IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KRISTEN SMITH,

Plaintiff,

v.

UNITED STATES of AMERICA,

Defendant.

OPINION & ORDER

14-cr-24-jdp
16-cv-439-jdp

Petitioner Kristen Smith is currently in custody at the Federal Medical Center, Carswell, in Fort Worth, Texas. Following a jury trial in July 2014, she was convicted of kidnapping a minor under 18 U.S.C. § 1201(a)(1). I sentenced petitioner to 25 years, the mandatory minimum. Judgment and Commitment, *United States v. Smith*, No. 14-cr-24-jdp, (W.D. Wis. October 29, 2014), ECF No. 134; *see also* 18 U.S.C. § 3559(f)(2).

Petitioner, now pro se, seeks to vacate her conviction and sentence under 28 U.S.C. § 2255. Because petitioner is proceeding pro se, I must review her petition under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After conducting a preliminary review of the petition under Rule 4 of the Rules Governing Section 2255 Cases in the United States District Courts, I conclude that the government should be served with the petition for the purpose litigating petitioner's claims that she received ineffective assistance of counsel and that she was not competent to stand trial.

BACKGROUND

In February 2014, petitioner took her half-sister's newborn son in the middle of the night from Beloit, Wisconsin, and began driving him to her home in Aurora, Colorado. Petitioner had been faking her own pregnancy, and had plans to pass the baby off as her own child. Police stopped petitioner en route, but not before she had stowed the baby away. She wrapped him in blankets, and put him in a plastic container with the lid snapped shut, by a dumpster behind a gas station, in sub-zero weather. Police took petitioner in to be questioned, but she denied involvement in the kidnapping. Approximately 30 hours later, police found the baby, alive. Only after the baby was found did petitioner tell police where she had left him.

A jury convicted petitioner of kidnapping a minor and transporting him in interstate commerce, in violation of 18 U.S.C. §§ 1201(a)(1) and 3559(f)(2). Dkt. 95. I sentenced her to 300 months of prison and 10 years of supervised release. Petitioner appealed to the Seventh Circuit, which affirmed her conviction. *United States v. Smith*, No. 14-3442, 2016 WL 4145184, at *1 (7th Cir. Apr. 28, 2016).

ANALYSIS

"[R]elief under § 2255 is an extraordinary remedy because it asks the district court to essentially reopen the criminal process to a person who already has had an opportunity for full process." *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). To prevail, petitioner must show that her "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or

that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

Petitioner alleges four grounds for relief. First, she contends that her attorney at trial was ineffective. Specifically, she contends that her attorney: (1) allowed an all-white jury to hear her case; (2) failed to challenge her mental competency to stand trial; (3) failed to challenge inconsistencies in the government's case; (4) never spoke to petitioner about a plea; and (5) was from outside of the district. Second, petitioner separately contends that she was not competent to stand trial. Third, petitioner alleges "suppression issues." Fourth, petitioner invokes *Johnson v. United States*, 135 S. Ct. 2551 (2015), a recently decided Supreme Court case that examined the constitutionality of the definition of a "violent felony" under the Armed Career Criminal Act.

A. Competency and ineffective assistance of counsel

Petitioner did not raise the first two grounds for relief—ineffective assistance of trial counsel and incompetency—on direct appeal. Ordinarily, issues that were not raised on direct appeal may not be litigated in a § 2255 motion, but this rule does not apply to allegations of ineffective counsel. *Massaro v. United States*, 538 U.S. 500, 504 (2003) ("in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance."). This is primarily because the trial record is rarely developed for the objective of litigating such a claim and it would not reflect actions that take place outside the courtroom. *Id*. at 504-05. Petitioner's competency claim was not raised on appeal, but she was represented by the same attorney on appeal who represented her at trial. I will assume that is the reason that counsel did not raise the issue of his own effectiveness at trial while on direct appeal. The competency claim is so closely intertwined to the ineffective assistance of counsel

claim that I will not consider it procedurally defaulted. Petitioner may proceed with both of these claims.

Once served, the government will be obligated to respond to the petition. But before the government addresses petitioner's arguments, she will be required to submit an additional brief articulating her theory for both her ineffective assistance of trial counsel claim and her competency claim. For each claim, petitioner should be sure to explain exactly what happened and how it violated the Constitution or laws of the United States. The government will then respond and petitioner will have an opportunity to reply to the government.

B. Suppression claim

Petitioner alleges a claim of "suppression issues." That ground seems to correspond to the evidentiary issues that she raised on appeal, *see Smith*, No. 14-3442, 2016 WL 4145184, at *6-7. Unless petitioner's circumstances have changed since then—for example, new evidence has come to light or the applicable law has changed—that claim is barred. *Vinyard v. United States*, 804 F.3d 1218, 1226-27 (7th Cir. 2015) ("Issues raised on direct appeal may not be reconsidered on a § 2255 motion absent changed circumstances." (internal quotation marks and citations omitted)). Petitioner does not suggest any reason that her circumstances have changed regarding this claim, so the government need not respond to this claim.

C. *Johnson* claim

Petitioner invokes *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that case, the Supreme Court explored the constitutionality of one part of 18 U.S.C. § 924(e)(2)(B), which defines a "violent felony." As a result of the Court's decision, criminal defendants who received enhanced sentences pursuant to a clause in § 924(e) may now challenge those enhanced sentences as unconstitutional. Petitioner did not receive a sentence pursuant to

§ 924(e), or any other provision containing similar language, so *Johnson* does not apply to her case. Therefore, this claim fails, and the government need not respond to it.

ORDER

IT IS ORDERED that:

1. **Service of petition.** The clerk of court is directed to serve the petition on the United States Attorney's Office for the Western District of Wisconsin and on the U.S. Attorney General via certified mail.

2. **Briefing.** The parties shall adhere to the following briefing schedule with respect to petitioner's claims:

    a. Petitioner may have until October 10, 2016, to submit a brief articulating her theory for both her ineffective assistance of trial counsel claim and her competency claim.

    b. The government may have until November 10, 2016, to submit its answer.

    c. Petitioner may have until December 1, 2016, to submit her reply.

Entered September 12, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge