

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13773-K

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ISAAC JEROME SMITH,
a.k.a. Sherome Lee Shannon,
a.k.a. Sheron Lee Shannons,
a.k.a. Sherone Lee Shannons,
a.k.a. Isaac Smith,

Defendant - Appellant.

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

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Isaac Jerome Smith has failed to pay the filing and docketing fees to the district court within the time fixed by the rules, effective February 22, 2018.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Beth Johnson-Kellmayer, K, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13773-K

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISAAC JEROME SMITH,

Defendant-Appellant.

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

ORDER:

Isaac Jerome Smith is a federal prisoner serving a 294-month sentence for possessing ammunition as a convicted felon. He appealed, and this Court affirmed his conviction and sentence. He then filed multiple 28 U.S.C. § 2255 motions, all of which were denied on the merits or as improperly successive.

In 2011, Smith filed a Fed. R. Civ. P. 60(b) motion, contending that the district court lacked subject-matter jurisdiction to hear his case because the government did not prove that the ammunition that he possessed traveled in interstate commerce. The district court denied his Rule 60(b) motion, construing it as a second or successive § 2255 motion because he sought to attack his original judgment of conviction after he had already filed a § 2255 motion, which was denied with prejudice. As a result, the court concluded that Smith was not entitled to a certificate of

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appealability (“COA”). Smith appealed, filed a motion for a COA in this Court, and this Court denied that motion.

In July 2017, Smith filed another Rule 60(b)(6) motion (the “second Rule 60(b) motion”), essentially reiterating the arguments that he made in his prior Rule 60(b) motion. He also challenged the denial of his previous § 2255 motions. Without explanation, the district court denied Smith’s second Rule 60(b) motion. Smith then filed a notice of appeal and a motion for leave to appeal *in forma pauperis* (“IFP”), which the district court denied. So he filed a motion for IFP status in this Court.

A COA is required for the appeal of any denial of a Rule 60(b) motion in a § 2255 proceeding. *Jackson v. Crosby*, 437 F.3d 1290, 1295-96 (11th Cir. 2006). However, we have explained in *Hubbard v. Campbell* that the dismissal of a successive habeas motion for lack of subject-matter jurisdiction does not constitute a “final order in a habeas corpus proceeding” for purposes of 28 U.S.C. § 2253(c). *See* 379 F.3d 1245, 1247 (11th Cir. 2004). Instead, this Court may review that dismissal as a “final decision” under 28 U.S.C. § 1291. *See id.*

When a *pro se* plaintiff brings a motion under Rule 60, the district court may appropriately construe it as a § 2255 motion, and, if applicable, treat it as an unauthorized second or successive motion. *See Williams v. Chatman*, 510 F.3d 1290, 1293-95 (11th Cir. 2007). Specifically, Rule 60(b) motions are subject to the restrictions of second or successive habeas petitions if the prisoner is attempting to raise a new ground for relief or to attack a federal court’s previous resolution of a claim on the merits, even if “couched in the language of a true Rule 60(b) motion.” *Gonzalez v. Crosby*, 545 U.S. 524, 531-32, 125 S. Ct. 2641, 2647-48, 162 L. Ed. 2d 480 (2005).

As a preliminary matter, the district court properly construed Smith's Rule 60(b) motion as a successive § 2255 motion because Smith merely reiterated his previous arguments. *See Gonzalez*, 545 U.S. at 531-32. Thus, Smith did not need a COA to appeal the dismissal of his successive § 2255 motion. *See Hubbard*, 379 F.3d at 1247.

Based on Smith's inmate account statement and affidavit of indigency, he is a pauper, and although he is not required to obtain a COA to appeal the judgment of dismissal, because he seeks leave to proceed IFP on appeal, his appeal from the judgment is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B); *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983); *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (holding that an action is frivolous if it is without arguable merit either in law or fact). Here, the district court also properly dismissed the motion as impermissibly successive, as the record demonstrates that Smith's prior § 2255 motions were denied on the merits, and this Court has not granted Smith permission to file a successive § 2255 motion. *See United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition."). Further, Smith has not demonstrated that his claims fall into the small subset that must not be categorized as successive. *See Stewart v. United States*, 646 F.3d 856, 859 (11th Cir. 2011). Therefore, he does not have a non-frivolous issue with respect to the dismissal of his successive § 2255 motion.

Accordingly, Smith's motion for leave to proceed IFP is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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

UNITED STATES OF AMERICA

vs.

Case No. 3:06cr26/RV

ISAAC JEROME SMITH
Defendant.

ORDER

This cause is before the court upon defendant's notice of appeal (doc. 128), construed as a motion for certificate of appealability. Defendant is appealing this court's denial of his motion for relief from final judgment (doc. 121), filed pursuant to FEDERAL RULE OF CIVIL PROCEDURE 60(b).

This court must determine whether a certificate of appealability is appropriate for any of the issues defendant seeks to raise in his appeal of the denial of his RULE 60(b) motion. See 28 U.S.C. § 2253(c)(2) (providing that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right"). Defendant, who was charged with possession of ammunition affecting interstate commerce by a convicted felon, argues that the court accepting his plea lacked subject matter jurisdiction because, he alleges, the government failed to prove the required nexus between the ammunition and interstate commerce. The court finds that defendant is not entitled to the issuance of a certificate of appealability.

To obtain a certificate of appealability under § 2253(c), "a habeas prisoner must make a substantial showing of the denial of a constitutional right" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Generally speaking, RULE 60(b) is not a proper avenue for relief in criminal proceedings. See *Serrano v. United States*, 411 F. App'x 253, 255 (11th Cir. 2011) ("Rule 59 and Rule 60(b) are civil remedies, and, therefore,

cannot be used to obtain relief from a judgment in a criminal case.”); *United States v. Mosavi*, 138 F.3d 1365, 1366 (11th Cir. 1998) (recognizing that “Rule 60(b) simply does not provide for relief from judgment in a criminal case”). Though under limited circumstances a prisoner may use a RULE 60(b) motion to challenge a judgment denying relief in a post-conviction proceeding, see *Serrano*, 411 F. App’x at 255, here defendant, in effect, is attacking the original judgment of conviction.

Moreover, because defendant’s nominal RULE 60(b) motion was actually “aimed at having a judgment of conviction and sentence set aside because of some constitutional violation, jurisdictional defect, or other ground that makes the judgment subject to collateral attack,” the motion is properly construed as one arising under 28 U.S.C. § 2255. See *Gonzalez v. Sec’y for Dep’t of Corr.*, 366 F.3d 1253, 1260 (11th Cir. 2004) (discussing the distinction between a § 2255 motion and a RULE 60(b) motion, the latter of which “is aimed at having a prior judgment denying § 2255 relief from a conviction and sentence set aside because of some problem with or defect in the proceeding that led to the judgment denying § 2255 relief”). Defendant, who has already filed a motion to vacate under § 2255 (doc. 68), is proscribed from filing a second or successive such motion absent authorization from the U.S. Court of Appeals for the Eleventh Circuit. See *Weeks v. United States*, 382 F. App’x 845, 849 (11th Cir. 2010). For these reasons, the court concludes that defendant has not made a substantial showing of the denial of a constitutional right.

Accordingly, it is ORDERED:

Defendant’s motion for certificate of appealability (doc. 128) is DENIED.

DONE AND ORDERED this 6th day of April, 2012.

/s/ Roger Vinson

ROGER VINSON
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

VS

CASE NO. 3:06cr26/RV

ISAAC JEROME SMITH

REFERRAL AND ORDER

Referred to Judge Vinson on July 24, 2017

Type of Motion/Pleading MOTION FOR TERMINATION OF JUDGMENT AND
IMMEDIATE RELEASE Fed.R.Civ.P. 60(b)(6)

Filed by: Defendant on 7/21/2017 Doc. No. 160

() Stipulated/Consented/Joint Pleading

RESPONSES:

_____ on _____ Doc. No. _____
_____ on _____ Doc. No. _____

JESSICA J. LYUBLANOVITS
CLERK OF COURT

s/ Susan Simms

Deputy Clerk: Susan Simms

ORDER

Upon consideration of the foregoing, it is ORDERED this 26th day of
July, 2017, that:

- (a) The requested relief is DENIED.
(b) See all of the prior orders in this case.

/s/ Roger Vinson

ROGER VINSON
SENIOR UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CASE NO.: 3:06cr26/RV/MD

ISAAC JEROME SMITH,
Defendant.

ORDER

This cause is before the court upon defendant's motion for "habeas corpus challenging the conviction and sentence imposed." (Doc. 152). Defendant's habeas corpus petition was filed in his original criminal case and must instead be transferred to a new civil case for proper adjudication.

Accordingly, it is ORDERED:

Defendants's habeas corpus petition (doc. 152) will be transferred to a new civil case. The clerk is directed to open a new civil case number and file the petition under that number. Following transfer of the petition, defendant's motion for habeas corpus in 3:06cr26/RV/MD (doc. 152) will be DENIED as MOOT in light of the new civil case.

DONE AND ORDERED this 17th day of April, 2013.

Charles J. Kahn, Jr.

**CHARLES J. KAHN, JR.
UNITED STATES MAGISTRATE JUDGE**

Appendix A

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ISAAC JEROME SMITH, a.k.a. Sherome Lee Shannon, a.k.a. Sheron Lee Shannons, a.k.a. Sherone Lee Shannons, a.k.a. Isaac Smith, Defendant-Appellant.

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
480 F.3d 1277; 2007 U.S. App. LEXIS 6299; 20 Fla. L. Weekly Fed. C 410**

No. 06-14077 Non-Argument Calendar

March 19, 2007, Decided

March 19, 2007, Filed

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Smith v. United States, 552 U.S. 872, 128 S. Ct. 175, 169 L. Ed. 2d 119, 2007 U.S. LEXIS 9791 (2007) Subsequent civil proceeding at Smith v. Gilmore, 2007 U.S. Dist. LEXIS 73431 (N.D. Fla., Oct. 2, 2007) Decision reached on appeal by, Motion denied by United States v. Smith, 300 Fed. Appx. 738, 2008 U.S. App. LEXIS 24066 (11th Cir. Fla., 2008)

Editorial Information: Prior History

Appeal from the United States District Court for the Northern District of Florida. D.C. Docket No. 06-00026-CR-3-001-MCR.

Disposition:

AFFIRMED.

Counsel

For Smith, Isaac Jerome, Appellant: Nkrumah, Kafahni, Assistant Federal Public Defender, PENSACOLA, FL.

For United States of America, Appellee: Register, Lennard B. III, U.S. Attorney's Office, PENSACOLA, FL.

For Appellee: Wilson, E. Bryan, U.S. Attorney, U.S. Attorney's Office NDFL, TALLAHASSEE, FL.

Judges: Before TJOFLAT, HULL and MARCUS, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the 294-month sentence for his violation of 18 U.S.C.S. §§ 922(g)(1) and 924(e), arguing that the United States District Court for the Northern District of Florida committed a sentencing enhancement error and a Booker error. Defendant's 294-month sentence for his violation of 18 U.S.C.S. §§ 922(g)(1) and 924(e) was affirmed since a preponderance of the evidence supported the district court's finding that he possessed the ammunition "in connection with" another felony offense, and the district court did not commit a Booker error.

OVERVIEW: Defendant argued that the district court erred by finding that he possessed the ammunition "in connection with" another felony offense within the meaning of U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) and erred under the Booker decision by enhancing his sentence based on facts not proven to a jury beyond a reasonable doubt and sentencing him under a mandatory U.S. Sentencing Guidelines (Guidelines) system. A preponderance of the evidence supported the district court's finding that defendant possessed the ammunition "in connection with" the other felony offenses of either cocaine

possession or resisting arrest, or both. There was no error in the district court's conclusion that the government had met its burden to establish, by a preponderance of the evidence, the facts necessary to support the sentencing enhancement. The record showed that the district court understood the Guidelines to be advisory, recognized its authority to vary from them, and ultimately concluded that a 294-month term of imprisonment was sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in 18 U.S.C.S. § 3553(a). The district court imposed a reasonable sentence.

OUTCOME: Defendant's sentence was affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Sentencing > Guidelines

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview

An appellate court reviews a district court's application and interpretation of the U.S. Sentencing Guidelines de novo and its factual findings for clear error.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

Criminal Law & Procedure > Sentencing > Imposition > Factors

An appellate court reviews the ultimate sentence imposed for reasonableness, in the context of the factors outlined in 18 U.S.C.S. § 3553(a).

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

When a defendant raises a claim for the first time on appeal, an appellate court's review is for plain error.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Penalties

Criminal Law & Procedure > Sentencing > Guidelines

Criminal Law & Procedure > Sentencing > Adjustments

U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) provides that if the defendant used or possessed any firearm or ammunition "in connection with" another felony offense increase the base offense level by 4 levels. The other felony offense is defined as any offense, federal, state, or local, punishable by imprisonment for a term of more than one year, whether or not the defendant was charged with that offense. U.S. Sentencing Guidelines Manual § 2K2.1, cmt., application n. 4.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Penalties

Criminal Law & Procedure > Sentencing > Guidelines

Criminal Law & Procedure > Sentencing > Adjustments

The United States Court of Appeals for the Eleventh Circuit has held that the term "in connection with" in U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) should be given its ordinary and natural meaning, and that court has expressly rejected a more restrictive interpretation. Moreover, in interpreting U.S.

Sentencing Guideline provisions that contain an "in connection with" requirement identical to § 2K2.1(b)(5), the United States Court of Appeals for the Eleventh Circuit has held that in certain circumstances, mere possession of a firearm can be enough to apply a sentencing enhancement.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Sentencing > Adjustments
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

The government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement.

Criminal Law & Procedure > Witnesses > Credibility

Credibility determinations are the exclusive province of the fact finder.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Impartial Jury
Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Sentencing > Imposition > Findings

The Booker decision holds that the Sixth Amendment right to trial by jury is violated where under a mandatory U.S. Sentencing Guidelines (Guidelines) system a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury. When the district court applies the Guidelines in an advisory manner, nothing in the Booker decision prohibits district courts from making, under a preponderance-of-the-evidence standard, additional factual findings that go beyond a defendant's admissions. Moreover, the district court's factual findings for purposes of sentencing may be based on, among other things, evidence heard during trial, undisputed statements in the presentence investigation report, or evidence presented during the sentencing hearing.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Sentencing > Presentence Reports

When a defendant fails to object to a fact contained in the presentence investigation report or in the government proffer at the plea colloquy, the defendant is deemed to have admitted the fact, which may then be used to enhance the sentence.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Impartial Jury
Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Sentencing > Imposition > Findings

The use of extra-verdict enhancements in an advisory U.S. Sentencing Guidelines system is not unconstitutional.

Opinion

Opinion by: MARCUS

Opinion

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{480 F.3d 1278} MARCUS, Circuit Judge:

Isaac Jerome Smith appeals his 294-month sentence for possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(e). On appeal, Smith argues that: (1) the district court erred by finding that he used the ammunition "in connection with" another felony offense; and (2) the district court erred under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), by enhancing his sentence based on facts not proven to a jury beyond a reasonable doubt and sentencing him under a mandatory Guidelines system. 1 After careful review, we affirm.

We review the district court's application and interpretation of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. {480 F.3d 1279} Kinard*, 472 F.3d 1294, 1297 n.3 (11th Cir. 2006) (per curiam); *United States v. Rhind*, 289 F.3d 690, 693 (11th Cir. 2002). We review the ultimate sentence imposed for reasonableness, in the context of the factors outlined in 18 U.S.C. § 3553(a). *United States v. Winingear*, 422 F.3d 1241, 1246 (11th Cir. 2005) (per curiam). Because Smith raises his *Booker* claims for the first time on appeal, our review is for plain error. See *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.), *cert. denied*, 545 U.S. 1127, 125 S. Ct. 2935, 162 L. Ed. 2d 866 (2005).

According to the presentence investigation report ("PSI"), which the district court adopted, and the testimony presented at Smith's sentencing hearing, the facts relevant to Smith's sentencing arguments are these. On January 27, 2006, Deputy Michael Gilmore, of the Escambia County Sheriff's Office, executed a traffic stop of a vehicle in which Smith was a passenger. During the stop, Deputy Gilmore observed Smith attempt to conceal a firearm and to put a bag of suspected cocaine in his sock. Deputy Gilmore instructed Smith to place his hands on his head, but Smith instead reached underneath the seat. Deputy Gilmore then pulled on Smith's arm in an attempt to pull him from the vehicle. After Smith managed to manoeuvre out of Gilmore's grip, Smith pulled the bag from his sock and dropped it on the floorboard of the vehicle. Smith then exited the car and tried to strike Deputy Gilmore. After a struggle, Smith escaped on foot.

Deputy Gilmore pursued Smith and observed him throw an object to the ground. After Smith was apprehended, Gilmore found a .38 caliber bullet in the location on the street where he had seen Smith throw the object. A search of Smith at the scene resulted in the recovery of another .38 caliber bullet from his front shirt pocket. A corrections deputy at the jail discovered yet another bullet in Smith's front pants pocket.

The driver of the stopped car left the scene in his car when Gilmore began chasing Smith. The driver was never identified, and officers never recovered the handgun or bag of suspected cocaine that Deputy Gilmore had observed in Smith's possession during the initial stop of the vehicle.

At Smith's sentencing hearing, Special Agent Craig Saier, of the Bureau of Alcohol, Tobacco, and Firearms, testified that Smith previously had been convicted of two robberies that involved firearms. About three months after his release from imprisonment for the robberies, he was arrested for selling cocaine. During his arrest, he attempted to use a firearm against the arresting officers. Special Agent Saier also described some phone calls Smith had made from the jail after his arrest on the instant charges, during which Smith told the other person (who Special Agent Saier believed was Smith's wife) that "that lady no longer has what was in the car at the time it was stopped, that she would have gotten rid of it." When confronted with the phone calls, Smith admitted that the driver's name was Monique, but claimed that he did not know her last name or where she resided.

The PSI recommended a base offense level of 24 and a 4-level upward enhancement for possession of a firearm or ammunition in connection with another felony offense (resisting arrest with violence), pursuant to U.S.S.G. § 2K2.1(b)(5). In addition, the PSI noted that because Smith was subject to an

enhanced sentence under 18 U.S.C. § 924(e), his adjusted offense level was a 34, pursuant to U.S.S.G. § 4B1.4(b)(3)(A), since he possessed ammunition in connection with a crime of violence. With an adjusted offense level of 34 and a criminal history category VI, {480 F.3d 1280} Smith faced an advisory Guidelines range of 262 to 327 months imprisonment.

The district court overruled Smith's objections to the PSI's imposition of the enhancement under U.S.S.G. § 2K2.1(b)(5), finding that Smith possessed the ammunition in connection with a drug felony. More specifically, the court found that Deputy Gilmore's testimony established the presence of a firearm, and that even if there was no firearm, the ammunition was sufficiently connected with Smith's resistance of an officer. The district court also noted, alternatively, that the enhancement applied because the ammunition was possessed in connection with the drugs that Gilmore witnessed Smith drop in the car.

After adopting the PSI's findings and recommendations, the district court imposed a 294-month term of imprisonment followed by a 5-year term of supervised release. In imposing sentence, the court stated that it had consulted the advisory Guidelines range and the factors set forth in 18 U.S.C. § 3553(a) in arriving at the sentence. This appeal followed.

First, Smith argues the district court erred by finding that his possession of the ammunition was "in connection with" another felony, within the meaning of U.S.S.G. § 2K2.1(b)(5), which provides: "[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense . . . increase [the base offense level] by 4 levels." U.S.S.G. § 2K2.1(b)(5) (2005). The other "felony offense" is defined as any offense (federal, state, or local) punishable by imprisonment for a term of more than one year, whether or not the defendant was charged with that offense. *Id.* at cmt. n.4.

We have held that the term "in connection with" in U.S.S.G. § 2K2.1(b)(5) should be given its ordinary and natural meaning, and we have expressly rejected a more restrictive interpretation. *Rhind*, 289 F.3d at 695; see also *United States v. Young*, 115 F.3d 834, 838 (11th Cir. 1997) (per curiam) (refusing to adopt a more restrictive interpretation that required the firearm to serve a purpose related to the crime). Moreover, in interpreting Guideline provisions that contain an "in connection with" requirement identical to U.S.S.G. § 2K2.1(b)(5), we have held that, "in certain circumstances, mere possession of a firearm can be enough to apply a sentencing enhancement." *United States v. Jackson*, 276 F.3d 1231, 1234 (11th Cir. 2001).

Here, a preponderance of the evidence supported the district court's finding that Smith possessed the ammunition in connection with the other felony offenses of either cocaine possession or resisting arrest, or both. *Cf. United States v. Askew*, 193 F.3d 1181, 1183 (11th Cir. 1999) (holding that the government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement). Deputy Gilmore described seeing Smith in possession of a white, powdery substance, which Smith attempted to conceal in his sock. Moreover, Gilmore observed Smith attempt to reach into an area below his seat, where Gilmore had seen him drop a firearm, shortly before Smith began fighting with Gilmore. 2 On this record, we discern no error in the district court's conclusion that the government had met its burden to establish, by a preponderance of the evidence, {480 F.3d 1281} the facts necessary to support the sentencing enhancement.

Next Smith argues, for the first time on appeal, that the district court erred under *Booker* by treating the Guidelines as mandatory and making additional factual findings to support enhancement of his sentence. *Booker* holds that "the Sixth Amendment right to trial by jury is violated where *under a mandatory guidelines system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." *United States*

v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir.) (emphasis in original), *cert. denied*, 545 U.S. 1127, 125 S. Ct. 2935, 162 L. Ed. 2d 866 (2005). When the district court applies the Guidelines in an advisory manner, nothing in *Booker* prohibits district courts from making, under a preponderance-of-the-evidence standard, additional factual findings that go beyond a defendant's admissions. See *United States v. Chau*, 426 F.3d 1318, 1322-23 (11th Cir. 2005). Moreover, "[t]he district court's factual findings for purposes of sentencing may be based on, among other things, evidence heard during trial, undisputed statements in the PSI, or evidence presented during the sentencing hearing." *United States v. Polar*, 369 F.3d 1248, 1255 (11th Cir. 2004); see also *United States v. Shelton*, 400 F.3d 1325, 1329-30 (11th Cir. 2005) (holding that when a defendant fails to object to a fact contained in the PSI or in the government proffer at the plea colloquy, the defendant is deemed to have admitted the fact, which may then be used to enhance the sentence).

From our review of the transcript from the sentencing hearing, it is *clear* that the district court considered the Guidelines to be advisory. Indeed, the district judge explicitly stated that she had consulted the "advisory range" and determined that no departures from that range were warranted. The court also noted that it had considered the factors set forth in 18 U.S.C. § 3553(a) in arriving at a sentence. Thus, the record showed that the district court understood the Guidelines to be advisory, recognized its authority to vary from them, and ultimately concluded that a 294-month term of imprisonment "is sufficient but not greater than necessary to comply with the purposes of sentencing set forth in [§ 3553(a)]." Because the court understood it was operating under an advisory scheme, its fact-finding did not implicate the Sixth Amendment. See *Chau*, 426 F.3d at 1323 ("As we have explained, 'all nine [justices] agreed that the use of extra-verdict enhancements in an advisory guidelines system is not unconstitutional.'" (citation omitted)). We affirm Smith's sentence because the district court did, in fact, consider the advisory Guidelines range, as well as the § 3553(a) factors, and imposed a reasonable sentence.

AFFIRMED.

Footnotes

1

In light of our decision on Smith's first argument, and given his concession that his prior convictions are of the type and seriousness so as to render him eligible for enhancement under the Armed Career Criminal Act ("ACCA"), we reject his challenge to the district court's enhancement of his offense level pursuant to U.S.S.G. § 4B1.4.

2

We find Smith's argument concerning Gilmore's credibility and whether he indeed saw a gun and drugs to be without merit, in light of the district court's factual findings. Cf. *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (holding that credibility determinations are the exclusive province of the fact finder (quotations omitted)), *modified on other grounds*, *United States v. Toler*, 144 F.3d 1423 (11th Cir. 1998).

Appendix B

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ISAAC JEROME SMITH, a.k.a. Sherome Lee Shannon, a.k.a. Sheron Lee Shannons, a.k.a. Sherone Lee Shannons, a.k.a. Isaac Smith, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

300 Fed. Appx. 738; 2008 U.S. App. LEXIS 24066

No. 08-13770 Non-Argument Calendar

November 21, 2008, Decided

November 21, 2008, Filed

Notice:

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

Editorial Information: Subsequent History

Post-conviction proceeding at, Magistrate's recommendation at United States v. Smith, 2009 U.S. Dist. LEXIS 46871 (N.D. Fla., May 15, 2009) Post-conviction relief dismissed at Smith v. United States, 2011 U.S. Dist. LEXIS 67634 (S.D. Miss., June 22, 2011) Magistrate's recommendation at, Habeas corpus proceeding at, Motion granted by Smith v. United States, 2013 U.S. Dist. LEXIS 81191 (N.D. Fla., May 23, 2013)

Editorial Information: Prior History

Appeal from the United States District Court for the Northern District of Florida. D.C. Docket No. 06-00026-CR-3-MCR. United States v. Smith, 480 F.3d 1277, 2007 U.S. App. LEXIS 6299 (11th Cir. Fla., 2007)

Disposition:

AFFIRMED.

Counsel

Isaac Jerome Smith (06384-017), Appellant, Pro se, JESUP, GA.

For United States of America, Appellee: Lennard B. Register, III, U.S. Attorney's Office, PENSACOLA, FL; E. Bryan Wilson, TALLAHASSEE, FL; Thomas P. Swaim, PENSACOLA, FL.

Judges: Before BLACK, MARCUS and FAY, Circuit Judges.

Opinion

{300 Fed. Appx. 738} PER CURIAM:

Isaac Smith appeals *pro se* the denial of his motion to reduce his sentence, filed pursuant to 18 U.S.C. § 3582(c)(2). Smith argues that the district court abused its discretion in denying his motion by failing to apply Amendment 599 to his U.S.S.G. § 2K2.1(b)(5) enhancement. After careful review, we affirm.

We review a district court's denial of a defendant's § 3582(c)(2) motion for abuse of discretion. *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003). Under § 3582(c)(2), a district court

has discretion to reduce the term of imprisonment of an already incarcerated defendant when that defendant was sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o). *United States v. Bravo*, 203 F.3d 778, 780 (11th Cir. 2000); 18 U.S.C. § 3582(c)(2).

Amendment 599 became effective November 1, 2000, and amended the commentary to U.S.S.G. § 2K2.4, which provides the base offense level for individuals who have violated either 18 U.S.C. §§ 844(h), {300 Fed. Appx. 739} 924(c), or 929(a). 1 U.S.S.G. App. C, Amendment 599; see also U.S.S.G. § 2K2.4. Amendment 599 directed that, if a sentence under § 2K2.4 was being "imposed in conjunction with a sentence for an underlying offense," a district court should "not apply any specific offense characteristics for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." U.S.S.G. App. C, Amendment 599. The purpose of Amendment 599 was "to clarify under what circumstances defendants sentenced for violations of 18 U.S.C. § 924(c) in conjunction with convictions for other offenses may receive weapon enhancements contained in the guidelines for those other offenses." *Id.*

Because Amendment 599 became effective November 1, 2000, *prior* to Smith's sentencing, Section 3582 does not permit a modification of Smith's sentence. See 18 U.S.C. § 3582(c)(2) (allowing a motion to modify when a sentencing range has "subsequently been lowered" by an amendment to the sentencing guidelines). Smith's argument also fails on the merits because Amendment 599 amended the commentary to § 2K2.4, which provides the base offense level for individuals who have violated either 18 U.S.C. §§ 844(h), 924(c), or 929(a), yet Smith violated 18 U.S.C. §§ 922(g)(1) and 924(e). Therefore, Amendment 599 is inapplicable to Smith on its face, and the district court did not abuse its discretion by denying Smith's § 3582 motion. 2

AFFIRMED. 3

Footnotes

1

Section 844(h) criminalizes the use of fire or the use or carrying of explosives during the commission of any felony. 18 U.S.C. § 844(h). Section 924(c) criminalizes the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking offense. 18 U.S.C. § 924(c). Section 929(a) criminalizes the carrying or use of a firearm and possession of armor piercing ammunition, capable of being fired in that firearm, during and in relation to a crime of violence or a drug trafficking offense. 18 U.S.C. § 929(a).

2

We also note that Smith has abandoned any argument as to Amendment 709 because he did not raise it here. See *Irwin v. Hawk*, 40 F.3d 347, 347 n.1 (11th Cir.1994) (noting that a *pro se* litigant abandons an issue by failing to challenge it on appeal).

3

Because the facts and legal question at issue here are simple and straightforward, Smith's motion for appointment of counsel is DENIED.

Appendix C

UNITED STATES OF AMERICA vs. ISAAC J. SMITH
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA
DIVISION
2009 U.S. Dist. LEXIS 46871
3:06cr26/MCR,3:08cv315/MCR/MD
May 15, 2009, Decided
May 15, 2009, Filed

Editorial Information: Subsequent History

Adopted by, Motion denied by United States v. Smith, 2009 U.S. Dist. LEXIS 46878 (N.D. Fla., June 4, 2009)

Editorial Information: Prior History

United States v. Smith, 300 Fed. Appx. 738, 2008 U.S. App. LEXIS 24066 (11th Cir. Fla., 2008)

Counsel

ISAAC JEROME SMITH, also known as SHEROME LEE SHANNON, also known as SHERON LEE SHANNONS, also known as SHERONE LEE SHANNONS, also known as ISAAC SMITH, Defendant (3:06-cr-00026-MCR-MD-1), Pro se, JESUP, GA.

For ISAAC JEROME SMITH, also known as SHEROME LEE SHANNON, also known as SHERON LEE SHANNONS, also known as SHERONE LEE SHANNONS, also known as ISAAC SMITH, Defendant (3:06-cr-00026-MCR-MD-1): KAFAHNI NKRUMAH, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER OFFICE - PENSACOLA FL, PENSACOLA, FL.

For USA, Plaintiff (3:06-cr-00026-MCR-MD-1): LENNARD B REGISTER, III, LEAD ATTORNEY, US ATTORNEY - PENSACOLA FL, NORTHERN DISTRICT OF FLORIDA, PENSACOLA, FL; THOMAS P SWAIM, LEAD ATTORNEY, US ATTORNEY - PENSACOLA FL, PENSACOLA, FL.

For ISAAC JEROME SMITH, Petitioner (3:08-cv-00315), Pro se, JESUP, GA.

Judges: MILES DAVIS, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: MILES DAVIS

Opinion

REPORT AND RECOMMENDATION

This matter is before the court upon a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (doc. 68). The government has filed a response (doc. 80) and the defendant has filed a traverse (doc. 82). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After a careful review of the record and the arguments presented, it is the opinion of the undersigned that defendant has not raised any issue requiring an evidentiary hearing, Rules Governing Section 2255 Cases 8(a) and (b),

and that the motion should be denied.

I. BACKGROUND

Defendant was charged in a single count indictment with possession of ammunition in and affecting interstate commerce by a convicted felon. (Doc. 1). The indictment listed four prior felonies. These offenses were also separately listed in a corrected notice of enhancement information. (Doc. 5). Represented by Assistant Federal Public Defender Kafahni Nkrumah, defendant entered a plea of guilty pursuant to a written statement of facts and plea and cooperation agreement. (Doc. 14 & 16). The facts in support of the guilty plea provided that while in the process of conducting a lawful traffic stop, 1 an Escambia County Sheriff's Office (ECSO) deputy observed the defendant, who was a passenger in the vehicle, attempt to conceal what appeared to be a firearm under the passenger seat. (Doc. 14 at 1). When the deputy opened the passenger door, he observed the defendant place what appeared to be a bag of cocaine into his sock. (Doc. 14 at 1-2). The deputy removed defendant from the car, and observed the bag fall onto the floorboard of the car. The defendant spun away from the deputy and ran, with the deputy giving chase. During the pursuit, the deputy observed the defendant throw something to the ground. After securing the defendant, the deputy searched the area where he had observed the defendant discard the item and recovered a .38 caliber bullet. A second .38 caliber round was found in the defendant's right front shirt pocket, and at the jail, a corrections deputy located a third round of .38 caliber ammo in the defendant's right front pants pocket. (*Id.* at 2). The driver of the car in which defendant was riding left the scene almost immediately after the defendant left in pursuit of the defendant. Defendant is a convicted felon who has not had his right to possess ammunition restored. (*Id.*).

The plea proceedings were largely unremarkable. Defendant was advised of his rights and the potential sentence range he faced, with and without prior felony convictions, as well as the fact that a 5K1 motion was not guaranteed. (Doc. 35). The court questioned the defendant about his criminal history and whether he was the person named in the government's notice of enhancement as having received the listed convictions. He agreed that he was. (Doc. 35 at 20). After the government recited the statement of facts, defendant indicated that he disagreed with what the officer said about allegedly observing a weapon and cocaine, and about a discrepancy between the police report and the statement of facts with respect to the details of the deputy finding the bullets. (*Id.* at 23-26). Defendant ultimately admitted that he had possessed the ammunition, while denying that he had possessed a firearm or crack cocaine. (*Id.* at 26-27). Finally defendant expressed his satisfaction with his appointed counsel and counsel's representation of him. (*Id.* at 29).

The PSR calculated defendant's base offense level at 24 and assigned a 4-level upward adjustment for possession of a firearm or ammunition in connection with another felony offense (resisting arrest with violence), pursuant to § 2K2.1(b)(5) U.S.S.G. Defendant was subject to an enhanced sentence under 18 U.S.C. § 924(e), and therefore his adjusted offense level pursuant to U.S.S.G. § 4B1.4(b)(3)(A) was 34 due to his possession of the ammunition in connection with a crime of violence. His total offense level was 34, his criminal history category was VI, and therefore the applicable advisory guidelines range was 262 to 327 months imprisonment.

The district court overruled defendant's objection to the imposition of the adjustment pursuant to § 2K2.1(b)(5), finding that it was more likely than not that the defendant had possessed the ammunition in connection with either possession of a firearm as well as narcotics. (Doc. 36 at 78). The court overruled defendant's objection to the probation officer's failure to award him an adjustment for acceptance of responsibility. (Doc. 36 at 83). Defendant was sentenced at the mid point of the applicable guidelines range, to a term of 294 months imprisonment. (Doc. 21, doc. 36 at 89). After the imposition of sentence, counsel objected, contending that the sentence was in violation

of the Eighth Amendment to the constitution. (Doc. 36 at 90). He asserted that the sentence was excessive, and that the defendant was correct, that he was being sentenced based on his record. Counsel further stated that the Armed Career Criminal Act was a poorly written law that punishes indiscriminately and needs to be re-written. He concluded by saying that the defendant had been taken advantage of by the system, that the sentence was excessive and cruel and asked the court to reconsider. The court denied the request. (Doc. 36 at 91).

Defendant appealed, contending that the district court erred by finding that he used the ammunition "in connection with" another felony offense and that the district court erred under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) by enhancing his sentence based on facts not proven to a jury beyond a reasonable doubt and sentencing him under a mandatory Guidelines system. The Eleventh Circuit found that the preponderance of the evidence supported the district court's finding that defendant possessed the ammunition in connection with either possession of cocaine or resisting arrest, or both. *United States v. Smith*, 480 F.3d 1277, 1280-1281 (11th Cir. 2007). With respect to the defendant's Booker argument, the appellate court found that the district judge had clearly considered the Guidelines as advisory, and therefore, she was not prohibited from making additional factual findings under the preponderance of evidence standard. *Id.* at 1281. The Eleventh Circuit affirmed defendant's sentencing finding that the district court had considered the advisory Guidelines range, as well as the 18 U.S.C. § 3553(a) factors and imposed a reasonable sentence. *Id.*

Defendant filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on October 1, 2007. The instant motion, which was timely filed, is separated into five grounds for relief, each related to the allegedly deficient performance of counsel. The government opposes the motion in its entirety.

II. LEGAL ANALYSIS

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to § 2255 are extremely limited. A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255; *Thomas v. Crosby*, 371 F.3d 782, 811 (11th Cir. 2004); *United States v. Phillips*, 225 F.3d 1198, 1199 (11th Cir. 2000); *United States v. Walker*, 198 F.3d 811, 813 n.5 (11th Cir. 1999). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent. . . ."

