NOT FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13589

DUSTIN LEE MCLELLAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket Nos. 1:20-cv-00469-KD-N,
1:17-cr-00093-KD-N-1

Before BRANCH, LUCK, Circuit Judges, and MORENO,* District Judge.

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* The Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Dustin McLellan, a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence. A judge of this Court granted a certificate of appealability ("COA") on two issues:

> 1. Whether the district court violated *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc), in denying McLellan's 28 U.S.C. § 2255 motion without addressing his claim that the Armed Career Criminal Act unconstitutionally barred the sentencing court from considering a downward departure under U.S.S.G. § 5K2.[1]

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[1] We note that McLellan did not cast this claim in constitutional terms in his § 2255 motion. Instead, he stated in his § 2255 motion that "the court was not allowed to consider 5K2 factors that was and still are warranted, because of the Armed Career Criminal Act mandatory minimum. The facts already established and agreed to by the government by themselves are grounds for downward departure and suggested under the Guidelines." McLellan made no mention of the Constitution or due process in the context of this claim. Furthermore, McLellan filed a very detailed motion for a COA, followed by a supplemental motion, that set forth the claims that he sought a COA on, and this constitutional challenge was not among them. Instead, his motion for a COA alleged that the district court "abused its discretion" in not considering the relevant U.S.S.G. § 5K2.0 factors that supported "a downward variance" when it resentenced him. We also note that McLellan did not argue in his motion for a COA that the district court overlooked any of his claims when ruling on his § 2255 motion. Nevertheless, when ruling on the COA motion, a judge of this Court construed McLellan's claim as raising a constitutional challenge and *sua sponte* raised a *Clisby* concern. While we are not bound by a single judge's construction of McLellan's claim, we accept for purposes of this

> 2. Whether the district court erred in concluding that the claims, raised in McLellan's April 14, 2022, motion to amend his motion to vacate, were untimely, where those claims arguably related back to the sentencing claims raised in McLellan's initial § 2255 motion.

After careful review and with the benefit of oral argument, we affirm as to the *Clisby* issue. As for the procedural issue identified in the second question, we vacate the COA as improvidently granted and dismiss that portion of this appeal.

I. BACKGROUND

McLellan was convicted of two counts of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court concluded that McLellan was subject to a sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), over McLellan's counsel's objection. Accordingly, the district court sentenced McLellan to concurrent mandatory minimum 15-year sentences on each § 922(g) count to

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opinion that this claim encompassed a constitutional challenge. *See Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1095 (11th Cir. 2015) (explaining that "a single judge's expression of views in an order [at the COA stage] does not bind a panel of three judges"); *see also* 11th Cir. R. 27–1(d)(2) (providing that single judge's COA order is "subject to review by the court"); 11th Cir. R. 27–1(g) ("A ruling on a motion . . . by a single judge . . . is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it.").

be followed by concurrent terms of 5 years' supervised release.[2] The district court explained that the mandatory minimum was "well-warranted" in McLellan's case, but that even if he had not qualified for an ACCA enhancement, it would have still sentenced him to a total of 15 years by sentencing him to 10 years on one count, 5 years on the other, and running the sentences consecutively. The district court acknowledged that the stated alternative 15-year sentence was "not a guideline sentence," but it "found that the 180 months [was] sufficient" and not "greater than necessary, to fulfill the sentencing factors under [§] 3553."

McLellan challenged the ACCA enhancement on direct appeal, arguing that he did not have the necessary qualifying predicate convictions. *United States v. McLellan*, 958 F.3d 1110, 1116–17 (11th Cir. 2020). We declined to address the applicability of the enhancement "because the record [was] clear that the district court would have imposed the same 180-month sentence regardless of whether the mandatory minimum applied," and we concluded that the 15-year sentence was substantively reasonable. *Id.*; *see also United States v. Keene*, 470 F.3d 1347, 1348 (11th Cir. 2006) (explaining that "it is unnecessary for us to decide [an] enhancement issue [where, as here,] a decision either way will not

[2] At the time of McLellan's sentencing, a § 922(g) conviction carried a statutory maximum of ten years' imprisonment. 18 U.S.C. § 924(a)(2) (2017). However, the ACCA increased the statutory maximum and imposed a mandatory minimum sentence of 15 years' imprisonment if a person convicted of a § 922(g) offense has "three previous convictions" for a "violent felony" or a "serious drug offense." *Id.* § 924(e)(1).

affect the outcome of th[e] case"). Accordingly, we affirmed the convictions and sentence, but we remanded to the district court "for clarification of the judgment to reflect the sentence the district court said it would have imposed if the [ACCA] did not apply." *McLellan*, 958 F.3d at 1120.

On remand, pursuant to this Court's instruction, the district court entered an amended judgment stating that McLellan's sentence of imprisonment was "180 months as to each of Counts One and Two, said terms to run concurrently; or in the alternative, 120 months as to Count One and 60 months as to Count Two, said terms to be served consecutively."

Thereafter, McLellan filed a timely *pro se* motion to vacate sentence pursuant to 28 U.S.C. § 2255 in September 2020, followed by a *pro se* "addendum" that set forth additional claims. Specifically, he raised the following claims:

> 1. He "was sentenced under the [ACCA] guidelines which I am not now" and without the ACCA enhancement, his criminal history, base offense level, and resulting guidelines range were all much lower;[3]

[3] It appears that McLellan viewed the amended judgment entered after his direct appeal as a formal resentencing proceeding and a determination that the ACCA enhancement did not apply, despite the fact that we expressly declined to address the applicability of the ACCA enhancement on direct appeal. *McLellan*, 958 F.3d at 1116–17. To be clear, no court has ever held that the ACCA enhancement did not apply to McLellan, and entry of the amended judgment was simply a matter of clarification of the judgment per our

2. The district court was not allowed to consider a downward departure under U.S.S.G. § 5K2.0 because of the ACCA mandatory minimum, even though grounds existed for a downward departure;

3. The district court erroneously relied on testimony from the probation office regarding an altercation McLellan was involved in while detained at the Escambia County jail, even though evidence showed that he acted in self-defense and that he reported the incident to the warden;

4. The government sought a superseding indictment adding a second § 922(g) count in retaliation for McLellan's decision to proceed to trial on Count 1;

5. Trial counsel failed to object to the government's "very unfounded [and] prejudicial remark at closing argument that . . . [McLellan] was a 'weapon [him]self'"; and failed to present evidence of McLellan's prescriptions for anxiety medication;

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mandate. *Id.* at 1120 ("[W]e AFFIRM the district court but REMAND for clarification of the judgment to reflect the sentence the district court said it would have imposed if the Armed Career Criminal Act did not apply."). It was not a full resentencing.

6. Trial counsel failed to introduce at sentencing "a letter from company owner and contractor, Donnie Fuqua, detailing [McLellan's] employment";

7. "[T]he sole person to testify" against McLellan was a friend of his, who was pressured to perjure himself;

8. His supervised release term when combined exceeded the statutory maximum;

9. He was not allowed to object to his sentences being run consecutively upon resentencing, and a downward departure was warranted;

10. The indictment violated the Double Jeopardy Clause because it charged two § 922(g) offenses that had the same elements.

As relief, he requested that the district court resentence him "using the correct set of guidelines now that the ACCA [was] not applicable."

After the expiration of § 2255's one-year limitation period,[4] on April 14, 2022, McLellan filed a "motion to amend" his § 2255 motion to add, as relevant here, the following claims:[5]

1. His due process rights were violated because he had no opportunity to defend against an upward departure at his resentencing, or to "dispute any factors that was [sic] used against [him] to increase [his] sentence above the [g]uidelines";

2. The district court did not calculate the correct guideline range for its alternative sentence or consider McLellan's arguments for a downward departure;

3. McLellan had no "opportunity to present any mitigating evidence in [his] favor" concerning the alternative sentence because "[t]he court stated it was a mandatory minimum case";

4. The district court failed to avoid "unwarranted sentencing disparities for giving [McLellan] a

[4] *See* 28 U.S.C. § 2255(f) (establishing a one-year statute of limitations from the date the judgment of conviction becomes final for filing a timely § 2255 motion to vacate).

