

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SAYON BESTMAN,	:	MOTION TO VACATE
Fed. Reg. No. 72627019,	:	28 U.S.C. §2255
Movant,	:	
	:	CRIMINAL NO.
v.	:	1:21-CR-385-ELR-JSA-6
	:	
UNITED STATES,	:	CIVIL ACTION NO.
Respondent.	:	1:24-CV-2863-ELR-JSA

MAGISTRATE JUDGE’S FINAL REPORT AND RECOMMENDATION

Movant Sayon Bestman filed the instant *pro se* motion to vacate pursuant to 28 U.S.C. §2255, and seeks to challenge the constitutionality of his convictions and sentences in the Northern District of Georgia. (Doc. 269). The Government filed its response [Doc. 279], and Movant has not submitted a reply thereto.

I. Factual and Procedural History

A. Procedural History

On September 28, 2021, a federal grand jury in the Northern District of Georgia indicted Movant with conspiracy to commit access device fraud in violation of 18 U.S.C. §1029(b)(2), six counts of access device fraud in violation of 18 U.S.C. §1029(a)(2), and six counts of aggravated identity theft in violation of 18 U.S.C. §1028A(a)(1).¹ Represented by Victoria Ivory, Movant entered a negotiated plea to

¹ Movant was one of six defendants named in the indictment. (Doc. 1).

one count each of access device fraud (Count 74) and aggravated identity theft (Count 80). (Doc. 123-1 (“Plea Agreement”)).

As part of the agreement, the Government dismissed the remaining charges against Movant. (*Id.* ¶11). Also as part of the agreement, the Government recommended that Movant receive the maximum offense level adjustment for acceptance of responsibility. (*Id.* ¶15). On October 6, 2022, Movant was sentenced to a total of fifty-four (54) months of imprisonment.² Movant did not file an appeal of his convictions and sentences.

Movant filed the instant §2255 motion on June 7, 2024.³ He argues that his conviction and sentence for aggravated identity theft should be vacated based on the Supreme Court’s decision in *Dubin v. United States*, 599 U.S. 110 (2023), which held that “[a] defendant ‘uses’ another person’s means of identification ‘in relation

² Specifically, Movant was sentenced to thirty (30) months for access device fraud and a consecutive twenty-four (24) months for aggravated identity theft. (Doc. 154).

³ Since Movant did not provide a specific day in June that he executed the §2255 motion, the Government uses June 8, 2024 – the date that the motion was received at the United States Postal Service – as the filing date. However, the envelope containing the pleadings indicates that it was processed for mailing by the prison on June 7, 2024. (*See* Doc. 269-1 at 6). Under these circumstances, June 7, 2024 is the date that this Court will consider the §2255 motion was filed. *See, e.g., United States v. Lassiter*, 812 F. App’x 896, 900 (11th Cir. 2020) (per curiam) (“Pursuant to the prison mailbox rule, Appellant’s notice of appeal was deemed filed on the date stamped on the envelope containing the notice[.] . . .”).

to’ a predicate offense when this use is at the crux of what makes the conduct criminal.” *Id.* at 131 (quoting 18 U.S.C. §1028A(a)(1)). The Government argues that the collateral waiver in the plea agreement precludes Movant from raising this claim, the §2255 motion is untimely, and his claim is procedurally barred. Because the undersigned agrees that the collateral waiver bars Movant from filing this claim, and because in any event the motion is untimely, the Court does not discuss whether Movant’s claim is procedurally barred.

B. Facts⁴

The following facts were provided by the Government as the factual basis for Movant’s guilty plea in connection with Count 74 (access device fraud), to which Movant agreed:

[F]rom in or about November 2018 through in or about February of 2020, the Defendant knowingly used one or more unauthorized access devices, that is, stolen credit cards issued to individuals, specifically including the individual identified in the indictment by the initials DWJ, to purchase large quantities of cigarettes from Sam’s Club stores located within the Northern District of Georgia.

During this period, the Defendant obtained things of value aggregating over \$1,000 as a result of his use of these stolen credit cards. That is, he purchased over \$250,000 worth of cigarettes, including purchasing approximately \$8932.28 in cigarettes on or about December 18, 2018, using a stolen credit card issued to DWJ.

⁴ Unless otherwise indicated, these facts were relayed by the Government during the plea hearing as the factual basis for Movant’s guilty plea, to which Movant agreed. (Doc. 277 (“Plea Tr.”) at 22-24).

