APPENDEX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6973

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MAURICE BAUM, a/k/a Dog Pound,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Louise W. Flanagan, District Judge. (2:13-cr-00002-FL-1; 2:16-cv-00012-FL)

Submitted: December 21, 2017 Decided: December 27, 2017

Before WILKINSON and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Maurice Baum, Appellant Pro Se. Jennifer P. May-Parker, Seth Morgan Wood, Assistant United States Attorneys, Tobin Webb Lathan, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Maurice Baum seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Baum has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: December 27, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6973
(2:13-cr-00002-FL-1)
(2:16-cv-00012-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MAURICE BAUM, a/k/a Dog Pound

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: December 27, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6973, US v. Maurice Baum
2:13-cr-00002-FL-1, 2:16-cv-00012-FL

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

APPENDEX B

MAURICE BAUM, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION
2017 U.S. Dist. LEXIS 110343
No. 2:13-CR-2-FL-1,No. 2:16-CV-12-FL
July 17, 2017, Decided
July 17, 2017, Filed

Editorial Information: Prior History

Baum v. United States, 2017 U.S. Dist. LEXIS 112384 (E.D.N.C., May 15, 2017)

Counsel For USA, Plaintiff (2:13-cr-00002-FL): Seth Morgan Wood, Tobin W Lathan, LEAD ATTORNEYS, U.S. Attorney's Office, Raleigh, NC.
Maurice Baum, Petitioner (2:16cv12), Pro se, Edgefield, SC USA.

Judges: LOUISE W. FLANAGAN, United States District Judge.

Opinion

Opinion by: LOUISE W. FLANAGAN

Opinion

ORDER

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (DE 60) and the government's motion to dismiss (DE 67). Pursuant to 28 U.S.C. § 636(b)(1)(B), United States Magistrate Judge Robert T. Numbers, II, entered a memorandum and recommendation ("M&R") (DE 75), wherein it is recommended that this court deny petitioner's motion to vacate and grant the government's motion to dismiss. Petitioner filed objections to the M&R. In this posture, the issues raised are ripe for ruling. For the reasons stated herein, this court adopts the recommendation of the M&R, denies petitioner's motion to vacate, and grants the government's motion to dismiss.

BACKGROUND

On May 14, 2013, petitioner pleaded guilty, pursuant to a written agreement, to the following: conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base (crack) and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) (Count One); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Count Two). On July 8, 2014, this court sentenced petitioner to 273 months imprisonment on Count One and 240 months imprisonment on Count Two, to be served concurrently. Petitioner appealed, and the Fourth Circuit Court of Appeals affirmed. See United States v. Baum, 604 F. App'x 295 (4th Cir. 2015). Petitioner did not file a petition for certiorari with the Supreme Court.

Petitioner filed the instant motion to vacate on March 14, 2016, asserting four claims of ineffective assistance of counsel. On April 8, 2016, this court reduced petitioner's sentence to 221 months on

Count One, pursuant to 18 U.S.C. § 3582(c)(2).1 On April 25, 2016, the government filed the instant motion to dismiss. On May 15, 2017, the magistrate judge entered an M&R. Petitioner then filed objections to the M&R, to which the government filed a response in opposition.

COURT'S DISCUSSION

A. Standard of Review

The district court reviews de novo those portions of a magistrate judge's M&R to which specific objections are filed. 28 U.S.C. § 636(b). The court does not perform a de novo review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely-filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the 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). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Id. § 2255(b).

B. Analysis

Petitioner makes three arguments in his objections. See Objections (DE 76). Initially, petitioner argues that his trial counsel provided ineffective assistance of counsel by advising him to plead guilty to the money laundering charge (Count Two). Id. at 3-5. Next, petitioner argues that the M&R erred in finding that his trial counsel's failure to object to the three-level role enhancement was not ineffective assistance of counsel. Id. at 5-6. Finally, petitioner argues that his trial counsel provided ineffective assistance of counsel by failing to investigate and make arguments in support of a reduced drug quantity. Id. at 7-8.

In order to establish ineffective assistance of counsel, a petitioner must satisfy a two-pronged test. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong, a petitioner must show that his counsel's representation "fell below an objective standard of reasonableness." Id. at 688. The court must be "highly deferential" to counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." Id. at 689. Therefore, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. The second prong requires a petitioner to show that he was prejudiced by the ineffective assistance by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

1. Advice regarding plea

Initially, petitioner argues that his trial counsel provided ineffective assistance by advising him to plead guilty to the money laundering charge (Count Two). See Objections (DE 76) at 3-5. Petitioner contends that his trial counsel ignored the issue of guilt or innocence and merely recommended that he plead guilty to allow for favorable negotiations. Id. at 4. Petitioner further contends that he was prejudiced because his sentence was "19 months longer than it would have been." Id. at 5. Petitioner

concludes that his trial counsel should have had him enter a plea to "animal fighting," which had far less sentencing exposure than money laundering. Id.

Petitioner's objection does not challenge the magistrate judge's reasoning, but rather submits an entirely new argument for why this court should conclude that his trial counsel provided ineffective assistance of counsel. Where the government had the opportunity to respond, see DE 78, this court will consider the new argument. See United States v. George, 971 F.2d 1113, 1118 (4th Cir. 1992) ("[A]s part of its obligation to determine de novo any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate.").

