

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

GILLIAN HARPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

1:11-cr-00004-1

TO: Gillian Harper, *Pro Se*
Reg. #08218-094
United States Penitentiary Pollock
P.O. Box 2099
Pollock, LA 71467
Alphonso Andrews, Esq., AUSA

REPORT AND RECOMMENDATION

THIS MATTER came before the before the Court on the Orders (ECF Nos. 269, 270) of Chief Judge Wilma A. Lewis in Criminal No. 11-00004 referring Gillian Harper's "Petitioner's Motion For Review of Sentence Under 3742(a)(2)" (ECF No. 224), "Motion for Extension of Time petition under 28 U.S.C. § 2255" (ECF No. 230), and "Petitioner's Motion To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody Pursuant To 28 U.S.C. § 2255" (ECF No. 237). The government provided responses to two of the motions (ECF Nos. 267, 268), and Petitioner did not reply.

I. RELEVANT PROCEDURAL HISTORY

One year after Luis Orlando Encarnacion was killed in the filed behind the Evelyn Williams Elementary School, Gillian Harper and Kalif Flanders were charged with his

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murder. Found guilty by a jury, the co-defendants were sentenced on several counts, including murder in the first degree for which they were sentenced to life without parole. Harper and Flanders were sentenced to 10 years for possession of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)(A)(iii)), five years for possession of a firearm in school zone (18 U.S.C. § 922(q)), 15 years for unauthorized firearm possession (18 V.I.C. § 2253(a)), and life without parole for murder in the first degree (18 V.I.C. §§ 922(a)(1), 923(a)). (ECF Nos. 204, 211). Their sentencing for assault in the third degree (14 V.I.C. § 297(2)) was stayed. (ECF Nos. 204, 211). By mandate entered June 16, 2016, the Third Circuit affirmed their conviction. (ECF No. 223; *United States v. Flanders*, 635 Fed. App'x 74 (3d Cir. 2016)). On September 6, 2016, Petitioner filed the Motion for Review of Sentence (ECF No. 224). On November 17, 2017, he filed the Motion for Extension (ECF No. 230). On March 29, 2018, Petitioner filed his Motion to Vacate (ECF No. 237).

II. APPLICABLE LEGAL STANDARDS

“Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution.” *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

Before ordering an answer, the court must review a § 2255 motion and “dismiss the motion” if it “plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief.” 28 U.S.C. § 2255 Proc. R. 4.

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A petitioner properly raises ineffective assistance of counsel arguments under § 2255 rather than on direct appeal. *See, e.g., Massaro v. United States*, 538 U.S. 500, 504 (2003) (explaining that it is “preferable” that such claims be considered on collateral review where the record for such claims may be properly developed); *accord United States v. Garcia*, 516 F. App’x 149, 151 (3d Cir. 2013) (“It is well-settled that this Court ordinarily does not review claims of ineffective assistance of counsel on direct appeal.”) (citing *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. (2003))).

Pro se pleadings are liberally construed and must be held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nonetheless, “pro se litigants still must allege sufficient facts in their complaints to support a claim.” *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

III. DISCUSSION

A. Petitioner’s Motion for Review of Sentence (ECF No. 224)

Petitioner brings this motion pursuant to 18 U.S.C. § 3742(a)(2), which states that “[a] defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines.” The language of the statute makes clear that the statute is a vehicle for appellate review, and thus a federal district court has no jurisdiction over any claims brought pursuant to that statute. The undersigned will thus construe this motion as a motion to vacate under § 2255.

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Petitioner argues in this motion that because his murder convictions were pursuant to territorial law—not federal law—the application of offense level 43 in his sentencing was incorrect. (ECF No. 224 at 2). Additionally, Petitioner argues that none of the federal firearms offenses for which he was convicted carry an offense level of 43 and that his local murder and local firearm offenses were dismissed. *Id.*

Petitioner misunderstands the applicable law pertaining to his guideline range. Section 2K2.5(c)(1)(B) of the Sentencing Guidelines, which addresses a conviction for possession of a firearm in a school zone, states as follows:

(1) (If the defendant used or possessed the firearm or dangerous weapon in connection with the commission of attempted commission of another crime ..., apply—

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

U.S.S.G. § 2K2.5(c)(1)(B).

Here, death did occur as Defendant was convicted of murder pursuant to territorial law. Thus, subsection (1)(B) is applicable. Chapter Two, Part A, Subpart 1 then provides offense levels for first-degree murder, second-degree murder, involuntary manslaughter, and conspiracy or solicitation to commit murder. U.S.S.G. § 2A1.1(a). Since level 43 is greater than the offense level provided by Section 2K2.5 (*i.e.*, level 8), level 43 is the applicable offense level to Petitioner's conviction for possession of a firearm in a school zone.

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Petitioner further argues that his motion for a reduction in his sentence has merit, because he was not convicted under 18 U.S.C. § 924(j)(1). (ECF No. 224 at 2). That statute applies a sentencing enhancement where a defendant commits a § 924(c) violation and “causes the death of a person through the use of a firearm.” If the killing “is a murder (as defined in [18 U.S.C. § 1111]),” the defendant may “be punished by death or by imprisonment for any term of years or for life.” *Id.* § 924(j)(1). Petitioner offers no support for why he is entitled to a reduction in his sentence simply because he was not prosecuted under this statute, and the undersigned could find none. To the extent that Petitioner argues that Section 2K2.5(c) of the Sentencing Guidelines do not apply as a result of his not being prosecuted under Section 924, Petitioner misreads Section 2K2.5(c), which does not require a federal murder conviction. The District Court properly applied Section 2K2.5(c), because Petitioner used a firearm in connection with another offense, from which death resulted.

In sum, the undersigned **RECOMMENDS** that Petitioner’s Motion for Review (ECF No. 224) be **DENIED**.

B. Petitioner’s Motion to Vacate (ECF No. 237)

Because the undersigned construed the Motion for Review as a § 2255 motion to vacate, that means that the Motion to Vacate (ECF No. 237) would be a second successive habeas petition, subject to dismissal, before reaching the merits.

Petitioner’s motion should not reach the merits if it is interpreted as a second successive habeas motion. Before a second or successive § 2255 motion may be considered

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by the district court, it must be certified by a three-judge panel of the appropriate court of appeals to contain:

- (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). Petitioner has not offered any support to indicate that he is entitled to review of a second successive habeas petition, and the undersigned recommends dismissal on this basis.

As to the merits of Petitioner's claims, although he does reference ineffective assistance of counsel as the basis for his motion, he does not provide any substantive arguments beyond the statements "Petitioner hereby adopts all of his co-defendant's post-conviction allegations, claims and legal authorities as if fully stated herein, insofar as they are applicable" and that "supplement and memorandum in support are forthcoming" (ECF No. 237 at 10). In an abundance of caution, the undersigned takes judicial notice of Kalif Flanders' § 2255 motion to vacate (ECF No. 225), for which a separate R&R (ECF No. 238) remains pending. In Flanders' motion, he argued that his attorney failed to argue that double jeopardy resulted when sentences in three of the counts were ordered to run consecutively. The record shows that Flanders' attorney did not make this argument on appeal. However,

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Petitioner's attorney argued that the sentences imposed were excessive, and the Third Circuit addressed the issues that Flanders' motion to vacate raised:

As an initial matter, Harper's sentences for possession of a firearm within a school zone and use of a firearm during a crime of violence for which federal prosecution was possible *are required by statute to run consecutively with any other sentence*. The District Court then determined that the record in this case called for a stiff sentence, and ordered the remaining sentences to run consecutively in order to reflect the seriousness of the crime, promote respect for the law, provide just punishment, and deter from further criminal conduct. Such reasoning evinces careful consideration, not abuse of discretion. Therefore, we uphold Harper's judgment of sentence.

Flanders, 635 Fed. App'x 74 at *9 (Emphasis added).

To succeed on an ineffective assistance of counsel claim, a movant must show both that 1) counsel's representation was deficient, and 2) the deficient performance "prejudiced the defense." *Strickland*, 466 U.S. at 687. The Third Circuit's decision indicates that Flanders would not have prevailed on his argument that his sentence triggered double jeopardy. As such, Flanders was not prejudiced by counsel's performance and was not entitled to relief due to ineffective assistance of counsel. Without any elaboration from Petitioner as to whether he was advised differently, the undersigned can assume only that he adopts Flanders' argument in its entirety. As such, Petitioner's ineffective assistance of counsel claim would also fail.

The undersigned this **RECOMMENDS** that Petitioner's motion to vacate be **DENIED**.

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C. Petitioner's Motion for Extension (ECF No. 230)

Because Petitioner 1) filed his motion to vacate before receiving leave to do so from the Court, and 2) this Report and Recommendation addresses the merits of that motion, the undersigned **RECOMMENDS** denying the Motion for Extension as **MOOT**.

IV. EVIDENTIARY HEARING

The question of whether to order an evidentiary hearing when considering a motion to vacate a sentence under §2255 “is committed to the sound discretion of the district court.” *Government of the V.I. v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). A § 2255 evidentiary hearing “is unnecessary when the ‘files and records of the cases conclusively show that the prisoner is entitled to no relief.’” *United States v. Padilla-Castro*, 426 F. App’x 60, 63 (3d Cir. 2011) (quoting 28 U.S.C. § 2255(b)). Here, the record in this case conclusively shows that Petitioner is not entitled to relief, and, as such, the undersigned **RECOMMENDS** that he not receive an evidentiary hearing.

V. CERTIFICATE OF APPEALABILITY

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. AEDPA limits the issuance of a certificate of appealability to circumstances where “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (explaining that movant must “demonstrate that reasonable jurists would

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find the district court's assessment of the constitutional claims debatable or wrong."). The undersigned recommends denying Petitioner's claims as meritless. The undersigned concludes that reasonable jurists would not find this assessment debatable or wrong. Accordingly, the undersigned **RECOMMENDS** that the District Court not issue a Certificate of Appealability.

VI. CONCLUSION

Based upon the foregoing, **IT IS HEREBY RECOMMENDED** that Gillian Harper's "Petitioner's Motion For Review of Sentence Under 3742(a)(2)" (ECF No. 224), and "Petitioner's Motion To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody Pursuant To 28 U.S.C. § 2255" (ECF No. 237) be **DENIED** without an evidentiary hearing. It is further **RECOMMENDED** that Harper's "Motion for Extension of Time petition under 28 U.S.C. § 2255" (ECF No. 230) be **DENIED AS MOOT**. It is further recommended that a certificate of appealability be **DENIED**.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: February 9, 2020

/s/ George W. Cannon, Jr.
GEORGE W. CANNON, JR.
MAGISTRATE JUDGE