

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

BRIAN S. GRIMMOND,)	Criminal Action No. 3:93cr70058-2
Petitioner,)	Civil Action No. 3:14cv80715
)	
v.)	<u>REPORT & RECOMMENDATION</u>
)	
UNITED STATES OF AMERICA,)	By: Joel C. Hoppe
Respondent.)	United States Magistrate Judge

Brian S. Grimmond, a federal inmate proceeding *pro se*, filed a petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (“Petition”). ECF No. 80.¹ The Government filed an answer and motion to dismiss, ECF No. 87, to which Grimmond has responded, ECF No. 97. The matter is before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 98. Having considered the parties’ filings, the criminal case record, and the applicable law, I find that Grimmond’s Petition is time-barred and that he is not entitled to equitable tolling.

I. Standard of Review

A prisoner claiming the right to be released from a federal sentence must show that the district court did not have jurisdiction to impose the sentence; the sentence was imposed in violation of the Constitution or laws of the United States; the sentence exceeded the maximum penalty allowed by law; or the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a)–(b); *Michel v. United States*, Nos. 5:06cr41, 5:10cv80281, 2011 WL 767389, at *1 (W.D. Va. Feb. 25, 2011) (Conrad, C.J.). The prisoner ultimately must prove the facts supporting his grounds for relief by a preponderance of the evidence. *See Holland v. Jackson*, 542 U.S. 649, 654 (2004) (per curiam); *United States v. White*, 366 F.3d 291, 297 (4th Cir. 2004).

¹ ECF numbers refer to entries on the criminal case docket.

On the Government’s motion to dismiss, however, the court determines only whether “the [petition] and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *accord White*, 366 F.3d at 296–97; *cf. Walker v. Kelly*, 589 F.3d 127, 138–39 (4th Cir. 2009) (citing R. Gov. § 2254 Cases, Rule 12; Fed. R. Civ. P. 12(b)(6)). Summary dismissal is not appropriate when the prisoner alleges facts that, if true, state a claim for relief that is plausible on its face. *See White*, 366 F.3d at 297; *Walker*, 589 F.3d at 139. In making this determination, the court must accept all well-pleaded facts as true and construe those facts and any reasonable inferences in the prisoner’s favor. *White*, 366 F.3d at 297. The court does not weigh evidence, consider credibility, or resolve disputed issues—it decides only whether the prisoner’s filings state a claim for which relief can be granted.² *See United States v. Stokes*, 112 F. App’x 905, 906 (4th Cir. 2004) (citing *Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970)).

II. Background

In the spring of 1992, Grimmond and Jamal Heath began selling crack cocaine near Heath’s home in Langley Park, Maryland. *United States v. Grimmond*, 137 F.3d 823, 826 (4th Cir. 1998). Their operation was soon interrupted by local police officers, who found a vial of crack and a semi-automatic assault rifle hidden in the bushes in front of Heath’s apartment

² The same standard applies whether the grounds for relief are procedural or substantive. *See, e.g., Holland v. Florida*, 530 U.S. 631, 654 (2010) (vacating order dismissing habeas petition as untimely and remanding for the lower courts “to determine whether the facts in th[e] record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that the respondent should prevail” on that issue); *United States v. Ray*, 547 F. App’x 343, 345 (4th Cir. 2013) (per curiam) (noting that an evidentiary hearing is required where the prisoner “presents a colorable Sixth Amendment claim showing disputed facts beyond the record or when a credibility determination is necessary in order to resolve the issue” (citing *United States v. Witherspoon*, 231 F.3d 923, 926–27 (4th Cir. 2000))).

building. *Id.* Grimmond and Heath decided to move to Charlottesville, Virginia, where they sold crack until late June 1992. *See* Presentence Report 3, Oct. 16, 1996, ECF No. 57 (“PSR”).

