

NOT RECOMMENDED FOR PUBLICATION

No. 23-5949

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Jan 10, 2025  
KELLY L. STEPHENS, Clerk

JUSTIN CHRISTOPHER SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

)  
)  
)  
) ON APPEAL FROM THE UNITED  
) STATES DISTRICT COURT FOR  
) THE EASTERN DISTRICT OF  
) TENNESSEE  
)  
)

ORDER

Before: BATCHELDER, COLE, and BUSH, Circuit Judges.

Justin Christopher Smith, a pro se federal prisoner, appeals the district court's order denying his motion to amend his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The government moves the court to take judicial notice of documents in Smith's criminal case. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As discussed below, we construe Smith's appeal as an application to file a second or successive § 2255 motion and deny it.

Upon his indictment on one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), Smith pleaded guilty as charged.

The presentence report (PSR) determined that Smith was subject to an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), due to his Florida state convictions for resisting an officer with violence in 2001, committing robbery in 2002, and resisting arrest with violence in 2002. His resulting sentencing guidelines range was 180 to 210 months in prison. Smith objected to the ACCA enhancement on the ground that he had not

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committed the 2002 offenses "on occasions different from one another," per § 924(e), and he provided a copy of the felony information for these offenses

Prior to sentencing, the district court overruled Smith's objection because, according to his own sentencing memorandum, Smith had completed the offense of robbery before he fled the scene and was arrested.

A grand jury thereafter issued a superseding indictment against Smith, recharging him with the § 922(g)(1) offense and adding a new firearm charge.

The parties entered into an amended written agreement, which provided that Smith would plead guilty to the § 922(g)(1) count and receive the statutory minimum term of 180 months in prison if the ACCA applied. Smith waived his right to appeal his conviction and sentence unless his sentence exceeded the greater of the guidelines range or "any mandatory minimum sentence deemed applicable by the [district] Court." However, he retained the right to raise claims of prosecutorial misconduct and ineffective assistance of counsel in a § 2255 motion.

At a hybrid plea and sentencing hearing, Smith pleaded guilty to the § 922(g)(1) count. With respect to his two 2002 felony offenses, he admitted during allocution that he had committed "a robbery, cops come, fled the scene," and he resisted "when they caught me." The district court concluded that the ACCA applied and sentenced him under the plea agreement to 180 months in prison. On appeal, Smith challenged only the ACCA enhancement. We granted the government's motion to dismiss the appeal because Smith had not reserved the issue for review. *United States v. Smith*, 2020 U.S. App. LEXIS 18727, No. 19-5978, slip op. at 2 (6th Cir. June 12, 2020).

In 2021, Smith filed his § 2255 motion, asserting that (1) trial counsel rendered ineffective assistance by failing to (a) communicate with him and explain the consequences of pleading guilty as opposed to proceeding to trial, (b) conduct an adequate, independent pretrial investigation, (c) attempt to negotiate a more favorable plea agreement, and (d) properly challenge his ACCA enhancement; and (2) his sentence exceeded the appropriate, non-ACCA statutory maximum of ten years. In arguing that the ACCA did not apply, Smith denied that he had fled the scene of the 2002 robbery, denied admitting to fleeing, and contended that his companion offense of resisting

arrest with violence was not a qualifying violent felony because it did not happen on a separate occasion. He contended that defense counsel had improperly adopted his alleged admission to fleeing from the PSR.

Smith soon moved to stay his case until the Supreme Court issued a decision in *Wooden v. United States*, which concerned whether a defendant who had committed ten robberies in a single building on the same night had done so on separate occasions. Although the district court had not acted on his motion, he moved to lift the stay upon the Court's issuance of *Wooden v. United States*, 595 U.S. 360 (2022).

In October 2022, the district court denied Smith's § 2255 motion, reasoning that his collateral-attack waiver barred his ACCA sentencing claim and that his ineffective-assistance claim lacked merit. The court denied Smith's stay motions as moot and declined to issue a certificate of appealability. We likewise declined to issue a certificate of appealability. *Smith v. United States*, No. 22-5971, 2023 WL 6476010 (6th Cir. Mar. 23, 2023), *cert. denied*, 144 S. Ct. 223 (2023).

On March 29, 2023, Smith moved to amend his § 2255 motion, stating that he did not seek to bring a new claim but to "clarify" his ACCA sentencing claim. He asserted that his appeal waiver did not bar the claim and that his 2002 offenses did not happen on separate occasions when considered in light of *Wooden*. He also reiterated that the district court had inappropriately used a statement from the PSR to find that he had admitted to fleeing the scene of the robbery.

The government responded in opposition, arguing that Smith was reasserting, not clarifying, his ACCA claim and that a district court's judgment ordinarily cuts off the right to amend. Alternatively, the government requested that the motion to amend be transferred to our court as a second or successive § 2255 motion. In his reply, Smith stated that his offense of resisting arrest was "closely related to the robbery because that's what charge [he] was resisting" and he was "caught in the same general area."

The district court denied Smith's motion to amend as futile because he had previously invoked *Wooden* in his stay motions and the court had referred to it when denying his § 2255 motion.

On appeal, Smith argues that the district court erred by ruling that his motion to amend was futile and by not revisiting its order overruling his objection to the PSR's application of the ACCA enhancement.

A motion to amend a § 2255 motion is a second or successive § 2255 motion when it asserts a claim, i.e., a basis for relief from a judgment of conviction, and it is filed after the movant has appealed the district court's denial of his original § 2255 motion or after the time for appealing has expired. *See Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016); *In re Nailor*, 487 F.3d 1018, 1022-23 (6th Cir. 2007); *see also Khamisi-El v. United States*, 800 F. App'x 344, 348-49 (6th Cir. 2020). When a defendant files a second or successive petition for habeas corpus relief in the district court without § 2244(b)(3) authorization from this court, the district court "shall transfer the document to this court pursuant to 28 U.S.C. § 1631." *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). If the district court fails to do so, we may construe the appeal as an application for permission to file a second or successive § 2255 motion. *See Moreland*, 813 F.3d at 325.

We observe that a movant is not barred from filing a second or successive § 2255 motion merely because he reasserts a claim from a prior motion. *See Williams v. United States*, 927 F.3d 427, 436 (6th Cir. 2019). Nonetheless, to obtain authorization to file a second or successive § 2255 motion, the movant still must make a prima facie showing of:

- (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); *see also* 28 U.S.C. § 2244(b)(3)(C). "A prima facie showing, in this context, simply requires that the applicant make a showing of possible merit sufficient to warrant a fuller

exploration by the district court.” *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015) (quoting *In re Lott*, 366 F.3d 431, 432-33 (6th Cir. 2004)).

Smith has not made the necessary showing because he does not present any newly discovered evidence or rely on a new rule of constitutional law made retroactive by the Supreme Court. *Wooden* is a case of statutory interpretation and did not announce a new rule of constitutional law made retroactive to cases on collateral review. See *Mitchell v. United States*, 43 F.4th 608, 617 (6th Cir. 2022); *Bawgus v. United States*, No. 2:22-CV-00132-JRG-CRW, 2024 WL 3837752, at \*4 (E.D. Tenn. Aug. 15, 2024).

For these reasons, we **DENY** Smith leave to file a second or successive § 2255 motion, and we **DENY** the government’s motion to take judicial notice as unnecessary.

ENTERED BY ORDER OF THE COURT

  
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Kelly L. Stephens, Clerk



could be sentenced, however, the Supreme Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which required proof of an additional element for conviction under § 922(g) [See Doc. 25, pgs. 1–2]. The United States filed a Superseding Indictment. [Criminal Case. Doc. 54], and the parties executed an amended plea agreement pursuant to Rule 11(c)(1)(C) [Criminal Case, Doc. 58]. On August 27, 2019, the Court accepted Petitioner’s guilty plea to the Superseding Indictment and sentenced Petitioner to 180 months’ imprisonment per his Rule 11(c)(1)(C) agreement, to be followed by five years of supervised release [Criminal Case. Docs. 63, 64]. Petitioner appealed, [Criminal Case, Doc. 66], and the Sixth Circuit dismissed his appeal based on the waiver in his plea agreement [Criminal Case, Doc. 75].

Petitioner then filed the Motion to Vacate, Set Aside, or Correct Sentence in this case on June 7, 2021 [Doc. 1]. He asserted his attorney failed to (1) inform him of the likely consequences of pleading guilty, (2) conduct an adequate pretrial investigation, (3) attempt to negotiate a favorable plea agreement, and (4) properly challenge Petitioner’s Armed Career Criminal designation [Doc. 1, pg. 4]. Petitioner’s motion also claimed the Armed Career Criminal Act (“ACCA”) was misapplied in his case [Doc. 1, pg. 5]. On October 14, 2022, the Court denied Petitioner’s motion and dismissed the case [Doc. 14, pg. 16; Doc. 15]. The Court reasoned Petitioner’s valid waiver of his right to collaterally attack his sentence precluded his argument the Court misapplied the ACCA [Doc. 14, pgs. 7–8]. The Court further rejected Petitioner’s argument it relied on a non-*Shepard* document in determining the ACCA’s applicability, and that his attorney should have challenged that [Doc. 14, pg. 14]. Petitioner appealed [Doc. 16]. While the appeal was pending, Petitioner attempted to file a Motion to Amend his § 2255 motion, which the Sixth Circuit returned unfiled because the motion should have been presented to this Court. *Justin Smith v. United States*, No. 22-5971, Doc. 9-1 (6th Cir. 2023). The Sixth Circuit denied a Certificate of

Appealability on March 23, 2023 [Doc. 21, pg. 6]. The present Motion to Amend followed on April 3, 2023 [Doc. 22]. In the motion, Petitioner states, “[t]his amendment is not a new claim/ground, but clarify/amplify [sic] ground # 2 on [his] original 2255” [Doc. 22, pg. 2].

## II. ANALYSIS

Under Fed.R.Civ.P. 15(a)(2), “a party may amend its pleading only with the opposing party’s written consent or the court’s leave,” and “[t]he court should freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2). In § 2255 proceedings, the Court considers whether the amendment is within the one-year statute of limitations or otherwise “relates back to the date of the original pleading within the meaning of Rule 15(c)(2).” *Howard v. United States*, 533 F.3d 472, 475–76 (6th Cir. 2008) (citing *Wiedbrauk v. Lavigne*, 174 Fed.Appx. 993, 1001–02 (6th Cir. 2006) and *Oleson v. United States*, 27 Fed.Appx. 566, 571 (6th Cir. 2001)). “Yet, irrespective of the factual relationship between the original and proposed claims for relief,” a judgment denying the original claims “would ordinarily cut-off any right to amend . . . later.” *Bender v. United States*, 372 F. App’x 638, 642 (6th Cir. 2010). Moreover, as in ordinary civil proceedings, a court may deny leave to amend a § 2255 motion if amendment would be futile. *Id.* at 642–43.

Here, Petitioner’s amendment would be futile. Petitioner asserts four arguments in his motion: (1) that his appeal waiver does not preclude him from raising an objection to the Court’s application of the ACCA, [Doc. 22, pg. 2]; (2) that two of his three predicate offenses did not occur on separate occasions, [Doc. 22, pg. 2]; (3) that the Court relied on the PSR, a non-*Shepard* document, in determining the ACCA applied, [Doc. 22, pg. 3]; and (4) the Supreme Court recently “clarified” the test for the separate-occasions determination in *Wooden v. United States*, 595 U.S. 360 (2022) [Doc. 22, pg. 3]. However, with the exception of the citation to *Wooden*, Petitioner presented all these arguments in his initial motion [See Doc. 2, pgs. 25–26 (arguing counsel

Definition → Futile = incapable of producing any useful results.

"misinformed" Petitioner as to the appeal waiver); Doc. 1, pg. 5 (arguing the Court "misapplied" the ACCA enhancement); Doc. 2, pg. 23 (arguing "there is no logical way to prove that Smith's two crimes happened on separate occasions" and that the Court's reliance on Defendant's admission he "fled the scene" was an impermissible use of the PSR)]. The Court previously addressed his arguments and found them without merit. The Sixth Circuit affirmed. [Doc. 21, pg. 5].

He now seeks to supplement his petition with more arguments about the applicability of *Wooden* on his case. But he invoked *Wooden* before and the District Court referenced it when it denied his petition. [Doc. 86, pg. 16]. In other words, Petitioner is "re-presenting already presented claims." *Moreland v. Robinson*, 813 F.3d 315, 325 (6th Cir. 2016). His claim regarding the applicability of *Wooden* to his case is not a second or successive petition because it addresses issues already addressed by the District Court previously.<sup>1</sup> Accordingly, his Motion to Amend [Doc. 22] is DENIED.

**SO ORDERED:**

s/ Clifton L. Corker  
United States District Judge

\* if *Wooden* is a already presented claim then why did the court apply MFTest to it? I want to see if they were committed on separate occasions?

<sup>1</sup> The Government argues that this latest attempt to amend is only a supplement to his original petition because the issue was already addressed by the District Court in its prior order denying him relief. Otherwise, if it were a second petition, the Court would be required to "transfer the document . . . pursuant to 28 U.S.C. § 1631," to the Sixth Circuit for its consideration on whether to permit the successive filing under § 2255. See *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Why did I file if one of my claims had been answered?

No. 23-5949

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Sep 30, 2025  
KELLY L. STEPHENS, Clerk

JUSTIN CHRISTOPHER SMITH, )  
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 Petitioner-Appellant, )  
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 v. )  
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 UNITED STATES OF AMERICA, )  
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 Respondent-Appellee. )  
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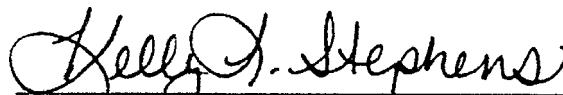
**ORDER**

**BEFORE:** BATCHELDER, COLE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

  
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Kelly L. Stephens, Clerk

(Appendix G)

**Additional material  
from this filing is  
available in the  
Clerk's Office.**