[5] McLellan also filed two additional motions to amend after the limitations period expired seeking to raise additional claims, but we discuss only the claims related to the April 2022 motion to amend because that motion is the subject of the COA.

> sentence a lot worse than defendants similarly situated";
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> 5. Trial counsel was ineffective "for not objecting to the Court classifying [him] as [subject to the] ACCA . . . without explaining . . . the way it [made this] determin[ation]."

Upon review, the district court explained that McLellan's motion to amend was untimely, and he was not entitled to equitable tolling. Nevertheless, the district court concluded that it would "consider the arguments raised in [the motion to amend] only to the extent they relate back to grounds originally raised in McLellan's timely [§] 2255 Motion and Addendum." Next, the district court explained that its entry of an amended judgment was not a sentence correction or a resentencing; rather, it "was a mere clarification" as directed by this Court on direct appeal. It further noted that "McLellan's sentencing claims are not viable in a [§] 2255 motion, as a defendant has no right to raise Guidelines sentencing issues in a § 2255 proceeding." The district court then explained that this Court did not address the applicability of the ACCA enhancement on direct appeal, but to the extent that McLellan again challenged it, he had the necessary qualifying predicate convictions. As for the purported trial court errors, the district court explained that these errors had either been addressed on appeal or were procedurally defaulted because McLellan could have raised them on direct appeal, but failed to do so. Likewise, McLellan's alleged sentencing issues were procedurally defaulted because they could have been raised on direct appeal. Lastly, the

district court concluded that McLellan's ineffective assistance claims in the initial § 2255 motion were without merit. Accordingly, the district court denied the § 2255 motion and denied a COA.

McLellan then sought a COA from this Court, which a judge of this Court granted on two issues. The first issue related to whether the district court violated the rule announced in *Clisby* when it allegedly failed to address McLellan's claim in his initial § 2255 motion that the ACCA unconstitutionally barred the sentencing court from considering a downward departure under U.S.S.G. § 5K2. The second issue was procedural and concerned the April 2022 motion to amend—namely, whether the district court erred in concluding that the claims in the motion to amend were untimely where those claims arguably related back to the sentencing claims raised in McLellan's initial § 2255 motion.

II. Standard of Review

When reviewing the district court's denial of a § 2255 motion, we review questions of law *de novo*. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). "[W]e review de novo the legal question of whether the district court violated the rule

announced in *Clisby*." *Dupree v. Warden*, 715 F.3d 1295, 1299–1300 (11th Cir. 2013).

III. Discussion

A. Clisby *claim*

McLellan argues that the district court violated the rule announced in *Clisby* because it failed to consider his claim in his initial § 2255 motion that the ACCA unconstitutionally prohibited the district court from considering his argument for a downward departure under U.S.S.G. § 5K2.0.[6]

In *Clisby*, we instructed district courts to resolve all claims for relief raised in petitions for writs of habeas corpus under 28 U.S.C. § 2254. 960 F.2d at 936. We expressed "deep concern over the piecemeal litigation of federal habeas petitions filed by state prisoners," and emphasized the importance of litigating all of a petitioner's claims in one habeas proceeding. *Id.* at 935. We subsequently extended the *Clisby* principle to § 2255 motions by federal prisoners. *See Rhode*, 583 F.3d at 1291.

