

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,

Plaintiff,

v.

GIBBS BULLY,

Defendant.

1:17-cr-00012-1

TO: Gibbs Bully, #10562-04
MDC Guaynabo
P.O. Box 2005
Catano, PR 00963
Alphonso G. Andrews, Jr., Esq., AUSA
Daniel H. Huston, Esq., AUSA
Kia Sears, Esq., AFPD

REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon the Order (ECF No. 155) of Chief Judge Wilma A. Lewis in 1:17-cr-00012-1 referring Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 147) purportedly filed on behalf of Defendant Gibbs Bully ("Bully") by Michael J. Dee ("Dee"). For the reasons set forth below, the undersigned **RECOMMENDS** 1) that the § 2255 motion be **DENIED** and 2) that the motion not count as a first § 2255 motion filed by Bully.

I. RELEVANT BACKGROUND

On January 10, 2018, Bully entered into a Plea Agreement in which he pleaded guilty to possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)¹

¹ This section of the Code states as follows:

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and § 841(B)(1)(D).² (Plea Agreement, ECF No. 74). Defendant acknowledged that he entered the agreement “knowingly, voluntarily, and upon the advice of counsel.” *Id.* at 6.

In the Plea Agreement, Bully admitted that the government would be able to prove the following beyond a reasonable doubt:

On or about February 17, 2017, Mr. Bully aided and abetted Nathalie Lopez (whose U.S. Passport indicates that she is a U.S. citizen, born in Puerto Rico) in traveling on a flight operated by American Airlines from Miami, Florida, to St. Croix. Mr. Bully aided and abetted Ms. Lopez to check one box on this flight containing five separate vacuum-sealed packages of marijuana, weighing approximately 4.5 kilograms. Once Ms. Lopez arrived in St. Croix, Mr. Bully retrieved the box containing the marijuana from the baggage carousel. He possessed this marijuana either actually or constructively, with

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(a)(1).

² This section of the Code states as follows:

In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

21 U.S.C. § 841(B)(1)(D).

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the specific intent to distribute the marijuana, and did so knowingly and intentionally.

(*Id.* at 2). The Plea Agreement also addressed the fact that Bully was knowingly waiving his appellate rights:

[T]he defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction or the manner in which that sentence was determined, on the grounds set forth in Title 18, United States Code, Section 3742(a) or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. In addition, the defendant expressly waives the right to petition under 28 U.S.C. Section 2255, with the exception of the claim of ineffective assistance of counsel. The defendant has discussed these rights with the defendant's attorney. The defendant understands the rights being waived, and the defendant waives these rights knowingly, intelligently, and voluntarily.

Plea Agreement at 4.

On March 14, 2019, Judge Lewis sentenced Bully to an 18-month term of imprisonment, to be followed by a term of supervised release of four years. (Judgment, ECF No. 139 at 2-3).

Dee filed this motion on May 16, 2019. The government responded, and Dee replied.

II. LEGAL STANDARDS

A. Section 2255

"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

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Constitution.” *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

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 it is “preferable” to consider such claims on collateral review where the record may be 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)).

B. Ineffective Assistance of Counsel

To succeed on an ineffective assistance of trial counsel claim, a movant must show both that 1) counsel's representation was deficient and that 2) the deficient performance “prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As for the “deficient” prong, a movant must show that counsel “made errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* As for the prejudice prong, a movant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.³

³ A court may dispose of a claim at either prong, as there is no required order to the *Strickland* inquiry. *Strickland*, 466 U.S. at 697 (explaining 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” or “address both components of the inquiry if the defendant makes an insufficient showing on one”).

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The movant bears the burden of establishing his ineffective assistance of counsel claims by a preponderance of the evidence. *United States v. Serrano*, 798 F. Supp. 2d 634, 641 (E.D. Pa. July 18, 2011) (citing *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980)).

A movant “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's performance is highly deferential, and a petitioner must overcome a “strong presumption” that counsel's strategy and tactics “fall[] within the wide range of reasonable professional assistance.” *Id.* at 689. In addition, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” *Id.* at 691-92. Thus, “[s]urmounting Strickland's high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

III. DEE'S ARGUMENT

Dee has offered the following argument as to why the Court must vacate Bully's sentence:

Mr. Bully is being illegally deprives of a substantial constitutional right, his liberty. Congress criminalized marijuana without compelling government

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reasons therefore without due process of law contravening the 4th and 5th Amendments of the Constitution of the United States and is unconstitutional.

Mot. to Vac. at 3. In support of his argument, Dee states the following:

Marijuana is classified as a dangerous federal controlled substance.

The operation and effect of federal prosecution in the enforcement of these marijuana criminal laws was the seizure of Bully's person and deprivation of his constitutional right of liberty by the bounds of prison.

A reasonable regulated interstate commerce of this property, marijuana, does not present a substantial threat to the rights of others, to public safety or health, requiring the use of federal police power.

Marijuana is not a dangerous, lethal substance for personal consumption.

Since the Viet Nam war era marijuana has proven to be safe to use by adults without medical supervision. No one has died from smoking marijuana. Mr. Bully plead guilty, was convicted, and deprived of his liberty for a victimless crime.

Id. Dee also uses a patched-together series of legal buzzwords in an attempt to state an ineffective assistance of counsel claim:

Ground One has not been raised because of ineffective assistance of counsel who did not inform Bully of the fact that he is being be deprived of his constitutional right of liberty. That deprivation of his liberty by the federal government is an Article III justiciable controversy ripe for adjudication by this court under strict scrutiny standard of review. That Bully has had standing to know the compelling reasons, the validity, therefore, the constitutionality of the law he was convicted of, Lawyers will not recognize the substantial denial of his constitutional right of liberty, freedom from physical restraint, bounds of prison.

Lawyers are trained to believe the marijuana laws, criminal laws are a political question. No rights are deprived because what is a crime is not fundamental right. This is repugnant to the rule of law, the Constitution of the United States.

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Id. at 4.

IV. DISCUSSION

A. The Court Recommends Dismissal, because Dee does not have standing to file the motion.

Bully did not verify or sign the motion, and it is not clear that he even knows about it. Although Dee correctly points out that § 2242 allows for a writ of habeas corpus by a third party on behalf of “the person for whose relief it is intended,” standing to raise such a claim for another is far from automatic under *Whitmore v. Arkansas*, 499 U.S. 149, 163 (1990).

Before the undersigned can consider Dee’s motion on Bully’s behalf, Dee must prove “the propriety of his status” and establish the Court’s jurisdiction. *Id.* at 164. To show his standing to sue on Bully’s behalf, Dee must (1) “provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action” and (2) “be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.” *Id.* at 163. It would also help if Dee had “some significant relationship with” Bully—who remains “the real party in interest.” *Id.* at 164.

Here, Dee offers very little to establish his standing to litigate on Bully’s behalf. Rather than say why Bully did not sign the motion and cannot represent himself, Dee states the following:

I seek post-conviction relief on behalf of Mr. Bully based on ineffective assistance of counsel who believes criminal laws are a political question.

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My relationship to Mr. Bully is that I am a military veteran defending his constitutional right of liberty, freedom from physical restraint by the bounds of prison from domestic enemies, lawyers. (oath of enlistment) He is being illegally deprived of a substantial constitutional right of liberty without compelling reasons, without due process of law, therefore under the color of law contravening the Fourth and Fifth Amendments of the Constitution of the United States. How can he sign when he doesn't understand what he is signing and conflicts with what a lawyer and others tell him?

Mot. to Vac. at 6.