This claim fails under both prongs of the Strickland standard. It fails under the performance prong because petitioner is essentially asking this court to second guess his trial counsel's strategy. According to petitioner's own description of events, his trial counsel advised him to plead guilty to "gain favor in other parts of the negotiations." See Objections (DE 76) at 4. This strategy benefitted petitioner and was reasonable for at least two reasons. First, the government agreed to dismiss a five-count indictment in exchange for petitioner's guilty plea to the two-count information, which involved less sentencing exposure.2 See Plea Agreement (DE 24) at 7. Second, the government agreed that petitioner was entitled to a downward adjustment of two to three levels for acceptance of responsibility. Id. at 8.

This claim fails under the prejudice prong because petitioner has failed to sufficiently allege prejudice. In order to state prejudice in the context of a guilty plea, a petitioner must allege that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on proceeding to trial. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Because this argument fails under both prongs of the Strickland standard, petitioner's first objection must be overruled.

2. Failed to object to role enhancement

Next, petitioner argues that the M&R erred in finding that his trial counsel's failure to object to the leadership role enhancement was not ineffective assistance. See Objections (DE 76) at 5-6. Petitioner references two affidavits he submitted in support of his § 2255 motion. Id. at 6 (citing Mot. Vacate (DE 60-2, 60-3)). According to petitioner, these affidavits create a "material fact in dispute." Id.

At sentencing, petitioner was given a three-level increase because this court found that he was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive. See PSR ¶ 70 (citing U.S.S.G. § 3B1.1(b)). The following evidence supports the application of this enhancement: petitioner directed no less than three individuals. See PSR ¶ 17. In particular, petitioner exploited the mothers of his children by utilizing them to reside in and sell drugs from his stash houses. See PSR ¶ 17. According to multiple sources, petitioner received orders for cocaine and then directed his girlfriend or one of his children's mothers to complete the sale. See PSR Addendum ¶ 11. According to one statement, the women only sold crack. See PSR Addendum ¶ 11. Several witnesses confirmed that petitioner used the mothers of his children to store drugs at stash houses by providing a home for the women. See PSR Addendum ¶ 11. Petitioner also paid kennel workers to "work the dogs" in furtherance of his criminal activities, which included dog fights. See PSR Addendum ¶ 11; PSR ¶ 12. Petitioner received $40,000 to $50,000 for the dog fights he arranged. See PSR ¶ 12.

Given the foregoing evidence, this court could have easily found the leadership role enhancement applicable by a preponderance of the evidence. See United States v. Steffen, 741 F.3d 411, 414 (4th

Cir. 2013) ("The burden is on the government to prove by a preponderance of the evidence that the sentencing enhancement should be applied."). Thus, trial counsel's objection to the role enhancement would have been futile. Failure to lodge a meritless objection does not amount to ineffective assistance. See United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999) (holding that "[a]n attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim"); Moore v. United States, 934 F.Supp. 724, 731 (E.D. Va. 1996) (holding that "[f]ailure to raise a meritless argument can never amount to ineffective assistance"). Consequently, petitioner's second objection must be overruled.

3. Failed to object to drug weight

In petitioner's final objection, he alleges that his trial counsel provided ineffective assistance by failing to investigate and make knowledgeable arguments in support of reducing his drug quantity. See Objections (DE 76) at 7-8. Petitioner concedes that his trial counsel made arguments in support of a reduction in his drug quantity, but he claims that his trial counsel lacked the knowledge that a complete investigation into the facts would have revealed. Id. at 7.

In this objection, petitioner does not challenge the magistrate judge's reasoning, but rather, he submits an entirely new argument for why this court should conclude that his trial counsel provided ineffective assistance of counsel. Because the government had the opportunity to respond, see DE 78, this court will consider the new argument. See George, 971 F.2d at 1118 ("[A]s part of its obligation to determine de novo any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate.").

Prior to sentencing, the U.S. Probation Officer determined that petitioner should be held accountable for the following: 24.18 grams of marijuana, 16,650.78 grams of cocaine, and 43,997.78 grams of crack cocaine, which had a total marijuana equivalency of 160,446.21.22 kilograms. See PSR ¶ 17.

At petitioner's sentencing, held on July 8, 2014, this court noted that there had been "some further discussions" and that the case had been continued to the extent that it was not taken up first. See July 8, 2014 Tr. (DE 49) at 3:10-12. This court asked counsel about discussions that would allow the case to move forward as scheduled. Id. at 3:13-15. Defense counsel responded by advising the court that there had been some disagreement over the drug quantity for which petitioner was to be held accountable. Id. at 3:16-18. Defense counsel advised that it was his understanding that the government had agreed to remove some of the drug quantity computed in the Presentence Report and would further agree that the two-level enhancement for the utilization of friends and family was not appropriate. Id. at 3:20-25, 4:1-4. The parties agreed that the total drug weight in the Presentence Report converted to marijuana was 160,446.22 kilograms. Id. at 4:7-8. This court asked the government what the readily provable amount was. Id. at 4:11-12. The government responded that it was a "total of 18,253 [kilo]grams." Id. at 4:13-16. The government noted that the drug weight came primarily from historical statements from multiple individuals who were debriefed and provided information. Id. at 5:8-24. The government noted that what the parties were asking the court to do was to remove two statements. Id. at 5:25, 6:1-4. The U.S. Probation Officer advised that his resulting calculations revealed a total marijuana equivalency of 18,170.727 kilograms, which equated to a base offense level of 36. Id. at 8:3-9.