On June 27, 1992, Heath and Corey Kinney met J.J. Feaster at a party in Charlottesville. *Grimmond*, 137 F.3d at 826; PSR 3. “According to Heath, Feaster was giving him looks that made him feel unsafe.” *Grimmond*, 137 F.3d at 826. Heath “told Grimmond about the incident with Feaster, and Kinney added that he thought Feaster was the guy who had previously assaulted Grimmond’s sister.” *Id.* Grimmond shot and killed Feaster later that day. *See id.* Milton Dickerson was shot in the hand while standing next to Feaster. PSR 9. On June 28, Grimmond shot and seriously wounded Kinney while they were visiting friends in Washington, D.C. *See Grimmond*, 137 F.3d at 826. Heath and Grimmond tried “to kill Kinney because he ‘knew too much’ about the Feaster slaying.” *Id.*

On April 22, 1993, a federal grand jury in the Western District of Virginia indicted Grimmond and Heath on several gun and drug charges. *See id.*; PSR 3. Grimmond’s federal prosecution was put on hold while the Commonwealth of Virginia and the District of Columbia prosecuted him in their courts for shooting Feaster, Dickerson, and Kinney. *See Grimmond*, 137 F.3d at 826. On June 3, 1993, Grimmond was convicted in Charlottesville Circuit Court and sentenced to 50 years’ incarceration for murdering Feaster and maliciously wounding Dickerson. *See* PSR 9. Grimmond was then transferred to the District of Columbia where on September 16, 1993, he pled guilty to assaulting Kinney with intent to kill him. *See Grimmond*, 137 F.3d at 826; Pet. Resp. 2, Feb. 9, 2015, ECF No. 97. On November 9, 1993, the D.C. Superior Court sentenced Grimmond to prison for a term of twelve years to life. PSR 9.

Grimmond was arraigned on the federal charges on March 8, 1996. After a one-day trial on July 23, 1996, a jury convicted Grimmond of (1) conspiring to commit various federal crimes,

in violation of 18 U.S.C. § 371; (2) conspiring to distribute cocaine base, in violation of 21 U.S.C. §§ 841 and 846; (3) carrying or using a firearm during and in relation to a federal drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (4) possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). *See Grimmond*, 137 F.3d at 826; PSR 1, 3. On October 18, 1996, United States District Judge Samuel G. Wilson sentenced Grimmond to life plus five years in federal prison to run concurrently with the sentences imposed by the Virginia and District of Columbia courts. *See* Judgment 2, ECF No. 68; Sent. Hr'g Tr. 26.

The United States Court of Appeals for the Fourth Circuit affirmed Grimmond's convictions in a published decision dated March 16, 1998. *Grimmond*, 137 F.3d 823. The judgments of conviction became final on October 5, 1998, when the United States Supreme Court denied Grimmond's petition for a writ of certiorari. ECF No. 66; *see Clay v. United States*, 537 U.S. 522, 527 (2003). Grimmond did not collaterally attack his conviction or sentence before subsection 2255(f)(1)'s one-year limitations period expired on October 6, 1999. *See* Pet. ¶ 10. He filed this § 2255 petition on February 3, 2014.

Grimmond challenges his life sentence, asserting that his attorney provided ineffective assistance of counsel at sentencing because he did not object to Grimmond's erroneous guideline classification as a career offender. *See id.* ¶ 12(A); Pet. Br. in Supp. 4–6, ECF No. 80-1. Because Grimmond filed well after October 1999, the Court gave him an opportunity to submit additional information on the timeliness issue or to withdraw his petition without prejudice. ECF No. 81. Grimmond asked the Court to consider his ineffective-assistance-of-counsel claim on the merits because he is “actually innocent of being a career offender.” *See* Pet. Reply 1–2, 4, ECF No. 82. On June 27, 2014, the Government filed its answer and moved to dismiss Grimmond's petition

as untimely filed.³ *See* Mot. to Dismiss 1–3. The Government’s motion is ripe for review and can be resolved on the existing record. *See* 28 U.S.C. § 2255(b) (the district court may dismiss a § 2255 motion without an evidentiary hearing if “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief”); *Ray*, 547 F. App’x at 345.