This explanation is far from sufficient to find that Dee had the necessary pre-existing relationship with Bully that would allow for Dee to prosecute this action. Further, Dee has not submitted any evidence which would permit the Court to find that Bully suffers from some lack of access to the Court. Not only does Dee not discuss whether he conferred with Bully as to this motion, he does not say if he and Bully have any relationship at all. The undersigned's research revealed that Dee is, in fact, "a marijuana advocate" who has "previously filed numerous cases challenging marijuana laws and [who] ultimately became subject to filing restrictions" in the United States District Court for the District of Maine. *Dee v. United States*, Civil No. 9-163-P-H, 2009 WL 1149903, at *1 n.1 (D. Me. Apr. 28, 2009) (discussing Dee's previous filings with that court).

Dee's most recent activity prior to this motion appears to have been in federal courts in Tennessee and Nebraska, where he filed motions like the one at issue here. *See United States v. Starkey*, Case No. 8:17CR242 (D. Ne. June 4, 2019) ("Given Dee's explanation, he has not established his standing to file a § 2255 motion on Starkey's behalf."); *Cisco v. United States*, Case No. 1:19-cv-01096-STA-jay, 2019 U.S. Dist. LEXIS

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85867, at *3 (W.D. Tenn. May 22, 2019) (“Dee is advised that any further attempt on his part to file or sign documents purportedly on Cisco’s behalf, or on behalf of other federal prisoners, will result in the imposition of sanctions without further notice.”). The undersigned views the decisions of those courts as highly persuasive.

For these reasons, the undersigned recommends denying the motion. However, because there is no indication that Bully was even aware of this motion, the undersigned also recommends that the motion not be counted as a first § 2255 motion by Bully.

B. Alternatively, The Motion Can be Dismissed on the Merits.

Dee offers no support to advance his argument that 21 U.S.C. § 841(a)(1) or § 841(B)(1)(D) are unconstitutional. Rather, Dee appears to be making a series of public policy arguments against the criminalization of marijuana. Dee’s arguments should fail, because marijuana remains classified as a Schedule I drug and remains illegal under federal law.

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“CDAPCA”) in response to President Nixon’s declared “war on drugs.” *Gonzales v. Raich*, 545 U.S. 1, 10 (2005). Congress classified controlled substances into five separate schedules, the designation of which is based on “their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.” *Id.* at 13. A drug falling within the scope of Schedule I—the highest level of classification with the most onerous control restrictions—must have:

1. A high potential for abuse;

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2. “[N]o currently accepted medical use in treatment in the United States,” and
3. “[A] lack of accepted safety for use of the drug or other substance under medical supervision.”

21 U.S.C. § 821(b)(1). Congress classified marijuana as a Schedule I drug when it enacted Title II of the CDAPCA, codified at 21 U.S.C. § 801 *et seq.* This decision was based, in part, on the recommendation of the Assistant Secretary of the Department of Health, Education, and Welfare, who urged marijuana’s Schedule I classification at least until the completion of studies which were already underway at the time. *Gonzales*, 545 U.S. at 14. Congress then established a process for reclassifying a drug, vesting the Attorney General with that responsibility. *See* 21 U.S.C. § 811(a). The Attorney General, in turn, has delegated that responsibility to the Drug Enforcement Agency. *See* 28 C.F.R. § 0.100(b).

Those seeking to challenge the DEA’s determination with respect to classification must pursue relief in a United States Court of Appeals. 21 U.S.C. § 877 (“[A]ny person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision.”). Nonetheless, “[d]espite considerable efforts to reschedule marijuana, it remains a Schedule I drug.” *Gonzales*, 545 U.S. at 15. In classifying marijuana as a Schedule I drug, “the manufacture, distribution, or possession ... became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.” *Id.* at 15 n.23.