In McLellan's case, under the totality of the circumstances, there was no *Clisby* violation. Although couched in terms of

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[6] McLellan also asserts that the district court violated the *Clisby* rule because it failed to consider his claim that it erred as a procedural matter and violated due process by considering the altercation that occurred while McLellan was in the Escambia County Jail and then using that incident to justify the sentence. We do not address this claim because it is outside the scope of the certificate of appealability. *See Rhode*, 583 F.3d at 1290–91 (Our "scope of review is limited to the issues specified in the COA.").

constitutional "due process" at oral argument, McLellan's claim at bottom is nothing more than a run-of-the-mill sentencing challenge. His claim takes issue with the fact that he sought a downward departure under U.S.S.G. § 5K2.0, but U.S.S.G. § 5G1.1(c) prohibited the district court from imposing a sentence below the applicable statutory mandatory minimum sentence (*i.e.*, the ACCA's 15-year mandatory minimum). *See* U.S.S.G. § 5G1.1(c). The district court addressed this claim when it explained, albeit in a footnote, that "McLellan's sentencing claims [were] not viable in a [§] 2255 motion, as a defendant has no right to raise Guidelines sentencing issues in a § 2255 proceeding."[7] *See Spencer v. United States*, 773 F.3d 1132, 1138–39 (11th Cir. 2014) (en banc) (holding that a prisoner may not challenge a sentencing error on collateral review unless the claimed error "constitutes a fundamental defect which inherently results in a complete miscarriage of justice" (quotations omitted)); *see id.* at 1139 ("When a federal prisoner, sentenced below the statutory maximum,[8]

[7] When asked at oral argument whether the district court's footnote resolved the constitutional challenge, the government took the position that it was not entirely clear that the footnote resolved this claim. The government took this position in large part because it maintained that McLellan had not raised a constitutional challenge in his § 2255 motion. To the extent that the government's statement regarding the footnote could be viewed as a concession that a *Clisby* error occurred, "[w]e are not bound by that concession, and we decline to accept it." *United States v. Colston*, 4 F.4th 1179, 1187 (11th Cir. 2021).

[8] With application of the ACCA enhancement, McLellan's statutory maximum was life. Without the ACCA enhancement, the statutory maximum was 10 years for each count. *See* 18 U.S.C. § 924(a)(2). The district court was free to

complains of a sentencing error and does not prove either actual innocence of his crime or the vacatur of a prior conviction, the prisoner cannot satisfy the demanding standard that a sentencing error resulted in a complete miscarriage of justice."). Thus, the district court addressed McLellan's claim and resolved it by concluding that sentencing challenges were not cognizable in a § 2255 motion.[9] Accordingly, we conclude that there was no *Clisby* violation.

B. Relation Back

The second issue identified in the COA is a purely procedural issue: whether the district court erred in concluding that the claims raised in the April 2022 motion to amend were untimely where those claims arguably related back to the initial § 2255 motion. We do not reach the merits of this procedural

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run these sentences consecutively, even if the total sentence exceeded the statutory maximum for any single count. *United States v. Pressley*, 345 F.3d 1205, 1213 (11th Cir. 2003). Thus, McLellan's alternative sentence of 10 years on Count 1 and a consecutive term of 5 years on Count 2 does not exceed the authorized statutory maximum.

[9] Moreover, we note that, even if the district court erred in characterizing McLellan's challenge as a sentencing claim, we would affirm the district court on the alternative ground that McLellan's claim was not cognizable in a § 2255 motion because it was available to McLellan on direct appeal and he failed to advance it; thus, he was "barred from presenting [it] in a § 2255 proceeding." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004); *see also United States v. Campbell*, 26 F.4th 860, 879 (11th Cir. 2022) (en banc) ("[W]e have discretion to affirm on any ground supported by the law and the record . . . ." (quotations omitted)).

question because we conclude that the COA was improvidently granted on this issue.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Further, the COA "shall indicate which specific issue or issues satisfy the [substantial] showing" of the denial of a constitutional right. *Id.* § 2253(c)(3). A petitioner makes "a substantial showing of the denial of a constitutional right" when he demonstrates that reasonable jurists (1) "would find the district court's assessment of the constitutional claims debatable or wrong;" or (2) would find that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 338 (2003).

