

FILED IN CHAMBERS  
U.S.D.C ATLANTA

Date: Jun 25 2025

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISIONBy: KEVIN WEIMER, ClerkBy: Kari Butler  
Deputy Clerk

CHRISTOPHER LASHER,	:	MOTION TO VACATE
BOP # 71445-019,	:	28 U.S.C. § 2255
Movant,	:	
	:	CRIMINAL ACTION NO.
v.	:	4:18-CR-3-MLB-WEJ-18
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	4:22-CV-174-MLB-WEJ

**FINAL REPORT AND RECOMMENDATION**

Movant, Christopher Lasher, represented by counsel, submitted a “Petition to Vacate Sentence Pursuant to 28 [U.S.C.] § 2255,” which the Court construes as a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (“Motion to Vacate”) [1457]. The government filed a Response in Opposition [1494]. Movant filed a Reply [1495]. For the reasons stated below, the undersigned **RECOMMENDS** that the construed Motion to Vacate be **DENIED**.

**I. PROCEDURAL HISTORY**

On March 5, 2020, movant pleaded guilty to conspiracy to traffic a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846 [279, 952, 1128]. Movant’s sentencing guidelines range was 140 to 175 months of imprisonment. (Mot. Vacate 3.) On March 10, 2021, the District

Court filed the Judgment and Commitment, sentencing movant significantly below his guidelines range to the mandatory minimum 120 months of imprisonment, followed by five years of supervised release [1128]. Movant did not appeal. (Id. at 6.)

On April 4, 2022, movant filed a “Motion to Extend Time to File Motion for Relief Under 28 U.S.C. § 2255.” (Mot Ext. Time [1414].) In that Motion, movant correctly stated that the statute of limitations in 28 U.S.C. § 2255(f)(1) had already expired on March 24, 2022. (Id. at 1-2.) On May 12, 2022, the District Court granted the Motion and gave movant a ninety (90) day extension of time to file a motion to vacate [1429]. On August 9, 2022, movant filed the construed Motion to Vacate [1457].

The Eleventh Circuit has explained that a federal district court lacks jurisdiction to grant a motion for extension of time to file a motion to vacate:

[B]ecause [the movant] had yet to file an actual § 2255 motion at the time he sought an extension to the limitations period, there was no actual case or controversy to be heard. Thus, the district court . . . lacked jurisdiction to consider [the movant’s] requests for an extension of time to file a § 2255 motion absent a formal request for habeas relief.

Swichkow v. United States, 565 F. App’x 840, 844 (11th Cir. 2014) (per curiam).

Therefore, Eleventh Circuit precedent did not entitle movant to an extension of

time to file the construed Motion to Vacate. In light of Eleventh Circuit precedent, the undersigned recommends that the Order granting an extension of time [1429] be vacated.

Although the statute of limitations had expired more than four months before movant filed the construed Motion to Vacate, “[e]quitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam). The District Court previously concluded that movant is entitled to equitable tolling [1429]. The undersigned assumes that the District Court would reach the same conclusion if it first considered the issue after movant filed the construed Motion to Vacate. Accordingly, the undersigned recommends that the District Court reissue its decision regarding equitable tolling so that the decision follows rather than precedes the filing of the construed Motion to Vacate.

The undersigned now proceeds to consider the construed Motion to Vacate on the merits.

## **II. STANDARD OF REVIEW**

A motion to vacate, set aside, or correct sentence may be made “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). “[C]ollateral review is not a substitute for a direct appeal . . . .” Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). Section 2255 relief “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.” Id. (quoting Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988) (per curiam)) (internal quotation marks omitted).

A § 2255 movant “has the burden of sustaining his contentions by a preponderance of the evidence.” Tarver v. United States, 344 F. App’x 581, 582 (11th Cir. 2009) (per curiam) (quoting Wright v. United States, 624 F.2d 557, 558 (5th Cir. 1980)). The Court need not conduct an evidentiary hearing when “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . .” 28 U.S.C. § 2255(b). In the present case, the undersigned determines that an evidentiary hearing is not needed because the construed Motion to Vacate and record of the case conclusively show that movant is not entitled to relief.

### III. DISCUSSION

Movant raises one ground of ineffective assistance of counsel. (Mot. Vacate 6.) “[F]ailure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.” Massaro v. United States, 538 U.S. 500, 509 (2003). To demonstrate ineffective assistance of counsel, a convicted defendant must show that (1) “counsel’s performance was deficient,” and (2) “the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687 (1984). As to the first prong of Strickland, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. at 689 (internal quotation marks omitted). As to the second prong, “[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.” Id. at 694. A court may consider either prong first and need not address the other “if the defendant makes an insufficient showing on one.” Id. at 697.