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Despite growing legalization at the state level for both medical use and recreational use, marijuana remains a controlled substance under Schedule I. In 2011, the DEA denied a rescheduling petition, *see* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011), and the D.C. Circuit upheld the DEA's determination in *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013). The DEA denied another rescheduling petition as recently as 2016. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016). Other courts have also rejected arguments that it is unconstitutional for the government to continue to classify marijuana as a Schedule I controlled substance. *See, e.g., Craker v. DEA*, 714 F.3d 17, 19 n.1 (1st Cir. 2013) ("Although considerable efforts have been made to reschedule marijuana, it remains a Schedule I substance"); *United States v. Ernst*, 857 F.Supp.2d 1098, 1103-04 (D. Or. Mar. 9, 2012) (rejecting defendant's claim that continued classification of marijuana as Schedule I substance violated his due process and equal protection rights). In summary, the designation of marijuana as a Schedule I controlled substance was made by Congress, has been upheld by the Supreme Court, and remains controlling federal law. Nothing has changed since the time of Bully's plea, his sentencing, or the filing of this motion.

The undersigned also recommends that Dee's ineffective assistance of counsel claim should be dismissed. A liberal reading of Dee's motion reveals only two references to an attorney or counsel. On page four of the motion, Dee writes "Ground One has not been raised because of ineffective assistance of counsel who did not inform Bully of the fact that

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he is being deprived of his constitutional right of liberty” and that “[l]awyers are trained to believe the marijuana laws, criminal laws are a political question.” Mot. to Vac. at 4. These statements appear to be an attempt on Dee’s part to rehash his public policy arguments regarding the federal illegality of marijuana, but counsel cannot be found to be ineffective for failing to inform a criminal defendant as to a potential but nonetheless, nonexistent state of the law. *See Beltz v. U.S.*, No. 1:06CV0050 HEA, 2006 WL 2802201, at *6 (E.D. Mo. Sept. 25, 2006) (“Counsel is not ineffective for failing to object to a proposition that has no legal basis.”).

Judge Lewis’s exchange with Bully at the sentencing hearing confirms Bully’s understanding of the crimes for which he was being convicted, and there is no indication from the following brief exchange that Bully would have pursued facial attacks on the constitutionality of 21 U.S.C. § 841(a)(1) or § 841(B)(1)(D), even if his attorney had encouraged him to do so:

BY THE COURT:

Q. [to Bully] Mr. Bully, under some circumstances, a defendant has the right to appeal his sentence. However, a defendant may waive the right as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver itself is not valid, you can present that theory to the appellate court. Have you had the opportunity to speak with your attorney regarding the provisions of your plea agreement pertaining to the waiver of your appeal rights?

BULLY: Yes.

THE COURT: To summarize this waiver provision, do you understand that you are waiving both: (1) your right to appeal any sentence within the maximum

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provided by statute of conviction or the manner in which the sentence was determined; and (2) your right to petition under 28 U.S.C. § 2255, which pertains to the ability to challenge the sentence imposed, except to claim ineffective assistance of counsel? Do you understand?

BULLY: Yes.

Transcript of March 14, 2019 Sentencing Hearing at 2. (ECF No. 137).

Even if the statutes under which Bully pleaded guilty are deemed to be unconstitutional in the near future—and Dee has provided no evidence beyond his own desires to support that such a change is imminent—Dee’s claim should still fail, because counsel is not ineffective for taking a position that, while objectively reasonable at the time, is later ruled incorrect. *See McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). The question at that point would be whether the position counsel took was objectively reasonable *at the time it was provided* under *Strickland*, and there is no indication that Bully was misled by his attorney’s explanation of the state of the law as it existed before, during, or after trial. Further, even if there is some colorable basis for Dee’s assertion that counsel should have advised Bully as to the supposed unconstitutionality of 21 U.S.C. § 841(a)(1) or § 841(B)(1)(D)—and, again, there is not—counsel does not have a duty to raise every possible non-frivolous claim. *See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996). For these reasons, it is not possible to conclude that counsel’s approach prejudiced Bully within the meaning of *Strickland*. As such, Dee’s motion should be denied on this basis as well.

V. CONCLUSION

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Based upon the foregoing, IT IS HEREBY RECOMMENDED that the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 147) purportedly filed on behalf of Defendant Gibbs Bully ("Bully") by Michael J. Dee ("Dee") be **DENIED**. It is further recommended that the motion not count as a first § 2255 motion filed by Bully.

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: July 22, 2019

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