III. Discussion

Grimmond’s PSR included a five-level career-offender enhancement⁴ based on a 1984 state felony conviction for assault with a dangerous weapon and a 1985 state misdemeanor conviction for unlawfully entering a dwelling. *See* PSR 5–7; Pet. Br. in Supp. 3; Mot. to Dismiss 1. Grimmond argues, and the Government concedes, that his misdemeanor conviction should not have been used to enhance his sentence.⁵ Mot. to Dismiss 4; *see also* D.C. Code § 22-2102

³ “Because the [Government] filed its answer to [Grimmond’s] petition and its motion to dismiss simultaneously, it technically should have filed the motion under Rule 12(c) as one for judgment on the pleadings.” *Walker*, 589 F.3d at 139. The Court “will construe the [Government’s] motion as a motion under Rule 12(c) which is assessed under the same standard that applies to a Rule 12(b)(6) motion.” *Id.*

⁴ A federal defendant qualifies as a “career offender” if (1) he was at least 18 years old at the time of the instant offense, (2) “the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense,” and (3) he “has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. Manual § 4B1.1 (1991). “[T]wo prior felony convictions” means (1) the defendant committed the instant offense after “sustaining at least two felony convictions of either a crime of violence or a controlled substance offense” and (2) the sentences for at least two of those prior felony convictions would be counted separately under § 4A1.1(a)–(c) because they were imposed in unrelated cases. *Id.* § 4B1.2(3). Grimmond was convicted in this case of conspiring to distribute cocaine base in violation of 21 U.S.C. §§ 841 and 846, which is a felony controlled-substance offense. PSR 3; *see also* U.S.S.G. Manual § 4B1.2(2) & app. n.1.

⁵ The Government argues that Grimmond was nonetheless a “career offender” on October 18, 1996, because courts in Virginia and the District of Columbia had already convicted him of murdering Feaster (June 3, 1993) and assaulting Kinney with intent to kill him (September 16, 1993), which are felony “crimes of violence.” *See* Mot. to Dismiss 4. Those convictions are not “prior felony convictions,” however, because Grimmond “committed the instant offense” in spring 1992—more than one year *before* he was convicted in state court for his crimes against Feaster and Kinney. PSR 3; *see also* U.S.S.G. Manual § 4B1.2(3).

(1952). The Government asserts that this Court nonetheless must dismiss Grimmond’s petition because it is untimely and Grimmond is not entitled to equitable tolling. *Id.*

A federal prisoner must file his § 2255 motion within one year of the date on which: (1) the judgment of conviction becomes final; (2) the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f)(1)–(4). The parties agree that subsection (f)(1) controls the one-year clock in Grimmond’s case. Thus, unless equitably tolled, the statutory limitations period expired 15 years before Grimmond filed his petition.

A habeas “petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented” him from filing within the limitations period. *Holland*, 530 U.S. at 634 (holding that 28 U.S.C. § 2244(d)’s limitations period can be equitably tolled) (internal quotation marks omitted); *see also United States v. Terrell*, 405 F. App’x 731, 732 (4th Cir. 2010) (per curiam)

This Court need not decide whether Grimmond is a “career offender” in order to determine whether his petition is time-barred under 28 U.S.C. § 2255(f). *See United States v. Jones*, 758 F.3d 579, 581, 584, 586–87 (4th Cir. 2014). It is worth noting, however, that Judge Wilson likely could have relied on Grimmond’s August 1991 conviction for attempting to possess cocaine with intent to distribute, PSR ¶ 31, to enhance Grimmond’s sentence under the career-offender guideline. *See* D.C. Code §§ 48-904.01(a)(1)(A) (1991), 48-904.09 (1981) (attempted possession with intent to distribute cocaine punishable by not more than 30 years’ imprisonment); U.S.S.G. §§ 4B1.1, 4B1.2(2) app. nn.1, 3 (1991); *see also United States v. Moore*, 209 F. Supp. 2d 180, 182 (D.D.C. 2002) (“[The parties] concede that Moore’s previous convictions for attempted possession with intent to distribute [cocaine] qualify as controlled substance offenses for the purposes of U.S.S.G. § 4B1.2(b).”).

(applying *Holland*'s holding to § 2255(f)'s limitations period). In the Fourth Circuit, “equitable tolling is appropriate in those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (en banc).

Grimmond does not allege that he was “prevented” from filing his § 2255 petition in the year after his convictions became final, or that he was “diligently” pursuing his rights during that time. Instead, he seeks an equitable exception to § 2255(f)(1)'s limitations period because he is—and always has been—actually innocent of his enhanced sentence. Pet. Reply 8; Pet. Resp. 1–2, 4 (citing *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994)); see also *McQuiggin v. Perkins*, --- U.S. ---, 133 S. Ct. 1924, 1931 (2013) (distinguishing between “equitable tolling,” or an “extension of the time statutorily prescribed,” and an “equitable exception” to the statutory filing period in general). In *Maybeck*, the Fourth Circuit held that a prisoner who did not challenge a career-offender enhancement at sentencing or on direct appeal could raise that claim in a § 2255 petition—even though it was procedurally defaulted—because he was “actually innocent of being a career offender.” 23 F.3d at 890–91. *Maybeck* is a case about excusing a prisoner’s failure to comply with “the judge-made procedural default rule,” *Jones*, 758 F.3d at 586, that a prisoner generally cannot “proceed on a § 2255 motion ‘based on trial errors to which no contemporaneous objection was made,’” *Maybeck*, 28 F.3d at 891 (quoting *United States v. Frady*, 456 U.S. 152, 167–68 (1982)). That rule does not excuse a missed statutory filing deadline.⁶ See *Jones*, 758 F.3d at 586.

⁶ Indeed, *Maybeck* was decided in 1994, when “there was no time limitation on a federal prisoner’s ability to collaterally attack his conviction [or sentence] in a § 2255 motion.” *United States v. Sanders*, 247 F.3d 139, 142 (4th Cir. 2001). The Antiterrorism and Effective Death Penalty Act (“AEDPA”) amended § 2255 to add a one-year limitations period for filing such

The Supreme Court recently held that a prisoner “who demonstrates actual innocence of his crime of conviction may, in extraordinary circumstances, proceed with a habeas petition that otherwise would have been statutorily time-barred” under AEDPA’s one-year limitations period. *Jones*, 758 F.3d at 581 (emphasis omitted) (citing *McQuiggin*, 133 S. Ct. at 1928). Grimmond essentially asks this Court to “extend *McQuiggin*’s holding to provide relief to defendants who demonstrate actual innocence of their sentences,” *id.*, which would let Grimmond bypass § 2255(f)(1)’s limitations period all together. *See, e.g.*, Pet. Resp. 4; Pet. Br. in Supp. 7–8.

The Fourth Circuit recently rejected the same request in *United States v. Jones*, 758 F.3d 579 (4th Cir. 2014), *cert. denied* 135 S. Ct. 1467 (Feb. 23, 2015). Jones was convicted on federal drug-trafficking charges and sentenced as a career offender to 360 months’ imprisonment. *See id.* at 580. The state court vacated Jones’s two predicate convictions in 2004 and 2008, respectively, and Jones filed a § 2255 petition in 2012. *See id.* The district court denied the petition as

motions. *See id.*; 28 U.S.C. § 2255(f). That limitations period applies to all § 2255 motions filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

