

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30322
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH E. FRYAR,

Defendant-Appellant.

Appeal from the United States District Court
for the
Eastern District of Louisiana

(CA 94 563 D (CR 89 160 D))

March 28, 1995

Before JOHNSON, BARKSDALE, and PARKER, Circuit Judges.

JOHNSON, Circuit Judge:¹

Appellant Joseph Fryar ("Fryar") appeals the district court's denial of his section 2255 motion to vacate sentence. Because we do not believe that Fryar has shown the requisite cause and/or prejudice to collaterally attack his sentence under a section 2255 motion, we affirm.

¹Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to this Rule, the Court has determined that this opinion should not be published.

I. Facts and Procedural History

On October 30, 1989, Fryar pled guilty to Counts II and VI of an eight-count superseding indictment. Count II charged that Fryar and five co-defendants knowingly and willfully conspired to launder monetary instruments in violation of 18 U.S.C. § 1956(a)(3). Count VI charged that Fryar, along with others, acted as a currency dealer and knowingly and wilfully failed to file a currency transaction report in violation of 31 U.S.C. §§ 5313(a) and 5322(b).

On February 28, 1990, the district court sentenced Fryar to fifty-one months of imprisonment as to Count II and fifty-one months of imprisonment as to Count VI, with the two sentences set to run concurrently with one another. Additionally, the district court ordered the two sentences to run consecutively to a sentence that Fryar was also serving for jury tampering and conspiracy.² Finally, the district court ordered Fryar to be placed on a three-year term of supervised release for Count II and a three-year term of supervised release for Count VI, with these periods of supervised release set to run concurrently with one another. Fryar

²Fryar was convicted in the Western District of Louisiana of jury tampering and conspiracy to corruptly influence a jury. The Western District Court of Louisiana sentenced Fryar to ten years imprisonment and five years probation, but released Fryar on bond pending appeal. This Court affirmed the conviction and sentence of the Western District of Louisiana in *United States v. Fryar*, 867 F.2d 850 (5th Cir. 1989). While the Western District of Louisiana appeal was pending, Fryar committed the acts alleged in the instant case. After Fryar pleaded guilty in this case, the Western District of Louisiana revoked Fryar's probationary sentence and ordered him to serve a three-year sentence to run consecutively to the ten-year sentence that it previously imposed and to the fifty-one month sentence imposed here.

did not directly appeal his conviction or his sentence.

Fryar filed this section 2255 motion attacking his Eastern District of Louisiana sentence and conviction.³ Fryar argues that his sentence was unconstitutional because the Government had breached the plea agreement and because Fryar was not fully apprised of the ramifications of his guilty plea on other litigation. Fryar also contends that his conviction was invalid because the Government enhanced his punishment by manipulating the amount of money involved in the offense and because the statute to which he pleaded guilty was not effective when he committed the acts.⁴

The district court denied section 2255 relief to Fryar without an evidentiary hearing on the grounds that Fryar's claims were procedurally barred and without merit. Because we agree with the district court's assessment of Fryar's section 2255 motion, we affirm.

II. Discussion

The disposition of a 28 U.S.C. § 2255 motion to vacate

³Fryar also attempts to attack the district court's venue for the first time on appeal on the ground that the crime did not occur in the Eastern District of Louisiana. Because this issue necessarily requires the resolution of factual issues as to the conduct occurring during the offense, this Court will not review the issue when it was not first presented to the district court. See *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

⁴Fryar also requested that the district court grant him a three-level reduction under the Sentencing Guidelines for acceptance of responsibility in light of clarifications made to the relevant guidelines after Fryar's sentencing. This issue has been abandoned on appeal and, thus, has not been considered by this Court.

sentence lies within the sound judicial discretion of the trial judge, and this Court will only reverse the district court when that court has abused its discretion in denying the section 2255 motion. *See Barnes v. United States*, 579 F.2d 364, 365 (5th Cir. 1978); *Smith v. United States*, 223 F.2d 750, 750 (5th Cir. 1955).