This court noted that the parties' agreements would reduce the drug quantity to 18,253 kilograms of marijuana equivalency, and U.S. Probation had it calculated at 18,170 kilograms. Id. at 8:10-13. This court then proceeded to ask whether the parties agreed with this determination. Id. at 8:13. Defense counsel responded that petitioner agreed that was the proper drug weight. Id. at 8:14. The government also agreed that it was correct. Id. at 8:15. Then, this court asked petitioner, directly,

whether he accepted that as the proper drug weight. Id. 8:16-17. Petitioner responded affirmatively. Id. at 8:18.

This claim must fail under both prongs of the Strickland standard. Petitioner's trial counsel was able to secure a very significant reduction in petitioner's drug quantity. Moreover, because petitioner's admission before this court that the drug quantity was correct foreclosed and rendered moot any additional, meaningful argument by his trial counsel. Accordingly, petitioner's third objection must overruled.

C. Certificate of Appealability

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right" 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing reasons, this court ADOPTS the recommendation of the magistrate judge. The government's motion to dismiss (DE 67) is GRANTED. Petitioner's motion to vacate, set aside, or correct his sentence (DE 60) is DENIED. A certificate of appealability is also DENIED. The clerk is DIRECTED to close this case.

SO ORDERED, this the 17th day of July, 2017.

/s/ Louise W. Flanagan

LOUISE W. FLANAGAN

United States District Judge

Maurice Baum, Petitioner, v. United States of America, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION
2017 U.S. Dist. LEXIS 112384
No. 2:13-CR-00002-FL,No. 2:16-CV-0012-FL
May 15, 2017, Decided
May 15, 2017, Filed

Editorial Information: Subsequent History

Adopted by, Dismissed by, Post-conviction relief denied at, Certificate of appealability denied Baum v. United States, 2017 U.S. Dist. LEXIS 110343 (E.D.N.C., July 17, 2017)

Editorial Information: Prior History

United States v. Baum, 604 Fed. Appx. 295, 2015 U.S. App. LEXIS 8740 (4th Cir. N.C., May 27, 2015)

Counsel For USA, Plaintiff (2:13-cr-00002-FL): Seth Morgan Wood, LEAD ATTORNEY, U.S. Attorney's Office, Raleigh, NC; Tobin W Lathan, LEAD ATTORNEY, U. S. Attorney's Office, Raleigh, NC.

Maurice Baum, Petitioner (2:16cv12), Pro se, Edgefield, SC USA.

Judges: Robert T. Numbers, II, United States Magistrate Judge.

Opinion

Opinion by: Robert T. Numbers, II

Opinion

Memorandum & Recommendation

Petitioner **Maurice Baum**, proceeding under 28 U.S.C. § 2255, seeks to vacate the 273 month and 240 month concurrent sentences imposed in connection with his convictions for conspiracy to distribute and possess with the intent to distribute 280 grams or more of cocaine base (crack) and five (5) kilograms or more of cocaine (Count I) and concealment money laundering (Count II). D.E. 60

Baum argues that he is entitled to relief because his attorney (1) failed to challenge statements in his Presentence Investigation Report ("PSR") about drug weight attributable to him; (2) informed him, incorrectly, that if he did not accept the plea offer, the Government would file a superseding information charging him with dog fighting, which would carry a greater sentence than the money laundering charge; (3) advised him that it was possible to launder money from one criminal activity into another criminal activity; and (4) failed to object to a three-level enhancement for his role as a manager or supervisor in a criminal activity that involved five or more people. D.E. 60.

The Government maintains that Baum has failed to meet his burden of showing not only that counsel's performance fell below an objectively reasonable standard of reasonableness, but also that there is a reasonable probability that, but for counsel's deficiencies, the outcome of the proceedings

would have been different. D.E. 67, 68.

After reviewing the docket and the arguments of the parties, the undersigned has determined that Baum is not entitled to the relief he seeks because he failed to demonstrate that he received ineffective assistance from his counsel because the factual and legal allegations he advances to support his claims are unsupported by the record. Therefore, the undersigned recommends1 that the court deny Baum's Motion to Vacate (D.E. 60) and grant the Government's Motion to Dismiss (D.E. 67).

I. Background

In January 2013, a Grand Jury indicted Baum on five counts relating to possession and distribution of cocaine and cocaine base (crack). D.E. 1. Subsequently, the Government filed a Superseding Information charging Baum with conspiracy to distribute and possession with the intent to distribute 280 grams or more of cocaine base (crack) and five kilograms or more of cocaine (Count I) and money laundering (Count II). D.E. 20. At his arraignment on the Superseding Information, Baum pleaded guilty pursuant to a written Plea Agreement. D.E. 24.

The court held a sentencing hearing in July 2014. The PSR calculated Baum's converted drug weight2 to be 160,446.22 kilograms of marijuana. D.E. 30 at ¶ 67. At sentencing, the Government stated that only 18,253 kilograms could be attributed to Baum. D.E. 49 at 4:13-14. The parties agreed to the amended, lower drug weight. *Id.* at 8:10-18. The Government also took the position that a two-level enhancement for the use of friendship and affection to involve others should not apply. *Id.* at 3:20-4:2. As a result of these concessions, Baum agreed to withdraw all other objections he raised to the PSR.

After considering the parties' agreement, the district court calculated Baum's advisory guideline range to be 324 to 405 months in prison. Ultimately, the court sentenced Baum to concurrent sentences of 273 months on Count I and 240 months on Count II. D.E. 41.

Baum unsuccessfully appealed his sentence to the Fourth Circuit Court of Appeals and did not seek a writ of certiorari from the Supreme Court. *See United States v. Baum*, 604 F. App'x 295 (4th Cir. 2015) (Mem.) (unpublished). In March 2016, he filed his Motion to Vacate, to which the Government responded by filing a Motion to Dismiss. D.E. 60, 67. In April 2016, the court reduced Baum's sentence on Count One to 221 months due to drug quantity table amendments. D.E. 65. But his sentence on Count II remained at 240 months. *Id.* The original judgment remained unchanged in all other respects. *Id.*

II. Analysis

A. Standard of Review for § 2255 Petitions

In order to prevail on his Motion to Vacate, Baum must show that (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the Court was without jurisdiction to impose such sentence; or (3) that his sentence exceeded the maximum authorized by law. 28 U.S.C. § 2255(a). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law" regarding the petitioner's motion." 28 U.S.C. § 2255(b). However, ultimately, the petitioner must establish that he is entitled to relief by a preponderance of the evidence. *See, e.g., Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958) (per curiam).

The Federal Rules of Civil Procedure apply to the court's consideration of a § 2255 motion to the extent that they do not conflict with any other statutory provisions or the procedural rules specifically

applicable to § 2255 motions. Rules Governing Section 2255 Proceedings, Rule 12. Therefore, in reviewing the Government's Motion to Dismiss, the court will apply the standard that generally applies to motions brought pursuant to Rule 12(b)(6).

The Supreme Court has explained that in order to withstand a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Therefore, while a court must accept all the factual allegations contained in a complaint as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.* The court may also consider documents that are part of the public record, *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009), and in the context of a § 2255 motion, "the files and records of the case[,]" 28 U.S.C. § 2255(b).

After *Iqbal*, a court considering a motion under Rule 12(b)(6) must subject a complaint to a two-part test. First, the court must identify the allegations in the complaint that are not entitled to the assumption of truth because they are conclusory in nature or nothing more than a formulaic recitation of the elements of a claim. *Iqbal*, 556 U.S. at 679. Then, taking the remaining factual allegations as true, the court must determine whether the complaint "plausibly suggest[s] an entitlement to relief." *Id.* If, after conducting this two-part analysis, "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'shown' - 'that the pleader is entitled to relief'" *Id.* If a party fails to show that they are entitled to relief, the court must dismiss the deficient claims.

B. Ineffective Assistance of Counsel

Baum claims that his sentence was imposed in violation of the Constitution because his counsel's performance was so inadequate that it violated his right to counsel under the Sixth Amendment to the Constitution. The Government correctly asserts that Baum has not demonstrated that counsel's performance was objectively unreasonable and that he suffered prejudice as a result of counsel's actions.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. A defendant's right to assistance of counsel may be violated if his attorney fails to provide adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This right applies at all stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *United States v. Burkley*, 511 F.2d 47, 51 (4th Cir. 1975).

In *Strickland*, the Supreme Court held that a petitioner must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. 466 U.S. at 686-87. First, the petitioner must show that his attorney's performance fell below an objective standard of reasonableness. *Id.* at 688. Second, the petitioner must show that he was prejudiced by his attorney's unreasonable performance. *Id.* at 693. In regards to the reasonableness prong, courts must be "highly deferential" to counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." *Id.* at 689. Therefore, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In order to demonstrate prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, the difference in outcome as a result of

the unprofessional errors must have had an adverse effect on the petitioner. *Id.* at 693.

1. Drug Weight

Baum first contends that his trial attorney was ineffective in failing to challenge statements at sentencing regarding drug weights attributed to him. Baum claims that statements from three co-conspirators establishing the amount of drugs attributable to him were inconsistent and implausible. Baum also asserts that the calculation of drug weights incorrectly includes periods of time that he and two others, Desmond White and Develle Bunch, were incarcerated. Thus, he claims, regular purchases of narcotics by White and Bunch during these times was not factually possible.

The PSR, relying on statements from a confidential informant ("CI") and seven other individuals, including Bunch, attributed cocaine and cocaine base that had a marijuana equivalency of over 160,446 kilograms to Baum. D.E. 40 at ¶ 67. This resulted in a base offense level of 38. *Id.* Importantly, the PSR excluded from the drug weight calculation the periods of time Baum and the respective witnesses, including Delton Mallory, Gevon Owens, Morris Kee, and Bunch, were incarcerated. D.E. 30 at ¶ 12; D.E. 30, Addendum at ¶¶ 2, 3. Because the PSR does not include the periods Baum or the witnesses were in custody in the calculation of drug weight, Baum's argument is mistaken.

Additionally, although White is not identified as a witness offering a statement as to the drug quantity issue, Baum appears to believe White was the CI. The PSR notes that the CI sold 3.5 grams of crack per week for Baum from 1996 through 2000. In his petition, Baum asserts that White related selling crack in the same amount during the same time period. D.E. 60-1 at 8-9. Thus, the court assumes, for the purposes of this motion, that White is the CI.

