

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION**

<b>EVERETTE HILL,</b>	:	
	:	
<b>Movant,</b>	:	
	:	
v.	:	<b>Case No. 5:17-cr-00022-MTT-CHW-8</b>
	:	
<b>UNITED STATES OF AMERICA,</b>	:	
	:	
<b>Respondent.</b>	:	<b>Proceedings Under 28 U.S.C. § 2255</b>
	:	<b>Before the U.S. Magistrate Judge</b>
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**REPORT AND RECOMMENDATION**

Everette Hill has filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (Docs. 751, 755). The Government has moved to dismiss Hill’s motion as untimely under the applicable one-year limitation period. (Doc. 758). Based on the analysis below, it is **RECOMMENDED** that the Government’s motion to dismiss be **GRANTED**, and that Hill’s Section 2255 motion be **DISMISED**.

**BACKGROUND**

In May 2017, a grand jury handed down a fifty-one-count indictment against Everette Hill and fifteen other defendants. (Doc. 1). A superseding indictment filed in September 2017 increased the count total to sixty. (Doc. 249). The charges in the indictment related to distribution of drugs—cocaine base, methamphetamine, and heroin—along with the associated wrongful possession of firearms and the maintenance of a premises for drug purposes.

In December 2018, this Court entered judgment against Movant based on his plea of guilty to count 27 of the superseding indictment, a charge of distributing heroin in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C), as well as 18 U.S.C. § 2. As explained in a factual stipulation

contained in Movant's plea agreement, Movant aided a co-defendant, Delma Goddard, in the sale of heroin to a confidential informant. (Doc. 383, p. 9).

Movant received a sentence of 210 months of imprisonment (Doc. 638, p. 2), based largely on his status as a "career offender" under the Sentencing Guidelines. (Doc. 633, pp. 14, 28). Designation as a career offender requires, in relevant part, that "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). In a post-sentencing order denying a motion to correct the presentence report, the sentencing judge explained that Movant has at least three such qualifying convictions (Doc. 750, p. 2, n.1), including two Georgia convictions for felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(b). *See* (Doc. 633, pp. 19, 22).

After the Court's entry of judgment against Movant on December 17, 2018, Movant filed a notice of appeal on December 31, 2018. (Doc. 640). The Eleventh Circuit Court of Appeals dismissed Movant's appeal, upon his own motion, on June 10, 2019. (Doc. 669). Movant did not commence this Section 2255 action until January 26, 2022. (Doc. 751). In it, Movant argues that his prior conviction for obstruction of a law enforcement officer should not count as a "crime of violence" under the Sentencing Guidelines.

### **TIMELINESS**

Movant's Section 2255 motion is untimely under 28 U.S.C. § 2255(f)(1). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that Section 2255 motions must be filed within one year of four possible triggering dates. 28 U.S.C. § 2255(f). The usual triggering date, and the date applicable in this case, is "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). If Section 2255(f)(1) applies in this case, then Movant Hill's Section 2255 motion is indeed untimely. In detail, if Section 2255(f)(1)'s triggering

date applies, then Movant's conviction became final on Monday, September 9, 2019, when the time to seek certiorari review expired.<sup>1</sup> From that date, AEDPA's clock ran for 365 consecutive days, and it expired on September 9, 2020, around sixteen months before Movant filed his Section 2255 motion in January of 2022.

In an effort to avoid this result, Movant argues that a different timeliness provision set by 28 U.S.C. § 2255(f)(3) applies. Section 2255(f)(3) sets as an alternative triggering date "the date on which 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." Movant cites the Supreme Court's decision in *Borden v. United States*, 141 S.Ct. 1817 (June 10, 2021), as recognizing a new, retroactive right that activates the different triggering date of Section 2255(f)(3), but the holding of *Borden* does not apply to Movant's case.

In *Borden*, the Supreme Court held that reckless crimes cannot be violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a statute that has no bearing on Movant's criminal judgment. Movant pleaded guilty to distributing heroin in violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C), not to a firearm charge under 18 U.S.C. § 924. By analogy, *Borden*'s reasoning may be relevant to construction of the career offender sentencing guideline, which uses the term "crimes of violence," a term that is virtually identical to the term "violent felony" under the ACCA. *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010).

