

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

FRANKIE SHEARRY, JR.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Criminal Case No.

7 : 19-CR-42 (WLS)

28 U.S.C. § 2255 Case No.

7 : 24-CV-71 (WLS)

RECOMMENDATION

Petitioner’s Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255 was filed on July 22, 2024 (Doc. 101) and is before this Court for the issuance of a recommendation of disposition pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

Procedural History

On August 15, 2019, Petitioner was charged by means of an Indictment with one count of possession of a firearm by a convicted felon. (Doc. 1). Represented by appointed counsel Timothy Saviello from the Federal Defenders office, Petitioner entered into a non-negotiated plea agreement and pled guilty to the one-count Indictment on October 28, 2021. (Doc. 79; Doc. 97, p. 2). Petitioner was sentenced on March 3, 2022 to 188 months imprisonment followed by

three (3) years of supervised release. (Docs. 84, 86).

Petitioner filed a Notice of Appeal and his sentence was affirmed by the Eleventh Circuit Court of Appeals in an order dated May 2, 2023. (Docs. 89, 98). The U.S. Supreme Court denied Petitioner's application for the writ of certiorari on June 3, 2024. (Doc. 100). Petitioner signed this Motion to Vacate on July 15, 2024. (Doc. 101).

Evidentiary Hearing

Petitioner bears the burden of establishing that an evidentiary hearing is needed to dispose of his § 2255 motion. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984). "A federal habeas corpus petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief." *Futch v. Dugger*, 874 F.2d 1483, 1485 (11th Cir. 1989). "[If] the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schirro v. Landrigan*, 550 U.S. 465, 474 (2007); *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984). The record herein is sufficient to evidence that Petitioner's claim lacks merit, and therefore no evidentiary hearing is necessary as to his ground for relief.

Petitioner's Claims

Petitioner raises one (1) ground for relief in his Motion to Vacate. (Doc. 101). Petitioner alleges that his trial counsel was ineffective when he failed to object to the determination in the Final Presentence Report that Petitioner is an Armed Career Criminal Act ("ACCA") offender. *Id.*

Legal Standards

Section 2255 provides that:

a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

If a prisoner's § 2255 claim is found to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

In order to establish that his counsel's representation was constitutionally defective, the Petitioner must show (1) that his counsel's representation was deficient, and (2) that the Petitioner was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985).

"Our role in collaterally reviewing [] judicial proceedings is not to point out counsel's errors, but only to determine whether counsel's performance in a given proceeding was so beneath prevailing professional norms that the attorney was not performing as 'counsel' guaranteed by the sixth amendment." *Bertolotti v. Dugger*, 883 F.2d 1503, 1510 (11th Cir. 1989).

The *Strickland* court stated that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . *It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . [rather][t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . .* In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 693-694, *emphasis added*.

In evaluating whether Petitioner has established a reasonable probability that the outcome would have been different absent counsel's alleged errors, a court "must consider the totality of the evidence before the judge or jury." *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002).

The two-prong *Strickland* test applies to guilty plea challenges, although "[i]n the context of a guilty plea, the first prong of *Strickland* requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he would have entered a different plea." *Woolsey v. United States*, 2011 WL 195412, *2 (M.D. Fla.)(citing *Hill v. Lockhart*, 474 U.S. 52, 56-59 (1985)). Thus, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

"As to counsel's performance, 'the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Reed v. Sec'y. Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240 (11th Cir. 2010) (quoting *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009)). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). In order to find that counsel's performance was objectively unreasonable, the performance must be such that no competent counsel would have taken the action at issue. *Hall v. Thomas*, 611 F.3d 1259, 1290 (11th Cir. 2010). "The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable." *Chandler v. U.S.*, 218 F.3d 1305, 1313 (11th Cir. 2000).

Failure to object to sentencing enhancement

In Ground 1, Petitioner argues that counsel was ineffective in failing to object to his designation as an Armed Career Criminal. Pursuant to § 4B1.4 of the United States Sentencing Guidelines, "[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal." U.S.S.G. § 4B1.4 (a).

Section 924(e)(1) of Title 18 United States Code provides that,

[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the

conviction under section 922(g).