Baum contends that the crack attributed to him by this witness, 3.5 grams per week for four years, or 728 grams, is incorrect because White was incarcerated for eight months and Baum was incarcerated for nine months during this period of time. The Government does not address whether Baum and White were incarcerated during this time. However, Baum's PSR specifically factored periods of incarceration into the drug quantity calculation, properly reflecting only time frames where Baum and the respective witnesses were not in custody. D.E. 30 at ¶ 12; D.E. 30, Addendum at ¶¶ 2, 3. Additionally, the court has reviewed White's criminal background. While White incurred several misdemeanor convictions between 1996 and 2000, these most often resulted in suspended sentences and probation. The fact that White spent very little time in custody discredits Baum's present argument that White was incarcerated for a substantial period of time between 1996 and 2000. Accordingly, Baum's claim lacks merit.

Baum also takes issue with Marcel Bowe's statements attributing 10,800 grams of cocaine and 1,200 grams of cocaine base to Baum between 2005 and 2010. D.E. 30 at 5. Baum contends that Bowe testified at Demetrius Spence's trial that he had not purchased or sold more than five kilograms of cocaine in his lifetime.

The court notes, first, that 10,800 grams of cocaine would equate to 10.8 kilograms. Second, although the Government did not address this issue, Spence's trial transcript does not support Baum's argument. During Spence's trial on August 14, 2012, the following exchange occurred:

> AUSA: Can you estimate on the low end how much crack cocaine you purchased from the Defendant [Demetrius Spence]?
>
> Bowe: Estimation. I never really sat down and calculated it up. I mean, I estimate anywhere from, probably over the time period, how much, probably anywhere from five to six kilos.

AUSA: Of what?

Bowe: Crack cocaine.Official Transcript of Jury Trial - Day 2 at 245-46, *United States v. Spence*, No. 2:11-cr-00004-D (Apr. 19, 2013), D.E. 109. Additionally, the court has reviewed Spence's PSR and the drug weight attributed to him. The information contained therein contradicts Baum's present argument.

Although neither Bowe's testimony nor his statements specifically addresses his purchase of cocaine or crack from Baum, they undermine Baum's argument that Bowe never purchased more than five kilograms of cocaine. His objections to Bowe's statements are wholly unsupported and contrary to the record in the Spence case. Accordingly, Baum's argument on this matter also lacks merit.

Moreover, at Baum's sentencing, the parties agreed to remove the statements of two individuals, Mallory and Owens, regarding drug weight. Official Tr. of Sentencing Hr'g Proceedings at 5:25-6:22, D.E. 49. This yielded a drug weight with a marijuana equivalency of 18,170 kilograms, very near the parties' stipulated amount of 18,253 kilograms. *Id.* at 8:3-13. This agreement lowered the drug weight by approximately 140,000 kilograms and reduced Baum's base offense level from 38 to 36. Importantly, the court specifically asked Baum if he accepted the reduced drug weight.

Court: Do the parties accept that as the drug weight?

Mr. Thompson: Mr. Baum does, Your Honor.

Mr. Lathan: We do, Your Honor.

Court: And Mr. Baum, I'll ask you too directly, do you accept that as the drug weight?

Defendant: Yes.*Id.* at 8:13-18. Baum's unequivocally agreed to the reduced drug weight. Accordingly, his statement at sentencing undermines his present argument.

Combining the CI's reported amount of crack, having a marijuana equivalency of 5,595 kilograms, with Bowe's crack purchases attributed to Baum, approximately 6,445 kilograms, yields 12,040 kilograms which Baum seeks to exclude from the drug weight for which he is responsible. However, this argument neglects the favorable result to Baum stemming from counsel's negotiated agreement with the Government to exclude drug amounts of Mallory and Owens. Mallory attributed crack with a marijuana equivalency of 103,870 kilograms to Baum and Owens attributed crack with a marijuana equivalency of 36,446 kilograms. Together, the two co-conspirators could implicate Baum for crack with a marijuana equivalency of 140,315 kilograms. Excluding evidence from these two witnesses to reduce the overall drug weight attributable to Baum left him in a much better position than the 12,040 kilogram reduction he now seeks to receive through the exclusion of drug totals reported by Bowe and the CI.

It is well-settled that trial counsel has discretion to make reasonable strategic and tactical choices, and those choices are not used when determining whether counsel was ineffective. *Rose v. Lee*, 252 F.3d 676, 693 (4th Cir. 2001) (citing *Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991)). Here, Baum and his attorney collaborated with the Government to exclude certain witness statements from the drug quantity tabulation. As a result of these negotiations, the court reduced Baum's base offense level from 38 to 36. These circumstances can reasonably be viewed as sound legal strategy to which the court must give deference. *United States v. Higgs*, 663 F.3d 726, 739 (4th Cir. 2011). Given that Baum benefitted from counsel's agreements with the Government, he cannot demonstrate his attorney's performance was deficient or professionally unreasonable.

The undersigned is also unable to conclude that counsel's failure to challenge the statements of co-conspirators regarding drug weight adversely affected Baum. Baum's argument that statements

attributing drug quantities to him were incorrect is belied by his PSR, which excluded periods of incarceration for both Baum and relevant witnesses from the drug quantity calculations. Most significant, Baum's own statement at sentencing, that he accepted the drug weight with a marijuana equivalent of 18,273 kilograms, undermines his present argument. Based on such statements, it is difficult to conceive what basis counsel would have to challenge these findings so as to obtain an outcome more favorable to Baum. In light of these facts, Baum has not shown that trial counsel's failure to challenge statements from other witnesses prejudiced him. For these reasons, Baum has failed to establish ineffective representation and the court should dismiss his claim on this issue.

2. Superseding Information with Added Charge for Dog Fighting

Baum next maintains that counsel informed him that, if he rejected the plea offer, he would face a superseding information that substituted a dog fighting charge for the money laundering charge. Baum contends that his attorney incorrectly advised him that a dog fighting charge exposed him to a longer sentence than the money laundering charge. Baum asserts that had he known the dog fighting charge carried a lesser sentence than money laundering, he would have rejected the plea offer and elected to go to trial on a superseding information.

Baum points out that this argument does not assert that he was misadvised about the his guidelines, but instead submits that this argument turns on the misinformation he was provided about statutory maximum sentences he faced if he did not accept the plea deal. Believing that he would face exposure to a longer sentence for dog fighting than for money laundering, Baum accepted the plea offer. Had his attorney's representations correctly informed Baum that dog fighting carried a maximum penalty of five years, compared to the 20 year maximum sentence for money laundering, Baum contends he would have rejected the plea offer from the Government and gone to trial on a superseding information that charged dog fighting and dropped the money laundering count.

The Government does not address whether Baum's arguments would constitute deficient representation under the first prong of *Strickland*. Instead, it focuses its response arguing that Baum is unable to establish that he suffered prejudice on this claim. It submits that the drug conspiracy conviction in Count I "drove [Baum's] guidelines" and that replacing a dog fighting offense for a money laundering charge would not have altered his advisory guideline range. Government's Mem. in Supp. of Mot. to Dismiss. at 8, D.E. 68.

The court assumes, for purposes of this argument, that Baum's statement that counsel misrepresented that statutory maximum sentences for dog fighting and money laundering is accurate and that his counsel's performance was objectively unreasonable. But Baum cannot establish the "prejudice" prong required under *Strickland*. As noted above, Baum originally received a sentence of 273 months on Count I (drug conspiracy) and 240 months on Count II (money laundering), to be served concurrently. Baum successfully sought a reduction to his sentence on Count I based on the amendments to the drug table. This resulted in Count I's sentence being reduced to 221 months.3 Clearly, then, after his resentencing, Count I no longer "drove" his sentence, as the Government contends, because as Count II, in fact, yielded a longer term of incarceration.4

Nonetheless, Baum's sentence on Count I is below the statutory maximum sentence of life imprisonment. Baum's sentence also falls below his reduced advisory guideline range of 262-327 months. The court sentenced Baum below the minimum advisory guideline term, which can be viewed as successful advocacy by his attorney. *See Bridgers v. United States*, No. 5:13-CR-183-BO-2, 2016 U.S. Dist. LEXIS 12956, 2016 WL 438966, at *3 (E.D.N.C. Feb. 3, 2016) (fact that the court ultimately imposed a sentence below even the government's recommended range underscores the strategy behind counsel's decision not to raise certain objections at sentencing and undermines petitioner's claim of ineffective assistance), *appeal dismissed*, 653 Fed. Appx. 219 (4th

Cir. 2016).

Additionally, the court was not required to direct that Baum's sentences be served concurrently. Presuming a dog fighting charge carrying a maximum sentence of five years replaced a money laundering charge carrying a maximum sentence of 20 years, Baum still faced a sentence of 281 months had the sentences on drug conspiracy (reduced to 221 months) and dog fighting (60 months) run consecutively. His 240 month sentence for money laundering on Count II of the Superseding Information is well-below his potential exposure had the Government pursued another information with substituted charges.

Baum concedes there were facts supporting his guilt of a dog fighting charge in his present motion. D.E. 60-1 at 15 ("The Defendant knew that many people were aware of him fighting animals, thereby leading him to conclude it would be easier to prove that he actually engaged in 7 U.S.C. § 2156 (dog fighting))." Baum also admitted there were sufficient facts to establish his guilt on the drug conspiracy charge.

> Court: All right. Mr. Baum, how do you plead to Count One of the Information?
>
> Defendant: Guilty.
>
> Court: Mr. Baum, did you, as the Government alleges in count one of the Information, beginning on a date no later than in or around 2005, and continuing up to and including on or about June 18, 2012, in the Eastern District of North Carolina and elsewhere, knowingly and intentionally combine, conspire, confederate and agree to commit the following offense against the United States, that is, to knowingly and intentionally distribute and possess with the intent to distribute 280 grams or more of cocaine base (crack) and five kilograms or more of cocaine, Schedule II controlled substances, in violation of 21 U.S. Code 841(a)(1) and 846; did you do all of that?
>
> Defendant: Yes, sir.Official Tr. of Arraignment Proceedings at 5:25-6:22, D.E. 35. The court found that Baum's plea was supported by an individual factual basis containing each essential element of the offenses charged. *Id.* at 26:8-15. Baum's statement at his arraignment and in his filings in this action leave little doubt of his guilt of the drug conspiracy charge, and establish that the Government would have been able to prove a dog fighting count at trial.