This analogy does not establish retroactivity. Only substantive new rules, as opposed to procedural new rules, apply retroactively on collateral review. *Teague v. Lane*, 489 U.S. 288

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<sup>1</sup> See *McGee v. United States*, 2013 WL 3096825 at \*6 (S.D. Ga. 2013) (explaining that a defendant who voluntarily dismisses his direct appeal is still entitled to seek certiorari review from the Supreme Court).

(1989). “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes ... In contrast, rules that regulate only the *manner of determining* the defendant’s culpability are procedural.” *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis in original). Although the substantive–procedural dividing line is sometimes murky, longstanding precedent, including caselaw of the United States Supreme Court, explains that a district court’s “[f]ailure to calculate the correct Guidelines range constitutes [a] procedural error.” *Peugh v. United States*, 569 U.S. 530, 537 (2013). The statutory sentencing range defined by the ACCA is substantive, in that it creates a class of offenders subject to a certain punishment, whereas the (advisory) sentencing guidelines are procedural, in that they “merely guide the district court’s discretion” in determining a sentence within the applicable statutory range set by the substantive law. *Beckles v. United States*, 137 S.Ct. 886, 894 (2017). Even if *Borden*’s ACCA holding applies by analogy to the Sentencing Guidelines, therefore, any error made by this Court was procedural, and *Borden* affords no retroactive relief. Accordingly, Movant cannot rely on *Borden* to trigger Section 2255(f)(3), Section 2255(f)(1) therefore applies, and Movant’s Section 2255 motion is statutorily untimely under Section 2255(f)(1).

Finally, Movant does not meet the stringent standard that governs the equitable tolling of AEDPA’s limitation period. Equitable tolling is available only when a Section 2255 movant establishes “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted). The record in this case shows that nothing prevented Movant from earlier filing a Section 2255 motion. Indeed, the record shows that Movant filed a document that the Court construed as a possible Section 2255 motion (Doc. 701), but upon notice of recharacterization as required by *Castro v. United States*, 540 U.S. 375, 377 (2003), *see*

(Doc. 706), Movant withdrew his motion. (Docs. 713, 715). Accordingly, because the record shows that Movant could have sought Section 2255 relief within AEDPA's limitation period,<sup>2</sup> Movant is not entitled to equitable tolling, and his Section 2255 motion is therefore untimely.

### CONCLUSION

For the reasons discussed herein, it is **RECOMMENDED** that the Government's motion to dismiss (Doc. 758) be **GRANTED**, and that Movant's Section 2255 motion be **DISMISSED** as untimely. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. Any objection is limited in length to TWENTY (20) PAGES. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for

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<sup>2</sup> Even if *Borden* were retroactively applied to this case, it is unlikely that Movant would prevail on the merits of his challenge to the use of his Georgia felony obstruction conviction as a career offender predicate "crime of violence." At sentencing all parties appeared to concede that Movant's career offender status was based on two prior drug convictions. (*See* Doc. 658, pp. 96-96). There was no discussion of Movant's two felony obstruction convictions. Additionally, Eleventh Circuit precedent forecloses Movant's argument that Georgia's felony obstruction statute does not define a crime of violence, holding "that a conviction for felony obstruction under O.C.G.A. § 16-10-24(b) 'categorically meets the "use, attempted use, or threatened use of physical force" requirement of the elements clause' of the Armed Career Criminal Act." *United States v. Burns*, 736 F. App'x 243, 245 (2018) (quoting *United States v. Brown*, 805 F.3d 1325, 1327 (11th Cir. 2015)). *Borden* does not directly contradict or overturn *Brown* and would not apply to Georgia's felony obstruction statute, which requires that the crime be committed "knowingly and willfully." The statute does not include a recklessness *mens rea*.

failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

**SO RECOMMENDED**, this 19th day of August, 2022.

s/ Charles H. Weigle  
Charles H. Weigle  
United States Magistrate Judge