Movant claims that “trial counsel was ineffective for failing to seek a downward departure for [movant’s] discharged state sentence.” (Mot. Vacate 6.) The state sentence, imposed for Cobb County drug offenses, was four years long and ended on August 21, 2020, while movant’s federal criminal case was pending. (Id. at 1-2.) In movant’s view, the sentencing guidelines make an “arbitrary distinction between discharged and undischarged state sentences . . . [that] violates the Due Process Clause of the Fifth Amendment and is unconstitutional as applied to movant.” (Id. at 2.) According to movant, counsel’s failure to raise that argument constitutes ineffective assistance. (Id.)

Movant’s theory regarding the sentencing guidelines consists of two parts. First, movant contends that U.S.S.G. § 5G1.3(b) would have entitled him to credit for his state sentence if it was undischarged. (Mot. Vacate 6-20.) Section 5G1.3(b) provides the following:

If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b). Second, movant contends that § 5K2.23 possibly made him eligible for a downward departure because his state sentence was discharged.

(Id.) Section 5K2.23 provides the following:

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

U.S.S.G. § 5K2.23.

However, the government correctly explains that movant has misread the guidelines. (Resp. 16-18.) As to the first part of movant's theory, § 5G1.3(b) specifies that it applies only if § 5G1.3(a) does not apply. Section 5G1.3(a) provides the following:

If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(a). As the government explains, movant “was incarcerated when he facilitated the December 19, 2017, drug transaction” in his federal criminal case. (*Id.* at 17.) Therefore, § 5G1.3(a) applies, and it requires movant’s sentence to run consecutively to his state sentence. Because § 5G1.3(a) applies, § 5G1.3(b) does not apply, and movant would not have been entitled to credit for an undischarged state sentence. The first part of movant’s theory fails.

The second part of movant’s theory, that § 5K2.23 possibly made him eligible for a downward departure, is predicated on the applicability of § 5G1.3(b). Because § 5G1.3(b) does not apply, § 5K2.23 also does not apply. Thus, the second part of movant’s theory fails.<sup>1</sup> Accordingly, counsel’s failure to raise movant’s guidelines theory did not constitute deficient performance, and movant was not prejudiced.

To the extent that movant is attempting to raise any ground for relief other than ineffective assistance of counsel, it is procedurally defaulted. “Generally, if a challenge to a conviction or sentence is not made on direct appeal, it will be procedurally barred in a 28 U.S.C. § 2255 challenge” unless the movant

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<sup>1</sup> The government also correctly points out that, even if § 5K2.23 applied to movant, that guideline does not permit a downward departure below the mandatory minimum sentence that movant received. (Resp. 18-20.)



“overcome[s] this procedural default by showing both cause for [the] default as well as demonstrating actual prejudice suffered as a result of the alleged error.” Black v. United States, 373 F.3d 1140, 1142 (11th Cir. 2004). “[T]o show cause for procedural default, [a § 2255 movant] must show that some objective factor external to the defense prevented [movant or counsel] from raising [the] claims on direct appeal and that this factor cannot be fairly attributable to [movant’s] own conduct.” Lynn, 365 F.3d at 1235. To demonstrate actual prejudice, a movant must show that the alleged error “worked to [movant’s] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions.” Reece v. United States, 119 F.3d 1462, 1467 (11th Cir. 1997) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

As an alternative to showing cause and actual prejudice, a § 2255 movant may overcome a procedural default if “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Lynn, 365 F.3d at 1234-35 (quoting Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994) (per curiam)) (internal quotation marks omitted). “[A]ctual innocence means factual innocence, not mere legal innocence.” Id. at 1235 n.18 (citing Bousley v. United States, 523 U.S. 614, 623 (1998)) (internal quotation marks omitted).

In the present case, if movant is attempting to raise any ground for relief other than ineffective assistance of counsel, it is procedurally defaulted because movant failed to raise it on direct appeal. Movant fails to overcome the procedural default because he neither (1) shows cause and actual prejudice, nor (2) presents proof of actual innocence. (Resp. 10-12.)

Accordingly, the undersigned **RECOMMENDS** that the construed Motion to Vacate be **DENIED**.

#### **IV. CERTIFICATE OF APPEALABILITY**

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, “[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 issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” Section 2253(c)(2) states that a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion to vacate] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When the district court denies a [motion to vacate] on procedural grounds without reaching the prisoner’s underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing Slack, 529 U.S. at 484) (internal quotation marks omitted).

The undersigned **RECOMMENDS** that a certificate of appealability be denied because the resolution of the issues presented is not debatable. If the District Court adopts this recommendation and denies a certificate of appealability, movant “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” 28 U.S.C. foll. § 2255, Rule 11(a).

#### **V. CONCLUSION**

For the reasons stated above, the undersigned **RECOMMENDS** that (1) the construed Motion to Vacate [1457] be **DENIED**, (2) a certificate of appealability be **DENIED**, and (3) civil action number 4:22-cv-174-MLB-WEJ be **CLOSED**.

The Clerk is **DIRECTED** to terminate the referral of the construed Motion to Vacate to the undersigned.

**SO RECOMMENDED**, this 25th day of June, 2025.

  
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WALTER E. JOHNSON  
UNITED STATES MAGISTRATE JUDGE