Moreover, had Baum gone to trial on drug conspiracy and dog fighting charges, as he now claims, he would not be eligible for the departure he received for acceptance of responsibility. *See United States v. Hicks*, 438 F. App'x 216, 220 (4th Cir. 2011) ("[A] reduction for acceptance of responsibility is appropriate "[i]f the defendant clearly demonstrates acceptance of responsibility for the offense"; it "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted[.]"); USSG § 3E1.1 cmt. n.2 ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt[.]"). This would have resulted in a higher advisory guideline range as originally determined and as calculated as a result of the drug table amendments.

Importantly, Baum has presented no evidence that the Government intended to seek a superseding information substituting a dog fighting charge for money laundering. His argument presumes many factors-that the money laundering count would be dropped, that a dog fighting count would be added, that the remaining four narcotics charges in the original Indictment would not be included, and that he would prevail in his challenges to the PSR-with little factual support. Nothing in the record suggests such a result.

In sum, Baum cannot demonstrate that he was prejudiced by counsel alleged misadvice with respect

to the statutory maximum sentences for dog fighting and money laundering. Accordingly, his claim of ineffective counsel on this issue lacks merit and should be dismissed.

3. Money Laundering

Baum next argues that counsel provided incorrectly advised him that money laundering included acts where funds are directed from one criminal activity into another criminal activity, not only where one directs money towards a legitimate, or "clean," endeavors. Baum maintains that the traditional understanding of a money laundering charge includes using money derived from criminal activity and placing it into a lawful business or purpose in an attempt to legitimize the lucre. By his understanding of the money laundering laws, Baum asserts that his use of proceeds from the sale of narcotics for his dog fighting and gambling operation does not constitute a money laundering offense since both ventures represent criminal activity. However, Baum's interpretation of the money laundering offense is mistaken. The relevant statutory language does not distinguish between financial transactions involving legitimate and illegal enterprises. Because the elements of the offense are established in the guilty plea, Baum's argument is factually unsupported and should be denied.

Baum contends that he would not have pled guilty if his attorney had informed him that he had an available defense to the money laundering charge-that the funds were directed into another criminal activity (dog fighting) and not "cleaned" through diversion to a legitimate endeavor. Baum's argument is flawed, however, because it presumes, incorrectly, that directing funds from one criminal enterprise to another criminal enterprise, rather than towards a lawful operation, does not constitute money laundering under 18 U.S.C. § 1956.

The relevant statute provides in applicable part that:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> ***
>
> (B) knowing that the transaction is designed in whole or in part-
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity....will be subject to criminal penalties. 18 U.S.C. § 1956(a)(1)(B)(i).

Baum's challenge focuses on the requirement that he "conduct[] or attempt[] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity." *Id.* For purposes of the money laundering statute, a financial transaction includes "a transaction which in any way or degree affects interstate or foreign commerce ... involving the movement of funds by wire or other means...." *Id.* § 1956(c)(4)(A)(i). This term is defined broadly and includes "[a]lmost any exchange of money between two parties...." *See United States v. Blair*, 661 F.3d 755, 764 (4th Cir. 2011). A review of the plain language of the statute establishes that there is no requirement that the proceeds of an illegal activity be invested in a legitimate activity in order to constitute money laundering. *See also United States v. Reed*, 77 F.3d 139 (6th Cir. 1996) (en banc) (holding that transfer of drug proceeds to courier for the purpose of purchasing additional drugs and paying drug debts constituted a transfer under the money laundering statute).

Because the money laundering statute lacks a requirement that the money must be laundered through legitimate enterprise, Baum's reinvestment of drug proceeds to another illegal endeavor, dog fighting, is not a defense to money laundering. Thus, his counsel's failure to pursue it as a defense

was not an error. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) (stating that "[a]n attorney's failure to raise a meritless argument ... cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue"); *Moore v. United States*, 934 F. Supp. 724, 731 (E.D. Va. 1996) ("[T]here can be no claim of ineffective assistance where, as here, counsel is alleged to have failed to raise a meritless argument"). Accordingly, Baum cannot establish the first prong under *Strickland* with respect to his arguments on this issue.

Moreover, Baum's sworn testimony supports his guilt on Count II, money laundering. At his arraignment, Baum represented to the Court that he understood his rights, he understood the Plea Agreement, and its language and terms. D.E. 35 at 21:17-22:1. He further stated that he had discussed the Plea Agreement with his attorney, that no one had persuaded him or induced him to accept the Plea Agreement and plead guilty, and that he had answered all questions truthfully. *Id.* at 21:9-22:24. After the elements of money laundering were set forth, the following exchange occurred:

> Court: Mr. Baum, how do you plead to count two of the Information?
>
> Defendant: Guilty.
>
> Court: And did you as the Government alleges in count two, beginning on a date no later than in or around 2005, and continuing up to and including on or about June 18, 2012, in the Eastern District of North Carolina and elsewhere, knowingly conduct and attempting to conduct a financial transaction involving one or more monetary instruments, to wit, purchasing dogs and supplies for training dogs to fight, which involved the proceeds of a specified unlawful activity, that is, illegal distribution of controlled substances, knowing that the transaction was designed in whole, and in part, to conceal and disguise the nature, location, source, proceeds and control of the proceeds of said specified unlawful activity, and that while conducting or attempting to conduct such financial transaction, that you knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, all in violation of Title 18, U.S. Code, Section 1956(a)(1)[(B)(i)]; did you do all of that?
>
> Defendant: Yes.Official Tr. of Arraignment Proceedings at 23:16-24:12, D.E. 35. Thus, Baum conceded, under oath, that he is guilty of money laundering as charged in the Superseding Information. Additionally, the Plea Agreement itself represents Baum's acknowledgement of guilt on Count II, money laundering. D.E. 24 at 5. These statements are sufficient to support his conviction and sentence for Count II of the Superseding Information, money laundering. *United States v. Lemaster*, 403 F.3d 216, 221-22 (4th Cir. 2005) ("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should . . . dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements.").