Relief under section 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and which would, if condoned, result in a complete miscarriage of justice. *See United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Even if a defendant alleges a constitutional error, if the issue could have been raised on direct appeal, the defendant may not raise an issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 978 (1992). The only exception to the cause and prejudice test is the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* (citations omitted).⁵

A. Alleged Sentencing Errors

1. Breached Plea Agreement

To determine whether the Government has breached a plea

⁵To invoke the procedural bar, the Government must raise it in the district court. *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992). The Government has raised the procedural bar in both its response to Fryar's § 2255 motion as well as in the Government's appellate briefing.

agreement, this Court must consider "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." *United States v. Garcia-Bonilla*, 11 F.3d 45, 46 (5th Cir. 1993) (citation omitted). This inquiry is a question of law to be reviewed de novo. *Id.* Fryar, as the party alleging a breach of the plea agreement, bears the burdens of proving the underlying facts and of establishing a breach by a preponderance of the evidence. *Id.*

The Government's decision to seek a reduction of the defendant's sentence is discretionary. *See Wade v. United States*, 112 S. Ct. 1840, 1843-44 (1991). The Government nevertheless may bargain away its discretion in a plea agreement. *See Garcia-Bonilla*, 11 F.3d at 46-47. However, when the Government retains its discretion to file the motion for sentence reduction, "a defendant who provides substantial assistance without receiving a downward departure is not entitled 'to a remedy or even to discovery or an evidentiary hearing' unless the prosecution relied on an unconstitutional motive" in refusing to file the downward departure motion. *Id.* at 46 (quoting *Wade*, 112 S. Ct. at 1844). Allegations of bad motive alone are insufficient. *Wade*, 112 S. Ct. at 1844.

Fryar argues that the Government breached his plea agreement by failing to file either a section 5K1.1 motion or a Rule 35(b) motion on his behalf after Fryar had rendered substantial assistance. He argues that given his cooperation with the government, the failure to file a motion was arbitrary and

capricious as well as in bad faith.

The initial issue becomes, then, whether the Government reserved its discretion in deciding whether to file a motion for downward departure.⁶ Fryar's plea agreement states that:

The Government will bring to the attention of the Court any cooperation rendered to law enforcement by the defendant. However, the defendant's cooperation does not automatically require the Government to request a departure from the sentencing guidelines for substantial assistance to the Government. The decision will be made by the Government after it evaluates the cooperation. If the Government decides to file a motion that the Court may depart pursuant to Section 5K.1 of the sentencing guidelines, the Government will file a motion at a time determined by the Government, and only after the Government evaluates the entire cooperation of the defendant. The defendant understands that the motion could be filed prior to sentencing, at sentencing or after sentencing pursuant to Rule 35 of the F.R.Cr.P.

R. 3, 628-29 (emphasis added). The agreement expressly provides that the decision will be made by the Government alone, and only after the Government has evaluated Fryar's cooperation. Therefore, it is obvious to this Court that the government did retain its discretion as to whether it would file a motion for a downward departure in Fryar's sentence.

Fryar has not alleged that the Government relied upon an unconstitutional motive in not seeking a downward departure.⁷ Therefore, the district court did not err in rejecting Fryar's breach of plea agreement argument, and Fryar is not entitled to an

⁶If Fryar has not shown that he was prejudiced by the Government's failure to file a motion for downward departure, then this Court need not even proceed to the cause inquiry.

⁷Fryar's mere allegations of bad faith and ill-motive are insufficient to state a claim for constitutional deprivation of his rights when the plain language of the plea agreement itself indicates otherwise. See *Wade*, 112 S. Ct. at 1844.

evidentiary hearing on the issue.

2. Failure to Fully Apprise
Fryar of Ramifications of His Guilty Plea

Fryar claims that Federal Rule of Criminal Procedure 11 required the judge in this Eastern District of Louisiana case to inform Fryar of the ramifications his guilty plea would have in light of the Western District of Louisiana case which was on appeal. Specifically, Fryar claims that because he was not informed that his guilty plea in this case could cause the revocation of the probationary sentence he received in the Western District of Louisiana case, his guilty plea was not informed and voluntary.

Rule 11 does not require the district court to advise the defendant of collateral consequences of a guilty plea. FED. R. CRIM. P. 11(c); *United States v. Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1991). Rule 11 requires only that a sentencing judge inform a defendant of the potential minimum and maximum sentences in the case at hand. *Edwards*, 911 F.2d at 1935. The effect of a plea's possible enhancing effect on a subsequent or separate sentence is merely a collateral consequence of the conviction. See *id.* at 1035; *Wright v. United States*, 624 F.2d 557, 561 (5th Cir. 1980).

Even assuming that the alleged Rule 11 violation can rise to the level of a constitutional deprivation,⁸ the district court did not have a duty to inform Fryar of the collateral consequences of

⁸*Cf. United States v. Armstrong*, 951 F.2d 626, 629 (5th Cir. 1992) (holding a formal or technical violation of Rule 11 is not cognizable under section 2255 since it is neither constitutional nor jurisdictional).

his guilty plea in this case. Accordingly, Fryar has failed to show a cognizable section 2255 injury.

