

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60052  
Summary Calendar  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CALVIN VERNARD JOHNSON,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Southern District of Mississippi  
(3:93 CV 541 (3:90 CR 67B))  
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(August 22, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.\*

PER CURIAM:

Following a jury trial, petitioner-appellant Calvin Vernard Johnson (Johnson) was found guilty of possession with intent to distribute crack cocaine and the distribution of the same within 1000 feet of a school. The district court sentenced Johnson to 151 months of imprisonment, followed by 8 years of supervised release.

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\* Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The sentence was the result of a substantial downward departure by the district court.

Johnson filed a direct appeal of his conviction and sentence, arguing that the district court failed to suppress an incriminating statement he made while in custody and that the district court erred in giving the jury a transcript of the audiotape recording played at his trial. This Court addressed the issues and affirmed Johnson's conviction and sentence.

Johnson then filed this motion to vacate his sentence under 28 U.S.C. § 2255. His section 2255 motion asserted for the first time that: 1) the district court improperly enhanced his sentence under the guidelines for his role in the offense; 2) the district court improperly enhanced his sentence under the guidelines by a finding of obstruction of justice; 3) the district court violated FED. R. CRIM. P. 32(c)(3)(D) at sentencing; 4) he received ineffective assistance of counsel at the trial level, at sentencing, and on appeal; 5) the sentencing guidelines scheme punishing possession of cocaine base is unconstitutional. In its response, the government pleaded, *inter alia*, procedural default. The district court determined that Johnson's claims were procedurally barred and, in the alternative, addressed and denied all the claims on their merits.

A person who has been convicted and has exhausted or waived his right to appeal is presumed to have been "'fairly and finally convicted.'" *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) (citation omitted), *cert. denied*, 112 S.Ct. 978 (1992). "[A] 'collateral challenge may not do service for an

appeal.'" *Id.* at 231 (citation omitted).

This Court need not address constitutional issues raised for the first time on collateral review, unless the movant shows "both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *Id.* at 232 (citation omitted). 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." *Shaid*, 937 F.2d at 232 (internal quotations and citation omitted).

Johnson argues on appeal that the sentencing guidelines punishing the possession of crack cocaine are unconstitutional. However, he does not address the cause-and-prejudice test, nor does he argue his innocence. Therefore, this Court need not address this constitutional issue. In any event, this Court has previously addressed these arguments and decided that the crack-powder cocaine sentencing guidelines punishment scheme does not offend constitutional process or equal protection guarantees. *United States v. Watson*, 953 F.2d 895, 897-98 (5th Cir. 1992).

Johnson next argues on appeal that the district court improperly enhanced his offense level under U.S.S.G. § 3B1.1 for his role in the charged offense, as he did not have a leadership role in the offense. Johnson also argues that the district court improperly enhanced his offense level by finding that Johnson had obstructed justice under U.S.S.G. § 3C1.1.

Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a 28 U.S.C. § 2255

proceeding. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Such errors will be considered only if they could not have been raised on direct appeal, and, if condoned, would result in a complete miscarriage of justice. *Shaid*, 937 F.2d at 232 n.7.

Johnson's issues of offense level enhancements for his role in the offense and obstruction of justice pertain to the technical applications of the sentencing guidelines. Such issues are nonconstitutional claims that could have been raised on direct appeal. Therefore, they are not cognizable under section 2255. *Vaughn*, 955 F.2d at 368. Moreover, these claims are plainly without merit.

Johnson argues that the probation officer forwarded to the district court a presentence report (PSR) containing incomplete and inaccurate information.<sup>1</sup> Johnson contends that the district court violated FED. R. CRIM P. 32(c)(3)(D) by failing to make findings regarding disputed matters in the PSR, which caused Johnson to be denied acceptance of responsibility and to receive an upward departure for obstruction of justice.<sup>2</sup>

A violation of Rule 32(c)(3)(D) is cognizable only on direct

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<sup>1</sup> The record of the sentencing hearing reflects Johnson's personal admission that he had prior to sentencing received a copy of the PSR and read it and gone over it with his attorney. He personally also agreed at the end of the sentencing hearing that other than as asserted in specific objections which had been raised and ruled on by the district court, the PSR "is materially true and correct as presented."

<sup>2</sup> Johnson's contention that the district court's conduct violated his rights under the Fifth Amendment was not presented to the district court in the instant section 2255 motion. Therefore, this Court will not consider the argument. See *United States v. Cates*, 952 F.2d 149, 152 (5th Cir.), cert. denied, 112 S.Ct. 2319 (1992).

appeal or on a former FED. R. CRIM. P. 35 motion to correct a sentence. See *United States v. Smith*, 844 F.2d 203, 207 (5th Cir. 1988). To raise a former Rule 35 motion, a defendant must have committed his offenses before November 1, 1987. *Cates*, 952 F.2d at 151 n.1. Johnson committed his offenses in July and September 1990. Consequently, the only avenue for this issue is direct appeal. Johnson cannot raise this issue (which is meritless in any event) in his 28 U.S.C. § 2255 motion.

Johnson finally argues that he received ineffective assistance of counsel from his trial attorney and appellate attorney. This issue is not barred from consideration in this section 2255 proceeding. See *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988); *United States v. Smith*, 844 F.2d 203, 206 (5th Cir. 1988).

Johnson argues that this Court should assume that all his allegations, which he does not specify on appeal, against his trial attorney are true, due to the fact that the attorney did not respond to the district court's order to file an affidavit explaining his actions. This Court should not address this argument because it was presented for the first time on appeal. *Cates*, 952 F.2d at 152. In any event, the record reflects that Johnson's trial attorney did file his affidavit with the district court.

Johnson argues that he received ineffective assistance of counsel by his appellate attorney's failure to raise and preserve

his obstruction of justice sentence enhancement issue.<sup>3</sup>

A claim that counsel has been ineffective will prevail only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was thereby prejudiced. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). Courts indulge a strong presumption that counsel's performance was not deficient. *Id.* In order to establish prejudice, Johnson must show that his counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. *Lockhart v. Fretwell*, 113 S.Ct. 838, 844 (1993). Such unfairness or unreliability results only if counsel's ineffectiveness deprives Johnson of a substantive or procedural right to which the law entitles him. *Id.*

The sentencing court considered Johnson's trial attorney's objection to the obstruction of justice enhancement, yet specifically found that Johnson had threatened potential witnesses. A two-point enhancement is proper where a defendant threatens or attempts to threaten a witness. U.S.S.G. § 3C1.1, comment (n.3(a)). Johnson generally protests that he did not obstruct justice. However, he does not give any indication how his appellate counsel would have disputed the sentencing court's finding or what evidence the appellate counsel could have discovered to demonstrate that the obstruction of justice

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<sup>3</sup> Johnson argued in the district court that his attorneys were ineffective by failing to raise all of the issues he presented in his section 2255 motion, specifically mentioning his argument regarding the crack-powder cocaine sentencing guidelines punishment scheme. Because Johnson does not raise and argue these issues on appeal, they are deemed abandoned. See *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985). Moreover, they are in any event without merit.

enhancement was improper. Consequently, Johnson has not shown that his appellate counsel's failure to argue the obstruction of justice argument on appeal was either improper or would have made a difference in his sentence on appeal, and accordingly his claim that appellate counsel was ineffective fails. See *Lockhart*, 113 S.Ct. at 844.

Johnson's appeal demonstrates no reversible error in the denial of his requested section 2255 relief. The district court's judgment is accordingly

AFFIRMED.