Absent a showing of either deficient representation or prejudice under *Strickland*, and Baum's acknowledgement of guilt to the money laundering charge, his present claim lacks merit and should be rejected.

4. Enhancement for Role as Supervisor or Manager

Baum next contends his attorney was ineffective for failing to challenge the three level enhancement he received for his role as a manager or supervisor of a criminal activity involving five or more people. *See* D.E. 30 ¶ 70. The United States Sentencing Guidelines § 3B1.1(b) provides for a three-level enhancement "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S. Sentencing Guidelines Manual § 3B1.1(b) (U.S. Sentencing Guidelines Comm'n 2012). Baum states

that his children's mothers were willing to testify that he did not manage or supervise them in the possession and distribution of drugs.

The Government points out that Baum abandoned his objection to this sentencing enhancement as part of an agreement between the parties. It therefore contends that counsel's decision not to pursue a challenge to the three level enhancement for use of friendship or affection was a strategic decision which the court should not second-guess. Mem. in Support of Mot. to Dismiss at 12-13, D.E. 68.

Counsel's decision benefitted Baum because it removed a two-level enhancement for the use of friendship or affection to involve others that the PSR found was applicable. As noted above, a reduced drug weight was also part of the agreement between the Government and the defense, which resulted in a lower base offense level for Baum. Therefore, counsel's decision to withdraw any objection to the three level enhancement in exchange for removal of the two-level enhancement coupled with a downward adjustment of the drug weight can be reasonably viewed as a tactical decision. Given the benefit to Baum, it is difficult to view this approach as deficient representation. Accordingly, Baum has shown neither objective unreasonable performance by counsel or that he suffered prejudice to satisfy his burden under *Strickland* for an ineffective assistance of counsel claim.

Further, as explained in the Addendum to the PSR, "multiple sources" remarked that when Baum received an order, he would direct his girlfriend or one of his children's mothers to complete the sale. *Id.* at 21-22. Additionally, Isiah Gasby stated that the women only sold crack and that Baum only dealt directly with individuals who ordered powdered cocaine or one ounce or more of crack cocaine. *Id.* The Addendum further notes that multiple sources stated that Baum used his children's mothers to store drugs at stash houses by providing a home for these women. *Id.* Thus, even if, as Baum alleges, his children's mothers would testify that he did not supervise or manage them in the criminal activity, Gasby's statement to the contrary is sufficient for a fact-finder to conclude that he did, in fact, direct them in completing the drug sales. Accordingly, the factual basis for the three-level enhancement has been established.

Baum's motion seeks the benefit of the agreement between the parties regarding the applicable sentencing factors and asks the court to presume he would have prevailed on all objections he wanted to raise at sentencing. This argument ignores the fact that Baum was only entitled to the benefit of the agreement because he agreed to forego some of his objections at sentencing. The premise of Baum's argument lacks factual or legal support.

Again, Baum has shown neither that counsel's performance was deficient nor that he suffered prejudice. As he has failed establish an ineffective assistance of counsel claim with respect to the application of the sentencing enhancement, the court should dismiss this claim.

III. Conclusion

For the foregoing reasons, the undersigned recommends that the court deny Baum's Motion to Vacate, Set Aside or Correct Sentence (D.E. 60) and grant the Government's Motion to Dismiss (D.E. 67).

Furthermore, the court directs that the Clerk of Court serve a copy of this Memorandum and Recommendation on each of the parties or, if represented, their counsel. Each party shall have until 14 days after service of the Memorandum and Recommendation on the party to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct his or her own review (that is, make a *de novo* determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the

matter to the magistrate judge with instructions. *See, e.g.*, 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b), E.D.N.C.

If a party does not file written objections to the Memorandum and Recommendation by the foregoing deadline, the party will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, the party's failure to file written objections by the foregoing deadline will bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

Dated: May 15, 2017

/s/ Robert T. Numbers, II

Robert T. Numbers, II

United States Magistrate Judge

Footnotes

1

The district court referred this matter to the undersigned United States Magistrate Judge for the entry of a memorandum and recommendation pursuant to 28 U.S.C. § 636(b)(1).

2

The United States Sentencing Guidelines ("USSG") include a Drug Quantity Table that provides base offense levels that correspond to certain quantities of enumerated controlled substances. U.S.S.G. § 2D1.1. For controlled substances not on the Drug Quantity Table, the Guidelines include Drug Equivalency Tables, which convert the weight of the substances to an "equivalent quantity" of marijuana. *Id; see United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2011).

3

The amendments to the drug table reduced Baum's sentencing range on Count I to 262-327 months. His previously-calculated range of 324-405 resulted in a sentence of 273 months, which reflects a reduction of approximately 16% on Count I. His new sentence on Count I, 221 months, represents a sentence reduction comparable to his previously imposed term of incarceration.

4

The court notes that the Government's motion to dismiss and supporting brief were filed subsequent to Baum's sentence reduction.