UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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July 31, 2024

Emilio Santiago
FCI Edgefield - Inmate Legal Mail
PO BOX 725
EDGEFIELD, SC 29824

Appeal Number: 24-10272-H
Case Style: Emilio Santiago v. USA
District Court Docket No: 9:22-cv-81069-AMC
Secondary Case Number: 9:21-cr-80026-AMC-5

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10272

EMILIO SANTIAGO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cv-81069-AMC

ORDER:

Emilio Santiago, a federal prisoner serving a 240-month sentence for conspiracy to possess with intent to distribute fentanyl, filed a *pro se* 28 U.S.C. § 2255 motion. The district court denied his motion and a certificate of appealability ("COA"), and Santiago filed a notice of appeal, which this Court construed as a motion for a COA. Santiago then moved for leave to file an out-of-time COA motion and separately filed an out-of-time motion.

Santiago's motion for leave to file an out-of-time COA motion is GRANTED for good cause shown. *See* Fed. R. App. P. 26(b). In his COA motion he argues that reasonable jurists would find debatable: (1) whether he was erroneously sentenced as a career offender because the instant conviction for a conspiracy drug offense did not trigger the career offender provision of the Sentencing Guidelines; (2) whether he was erroneously sentence as a career offender because his past convictions for sale of cocaine under Florida law were not controlled substance offenses; and (3) whether counsel was ineffective for failing to raise those arguments at sentencing.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court denied a habeas petition on substantive grounds, the movant must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

To prove ineffective assistance of counsel, a movant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is not deficient for failing to raise a non-meritorious issue or for failing to make arguments based on predictions on how the law might develop. *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994); *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994).

A movant's claim that the district court erroneously classified him as a career offender cannot be grounds for § 2255 relief because the sentencing guidelines are advisory and thus any error in applying the guidelines would not render his sentence unlawful. *Spencer v. United States*, 773 F.3d 1132, 1138-40 (11th Cir. 2014). Thus, no COA is warranted on his direct challenges to his sentence.

At the time when Santiago was sentenced in October 2021, binding precedent by this Court held that conspiracy drug offenses were controlled substance offenses under U.S.S.G. § 4B1.2. *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995), *overruled by United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (*en banc*). Thus, reasonable jurists would not debate the district court's finding that counsel was not ineffective for failing to argue that Santiago's conspiracy conviction was not a controlled substance offense. *See Slack*, 529 U.S. at 484. That argument was foreclosed by *Smith* at the time of his sentencing, and counsel was not deficient for failing to foresee that *Smith* would be overturned a few years later. *See Smith*, 54 F.3d at 693; *Spaziano*, 36 F.3d at 1039.

We have held that a conviction under Fla. Stat. § 893.13 is a controlled substance offense for the career offender enhancement. *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017). Thus, reasonable jurists would not debate the district court's finding that counsel was not ineffective for failing to argue that Santiago's past convictions were not controlled substance offenses. *See Slack*, 529 U.S. at 484. Under binding precedent, his past convictions were controlled substance offenses, and counsel is not deficient for failing to raise a meritless argument. *Pridgeon*, 853 F.3d at 1198; *See Bolender*, 16 F.3d at 1573.

Because reasonable jurists would not debate the district court's denial of relief, a COA is DENIED on all claims.

/s/ Kevin C. Newsom

UNITED STATES CIRCUIT JUDGE