Consistent with AEDPA's requirements, we have held that where "a prisoner seeks to appeal a procedural error, the [COA] must specify the underlying constitutional issue" that reasonable jurists would find debatable. *See Spencer*, 773 F.3d at 1138. We must vacate a COA as improvidently granted where it fails to specify an underlying constitutional issue. *See id.* ("A failure to specify that issue would violate the text enacted by Congress, *see* 28 U.S.C. § 2253(c)(3), and will result in the vacatur of the certificate."); *Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1179 (11th Cir. 2017) ("We have the authority and duty to vacate a COA" that was improvidently granted.).

In McLellan's case, the COA on this procedural relation back issue did not specify any underlying constitutional issues on which McLellan allegedly made a substantial showing of the denial of a constitutional right. Therefore, the COA violates *Spencer* and § 2253(c). *See Spencer*, 773 F.3d at 1138. Furthermore, we cannot reissue a valid COA here because McLellan cannot show that any of the relevant claims in the April 2022 motion to amend stated a fairly debatable valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (explaining that a COA should only issue on a procedural ground "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"). Rather, all of the claims in the motion to amend that arguably related back to the original § 2255 motion concerned sentencing errors in connection with McLellan's alleged resentencing (*i.e.*, the entry of the amended judgment specifying an alternative sentence).[10] However, McLellan was never

[10] These claims were: (1) McLellan due process rights were violated because he had "no opportunity to defend against upward departure" as part of the alternative sentence; (2) the district court, in imposing the alternative sentence, gave "no consideration to the correct Guideline range or downward departure"; (3) he was deprived of the opportunity to present mitigating evidence as it related to the imposition of the alternative sentence; and (4) the district court failed to avoid sentencing disparities as it related to the alternative sentence. While all of these claims necessarily fail because there was no resentencing process related to the alternative sentence, even if these claims related to his original sentencing hearing, a COA would not be

resentenced; thus, no constitutional errors could have stemmed from a resentencing process that did not occur. Rather, the alternative sentence that we directed the district court to specify in the amended judgment simply flowed from the district court's *Keene* statement at sentencing that it would have imposed the same sentence regardless of the ACCA enhancement. *See McLellan*, 958 F.3d at 1116–17. When the district court made that statement during sentencing, McLellan had the opportunity but failed to raise concerns with the alternative sentence or to argue why, if he were not subject to the ACCA, such a sentence was not warranted. Additionally, because McLellan was well aware of the alternative sentence based on the district court's *Keene* statement, he could have and should have raised any concerns with the district court's alternative sentence in his direct appeal. Because he failed to do so, he is procedurally barred from raising such claims in a § 2255 motion. *See Lynn v. United States*, 365 F.3d at 1234. Accordingly because McLellan cannot show that any of the relevant claims in

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warranted on any of these claims because garden variety sentencing errors like these are not cognizable in a § 2255 proceeding. *Spencer*, 7073 F.3d at 1138.

Finally, we note that McLellan also raised an ineffective assistance claim concerning counsel's alleged failure to object to the district court's conclusion that the ACCA applied to him and its inadequate explanations at sentencing, but that claim does not relate back to any of the timely claims raised in his initial § 2255 motion. Moreover, even if this claim related back and the district court erred in finding it untimely, reasonable jurists would not find it debatable or that it deserves encouragement to proceed further because McLellan's trial counsel did object to the ACCA enhancement and argued it did not apply for multiple reasons.

the motion to amend stated a fairly debatable valid claim of the denial of a constitutional right, we vacate the COA as to the relation back issue as improvidently granted, and we dismiss the appeal in part.

AFFIRMED as to the *Clisby* issue. We **VACATE IN PART** the COA as improvidently granted on the procedural relation back issue and **DISMISS** that part of this appeal.