18 U.S.C. § 924(e)(1).

The U.S. Probation Office determined that Petitioner was an Armed Career Criminal. (Doc. 82, ¶ 22). In Petitioner's Final Presentence Report, the U.S. Probation Office identified Petitioner's four (4) prior convictions for a serious drug offense that were committed on different occasions and assigned Criminal History Points for these prior drug distribution convictions:

- Lowndes County Superior Court

Docket No. 99-CR-06

11/07/1998 Arrest Date
02/17/1999 Sentence Date

Possession with Intent to Distribute Cocaine
- Lowndes County Superior Court

Docket No. 02-CR-1255

11/25/2002 Arrest Date
01/27/2003 Sentence Date

Possession with Intent to Distribute Cocaine
- Lowndes County Superior Court

Docket No. 07-CR-288

12/07/2006 Arrest Date
08/22/2007 Sentence Date

Possession of Cocaine with Intent to Distribute
- Lowndes County Superior Court

Docket No. 09-CR-701A

05/12/2009 Arrest Date
10/01/2009 Sentence Date

Possession of Cocaine with Intent to Distribute

(Doc. 82, pp. 8-9).

At sentencing, Petitioner did not raise any objection to the use of his prior offenses in calculating

the sentencing guideline range. (Doc. 95).

On appeal to the Eleventh Circuit Court of Appeals, Petitioner argued that the District Court committed plain error in finding that his prior cocaine convictions qualified as serious drug offenses under the Armed Career Criminal Act. (Doc. 98). The Eleventh Circuit Court of Appeals determined that “[b]ecause there is no binding precedent holding that [Petitioner’s] prior convictions do not qualify as serious drug offenses, the District Court did not plainly err [in finding that Petitioner’s four prior Georgia cocaine convictions qualified as serious drug offenses under the Armed Career Criminal Act].” *Id.* at 2.

Petitioner asserts that counsel should have objected to his designation as an Armed Career Criminal based on the First Step Act of 2018, as Petitioner asserts that his predicate offenses as charged in the indictment did not satisfy the elements under the Controlled Substances Act as amended by the First Step Act. (Doc. 101-1). However, the First Step Act requirements for a “serious drug offense” to which Petitioner points, to wit, imprisonment of over a year and release from imprisonment no more than 15 years prior to the commencement of the instant offense, do not apply to the ACCA, and are not requirements for designating a criminal defendant as an Armed Career Criminal. *See* 18 U.S.C. § 924(e). The Eleventh Circuit has clearly found in unpublished cases that the First Step Act did not amend the ACCA’s definition of a “serious drug offense”, and the ACCA’s definition does not include any requirements related to prior imprisonment. *United States v. Smith*, 798 F. A’ppx 473 (11th Cir. 2020) (finding that the First Step Act did not amend § 924(e)(2)’s definition of a “serious drug offense”); *see also United States v. Wims*, 836 F. A’ppx 793, 796 (11th Cir. 2020) (First Step Act’s amendment of the term “felony drug offense” leaves “untouched the definitions of the ACCA’s predicate offenses”).

The Court notes that two (2) of the four (4) qualifying crimes set out in the Indictment were not ultimately relied on by U.S. Probation in determining that Petitioner qualified as an Armed Career Criminal. (Doc. 1; Doc. 82, ¶ 22). The Court did provide both counsel and Petitioner an opportunity to object to the Final Presentence Report at Petitioner's sentencing, and each stated he had no objection. (Doc. 95, pp. 2-3). To the extent that Petitioner references *Shepard* documents, the Court notes that the Eleventh Circuit applied the categorical approach to determine whether Petitioner's state convictions were serious drug offenses under the ACCA, making *Shepard* documents irrelevant to the determination. (Doc. 98, p. 6); *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) ("if the modified categorical approach is inapplicable, the *Shepard* documents are irrelevant to the ACCA issue").

As there is no merit to Petitioner's claim that he was improperly sentenced as an Armed Career Criminal under the Sentencing Guidelines, there is no basis for his ineffective assistance claim against attorney Saviello regarding his failure to object to Petitioner's Armed Career Criminal designation. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) ("Because [movant's] argument . . . was meritless, counsel's objection would not have been meritorious, and, thus, counsel's performance did not constitute ineffective assistance under *Strickland*").

Conclusion

WHEREFORE, it is recommended that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **DENIED**. (Doc. 101).

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo

determination as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is recommended that the Court deny a certificate of appealability in its Order addressing the grounds raised in this § 2255 Petition. If the Petitioner files an objection to this Recommendation, he may include therein any arguments he wishes to make regarding a certificate of appealability.

SO RECOMMENDED, this 1st day of May, 2025.

s/ *Alfreda L. Sheppard*
UNITED STATES MAGISTRATE JUDGE