

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

MIKEL SMITH,

*Defendant.*

CRIMINAL ACTION

NO. 15-121-1 &

NO. 15-427

PAPPERT, J.

March 9, 2020

MEMORANDUM

On March 26, 2015, Mikel Smith was indicted on four counts of interfering with interstate commerce by robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951(a) and 2, four counts of brandishing, using, and carrying a firearm during and in relation to a crime of violence and aiding and abetting in violation of 18 U.S.C. §§ 924(c)(1) and 2, and one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). He was also charged by information with one count of interfering with commerce by robbery in violation of 18 U.S.C. § 1951(a). Smith pled guilty on October 16, 2015 to all of the robbery counts, two § 924(c) counts, and the felon-in-possession count. *See* (Guilty Plea Agreement, ECF No. 52; Change of Plea Hr'g Tr., ECF No. 110). As part of the plea agreement, the government dismissed the remaining two § 924(c) counts. *See* (Guilty Plea Agreement ¶ 1). On June 16, 2017, he was sentenced to 384 months and one day of imprisonment, five years of supervised release, an \$800 special assessment, and \$2,300 in restitution. *See* (Judgment, ECF No. 97).<sup>1</sup>

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<sup>1</sup> Judge Kelly sentenced Smith. The case was transferred to this Court on November 12, 2019. (ECF No. 112.)

Smith did not appeal his sentence. He instead filed a *pro se* Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255. (ECF No. 106.) In his Motion, Smith first argues that he is entitled to sentencing relief under Section 403 of the First Step Act, which reduced the mandatory minimum sentence for first-time offenders who commit multiple 18 U.S.C. § 924(c) offenses charged in the same indictment. (Def.'s Mot. 7, ECF No. 106.) He next contends that his § 924(c) convictions must be invalidated because the definition of “crime of violence” in § 924(c)(3)(B) is unconstitutionally vague. (*Id.* at 6–7.) Finally, Smith raises an ineffective assistance of counsel claim. (*Id.* at 6.) For the reasons outlined below, the Court denies the Motion.

## I

28 U.S.C. § 2255 permits a prisoner sentenced by a federal court to move the court that imposed the sentence to “vacate, set aside, or correct the sentence” where: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a). The petitioner bears the burden of proving that his conviction is illegal. *United States v. Davies*, 394 F.3d 182, 189 (3d Cir. 2005). Further, a petitioner “must clear a significantly higher hurdle than would exist on direct appeal” to obtain relief. *See United States v. Cleary*, 46 F.3d 307, 310 (3d Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 166 (1982)).

The district court has discretion to determine whether to hold an evidentiary hearing on a prisoner’s motion under § 2255. *See Gov’t of the Virgin Islands v. Forte*,

865 F.2d 59, 62 (3d Cir. 1989). A district court may summarily dismiss a motion brought under § 2255 without a hearing where the “motion, files, and records, ‘show conclusively that the movant is not entitled to relief.’” *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day*, 969 F.2d 39, 41–42 (3d Cir. 1992)). That is the case here.

## II

Smith’s Guilty Plea Agreement forecloses the collateral relief he seeks based on his First Step Act and § 924(c) void-for-vagueness arguments. Criminal defendants “may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver.” *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008), *abrogated on other grounds by Garza v. Idaho*, 139 S. Ct. 738 (2019). When a criminal defendant waives collateral challenge rights, the Court must evaluate the validity of the waiver by examining two factors: (1) whether the waiver was knowing and voluntary; and (2) whether enforcing the waiver “would work a miscarriage of justice.” *Id.* at 237.

## A

In determining whether a waiver is knowing and voluntary, the Court “must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the terms of any provision in a plea agreement waiving the right to appeal or collaterally attack the sentence.” *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (citing Fed. R. Crim. P. 11(c)(6)). Judge Kelly did just that.

First of all, Smith agreed in his Guilty Plea Agreement that “[i]n exchange for the promises made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant’s conviction, sentence, or any other matter relating to this prosecution, whether such right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law,” subject to certain exceptions, all of which (excluding the ineffective assistance of counsel claim addressed *infra* in Section III) do not apply. (Guilty Plea Agreement ¶ 9.) Smith signed the Guilty Plea Agreement, acknowledging that he was waiving his right to appeal by pleading guilty. *See* (Guilty Plea Agreement, Acknowledgement of Rights, ¶ 6.) Moreover, Smith benefitted from the government’s dismissal of two § 924(c) counts. (*Id.* ¶ 1.)