Additionally, Both Fryar and his counsel knew of Fryar's prior criminal conviction and probationary sentence which was on appeal.⁹ Fryar's counsel was in a more than adequate position to be aware of the potential ramifications of the guilty plea in the present case. It seems highly unlikely that Fryar was, in fact, prejudiced by the district court's failure to apprise him of the potential collateral consequences of his guilty plea when Fryar's counsel was fully aware of both cases.

3. Sentence Manipulation

Fryar argues that the Government improperly manipulated his sentence by manipulating the money amount involved so as to attain an enhancement under the guidelines. This allegation is groundless since the technical misapplication of the sentencing guidelines is not cognizable under section 2255. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Technical misapplication of the sentencing guidelines must be attacked by direct appeal, if at all, and not through a section 2255 motion.

B. Alleged Conviction Errors

1. Effective Date of Conviction Statute

Fryar argues that Count II of his indictment should have been dismissed because 18 U.S.C. § 1956(a)(3) was not effective when the

⁹In fact, the plea agreement in the present case expressly mentioned that it did not preclude the United States Attorney's Office for the Western District of Louisiana from pursuing any investigation relating to jury tampering.

criminal conduct occurred. A statute becomes effective when it is signed into law, absent some contrary provisions. *United States v. Robles-Pantoja*, 887 F.2d 1250, 1257 (5th Cir. 1989). Fryar was convicted under subsection (3) of 18 U.S.C. § 1956. Subsection (3) was enacted under section 6454 of the Anti-Drug Abuse Act of 1988, and section 6454 had no effective date. PUB. L. No. 100-690, § 6465 (Nov. 18, 1988). Fryar's cited excerpt setting an express effective date refers only to subtitle A of the Anti-Drug Abuse Act, known as the "Chemical Diversion and Trafficking Act of 1988," sections 6052-6061. This subtitle is distinct from subtitle N, which is referred to as "Sundry Criminal Provisions." It is subtitle N which contains subsection (3)—the provision under which Fryar was convicted. Fryar has provided nothing to establish that the provisions in subtitle A also govern subtitle N. Therefore, the effective date of subtitle N and the statute of conviction is assumed to have been upon enactment. Accordingly, Fryar's argument that the statute under which he was convicted was ineffective at the date of the criminal conduct is without merit.

2. Financial Institution Status

Fryar also argues that Count VI of his indictment should have been dismissed because he was not a "financial institution" for purposes of a conviction under 31 U.S.C. §§ 5513(a) and 5322(b). Fryar argues that because he was not a "financial institution" he was under no legal duty to file currency transaction reports and, thus, did not break the law by not so filing. The basis of his argument is that the "financial institution" provisions do not

encompass individuals in their coverage.

The term "financial institution" is broadly defined and does include individuals. *United States v. Gollott*, 939 F.2d 255, 258 (5th Cir. 1991). Thus, Fryar's money laundering activities qualify him as a "financial institution" so as to come within in the terms of the conviction statute.

3. Conspiracy Under Section 1956(a)(3)

Fryar also argues that section 1956(a)(3) punishes only the individual act of money laundering and not a continuing course of action as has been alleged in the conspiracy count here. This argument is wholly without merit given that section 1956(a)(3) may clearly be violated as part of a conspiracy. *See United States v. Breque*, 964 F.2d 281, 386-87 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1253 (1993).

C. Failure to Hold an Evidentiary Hearing

Fryar contends that the lower court erred in denying his section 2255 motion without holding an evidentiary hearing. A district court may deny a section 2255 motion without conducting an evidentiary hearing "if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). If the allegations in the section 2255 motion are negated by the record, the district court need not hold an evidentiary hearing. *See United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 1016 (1993). This Court reviews a denial of an evidentiary hearing for an abuse of discretion. *Bartholomew*,

974 F.2d at 41.

As is demonstrated *supra*, the record in this case conclusively negates Fryar's allegations of error. Thus, the district court was more than justified in refusing to hold an evidentiary hearing.

III. Conclusion

The district court was correct in denying Fryar's section 2255 Motion to Vacate Sentence given that Fryar has failed to show the requisite cause and/or prejudice to justify a collateral attack. Additionally, Fryar's conviction was proper under the effective date and the coverage of the statutes of conviction. The record supports the sentence and conviction in such a way that an evidentiary hearing was not required for Fryar's section 2255 motion. For these reasons, the district court's denial of Fryar's section 2255 motion to vacate is affirmed.

AFFIRMED.