Although section 2255 mandates that the court conduct an evidentiary hearing "unless the motion and files and records conclusively show that the prisoner is entitled to no relief," a defendant must support his allegations with at least a proffer of some credible supporting evidence. See *Chandler v. McDonough*, 471 F.3d 1360 (11th Cir. 2006) (citing *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1293 (11th Cir. 2002) (referring to "our clear precedent establishing that such allegations are not enough to warrant an evidentiary hearing in the absence of any specific factual proffer or evidentiary support"); *Hill v. Moore*, 175 F.3d 915, 922 (11th Cir. 1999) ("To be entitled to an evidentiary hearing on this matter [an ineffective assistance of counsel claim], petitioner must proffer evidence that, if true, would entitle him to relief."); *Ferguson v. United States*, 699 F.2d 1071, 1072 (11th Cir. 1983). A

hearing is not required on frivolous claims, conclusory allegations unsupported by specifics, or contentions that are wholly unsupported by the record. *Peoples v. Campbell*, 377 F.3d 1208, 1237 (11th Cir. 2004); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989) (citations omitted). Likewise, affidavits that amount to nothing more than conclusory allegations do not warrant a hearing. *Lynn*, 365 F.3d at 1239. In this case, an evidentiary hearing is not warranted.

Ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a § 2255 motion regardless of whether they could have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503, 123 S. Ct. 1690, 1693, 155 L. Ed. 2d 714 (2003); see also *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002); *United States v. Jiminez*, 983 F.2d 1020, 1022, n. 1 (11th Cir. 1993). To show a violation of his constitutional right to counsel, defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 390, 120 S. Ct. 1495, 1511, 146 L. Ed. 2d 389 (2000); *Gaskin v. Secretary, Dept. of Corrections*, 494 F.3d 997, 1002 (11th Cir. 2007). "*Strickland's* two-part test also applies where a prisoner contends ineffective assistance led him or her to enter an improvident guilty plea." *Yordan v. Dugger*, 909 F.2d 474, 477 (11th Cir. 1990) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)); *United States v. Pease*, 240 F.3d 938, 941 (11th Cir. 2001). In applying *Strickland*, the court may dispose of an ineffective assistance claim if defendant fails to carry his burden on either of the two prongs. 466 U.S. at 697, 104 S. Ct. at 2069.

In determining whether counsel's conduct was deficient, this court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 104 S. Ct. at 2065; see also *Dingle v. Secretary for Dept. of Corrections*, 480 F.3d 1092, 1099 (11th Cir. 2007); *Atkins v. Singletary*, 965 F.2d 952 (11th Cir. 1992). "[R]eviewing courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance." *Yordan v. Dugger*, 909 F.2d 474, 477 (11th Cir. 1990) (citing *Harich v. Dugger*, 844 F.2d 1464, 1469 (11th Cir. 1988); *Dingle v. Secretary for Dept. of Corrections*, 480 F.3d 1092, 1099 (11th Cir. 2007); *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (emphasizing that petitioner was "not entitled to error-free representation")). Counsel's performance must be evaluated with a high degree of deference and without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008); *United States v. Freixas*, 332 F.3d 1314, 1319-1320 (11th Cir. 2003); (quoting *Brownlee v. Haley*, 306 F.3d 1043, 1059 (11th Cir. 2002)) (quoting *Strickland*, 466 U.S. at 687, 689-90, 104 S. Ct. at 2064-66 and *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc)). When examining the performance of an experienced trial counsel, the presumption that counsel's conduct was reasonable is even stronger, because "[e]xperience is due some respect." *Chandler*, 218 F.3d at 1316 n. 18.

With regard to the prejudice requirement, defendant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). Defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant

of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (quoting *Strickland*, 466 U.S. at 687). Or in the case of alleged sentencing errors, defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. *Glover v. United States*, 531 U.S. 198, 203-04, 121 S. Ct. 696, 700-01, 148 L. Ed. 2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.*

To establish ineffective assistance, defendant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir.), *cert. denied*, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 133 (1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (citing *Blackledge*, 431 U.S. at 74, 97 S. Ct. at 1629); *United States v. Ross*, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)).

1. Calculation of predicate offenses under ACCA

Defendant first claims that counsel was constitutionally ineffective for failing to raise on appeal a claim that his Florida conviction for battery on a law enforcement officer should not have been used as a predicate offense under the A.C.C.A., as it was not a "crime of violence" as defined in U.S.S.G. § 2L1.2.

The attachments to defendant's motion reflect that the original charge on the conviction defendant now seeks to contest was battery on a law enforcement officer in violation of § 784.07, Florida Statutes. The charge was later amended to one of aggravated assault in violation of § 784.021, Florida Statutes, and that is the charge of conviction. (Doc. 68, exh. A-C). The PSR reflects that defendant's conviction resulted from his having intentionally touched the buttocks of a female correctional officer. (PSR P 35). Defendant does not contest the conviction itself, and in fact during the plea colloquy he admitted under oath that he was the person named in the conviction. (Doc. 35 at 20). Nor does he contest the underlying facts as described in the PSR. He now asserts, however, that the conduct of conviction was "aggravated" only because the complainant was a corrections officer, and thus it does not come within the "generic, contemporary meaning" of "aggravated assault," and can not be classified as a "crime of violence."

Defendant's reliance on U.S.S.G. § 2L1.2 is misplaced. This section provides guidelines for sentencing defendants who unlawfully enter or remain in the United States in violation of Title 8 U.S.C. §§ 1325(a) and 1326. Additionally, since "aggravated assault" is specifically enumerated in the commentary to U.S.S.G. § 2L1.2 as a "crime of violence," the enhanced penalty would apply regardless of the facts underlying the conviction. See *United States v. Wilson*, 392 F.3d 1243, 1246 (11th Cir. 2004) (citing *United States v. Fuentes-Rivera*, 323 F.3d 869, 871-872 (11th Cir. 2003)).

Furthermore, defendant's conviction of "aggravated assault" qualifies as a "crime of violence" under § 4B1.2 of the guidelines and also as a "violent felony" under 18 U.S.C. § 924(e)(2). Each of these provisions provides in part that such an offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); U.S.S.G. § 4B1.2(a)(1). The Eleventh Circuit has held that physical contact of an insulting or provoking nature constitutes "physical force" because physical contact, of necessity, requires physical force to complete. *United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006) (citing *United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001); *United States v. Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999)). The cases cited by the defendant that suggest otherwise are factually distinguishable or not binding on this court. *Cf. State v. Hearn*, 961 So.2d 211 (Fla. 2007) (finding that battery on a law enforcement officer is not a forcible felony under all circumstances); *United States v. Sanchez-Torres*, 136 Fed.Appx. 644, 647-648 (5th Cir. 2005) ("destructive or violence force" required to satisfy the "use of force" element of a crime of violence.)

Additionally, even if the aggravated assault conviction was erroneously included in the district court's calculations, there was no error in applying the ACCA enhancement because the defendant had three other qualifying predicate offenses, each of which he admitted under oath. (PSR PP 31, 32, and 34; Doc. 35 at 20). Defendant was convicted of two incidents of armed robbery with a firearm that occurred on February 2, 1982 and March 8, 1982 respectively. (PSR PP 32 & 31). The fact that the convictions for these two robberies occurred on the same date is of no consequence, "so long as the predicate crimes are successive rather than simultaneous." *United States v. Richardson*, 230 F.3d 1297, 1298 (11th Cir. 2000) (quoting *United States v. Lee*, 208 F.3d 1306, 1307 (11th Cir. 2000)). "Successive" crimes are separated by a "meaningful opportunity to desist. . . activity before committing the second offense" such as when the crimes are committed in different venues. *Richardson*, 230 F.3d at 1298 (quoting *Lee*, 208 F.3d 1307). These two crimes were more than a month apart. Paragraph 34 of the PSR reflects that defendant was also convicted of Sale of Cocaine, Possession of Cocaine with intent to sell, resisting arrest without violence, carrying a concealed firearm and aggravated assault with a firearm, for which he received a sixteen year sentence.

Therefore, even if the court were to find that counsel's performance was deficient for his failure to object to the inclusion of the aggravated assault conviction in the district court's ACCA calculations, which it does not, defendant cannot show prejudice. The aggravated assault conviction was properly considered, and even if it had not been, there were sufficient other underlying offenses to sustain the ACCA enhancement.

Finally, to the extent defendant argues in his reply that Amendment 709 to the sentencing guidelines has amended the way prior sentences are counted for purposes of the ACCA, he is not entitled to relief. This amendment has no bearing upon his case as it is not retroactive. See U.S.S.G. § 1B1.10(c). To the extent that defendant argues it is a "clarifying" amendment that can be applied retroactively, this argument has been rejected by the Eleventh Circuit. *United States v. Abusaid*, 295 Fed.Appx. 362 (11th Cir. 2008) (citing *United States v. Armstrong*, 347 F.3d 905, 909 (11th Cir. 2003); see also *United States v. Kliffmueller*, 328 Fed. Appx. 912, 2009 U.S. App. LEXIS 9270, 2009 WL 1158696 (5th Cir. 2009) (except on direct appeal, a clarifying amendment not listed in U.S.S.G. § 1B1.10(c) is not to be retroactively applied) (citing *United States v. Drath*, 89 F.3d 216, 217-218 (5th Cir. 1996)); *United States v. Ahrendt*, 560 F.3d 69, 79 (1st Cir. 2009) (Amendment 709 is substantive, rather than clarifying, and not intended to be applied retroactively).

2. Failure to file a Motion to Suppress

Defendant next asserts that counsel provided constitutionally ineffective assistance because he

failed to file a motion to suppress. Defendant states that before he entered his guilty plea, he told counsel to file a motion to suppress regarding the traffic stop. He told counsel that he believed that the officer's failure to call in the license plate number to the dispatcher was a violation of his Fourth and Fourteenth amendment rights. Counsel purportedly told defendant that as a mere passenger in the car, he did not have standing to object and did not file the requested motion.

To the extent defendant now faults counsel for a misstatement of the law regarding a passenger's standing to challenge a traffic stop, he is mistaken. The case upon which defendant relies for the proposition that a passenger may challenge a traffic stop, *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007), was decided on June 18, 2007, three months after his appeal was decided. Trial counsel's failure to predict a change in the law does not constitute deficient performance. See *Herring v. Secretary, Dept. Of Corrections*, 397 F.3d 1338, 1352 (11th Cir. 2005); *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (citing *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994); *Davis v. Singletary*, 119 F.3d 1471, 1476 (11th Cir. 1997); *Jackson v. Herring*, 42 F.3d 1350, 1359 (11th Cir. 1995); *Pitts v. Cook*, 923 F.2d 1568, 1572-74 (11th Cir. 1991); *Thompson v. Wainwright*, 787 F.2d 1447, 1459 n.8 (11th Cir. 1986)). This is true even when the change is such that the forfeited issues was, in hindsight, a sure winner. *Id.* (Citing *Wright v. Hopper*, 169 F.3d 695, 707-708 (11th Cir. 1999) (*Batson* issue); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) (*Michigan v. Mosley* issue); *Thompson v. Wainwright*, 787 F.2d at 1459 n. 8 (*Ake* issue)). That is not the case here.

Furthermore, it is well established that when counsel's alleged ineffectiveness involves a failure to competently litigate a Fourth Amendment claim, in order to demonstrate actual prejudice, the defendant must prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2582-83, 91 L. Ed. 2d 305 (1986); *Zakrzewski v. McDonough*, 455 F.3d 1254, 1260 (11th Cir. 2006). Regardless of whether a defendant's guilt is established by the excludable evidence, the proper question is whether the outcome of the proceedings would have been different had the motion to suppress been filed and the evidence been excluded. *Jones v. United States*, 224 F.3d 1251, 1259 (11th Cir. 2000); *Huynh v. King*, 95 F.3d 1052, 1058-59 (11th Cir. 1996); *Thomas v. Newsome*, 821 F.2d 1550, 1552 (11th Cir. 1987); see also *Ward v. Dretke*, 420 F.3d 479, 488 (5th Cir. 2005).

In the seminal case of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) the Supreme Court held that law enforcement officers have the authority under the Fourth Amendment to stop and temporarily detain citizens when officers have a "reasonable suspicion" that "criminal activity may be afoot." There is a wideranging body of case law addressing the circumstances under which such investigatory stops, or *Terry* stops, may be conducted. The "reasonable suspicion" required for a *Terry* stop is a less demanding standard than probable cause in that the information needed to support reasonable suspicion need not be as detailed or as reliable as that required to form the basis for a showing of probable cause. *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301 (1990).

Seizures which began as stops for motor vehicle infractions are constitutionally permissible. *United States v. Holloman*, 113 F.3d 192 (11th Cir. 1997) (no tag light); *Draper v. Reynolds*, 369 F.3d 1270, 1275-76 (11th Cir. 2004) (tag light improperly illuminated); *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."). Therefore, there was no legal basis for a viable challenge to the traffic stop at the time of the trial court proceedings. Counsel is not ineffective for failing to preserve or argue a meritless claim. *Freeman v. Attorney General, Florida*, 536 F.3d 1225, 1233 (11th Cir. 2008); see also

Brownlee v. Haley, 306 F.3d 1043, 1066 (11th Cir. 2002) (counsel was not ineffective for failing to raise issues clearly lacking in merit); *Chandler v. Moore*, 240 F.3d 907 (11th Cir. 2001) (counsel not ineffective for failing to object to "innocuous" statements by prosecutor, or accurate statements by prosecutor about effect of potential sentence); *Meeks v. Moore*, 216 F.3d 951, 961 (11th Cir. 2000) (counsel not ineffective for failing to make meritless motion for change of venue); *Jackson v. Herring*, 42 F.3d 1350, 1359 (11th Cir. 1995) (counsel need not pursue constitutional claims which he reasonably believes to be of questionable merit).

3. Maximum Sentence under 18 U.S.C. § 924(e)

Defendant's third ground for relief appears to be that counsel was constitutionally ineffective because he misinformed his client that the maximum penalty for violations of 18 U.S.C. § 924(e) was life imprisonment. Defendant complains that Congress never prescribed a maximum penalty for § 924(e) and that the appellate courts collectively erred in "guessing" what Congress intended to be the maximum penalty. The basis for his argument is unclear. Counsel cannot be deemed constitutionally ineffective for advising his client in accordance with prevailing Circuit precedent and Supreme Court law. The law is well established that the maximum statutory penalty under the ACCA is life imprisonment. See *United States v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993) (statutory maximum penalty for ACCA offenses is life in prison) (collecting cases); *Logan v. United States*, 552 U.S. 23, 128 S. Ct. 475, 479 169 L. Ed. 2d 432 (2007) (same); *Custis v. United States*, 511 U.S. 485, 487, 114 S. Ct. 1732, 1734, 128 L. Ed. 2d 517 (1994) (same). To the extent defendant now claims that he was unaware of this at the time he entered his plea because the maximum penalty was not set forth in the indictment, his claim is disingenuous. The written plea and cooperation agreement specifically provided that if the court determined defendant had prior qualifying convictions, he faced a mandatory minimum term of fifteen years imprisonment, and a maximum term of life. (Doc. 16 at 2). The court also orally reiterated at defendant's arraignment the potential penalties he faced, and he affirmed, under oath, that he understood. (Doc. 35 at 15, 17). And finally, the defendant's 294 month guidelines sentence was unaffected by the statutory maximum. He has shown neither constitutionally deficient performance nor prejudice and is not entitled to relief on this ground.

4. Amendment of Indictment during Plea Colloquy

Defendant contends that counsel was constitutionally ineffective for failing to argue that the government impermissibly amended the indictment during the plea colloquy. He states:

A reading of petitioner's indictment alleges only one factual basis constituting the "in or affecting commerce" element of the charged offense, namely that Petitioner "did knowingly possess .38 caliber ammunition" and that said ammunition came from Arizona, even though said fact was not charged in indictment.

The indictment stated that the ammunition defendant possessed had previously been transported in interstate commerce. Defendant's reference to Arizona is perplexing, as the geographic origin of the ammunition was not mentioned in either the written statement of facts or the government's recitation of the facts at trial. In each instance, the ammunition was described merely as having "traveled in interstate commerce before being illegally possessed by the defendant." (Doc. 14 at 3, doc. 35 at 23). Likewise, the origin of the ammunition was not identified in the PSR. (PSR P 11). There was no amendment of the indictment, and counsel was not constitutionally ineffective for his failure to make such a groundless objection.

5. Failure to argue constitutionality of 18 U.S.C. § 924(e)

Defendant's final ground for relief appears interrelated with defendant's third claim. Here, he seems to assert that counsel should have argued that § 924(e) was unconstitutional because the statute

itself does not specify a statutory maximum penalty. Such an argument would have been futile, and counsel did not perform deficiently by failing to raise it.

To the extent he also argues that counsel was constitutionally ineffective for his failure to argue that U.S.S.G. § 4B1.4(b)(3)(A) was not cited in the indictment, defendant's argument likewise fails. There is no legal requirement that an indictment allege potentially relevant portions of the sentencing guidelines that may be used to calculate a defendant's advisory guidelines ranges. Counsel's failure to make this argument was not constitutionally deficient.

Based on the foregoing, it is respectfully RECOMMENDED:

The motion to vacate, set aside, or correct sentence (doc. 68) be DENIED.

At Pensacola, Florida, this 15th day of May, 2009.

/s/ Miles Davis

MILES DAVIS

UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten 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. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

Footnotes

1

The time of the stop was not reflected in the statement of facts, but at sentencing, the deputy testified that it took place about 7:20 p.m., after dark. (Doc. 36 at 47).

**UNITED STATES OF AMERICA vs. ISAAC J. SMITH
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA
DIVISION**

**2009 U.S. Dist. LEXIS 46878
3:06cr26/MCR,3:08cv315/MCR/MD**

June 4, 2009, Decided

June 4, 2009, Filed

Editorial Information: Subsequent History

Certificate of appealability denied, Motion denied by United States v. Smith, 2009 U.S. Dist. LEXIS 76541 (N.D. Fla., July 24, 2009)

Editorial Information: Prior History

United States v. Smith, 2009 U.S. Dist. LEXIS 46871 (N.D. Fla., May 15, 2009)

Counsel ISAAC JEROME SMITH, also known as, SHEROME LEE SHANNON, also known as, SHERON LEE SHANNONS, also known as, SHERONE LEE SHANNONS, also known as, ISAAC SMITH, Defendant, Pro se, JESUP, GA.

For ISAAC JEROME SMITH, also known as, SHEROME LEE SHANNON, also known as, SHERON LEE SHANNONS, also known as, SHERONE LEE SHANNONS, also known as, ISAAC SMITH, Defendant: KAFANI NKRUMAH, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER OFFICE - PENSACOLA FL, PENSACOLA, FL.

For USA, Plaintiff: LENNARD B REGISTER, III, THOMAS P SWAIM, LEAD ATTORNEYS, US ATTORNEY - PENSACOLA FL, PENSACOLA, FL.

ISAAC JEROME SMITH, Petitioner, Pro se, JESUP, GA.

Judges: M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: M. CASEY RODGERS

Opinion

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated May 15, 2009. The defendant previously has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1), and I have made a *de novo* determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed by the parties, I have determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.

2. The motion to vacate, set aside, or correct sentence (doc. 68) is DENIED.

DONE AND ORDERED this 4th day of June, 2009.

/s/ M. Casey Rodgers

M. CASEY RODGERS

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA v. ISAAC JEROME SMITH
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA
DIVISION
2009 U.S. Dist. LEXIS 76541
Case No: 3:06cr26/MCR,3:08cv315/MCR/MD
July 24, 2009, Decided
July 24, 2009, Filed

Editorial Information: Prior History

United States v. Smith, 2009 U.S. Dist. LEXIS 46878 (N.D. Fla., June 4, 2009)

Counsel

ISAAC JEROME SMITH, also known as SHEROME LEE SHANNON, also known as SHERON LEE SHANNONS, also known as SHERONE LEE SHANNONS, also known as ISAAC SMITH, Defendant, Pro se, YAZOO CITY, MS.

For ISAAC JEROME SMITH, also known as SHEROME LEE SHANNON, also known as SHERON LEE SHANNONS, also known as SHERONE LEE SHANNONS, also known as ISAAC SMITH, Defendant: KAFAHNI NKRUMAH, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER OFFICE - PENSACOLA FL, PENSACOLA, FL.

For USA, Plaintiff: LENNARD B REGISTER, III, LEAD ATTORNEY, US ATTORNEY - PENSACOLA FL, NORTHERN DISTRICT OF FLORIDA, PENSACOLA, FL; THOMAS P SWAIM, LEAD ATTORNEY, US ATTORNEY - PENSACOLA FL, PENSACOLA, FL.

Judges: M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: M. CASEY RODGERS

Opinion

ORDER

The defendant has filed an application for certificate of appealability and request for permission to proceed without prepayment of fees (doc. 101). Unless a certificate of appealability is issued, the defendant may not take an appeal from the final order denying Section 2255 relief. See 28 U.S.C. 2253(c)(1)(B). Because the defendant has not made a substantial showing of the denial of a constitutional right, see *United States v. Futch*, 518 F.3d 887 (11th Cir. 2008), and for the reasons set forth in this court's June 4, 2009 order (doc. 91) adopting and incorporating the Magistrate Judge's Report and Recommendation filed on May 15, 2009 (doc. 89) over defendant's objection (doc. 90), his request for a certificate of appealability is DENIED. Defendant's incorporated motion for leave to proceed *in forma pauperis* (doc. 101) should also be denied as the court finds that the appeal is not taken in good faith and the defendant is not otherwise entitled to so proceed.

2ykcases

Fed.R.App.P. 24(a)(3). Defendant shall pay the \$ 455.00 filing fee within thirty days.

DONE AND ORDERED this 24th day of July, 2009.

/s/ M. Casey Rodgers

M. CASEY RODGERS

UNITED STATES DISTRICT JUDGE

Appendix D

**ISAAC JEROME SMITH, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA
DIVISION**

2013 U.S. Dist. LEXIS 81191
Case No. 3:13cv170/MCR/CJK
May 23, 2013, Decided
May 23, 2013, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus dismissed Smith v. United States, 2013 U.S. Dist. LEXIS 81121 (N.D. Fla., June 7, 2013)

Editorial Information: Prior History

United States v. Smith, 300 Fed. Appx. 738, 2008 U.S. App. LEXIS 24066 (11th Cir. Fla., 2008)

Counsel ISAAC JEROME SMITH, Petitioner, Pro se, LOMPOC, CA.
Judges: CHARLES J. KAHN, JR., UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: CHARLES J. KAHN, JR.

Opinion

ORDER and REPORT AND RECOMMENDATION

Before the Court is an amended petition for writ of habeas corpus filed under 28 U.S.C. § 2241 (doc. 4), and a motion to proceed *in forma pauperis* (doc. 5). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After careful consideration, the undersigned concludes that petitioner has not demonstrated entitlement to proceed under § 2241, and that this action should be dismissed.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner, a federal inmate confined at the United States Penitentiary in Lompoc, California, is currently serving a sentence imposed by this Court in *United States v. Smith*, Case Number 3:06cr26. (Doc. 4, p. 2). In Case No. 3:06cr26, petitioner was convicted, pursuant to his guilty plea, of Possession of Ammunition by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1). Petitioner's indictment listed four prior felonies. (Case No. 3:06cr26, Doc. 1). The prior felonies were also listed separately in a corrected notice of enhancement information. (Case No. 3:06cr26, Doc. 5). Petitioner's plea proceeding was largely unremarkable. Petitioner was advised of his rights and the potential sentence range he faced, with and without prior felony convictions. (Case No. 3:06cr26, Doc. 35). The district court questioned petitioner about his criminal history and whether he was the person named in the government's notice of enhancement as having received the listed convictions. Petitioner agreed that he was. (*Id.* at p. 20). Petitioner was determined to be an Armed Career Criminal subject to sentencing under 18 U.S.C. § 924(e). (See *United States v. Smith*, Case Number

3:06cr26, Judgment at Doc. 21). Petitioner's statutory maximum penalty under the Armed Career Criminal Act ("ACCA") was life imprisonment. (Case No. 3:06cr26, Docs. 16, 35; see also Doc. 119). Petitioner was sentenced on July 13, 2006, to 294 months imprisonment followed by 5 years of supervised release. (Case No. 3:06cr26, Doc. 21).

Petitioner appealed, raising two issues: (1) the district court erred by finding that his possession of the ammunition was "in connection with" another felony, within the meaning of U.S.S.G. § 2K2.1(b)(5); and (2) the district court erred under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), by enhancing his sentence based on facts not proven to a jury beyond a reasonable doubt and sentencing him under a mandatory Guidelines system. *United States v. Smith*, 480 F.3d 1277, 1278 (11th Cir.), cert. denied, 552 U.S. 872, 128 S. Ct. 175, 169 L. Ed. 2d 119 (2007). Petitioner conceded on appeal that his prior convictions were of the type and seriousness so as to render him eligible for enhancement under the ACCA. *Id.* at 1278 n.1. The Eleventh Circuit affirmed the judgment and sentence on March 19, 2007. *Id.*

Petitioner collaterally attacked his conviction under 28 U.S.C. § 2255, raising five grounds of ineffective assistance of counsel. (Doc. 4, p. 3; see also Case No. 3:06cr26, Doc. 68). This Court denied the motion on June 4, 2009. (See Case No. 3:06cr26, Docs. 91, 92). The Eleventh Circuit denied a certificate of appealability. (Case No. 3:06cr26, Doc. 119).

In this habeas action, petitioner challenges his 2006 judgment of conviction and sentence on the following grounds: (1) "Factual and Actual Innocence of the Underlying Offense, and Factually Innocence [sic] of the Interstate Commerce of Offense"; (2) "Actual Innocence of the 2K2.1(b)(5) Four-Level Enhancement"; (3) "Actual Innocence of the ACCA15 Year Enhancement"; and (4) "The District Court Had No Jurisdiction to Convict and No Jurisdiction to Sentence Mr. Smith". (Doc. 4, pp. 7-55). As relief, petitioner asks this Court to "grant an evidentiary hearing to determine the facts in dispute" and to "set aside the conviction or allow the petitioner to withdraw his plea of guilty. . . .". (*Id.*, p. 55).

DISCUSSION

The execution or carrying out of an initially valid confinement is generally the sole issue in a § 2241 action, as attacks on the validity of a conviction or sentence must be asserted on direct appeal or under 28 U.S.C. § 2255. See *United States v. Hayman*, 342 U.S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952); *Darby v. Hawk-Sawyer*, 405 F.3d 942, 944 (11th Cir. 2005) ("Typically, collateral attacks on the validity of a federal sentence must be brought under § 2255."); *Broussard v. Lippman*, 643 F.2d 1131 (5th Cir. Unit A Apr. 27, 1981) 1 ("Attacks on the underlying validity of a conviction must be brought under 28 U.S.C. § 2255, not 28 U.S.C. § 2241(c)."). Direct review of a federal conviction and sentence may be sought by filing a notice of appeal in the underlying criminal case. A collateral attack on the validity of a federal conviction or sentence is brought by filing a motion under 28 U.S.C. § 2255 in the court which imposed the sentence. *Darby*, 405 F.3d at 944. A federal prisoner may file a § 2255 motion "upon the ground that the sentence was imposed 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).

Once a petitioner has filed his initial § 2255 motion, he is barred from making a second or successive motion except in two carefully delineated circumstances, neither of which applies here. See 28 U.S.C. § 2255(h) (requiring the court of appeals to certify the existence of either newly discovered evidence or a new rule of retroactively applicable constitutional law before a petitioner can file a second or successive § 2255 petition). In addition, pursuant to § 2255(e), the so-called "savings clause," a prisoner may file a § 2241 petition if the § 2255 remedy "is inadequate or

ineffective to test the legality of his detention." Section 2255(e) provides:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. 28 U.S.C. § 2255(e). "The burden of demonstrating the inadequacy or ineffectiveness of the § 2255 remedy rests squarely on the petitioner." *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1333 (11th Cir. 2013) (citing *McGhee v. Hanberry*, 604 F.2d 9, 10 (5th Cir. 2013)). "The applicability of the savings clause is a threshold jurisdictional issue. . . ." *Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 2013 WL 1482283, at *4 (11th Cir. 2013)

Petitioner's claims, in more detail, are: (1) that he is actually innocent of the offense for which he was convicted because he did not admit that the ammunition he possessed traveled in or affected interstate commerce, which was a necessary element of the offense; (2) that he is actually innocent of the 2K2.1(b)(5) four-level enhancement because his possession of the ammunition was not "in connection with" another offense; (3) that he is actually innocent of the ACCA15-year enhancement because he did not admit that the ammunition he possessed traveled in or affected interstate commerce, and his conviction was obtained through an unknowing and involuntary guilty plea; and (4) that the district court lacked jurisdiction to convict and sentence him because an element of the offense was that the ammunition traveled in or affected interstate commerce and he did not admit, nor was there proof of, that element, and the district court improperly determined that he could be convicted of the offense without his admitting that fact. Petitioner attempts no explanation as to why the remedy under § 2255 is inadequate or ineffective to test the legality of his detention. (Doc. 4, p. 6).

The matter of petitioner's guilt was either waived by his guilty plea or, if not waived, could have been raised on direct appeal or in his first § 2255 motion. Petitioner's sentencing claims either were, or could have been, raised on direct appeal or in his first § 2255 motion. Petitioner was not convicted of any crime which a retroactively applicable Supreme Court decision overturning prior circuit precedent has made clear is nonexistent, and none of his sentencing claims rest upon a "circuit law-busting, retroactively applicable Supreme Court decision." *Wofford v. Scott*, 177 F.3d 1236, 1245 (11th Cir. 1999). Petitioner is attempting to use § 2241 simply to escape the restriction on second or successive § 2255 motions.

A § 2241 habeas petition may not be used to avoid the restrictions on second or successive § 2255 motions when a prisoner could have, but failed to raise the claim at an earlier stage. *Wofford*, 177 F.3d at 1245 (reiterating that the savings clause "does not exist to free a prisoner of the effects of his failure to raise an available claim earlier."); *Turner*, 709 F.3d at 1334 ("Section 2255(e)'s 'savings clause does not cover sentence claims that could have been raised in earlier proceedings.'") (quoting *Gilbert v. United States*, 640 F.3d 1293, 1319 (11th Cir. 2011)); *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351-52 (11th Cir. 2008) ("[A] prisoner may not avoid [the] gatekeeping [provisions] under § 2244(b) or § 2255(h) by a mere change of caption when, in substance, their lawsuit collaterally attacks a [conviction or] sentence."); *Darby*, 405 F.3d at 945 ("A petitioner who has filed and been denied a previous § 2255 motion may not circumvent the successive motion restrictions simply by filing a petition under § 2241."). Actual innocence does not establish entitlement to proceed under the savings clause; it is only considered "[o]nce the savings clause of § 2255 applies to open the portal to a § 2241 proceeding. . . ." *Wofford*, 177 F.3d at 1244 n.3 (citation omitted).

As petitioner has not demonstrated entitlement to pursue habeas corpus relief, he should not be

permitted to bring his claims by § 2241.

Accordingly, it is ORDERED:

Petitioner's motion to proceed *in forma pauperis* (doc. 5) is GRANTED.

And it is respectfully RECOMMENDED:

1. The amended petition for writ of habeas corpus filed under 28 U.S.C. § 2241 (doc. 4), be DISMISSED for lack of jurisdiction, as petitioner has not demonstrated entitlement to proceed under that section.

2. That the Clerk be directed to close the file.

At Pensacola, Florida, this 23rd day of May, 2013.

/s/ Charles J. Kahn, Jr.

CHARLES J. KAHN, JR.

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all former Fifth Circuit decisions rendered before October 1, 1981.

ISAAC JEROME SMITH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA
DIVISION
2013 U.S. Dist. LEXIS 81121
CASE NO.: 3:13cv170/MCR/CJK
June 7, 2013, Decided
June 10, 2013, Filed

Editorial Information: Prior History

Smith v. United States, 2013 U.S. Dist. LEXIS 81191 (N.D. Fla., May 23, 2013)

Counsel ISAAC JEROME SMITH, Petitioner, Pro se, LOMPOC, CA.
Judges: M. CASEY RODGERS, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: M. CASEY RODGERS

Opinion

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated May 23, 2013. The petitioner previously has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). The petitioner filed a timely objection (doc. 7).

Having considered the report and recommendation and all timely filed objections, the court has determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.
2. The amended petition for writ of habeas corpus filed under 28 U.S.C. § 2241 (doc. 4) is DISMISSED for lack of jurisdiction, as petitioner has not demonstrated entitlement to proceed under that section.
3. The clerk is directed to close the file.

DONE AND ORDERED this 7th day of June, 2013.

/s/ M. Casey Rodgers

M. CASEY RODGERS

CHIEF UNITED STATES DISTRICT JUDGE

Appendix E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12067-J

IN RE: ISAAC SMITH,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: HULL, JORDAN and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Isaac Jerome Smith has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). “The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the

seeks to raise in a second or successive § 2255 motion, but also must show that he falls within the scope of the new substantive rule announced in *Johnson*. *Id.* § 2244(b)(3)(C).

In this case, Smith has not made a *prima facie* showing that he falls within the scope of the new substantive rule announced in *Johnson*. Smith has at least three prior convictions that occurred on different occasions: (1) his first 1982 conviction for armed robbery; (2) his second 1982 conviction for armed robbery; and (3) either his sale of cocaine conviction, his possession of cocaine with intent to sell conviction, or his aggravated assault with a firearm conviction.

 Because the record clearly demonstrates that Smith has three predicate felonies under the ACCA's elements clause and serious-drug-offenses clause, he cannot benefit from *Johnson*. See *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (concluding that Florida armed robbery categorically qualifies under the elements clause of the ACCA); see also *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337-38 (11th Cir. 2013) *abrogated on other grounds as recognized by United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015) (concluding that Florida aggravated assault qualifies under the elements clause of the ACCA); *United States v. Smith*, 775 F.3d 1262, 1264-65, 1268 (11th Cir. 2014) (holding that defendant's Florida convictions for sale of cocaine with intent to distribute and possession of cocaine with intent to distribute were serious drug offenses), *cert. denied*, 135 S. Ct. 2827 (2015).

Because Smith has failed to make a *prima facie* showing that his proposed claims meet the statutory criteria, his application for leave to file a second or successive motion is hereby DENIED

2016 U.S. Appx LEXIS 10858: In Re Hires: June 15, 2016
2016 U.S. Dist. LEXIS 17245: King v. United States: February 10, 2016
2016 U.S. Dist. LEXIS 10572: Massick v. United States: February 10, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17592-D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JAN 18 2017

David J. Smith
Clerk

IN RE: ISAAC SMITH,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: HULL, JORDAN, and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Isaac Jerome Smith has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the

application satisfies the requirements of this subsection.” *Id.* § 2244(b)(3)(C); *see also* *Jordan v. Sec’y, Dep’t of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court’s determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application, Smith indicates that he wishes to raise one claim in a second or successive § 2255 motion. Smith asserts that his claim relies upon the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He asserts that his Armed Career Criminal Act (“ACCA”) enhanced sentence is no longer valid after *Johnson*. Smith argues that the district court did not identify which convictions were the predicate offenses for his ACCA enhanced sentence. He contends that his two 1982 Florida armed robbery convictions were actually a single offense, and that the degree of force required by the robbery statute is insufficient to qualify his single conviction as an ACCA predicate.

We recently denied an application raising the same *Johnson*-based claim that was denied in a prior successive application because “the federal habeas statute requires us to dismiss a claim that has been presented in a prior application.” *In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016). We cited 28 U.S.C. § 2244(b)(1), which explicitly applies to petitions filed under 28 U.S.C. § 2254, and held that § 2244(b)(1)’s mandate to dismiss claims presented in a prior successive application also applies to applications for leave to file a second or successive § 2255 motion presenting the same claim that this Court has already rejected on its merits in a previous application. *Id.* at 1339-40. We also held that a prisoner may not file “what amounts to a motion for reconsideration under the guise of a separate and purportedly ‘new’ application” when the new

application raises the same claim that was raised in the old application. *Id.* at 1340. Finally, we determined that Baptiste's application was barred by the law-of-the-case doctrine. *Id.* at 1340-41.

Similarly, Smith's *Johnson*-based claims are barred by § 2244(b)(1) because he raises the same claims in the instant application that were raised and rejected in his prior applications, and he cannot use the current application to seek reconsideration of our prior order. *Id.* at 1339-41. Additionally, we previously explained that Smith has at least three prior convictions that occurred on different occasions: (1) his first 1982 conviction for armed robbery; (2) his second 1982 conviction for armed robbery; and (3) either his sale of cocaine conviction, his possession of cocaine with intent to sell conviction, or his aggravated assault with a firearm conviction. Because the record clearly demonstrates that Smith has three predicate felonies under the ACCA's elements clause and serious-drug-offenses clause, he cannot benefit from *Johnson*. See *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016); *United States v. Smith*, 775 F.3d 1262, 1264-65, 1268 (11th Cir. 2014); *In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016).

Accordingly, because Smith has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DENIED.