At his change of plea hearing, Smith again acknowledged that he signed the Guilty Plea Agreement of his own free will, and that the Agreement contained a waiver of his right to appeal or collaterally attack the sentence. (Change of Plea Hr’g Tr. 16:18–18:2; 20:16–23.) During his guilty plea colloquy, the Court specifically reviewed Smith’s limited right to appeal or collaterally attack his conviction or sentence, which Smith again confirmed that he understood. (*Id.* at 16:18–18:2.) Before accepting the plea agreement, the Court assured itself that Smith had not been threatened or forced to enter into it. (*Id.* at 20:24–21:4.) Smith’s guilty plea—including his waiver of the right to collaterally challenge his sentence—was knowingly, voluntarily, and intelligently made.

## B

The Court must next consider whether enforcing this waiver would work a “miscarriage of justice.” *Mabry*, 536 F.3d at 239. Courts should apply the miscarriage of justice exception to a collateral attack waiver “sparingly and without undue generosity.” *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005) (quoting *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001)). Nevertheless, the Court has an affirmative duty to examine the issue. *Mabry*, 536 F.3d at 237.

To determine whether enforcement would create a miscarriage of justice, courts should consider “the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.” *Id.* at 242–43 (quoting *Teeter*, 257 F.3d at 25–26).

The Third Circuit Court of Appeals has recognized the miscarriage of justice exception in a few limited circumstances, such as where constitutionally deficient lawyering prevented the defendant from understanding his plea, where a defendant should have been permitted to withdraw a guilty plea or where the waiver itself was the product of ineffective assistance of counsel. *United States v. Spivey*, 182 F. Supp. 3d 277, 280 (E.D. Pa. 2016) (citing *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007); *Wilson*, 429 F.3d at 458).

Pursuant to the terms of his Guilty Plea Agreement, Smith is not precluded from collaterally attacking his sentence on a claim of ineffective assistance of counsel, discussed *infra* in Section III. He did, however, waive his right to bring other claims.

Smith's argument for sentencing relief under § 403 of the First Step Act and his § 924(c) void-for-vagueness argument do not fall within the "limited circumstances" recognized by the Third Circuit. Enforcing Smith's agreed upon waiver will not work a miscarriage of justice. *See Khattak*, 273 F.3d at 563.

These claims also lack merit. Smith first argues that the Court should resentence him in accordance with Section 403 of the First Step Act of 2018. Pub. L. No. 115-391, § 403, 132 Stat. 5194, at 5221–22. Prior to the First Step Act, defendants like Smith faced a twenty-five-year mandatory minimum sentence under § 924(c) for a "second or subsequent conviction under this subsection." The First Step Act reduced the § 924(c) mandatory minimum for first-time offenders who committed multiple § 924(c) violations charged in the same indictment. *See United States v. Hodge*, 948 F.3d 160, 161 (3d Cir. 2020). The reduced § 924(c) mandatory minimum applies retroactively "to any offense that was committed before the date of enactment of this Act, if a sentence has not been imposed as of [that] date." § 403(b), 132 Stat. at 5222. Because the Court sentenced Smith before the First Step Act became law on December 21, 2018, he cannot benefit from its changes to § 924(c). *See Hodge*, 948 F.3d at 162.

Smith's next argument contends that his § 924(c) convictions are invalid because the definition of "crime of violence" in § 924(c)(3)(B) is unconstitutionally vague. Pursuant to § 924(c), an individual is subject to enhanced punishment if he uses, carries, possesses, brandishes or discharges a firearm "during and in relation to any crime of violence." *See* 18 U.S.C. § 924(c)(1)(A)(i)–(iii). A crime of violence is defined as a felony offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "(B) that

by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.*

§ 924(c)(3). Courts refer to clause A as the “elements clause” and clause B as the “residual clause.” In *Davis v. United States*, the Supreme Court held that the residual clause of § 924(c) is unconstitutionally vague. 139 S. Ct. 2319 (2019).

Because Smith’s underlying conviction is for Hobbs Act robbery in violation of § 1951(a), his conviction qualifies as a crime of violence under the elements clause of § 924(c), such that *Davis*’s holding entitles him to no relief. *See United States v. Harris*, 2019 WL 6310248, at \*2 (E.D. Pa. Nov. 25, 2019) (explaining that although the “Third Circuit has not addressed whether, using a categorical approach, Hobbs Act robbery qualifies as a crime of violence under § 924(c)’s element clause,” but that “every other Circuit . . . using a categorical approach has concluded that Hobbs Act robbery does qualify as a crime of violence under § 924(c)(3)(A)’s definition”).

### III

Smith did not waive in his Guilty Plea Agreement the right to assert an ineffective assistance of counsel claim, but that claim is nonetheless time barred. *See* (Guilty Plea Agreement ¶ 9(b)(4)). A § 2255 motion is subject to a one-year statute of limitations. *See* 28 U.S.C. § 2255(f). The limitations period runs from the latest of the following: (1) the date on which the judgment 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 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 diligence. *Id.*

The Court signed the judgment on June 21, 2017, which was entered by the Clerk on June 22, 2017. (ECF No. 97.) Smith then had fourteen days to file an appeal. *See* Fed. R. App. P. 4(b)(1). He did not do so, and his conviction became final on July 6, 2017. The one-year limitations period expired on July 7, 2018.<sup>2</sup> *See* 28 U.S.C. § 2255(f). Smith did not file his § 2255 Motion until April 22, 2019. Conceding that the statute of limitations bars his ineffective assistance of counsel claim, Smith contends that equitable tolling should apply. (Def.'s Mot. 7.)

Section 2255's statute of limitations is subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631 (2010). Equitable tolling is a remedy that should be invoked "only sparingly." *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998). "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Smith offers a variety of reasons for the belated filing of his Motion. He states that: (1) he lacked access to the prison law library; (2) he lacked knowledge of federal law, (3) he was "shipped/transferred from one U.S.P. RHU housing unit to another"; (4) counsel refused to provide Smith transcripts; and (5) he experienced difficulty in finding a jailhouse lawyer to help prepare his Motion. (Def.'s Mot. 8.)

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<sup>2</sup> If a defendant does not pursue a timely direct appeal, his conviction and sentence become final for purposes of a § 2255 motion on the date that the time for filing such an appeal expired. *See Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999).

Smith has not any alleged facts, however, to show that his circumstances present any unusual or extraordinary circumstances to justify equitable tolling. His Motion lacks sufficient detail explaining the extent to which his law library access was limited or how that impediment prevented him from filing a timely ineffective assistance of counsel claim. *See Patrick v. Phelps*, 764 F. Supp. 2d 669, 673 (D. Del. 2011) (explaining limited access to law library is “a routine aspect of prison life” and defendant must show “how this alleged restricted access actually prevented him” from timely filing his motion). Smith similarly fails to provide any details about why a transfer between housing units prevented him from filing a § 2255 motion within the one-year limitations period. Next, Smith’s argument that he was unable to secure help from a “jailhouse lawyer” fails because there is no right to assistance of counsel—or here, a layman—in filing a § 2255 motion. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding no constitutional right to counsel on collateral review). Nor does Smith’s lack of knowledge about federal law provide a basis to invoke equitable tolling. *See Merritt v. Blaine*, 326 F.3d 157, 170 (3d Cir. 2003) (explaining that confusion regarding the law does not excuse untimely filing).

Smith’s argument that counsel refused to provide him with transcripts also fails. For equitable tolling to apply, he must show that he exercised diligence in pursuing his rights, but Smith offers no facts showing that he made any effort, through either his counsel or the Court, to obtain the transcripts. *See Pace*, 544 U.S. at 418 (explaining that defendant bears the burden to show that he pursued his rights diligently *and* that

some extraordinary circumstance stood in the way). Because Smith's equitable tolling argument lacks merit, his ineffective assistance of counsel claim remains time barred.<sup>3</sup>

IV

When a district court denies a § 2255 motion, a petitioner may only appeal if the district court grants a certificate of appealability. 28 U.S.C. § 2253. Because Smith has not made a substantial showing of the denial of a constitutional right and reasonable jurists would not debate the dispositions of his claims, no certificate of appealability shall issue. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert  
GERALD J. PAPPERT, J.

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<sup>3</sup> Even if the Court concluded that equitable tolling should apply, Smith's ineffective assistance of counsel claim lacks merit. Smith argues that his counsel was ineffective at his sentencing "for failing to challenge and argue [his robbery] crime was not a crime of violence and [his] charges were the same as the residual and force clause." (Def.'s Mot. 5–6.) But as the Court already concluded in *supra* note 2, Smith's underlying robbery convictions properly qualify as "crimes of violence" under 18 U.S.C. § 924(c)(3)(A)—the elements clause. Because "[t]here can be no Sixth Amendment deprivation of effective assistance of counsel based on an attorney's failure to raise a meritless argument," Smith's ineffective assistance of counsel claim fails. *United States v. Bui*, 795 F.3d 363, 366–67 (3d Cir. 2015) (quoting *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

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**ORDER**

**AND NOW**, this 9th day of March 2020, upon consideration of Mikel Smith's Motion to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 106), the Government's Response (ECF No. 111), and Smith's Motion to Proceed *in Forma Pauperis* (ECF No. 107), it is **ORDERED** that:

1. Smith's Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C § 2255 (ECF No. 106) is **DENIED**;
2. A certificate of appealability **SHALL NOT** issue;
3. Smith's Motion to Proceed *in Forma Pauperis* (ECF No. 107) is **DENIED** as moot; and
4. The Clerk shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

*/s/ Gerald J. Pappert*  
GERALD J. PAPPERT, J.