The Defendant knew that he was not authorized to use the stolen credit card and acted with the intent to defraud or deceive.

And the Defendant's purchases of those cigarettes from Sam's Club affected interstate and foreign commerce.

The following facts were provided by the Government as the factual basis for Movant's guilty plea in connection with Count 80 (aggravated identity theft), and to which Movant agreed:

Defendant knowingly possessed and use another person's means of identification, specifically the stolen credit card issued to DWJ that included DWJ's name and account number on the card.

The Defendant did not have lawful authority to possess and use that means of identification. And the Defendant unlawfully possessed and used DJ's means of identification during and in relation to another felony violation, that is, the access device fraud alleged in Count 74.

B. Procedural History

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⁵ Movant was one of six defendants named in the indictment. (Doc. 1).

As part of the agreement, the Government dismissed the remaining charges against Movant. (*Id.* ¶11). Also as part of the agreement, the Government recommended that Movant receive the maximum offense level adjustment for acceptance of responsibility. (*Id.* ¶15). On October 6, 2022, Movant was sentenced to a total of fifty-four (54) months of imprisonment.⁶ Movant did not file an appeal of his convictions and sentences.

Movant filed the instant §2255 motion on June 7, 2024.⁷ He argues that his conviction and sentence for aggravated identity theft should be vacated based on the Supreme Court’s decision in *Dubin v. United States*, 599 U.S. 110 (2023), which held that “[a] defendant ‘uses’ another person’s means of identification ‘in relation to’ a predicate offense when this use is at the crux of what makes the conduct criminal.” *Id.* at 131 (quoting 18 U.S.C. §1028A(a)(1)). The Government argues

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that the collateral waiver in the plea agreement precludes Movant from raising this claim, the §2255 motion is untimely, and his claim is procedurally barred. Because the undersigned agrees that the collateral waiver bars Movant from filing this claim, and because in any event the motion is untimely, the Court does not discuss whether Movant's claim is procedurally barred.

II. Discussion

A. Movant Waived The Right To Challenge His Sentence.

Movant's claim that his sentence should be vacated based on the Supreme Court's decision in *Dubin* is precluded by his plea. Specifically, Movant's plea agreement provides that Movant may not collaterally attack his convictions and sentences – including through a §2255 motion – except under circumstances not relevant here. (Plea Agreement ¶30). Movant does not argue that his plea was involuntary, and it is clear from his testimony during the plea colloquy – which carries a presumption of truth, *see Blackridge v. Allison*, 431 U.S. 63, 74 (1977) – that he did, in fact, enter into the plea knowingly and voluntarily.

“[O]ne of the keys to enforcing a sentence appeal waiver is that the defendant knew he had a ‘right to appeal his sentence and that he was giving up that right.’” *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (citations omitted); *see also United States v. Boyd*, 975 F.3d 1185, 1192 (11th Cir. 2020) (explaining that the “touchstone for assessing” if a sentence appeal waiver “is whether ‘it was

clearly conveyed to the defendant that he was giving up his right to appeal under *most* circumstances.”) (alterations and emphasis in original) (quoting *Bushert*, 997 F.2d at 1352-53). In order to prevail on an argument to enforce a waiver, “[t]he government must show that either (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.” *United States v. Powell*, No. 23-12565, 2025 WL 618816, at *1 (11th Cir. Feb. 26, 2025) (per curiam) (quoting *Bushert*, 997 F.2d at 1351). In this case, the Government has demonstrated both.

Indeed, during the plea hearing Movant swore that: he understood he was giving up several rights by entering into the plea; no one threatened, coerced, or forced him to enter the guilty plea; he was entering into the plea freely and voluntarily; he understood the plea agreement; no one promised him a particular sentence; he had sufficient time to discuss his case and the plea with his attorney; he understood the maximum potential sentence he could receive; he understood that the Court does not have to follow the Government’s recommendation of a sentence, and if the Court imposes a sentence that is higher than the calculated guideline range, he still would be bound by his plea; and that he was entering into the plea because he is guilty. (Plea Tr. at 5-7, 13-16, 18-20, 25). The Court also went into depth about the

waiver of Movant's appellate and collateral rights and what that meant, and Movant swore that he understood. (*Id.* at 18-20).