Further, unlike *Maybeck*, Grimmond does not assert that the length of his sentence itself provides a substantive ground for relief under § 2255. *Compare* Pet. ¶ 12(A), and Pet. Br. in Supp. 4–6, with *Maybeck*, 23 F.3d at 890–92. Grimmond asserts that his attorney’s failure to object to the career-offender enhancement violated his Sixth Amendment right to effective assistance of counsel because, according to Grimmond, he obviously was not a “career offender” when Judge Wilson sentenced him. Pet. Br. in Supp. 4–6; *see also United States v. Curtis*, 360 F. App’x 413, 414–15 (4th Cir. 2010) (“Counsel’s failure to object to the erroneous Guidelines range was objectively unreasonable, given the ease with which counsel should have spotted the error.”); *United States v. Breckenridge*, 93 F.3d 132, 137 (4th Cir. 1996) (counsel’s failure to object to a career-offender enhancement was objectively unreasonable where “there [could] be no doubt” that his client did not have at least two qualifying prior convictions). An ineffective-assistance claim raised in an untimely § 2255 motion is time-barred, not procedurally defaulted. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) (“We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.”); *Madueno v. United States*, Nos. 1:08cv472, 1:05cr398-2, 2008 WL 5429656, at *2 (M.D.N.C. Dec. 30, 2008) (“Procedural default is a separate concept from AEDPA’s timing provisions. The time-bar is not a procedural default [that] can be excused through a cause and prejudice analysis.”).

untimely under 28 U.S.C. § 2255(f)(4) because it was not filed within one year after Jones received notice of the vacatur.⁷ *See id.*

On appeal, Jones asserted that “his failure to meet the requirements of § 2255(f)(4) should not bar his § 2255 motion because the vacatur of his state convictions rendered him ‘actually innocent of his sentence.’” *Id.* (“Jones . . . claims that *McQuiggin* draws no distinction between actual innocence of conviction and actual innocence of sentence claims.”). He argued that “because *McQuiggin* [was] based on the same ‘miscarriage of justice’ framework applied in the actual innocence of death penalty cases,” it should “naturally” apply to all cases in which the defendant is actually innocent of his sentence. *Id.* at 585.

The panel rejected Jones’s argument. *Id.* at 587. The Supreme Court in *McQuiggin* expressly limited its extension of the miscarriage-of-justice exception “to a severely confined category: cases in which new evidence shows ‘it is more likely than not than no reasonable juror would have convicted the petitioner.’” 133 S. Ct. at 1933 (internal alterations omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)); *see also Jones*, 758 F.3d at 584 (“[S]uch limiting language in *McQuiggin* was not isolated. Indeed, it was pervasive throughout the opinion.”). The Fourth Circuit also noted that *McQuiggin*’s underlying concern for incarcerating the wrongfully convicted “cannot, as a substantive matter, be easily applied” to sentencing decisions generally because “a sentencing error does not at all implicate guilt.” *Jones*, 758 F.3d at 584. Thus, even if

⁷ New information about the “fact of a prior conviction” developed more than one year after the date on which the judgment of the challenged conviction became final can trigger a renewed one-year limitations period under 28 U.S.C. § 2255(f)(4). *See Johnson v. United States*, 544 U.S. 295, 300–02, 306–07 (2005). In *Johnson*, the defendant’s career-offender enhancement was based on two prior state convictions, one of which was later vacated. 544 U.S. at 300–01. The Supreme Court held that the state court’s notice of vacatur triggered a renewed one-year limitations period if the prisoner exercised due diligence in challenging that conviction. *Id.* at 302. Subsection (f)(4) does not apply in Grimmond’s case because the “facts” of his prior felony convictions have not changed since his federal convictions became final in October 1999.

Grimmond is “actually innocent” of his federal sentence, that fact does not authorize this Court to consider his time-barred § 2255 petition on the merits. *Id.* at 587.

IV. Conclusion

The one-year clock for Grimmond to file his § 2255 petition began to run on October 5, 1998, the date on which the judgment of his conviction became final. Grimmond filed this petition more than 15 years later, on February 3, 2014. The record conclusively shows that his petition is time-barred under § 2255(f)(1), and Grimmond does not allege any facts that might justify equitably tolling that limitations period. Therefore, I respectfully recommend that the presiding District Judge **GRANT** the Government’s motion, ECF No. 87, **DISMISS** Grimmond’s petition, ECF No. 80, and **STRIKE** this case from the docket.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, Chief United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: June 23, 2015

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive style with a large initial 'J' and 'H'.

Joel C. Hoppe
United States Magistrate Judge