affect law enforcement's good faith in relying on the search warrant.

Claim 2

In Claim 2, Mr. Vernon argued that the district court violated due process when it sentenced him under the ACCA, as the government failed to prove to the jury beyond a reasonable doubt that his prior convictions occurred on separate occasions. He asserted that a reasonable doubt standard of proof was appropriate in proving the separateness element. He contended that the failure to prove the elements of an ACCA violation resulted in actual and factual innocence, which extinguished any procedural default.

The district court denied relief on Claim 2, finding that this claim was procedurally defaulted when it was not raised on direct appeal. It found that, although Mr. Vernon attempted to argue that he was actually innocent, he never actually alleged that he did not have the qualifying separate convictions, only that the government never proved the convictions to the jury. The court found that the government was not forced to prove the existence of the qualifying convictions to the jury, and instead, was permitted to rely on undisputed facts in the PSI. Because the PSI established that the qualifying offenses occurred on separate occasions, and Mr. Vernon admitted at sentencing that he had four qualifying convictions, his argument that he was actually innocent was refuted by the record.

Reasonable jurists would not debate the district court's resolution of Claim 2. Mr. Vernon did not raise this claim on direct appeal, and therefore, this claim is unexhausted and procedurally defaulted. *See McKay*, 657 F.3d at 1196. However, Mr. Vernon claims that he is actually innocent, which would allow the district court to review this claim on the merits. *See id.* Mr. Vernon's assertion is that he is actually innocent because the government failed to prove that his ACCA predicate offenses occurred on separate dates. However, he does not allege that he is innocent of the sentencing enhancement, as his argument merely concerns the government's burden of proof, and not whether he actually had the three qualifying convictions. Therefore, reasonable jurists would not debate whether this claim is procedurally defaulted.

Claim 3

In Claim 3, Mr. Vernon argued that the district court violated the Sixth Amendment by providing a coercive jury instruction, and counsel was ineffective for allowing this instruction and failing to perfect this claim for appeal. Specifically, when the jury informed the district court that it could not reach a decision on one charge, the court gave a modified *Allen* charge, and threatened the jury that, if it did not make a decision, it would have to come back on Tuesday. He argued that counsel should have objected to the *Allen*-charge and the "Tuesday push." He asserted that, even without the objection, the court committed a plain error of constitutional magnitude.

In counsel's affidavit, he stated that, from the nature of the jury's questions and requests for additional information, he knew that it was having trouble coming up with a verdict on the § 924(c) count. As a matter of strategy, he was pleased with the court's instruction, as it seemed to prod the jury into making a decision. He hoped that the jury would come to a compromise and find Mr. Vernon not guilty on the § 924(c) count.

The district court denied Claim 3, finding that the court did not err, and counsel was not deficient. The court found that the modified *Allen* charge was not inherently coercive. As to the court's reference to the jury coming back the following week, that was not coercive, but simply informative. The court found that, because the trial court did not err in giving the *Allen* charge, counsel's failure to object did not rise to the level of deficient performance, as any objection would have been overruled. Moreover, counsel explained his sound strategy for not objecting to the charge, which was not rebutted by Mr. Vernon. Alternatively, the court found that this claim was procedurally defaulted.

Reasonable jurists would not debate the district court's merits-based conclusion.[2] In *Allen*, the Supreme Court held that it is not error to charge the jurors, on their return for further instructions, that (1) it is their duty to decide the case, if they can conscientiously do so; (2) they should listen to each other's arguments; (3) if a majority is in favor of conviction, a dissenting juror should consider whether his doubt is reasonable; and (4) if a majority is for acquittal, the minority should consider whether they may reasonably doubt their judgment. 164 U.S. at 501. The modified *Allen* charge in the Eleventh Circuit Pattern Jury Instructions informs jurors that time, effort, money, and emotional strain has been exhausted on the trial, and there was no

[2] Although the district court alternatively denied this claim as procedurally defaulted, because reasonable jurists would not debate whether Claim 3 stated a valid claim of the denial of a constitutional right, the procedural ruling need not be discussed. *See Slack*, 529 U.S. at 484.

reason to believe another jury would be more competent to decide the case, or that more clear evidence could be produced. 11th Cir. Pattern Jury Inst. T5. The instruction further states:

> If a substantial majority of you are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again – and most thoughtfully – whether you should accept the weight and sufficiency of evidence that fails to convince your fellow jurors beyond a reasonable doubt.

Id. The instruction reminds jurors not to give up their honest beliefs, and asks the jury to continue deliberating with these additional comments in mind. *Id.* This Court has approved the use of the pattern *Allen* charge on numerous occasions. *United States v. Bush*, 727 F.3d 1308, 1320 (11th Cir. 2013).

Reasonable jurists would not debate whether the trial court erred by giving a modified *Allen* charge, as such a charge has been approved on several occasions by this Court. As to Mr. Vernon's contention that the trial judge threatened the jury that, if it did not make a decision, it would have to come back on Tuesday, such a contention is without merit. When a defendant does not object to an *Allen* charge, a court's decision will not be reversed unless there is plain error, and to determine such, courts consider whether the charge was inherently coercive. *United States v. Jones*, 504 F.3d 1218, 1219 (11th Cir. 2007). This Court has held that an instruction is impermissibly coercive if it appears to give a jury no choice but to return a verdict. *Id.*

This portion of the charge was not coercive, and instead, was informative. The trial judge was simply letting the jury know that it would not be kept past 5:00 p.m., and when deliberations were expected to resume. This portion of the instruction did not appear to give the jury no choice but to return a verdict. Therefore, reasonable jurists would not debate whether this portion of the charge was inherently coercive. Moreover, because the charge was not erroneous, it is not debatable whether no competent counsel would have failed to object.

Claim 4

In Claim 4, Mr. Vernon contended that his trial was fundamentally unfair because his physical infirmities impaired his ability to assist counsel. He was severely diabetic, which impacted his ability to focus and testify. He asserted that the court was aware of his condition, and should have suspended trial or declared a mistrial until his condition was stabilized. Mr. Vernon also faulted counsel for failing to bring his illness's effects to the court's attention. He contended that counsel knew that he had lost the ability to read, as diabetes impaired his eyesight, which contributed to his inability to prove that the searched residence was not his. If he could have reviewed the evidence, he would have explained to counsel why the search was in bad faith.

The district court found that Mr. Vernon's argument that the trial court erred was without merit. The trial court was never told that Mr. Vernon's ability to assist his counsel was impaired, but rather, was only informed that Mr. Vernon had a medical condition that required him to regularly need to use the bathroom in an urgent manner. Because the trial court was not aware of any medical condition affecting his ability to assist counsel, it did not err by allowing the trial to proceed. The court found that Mr. Vernon also had not shown how he was prejudiced by trial counsel's failure to inform the court of his symptoms. Although Mr. Vernon contended that his symptoms impaired his ability to prove that the residence searched was not his, and that he could have explained why the search was in bad faith, he did not show that the result of his proceeding would have been different, as he made this argument at trial, and the jury rejected it.

Reasonable jurists would not debate the district court's denial of relief. First, the trial court was not informed that Mr. Vernon was suffering from any infirmity affecting his ability to assist counsel, and therefore, whether the trial court erred is not debatable. Next, it is not debatable whether trial counsel was ineffective for failing to bring his infirmities to the court's attention. Mr. Vernon cannot show that reasonable jurists would debate whether the result of his proceedings would have been different had counsel informed the court of his infirmities.

Although Mr. Vernon claims that he could have proved that the searched residence was not his, counsel attempted to do this at trial, and Mr. Vernon has not shown a reasonable probability that he could have done this more effectively. Moreover, at trial, Mr. Vernon testified that he was going back and forth from his girlfriend's house to his mother's house, which weighs against his argument that he did not live at the subject residence. Furthermore, although Mr. Vernon contended that he could have explained to counsel why the search was not in good faith, if he was claiming that the searched residence was not his, he would have lacked standing to challenge the good-faith ruling. *See United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991)(holding that the defendants lacked standing to object to a search when they explicitly disclaimed ownership or interest in the property, even though they had access and kept personal effects at the property).

Claim 5

In Claim 5, Mr. Vernon argued that his current imprisonment, as a physically handicapped individual, violated the Eighth Amendment. He asserted that, under the current state of federal prison healthcare and facilities, his generation-long sentence deprived him of liberty and biological integrity.[3] The district court denied relief on Claim 5, finding that the claim was not cognizable in a § 2255 motion.

Reasonable jurists would not debate the district court's resolution of Claim 5. Any complaints that Mr. Vernon has about the quality of medical care that he receives in prison are properly brought in a 42 U.S.C. § 1983 complaint, not a § 2255 motion. The appropriate relief for a claim attacking prison conditions would be to require that any improper practices be discontinued, or that any conditions causing cruel and unusual punishment be corrected. *Fernandez v. United States*, 941 F.2d 1488, 1194 (11th Cir. 1991). This type of relief is not available in the § 2255 context. *See* 28 U.S.C. § 2255(a) (stating that a prisoner may move the district court to vacate, set aside, or correct his sentence when his sentence was imposed in violation of the Constitution of federal law, the court was without jurisdiction to impose the sentence, the sentence was in excess of the statutory maximum, or the sentence was otherwise subject to collateral attack).

CONCLUSION

Based on the foregoing, reasonable jurists would not debate the district court's resolution of Mr. Vernon's § 2255 motion. Vernon's motion for a COA is DENIED, and his motion for IFP status is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

[3] It is unclear what Mr. Vernon meant by biological integrity.

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No. 17-10126-D

CHARLIE VERNON, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: JORDAN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Charlie Vernon, Jr. has filed a motion for reconsideration of this Court's order dated June 1, 2017, denying his motions for a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Because Vernon has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, this motion for reconsideration is DENIED.