Because Movant knowingly and voluntarily entered into the plea agreement containing the collateral waiver, that waiver is valid and enforceable. *See United States v. Youngblood*, 803 F. App'x 352, 353-54 (11th Cir. 2020) (per curiam) (finding waiver knowingly and voluntarily given and enforceable where defendant testified he understood the charges against him, knew he was giving up his right to appeal, made the plea voluntarily, and none of the exceptions to the waiver applied). That waiver should be enforced even where, as here, Movant argues that new case law applies to his claims. *See Daniels v. United States*, No. 22-13509, 2023 WL 7149105, at *1 (11th Cir. July 6, 2023) (denying certificate of appealability for defendant's claim that his guilty plea was invalid based on new case law, as any such claim was waived by his guilty plea and appellate waiver); *United States v. Wyche*, No. 21-14301, 2022 WL 17883935, at *5 (11th Cir. Dec. 23, 2022) (per curiam) (affirming dismissal of claim as barred by appellate waiver based on new case law holding aiding and abetting Hobbs Act robbery was not a crime of violence); *see also King v. United States*, 41 F.4th 1363, 1367 (11th Cir. 2022) (“[E]ven when a new constitutional rule might provide a strong basis for collateral attack, we enforce an appeal waiver according to its terms.”); *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (“While it may appear unjust to allow criminal defendants to

bargain away meritorious appeals, such is the necessary consequence of a system in which the right to appeal may be freely traded.”).

B. The Motion To Vacate Is Untimely.

Even if the collateral waiver does not bar Movant’s claim, his §2255 motion is untimely. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), federal prisoners must file a 28 U.S.C. §2255 motion to vacate within one year of the latest of four specified events:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2255(f). After Movant was sentenced on October 6, 2022, he had fourteen days to file an appeal with the Eleventh Circuit. *See* Fed. App. P. 4(b)(1)(A). Because Movant did not file an appeal, his convictions became final on October 21, 2022, and he had one year, or until October 21, 2023, to file a §2255 motion. The instant motion, filed over eight months after the limitation period expired June 7, 2024, is untimely.⁸

III. Conclusion

Based on the foregoing reasons, **IT IS RECOMMENDED** that Sayon Bestman's motion to vacate his sentence [Doc. 269] be **DENIED WITH PREJUDICE**.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing §2255 Cases, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific

⁸ To the degree that Movant could rely upon §2255(f)(3), *Dubin* did not create a newly recognized right that would retroactively apply on collateral review. *See Randall v. United States*, No. 5:16-CR-00518, 2024 WL 2783901, at *2 (E.D. Pa. May 29, 2024) (finding that §2254(f)(3) inapplicable because the Supreme Court in *Dubin* did not newly recognize a right that would be retroactively available on collateral review); *United states v. Buck*, No. 2:23-CR-00136-KJD-BNW, 2024 WL 1554202, at *2 (D. *cf. Warner v. United States*, No. 1:13-CR-139-TCB, 2024 WL 1466787, at *2 (N.D. Ga. Apr. 4, 2024) (finding for successive petition purposes that *Dubin* is not a new rule of constitutional law made retroactive to cases on collateral review).

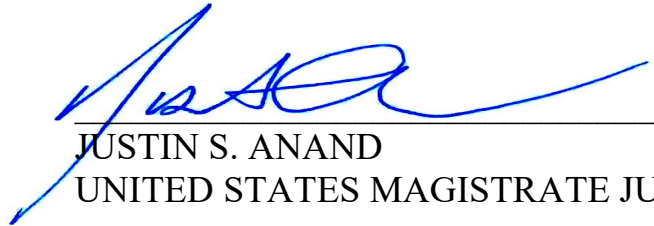
issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” 28 U.S.C. §2253(c)(2) provides that a certificate of appealability (“COA”) may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” In order for the certification requirement to fulfill its function of weeding out frivolous appeals, a court should not automatically issue a COA; rather, the applicant must prove “something more than the absence of frivolity” or “the existence of mere ‘good faith’ on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citations omitted).

Movant need not prove, however, that some jurists would grant the §2255 motion. *See id.* “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *See Lamarca v. Secretary, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El*, 537 U.S. at 325). In other words, Movant need only demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based on the foregoing discussion, reasonable jurists would not find “debatable or wrong” the undersigned’s determination that Movant’s claim is barred by the collateral waiver and/or is untimely. *See Slack*, 529 U.S. at 484.

Accordingly, **IT IS FURTHER RECOMMENDED** that a COA be denied.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED this 27th day of March, 2025.



JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE