IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12227-E

ZAVIEN BRAND,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Zavien Brand is a federal prisoner serving a 372-month total sentence after pleading guilty to 11 counts, including multiple counts of distributing cocaine base, being a felon in possession of a firearm, and possessing a firearm in furtherance of a drug-trafficking crime. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in order to appeal his 28 U.S.C. § 2255 motion to vacate sentence.

In order to obtain a COA, a § 2255 movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

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Claim 1:

Brand argued that his counsel rendered ineffective assistance by failing to file a notice of appeal. At the evidentiary hearing held before the magistrate judge, Brand stated that his counsel told him to sign the appeal waiver in conjunction with the guilty plea because Brand would still be able to appeal. However, his trial counsel testified at the evidentiary hearing that, after meeting with Brand for over an hour and advising him of his appellate rights, Brand had declined to file an appeal.

Reasonable jurists would not debate the district court's denial of this claim. To succeed on a claim of ineffective assistance of counsel, a movant must show that (1) his counsel's performance was deficient, and (2) he was prejudiced by this deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficient-performance prong requires a movant to show that counsel acted unreasonably in light of prevailing professional norms. *Id.* at 688. Credibility determinations by the district court are entitled to great deference. *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

Here, the magistrate judge determined that counsel's testimony at the evidentiary hearing, that Brand had instructed him not to file an appeal, was more credible than Brand's account. The district court later adopted that finding, so that credibility determination is entitled to great deference. *Anderson*, 470 U.S. at 575. On appeal, Brand has given no reason to second-guess the district court's determination. Consequently, because reasonable jurists would not debate the district court's denial of this claim, no COA is warranted.

Claim 2:

Brand argued that the district court lacked jurisdiction to impose a 25-year mandatory-minimum sentence because the indictment failed to charge that a second or

subsequent conviction under 18 U.S.C. § 924(c) would require the district court to impose an enhanced sentence.

Reasonable jurists would not debate the district court's denial of this claim. Although *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), holds that any fact that increases the mandatory-minimum sentence is an element of the offense that must be found beyond a reasonable doubt, a prior conviction is an exception to this beyond-a-reasonable-doubt requirement. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (involving facts that increase the applicable statutory maximum sentence); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (establishing that a sentencing enhancement based on a prior conviction was not subject to the Sixth Amendment requirement for a jury to determine the fact beyond a reasonable doubt).

Here, when Brand pleaded guilty, the agreement cautioned him that he faced a mandatory-minimum sentence of 25 years. The district court considered Brand's two convictions under § 924(c), which occurred at separate times, although they were charged in the same indictment, to provide a sufficient prior conviction to require the 25-year mandatory-minimum sentence. This determination was not in error because Brand's sentence was enhanced based on a prior conviction, to which he pled guilty. *Alleyne*, 133 S. Ct. at 2155. Consequently, because reasonable jurists would not debate the district court's denial of this claim, no COA is warranted.

Claims 3 & 4:

Brand also argued that his counsel rendered ineffective assistance during the plea negotiations by failing to advise him that he would be receiving a 25-year mandatory-minimum sentence and by not objecting to the 25-year mandatory-minimum sentence.

Reasonable jurists would not debate the district court's denial of these claims. Counsel's performance cannot be deficient for failing to raise issues that have no merit. *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). A defendant's guilty plea made knowingly, voluntarily, and with the benefit of competent counsel, waives all nonjurisdictional defects in the proceedings. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This waiver extends to claims of ineffective assistance of counsel that do not attack the voluntariness of the guilty plea. *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. Unit B Oct. 1981).

Here, the district court did not err by concluding that Brand's counsel did not render ineffective assistance of counsel. The sentencing court properly applied the mandatory-minimum sentence to Brand, and, based on the plea agreement he signed and acknowledged he understood, he had knowledge that, by pleading guilty, he would receive a mandatory-minimum sentence of 25 years' imprisonment. Accordingly, Brand's counsel cannot be considered to have rendered ineffective assistance for failing to raise this argument. *Card*, 911 F.2d at 1520. Moreover, because his claims do not challenge the voluntariness of his plea agreement, and because the record reflects that he knew of the mandatory-minimum prior to pleading guilty, Brand waived these arguments by signing his plea agreement. *Tollett*, 411 U.S. at 267. No COA is warranted as to either claim.

Accordingly, because reasonable jurists would not debate the district court's denial of Brand's § 2255 motion, his motion for a COA is DENIED. His IFP motion is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:11-cr-380-T-23AEP
8:13-cv-2103-T-23AEP

ZAVIEN BRAND
_____/

ORDER

Brand's moves under 28 U.S.C. § 2255 (Doc. 1) to vacate and challenges the validity of his several convictions, for which he is imprisoned for a total of 372 months. An earlier order (Doc. 28) adopts the magistrate judge's report and recommendation and denies Brand's claim asserted in Ground One that trial counsel rendered ineffective assistance by not appealing. Grounds Two, Three, and Four remain. Brand is entitled to no relief on the remaining grounds because each lacks merit and because Brand waived each claim when he pleaded guilty.

The earlier order summarized this action as follows (Doc. 28 at 1–2 and 5):

> 1. Brand was charged in a fourteen count superceding indictment for his involvement in a series of incidents where (1) he possessed firearms and ammunition and (2) he sold firearms and cocaine base to an undercover officer. More specifically, Brand faced six counts of distribution of cocaine base, four counts of being a felon in possession of a firearm, and four counts of possessing a firearm in furtherance of a drug crime. Brand pleaded guilty to ten of the counts without the benefit of a plea agreement but he was permitted to withdraw his guilty plea to one of the counts. The magistrate judge determined that "in return for the United States' agreement to dismiss 'all unresolved counts,' Brand later elected to plead

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> guilty pursuant to a plea agreement to Count Fourteen." (Doc. 26 at 2) As a consequence, Brand pleaded guilty to four counts of distribution of cocaine base, four counts of being a felon in possession of a firearm, and two counts of possessing a firearm in furtherance of a drug trafficking crime.
>
> 2. Brand was sentenced (1) to concurrent terms of imprisonment for one year on eight of the counts, (2) to a minimum mandatory consecutive term of imprisonment for five years, and (3) to a minimum mandatory consecutive term of imprisonment for twenty-five years, for a total of 372 months.
>
> 3. Under the terms of the plea agreement Brand waived his right to appeal his sentence or to challenge it collaterally.
>
> . . . .
>
> Moreover, the decision to enter into a plea agreement after pleading guilty to several counts without the benefit of a plea agreement is supported by former counsel's explanation of the defense's strategy, which changed when Brand changed his mind because he hoped to reduce his sentence by cooperating with the United States. Under the terms of the plea agreement the United States dismissed additional counts (including two counts that carried a minimum mandatory term of twenty-five years' imprisonment), allowed Brand to withdraw the guilty plea to a count that was not the subject of the plea agreement, and agreed to allow Brand to cooperate in hopes of reducing his sentence. The plea agreement — including the requisite appeal waiver — was part of a package both to resolve all of Brand's charges and to limit Brand's potential sentence.

Each of the three remaining grounds challenges Brand's 25-year minimum mandatory sentence. Brand (1) challenges the district court's jurisdiction to impose a 25-year minimum mandatory sentence and claims the indictment was allegedly faulty (Ground Two) and (2) challenges counsel's effectiveness during both the plea negotiation and the sentencing (Grounds Three and Four). Brand's guilty plea forecloses each challenge.

GUILTY PLEA

Tollett v. Henderson, 411 U.S. 258, 267 (1973), holds that a guilty plea waives a non-jurisdictional defect:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

This waiver of rights precludes most challenges to the conviction. "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989). *See also United States v. Patti*, 337 F.3d 1217, 1320 (11th Cir. 2003) ("Generally, a voluntary, unconditional guilty plea waives all non-jurisdictional defects in the proceedings.") and *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992) ("A defendant who enters a plea of guilty waives all non-jurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained."). A guilty plea waives a claim based on a pre-plea event, including a claim of ineffective assistance of counsel. *Wilson*, 962 F.2d at 997. Consequently, the entry of a guilty plea waives a claim that occurred before entry of the plea, including both a substantive claim and a purported failing of counsel but neither a jurisdictional challenge nor a voluntariness challenge to the plea.

INEFFECTIVE ASSISTANCE OF COUNSEL

Brand claims ineffective assistance of counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (*quoting Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)). *Strickland v. Washington*, 466 U.S. 668 (1984), governs an ineffective assistance of counsel claim:

> The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052.

Sims v. Singletary, 155 F.3d 1297, 1305 (11th Cir. 1998).

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims*, 155 F.3d at 1305 ("When applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds."). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment." *Strickland*, 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690. *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U.S. at 690.

Brand must demonstrate that counsel's alleged error prejudiced the defense because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691–92. To meet this burden, Brand must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Strickland cautions that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91. Brand cannot meet his burden merely by showing that the avenue chosen by counsel proved unsuccessful.

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial . . . . We are not interested in grading lawyers'

> performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992). *Accord Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) ("To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable . . . . [T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'") (*en banc*) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). *See also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (counsel has no duty to raise a frivolous claim).

Remaining Grounds:

In Ground Two Brand alleges that the district court lacked jurisdiction to impose a 25-year minimum mandatory sentence because the indictment failed to charge that a second or subsequent conviction under 18 U.S.C. § 924(c) would require the district court to impose an enhanced sentence. Brand argues the following in his motion to vacate (Doc. 1 at 5):

> The U.S. Supreme has recently held, and in essence overturned prior Supreme Court precedent and circuit court precedent, that any fact, that by law increases a minimum mandatory must be charged in the indictment and proved to a jury beyond a reasonable doubt. Because 18 U.S.C. 924 statue requires enhanced mandatory minimum sentences under various subsection(s), they are now elements that must be charged in the indictment.

In Ground Three Brand alleges that counsel rendered ineffective assistance by "failing to apprise him of the fact that he would be receiving a 25 year minimum mandatory-consecutive stacked sentence . . . ." (Doc. 1 at 7) In Ground Four Brand

alleges that counsel rendered ineffective assistance by not objecting to the 25-year mandatory sentence.[1] Brand waived challenging each ground, and each ground lacks merit.[2]

Brand asserts entitlement to the retroactive application of *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), which holds that any fact that increases the mandatory minimum sentence is an element of the offence that must be found beyond a reasonable doubt.

> In *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted *certiorari* to consider whether that decision should be overruled. 568 U.S. ___, 133 S. Ct. 420, 184 L. Ed. 2d 252 (2012).
>
> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and with the original meaning of the Sixth Amendment. Any fact that, by law,

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[1] In this ground Brand also alleges that counsel was ineffective at sentencing for not "provid[ing] mitigating evidence in support of a more lenient sentence." (Doc. 1 at 8) Brand identifies no evidence that counsel should have presented. This conclusory assertion supports no relief.

[2] Brand's original reply includes the conclusory statement that, under the "Alleyne-rule," he is "actually innocent of the minimum mandatory 25 years imposed upon him." (Doc. 13 at 8) The statement appears nowhere else. Nonetheless, under *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992), *cert. denied*, 513 U.S. 1162 (1995), the statement is construed as asserting entitlement to relief. The claim is both procedurally defaulted and without merit. "Because we conclude that McKay procedurally defaulted his claim by failing to raise it on direct appeal and that the actual innocence exception does not apply to McKay's claim of legal innocence, we AFFIRM the district court's denial of McKay's § 2255 motion." *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011) (capitalization original) (rejecting claim of actual innocence of career offender sentence), *cert. denied*, 133 S. Ct. 112 (2012). *See Hill v. United States*, 569 Fed. App'x 646, 648 (11th Cir. 2014) (applying *McKay*). Brand asserts no cause and prejudice to overcome the procedural default, actual innocence is inapplicable to overcome the procedural default, and under the terms of the plea agreement, as discussed later, Brand waived challenging his sentence.

> increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *See id.*, at 483, n. 10, 490, 120 S. Ct. 2348. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

Both *Apprendi* and *Alleyne* specifically recognize that, under *Almendarez–Torres v. United States*, 523 U.S. 224 (1998), a conviction is an exception to this beyond-a-reasonable-doubt requirement. *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Alleyne*, 133 S. Ct. at 2160 ("Because the parties do not contest [*Almendarez-Torres*]'s vitality, we do not revisit it for purposes of our decision today."). *See also United States v. Flowers*, 531 Fed. App'x 975, 985 (11th Cir. 2013) ("Flower's reliance on *Alleyne* is unavailing. *Alleyne* did not address prior-conviction sentencing enhancements. Instead, *Alleyne* merely extended the rationale of *Apprendi*, which itself noted that the Sixth Amendment did not require 'the fact of a prior conviction' to be submitted to a jury and proved beyond a reasonable doubt.").

Although *Apprendi*, *Alleyne*, and *Almendarez-Torres* use the term "prior conviction," convictions in a single proceeding will support an enhanced sentence, as *United States v. Irby*, 477 Fed. App'x 727, 728 (11th Cir. 2012),[3] explains:

> We next turn to Irby's contention that Count 5 is not second or subsequent conviction under § 924(c)(1)(C). If a defendant receives a "second or subsequent" conviction under § 924(c), he is subject to a mandatory consecutive sentence of 25 years for

[3] "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2.

> that second conviction. 18 U.S.C. § 924(c)(1)(C). A district court may deem one of two § 924(c) convictions charged in the same indictment as a "second or subsequent" conviction under § 924(c)(1)(C). *United States v. Phaknikone*, 605 F.3d 1099, 1111–12 (11th Cir. 2010) (noting that we "long ago rejected" the argument that a district court cannot impose a 25-year sentence under § 924(c)(1)(C) for a conviction contained in the same indictment as the other § 924(c) conviction); *Deal v. United States*, 508 U.S. 129, 134–35, 113 S. Ct. 1993, 1997–98, 124 L. Ed. 2d 44 (1993). Thus, the district court did not err in considering one of Irby's two § 924(c) convictions a second or subsequent conviction under § 924(c)(1)(C) even though the two § 924(c) convictions were charged in the same indictment.

The plea agreement cautioned Brand that he faced a "mandatory minimum sentence of twenty-five years and a maximum term of imprisonment of life, which may not run concurrently with any other term of imprisonment imposed upon the defendant . . . ." (Doc. 53 at 1) Additionally, under the terms of the plea agreement, Brand "agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence or to challenge it collaterally . . . ." (Doc. 53 at 11) When he pleaded guilty Brand admitted to understanding the potential sentence and the appeal waiver. (Doc. 69 at 18–19 and 24) Although Brand faced a possible sentence of life imprisonment, the district court, in formulating an appropriate sentence, varied downward from a guidelines range of 84–105 months to concurrent sentences of only twelve months for counts one, two, four, five, seven, nine, ten, and thirteen. As statutorily required, each one year sentence is followed by a consecutive sentence of five years for count three and a consecutive sentence of twenty-five years for count

fourteen. Brand's total sentence of 372 months is based on his actions, not counsel's alleged inaction.

Accordingly, the motion under Section 2255 to vacate the sentence (Doc. 1) is **DENIED**. The clerk must enter a judgment against Brand, enter a copy of this order in the criminal action, and close this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

Brand is not entitled to a certificate of appealability ("COA"). A prisoner moving under Section 2255 has no absolute entitlement to appeal a district court's denial of his motion to vacate. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Brand must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Brand is entitled to neither a certificate of appealability nor an appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Brand must obtain authorization from the circuit court to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on March 29, 2017.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:11-cr-380-T-23AEP
8:13-cv-2103-T-23AEP

ZAVIEN BRAND
_____/

ORDER

Brand moves to vacate his sentence under 28 U.S.C. § 2255. (Doc. 1) The earlier order (Doc. 15) refers to the magistrate judge Brand's claim that his counsel failed to appeal. Based on evidence presented during an evidentiary hearing, the magistrate judge issued his report and recommendation. (Doc. 26) Brand objects (Doc. 27) to the report and recommendation and requests that the district court reconsider Brand's claim that counsel failed to appeal.

Report and Recommendation:

The magistrate judge's thorough report includes the following recitation of facts from the evidentiary hearing and findings based on those facts:

1. Brand was charged in a fourteen count superceding indictment for his involvement in a series of incidents where (1) he possessed firearms and ammunition and (2) he sold firearms and cocaine base to an undercover officer. More specifically, Brand faced six counts of distribution of cocaine base, four counts of being a felon in

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possession of a firearm, and four counts of possessing a firearm in furtherance of a drug crime. Brand pleaded guilty to ten of the counts without the benefit of a plea agreement but he was permitted to withdraw his guilty plea to one of the counts. The magistrate judge determined that "in return for the United States' agreement to dismiss 'all unresolved counts,' Brand later elected to plead guilty pursuant to a plea agreement to Count Fourteen." (Doc. 26 at 2) As a consequence, Brand pleaded guilty to four counts of distribution of cocaine base, four counts of being a felon in possession of a firearm, and two counts of possessing a firearm in furtherance of a drug trafficking crime.

2. Brand was sentenced (1) to concurrent terms of imprisonment for one year on eight of the counts, (2) to a minimum mandatory consecutive term of imprisonment for five years, and (3) to a minimum mandatory consecutive term of imprisonment for twenty-five years, for a total of 372 months.

3. Under the terms of the plea agreement Brand waived his right to appeal his sentence or to challenge it collaterally.

4. Recognizing that the relevant claim hinges on the comparative credibility of Brand and his former counsel, the magistrate judge finds Brand not credible and finds his former counsel credible (Doc. 26 at 8):

> Brand testified in no uncertain terms that he instructed [former counsel] to file an appeal, while on the other hand, former counsel] testified unequivocally that Brand never instructed him to file an appeal, but rather directed him not to file an appeal. If Brand's testimony was accepted by the Court, that evidence

> would be sufficient to warrant the granting of his belated appeal. However, I cannot accept Brand's testimony and evidence because I find it not credible for several reasons.

5. As stated in the report and recommendation, former trial counsel explained the defense's strategy for initially pleading guilty to only some of the counts (Doc. 26 at 5–6):

> [Former counsel] explained that the strategy was for Brand to plead guilty to Counts One through Five, Seven, Nine, Ten, Twelve and Thirteen, but take to trial Counts Six, Eight, Eleven, and Fourteen. [Former counsel] emphasized that the primary concerns were the three pending Section 924(c)(1)(A) charges in Counts Eight, Eleven and Fourteen because combined they could have exposed Brand to a minimum mandatory sentence of seventy-five years imprisonment to run consecutive to any other term of imprisonment imposed. Thus, [former counsel] detailed that the plan was to emphasize to a jury that Brand pled guilty to those charges he was in fact guilty of, but that he was not guilty of the remaining Section 924(c)(1)(A) charges. [Former counsel] further stated that the defense was going to be that because Brand only brought the guns at issue to the transactions at the undercover agent's request in order to sell them to the undercover agent, then he could not be guilty under Section 924(c)(1)(A) as the guns were not in furtherance of the drug transactions. However, despite this defense, [former counsel] testified that Brand later decided to plead guilty because he wanted to try to cooperate with the Government in hopes of reducing his sentence. [Former counsel] described that in return for Brand pleading guilty to Count Fourteen pursuant to the plea agreement, the Government agreed to allow Brand to cooperate; to withdraw his plea to Count Twelve, which carried a mandatory minimum sentence of five years' imprisonment; and to dismiss the remaining Section 924(c)(1)(A) charges in Counts Eight and Eleven.

6. The magistrate judge found that former counsel's testimony that Brand did not want to appeal is supported by counsel's contemporaneously maintained notes.

7. The magistrate judge credits former counsel's testimony and rejects Brand's testimony ((Doc. 26 at 9–10):

> Contrary to Brand's testimony, I find it more plausible that after many consultations with [former counsel], Brand decided to plead guilty pursuant to the written plea agreement to avoid the potential exposure of a devastating sentence in conjunction with the additional Section 924(c)(1)(A) charges, and further hoped to reduce through cooperation with the Government whatever sentence he would receive from the Court on the remaining charges. Thus, I find it more plausible that when [former counsel] met with Brand on August 22, 2012, Brand told [former counsel] not to file an appeal because Brand was still hoping to reduce his sentence through cooperation, and did not want to disturb the possibility of a reduction in his sentence by filing an appeal contrary to the plea agreement. Given the above, I find it simply inconceivable that Brand instructed [former counsel] to file an appeal, and [former counsel] disregarded his instructions.

Brand's Objections:

Brand disagrees with the magistrate judge's finding that Brand pleaded guilty to avoid a "devastating sentence" (Doc. 27, ¶ 8 at 2):

> Mr. Brand comes before this Court with an aggregate sentence at 372 months. The practical implications that Mr. Brand would have been concerned about a potentially devastating sentence in this case is not well taken by the Defendant since an over 30-year prison sentence is, in and of itself, devastating.

To summarize his argument, Brand contends (1) that the appeal waiver in the plea agreement should be restricted to only the count that was the subject of the plea agreement and (2) that he was not precluded from appealing the sentences for the other counts. (Doc. 27, ¶ 12 at 3)

Brand cites no authority to support his argument. Moreover, the decision to enter into a plea agreement after pleading guilty to several counts without the benefit of a plea agreement is supported by former counsel's explanation of the defense's strategy, which changed when Brand changed his mind because he hoped to reduce his sentence by cooperating with the United States. Under the terms of the plea agreement the United States dismissed additional counts (including two counts that carried a minimum mandatory term of twenty-five years' imprisonment), allowed Brand to withdraw the guilty plea to a count that was not the subject of the plea agreement, and agreed to allow Brand to cooperate in hopes of reducing his sentence. The plea agreement — including the requisite appeal waiver — was part of a package both to resolve all of Brand's charges and to limit Brand's potential sentence.

Based on a credibility determination, the magistrate judge credits the testimony of Brand's former counsel and rejects Brand's testimony. *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980), instructs that "the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative." Nothing about the magistrate judge's hearing, the issues, the content of the testimony, the reasonableness of the factual findings, or any other aspect of the report and recommendation raises a doubt about the correctness and reliability of the result delivered by the magistrate judge, whose determinations and recommendations are accepted.

Having independently examined the file, reviewed the report, and considered the defendant's objections (Doc. 27), the objections are overruled and the report is adopted, confirmed, and incorporated by reference into this order. Brand's remaining claims await resolution. *See McIver v. United States*, 307 F.3d 1327, 1331, n.2 (11th Cir. 2002) (suggesting that a district court should first determine whether a movant is entitled to a delayed appeal before the other claims are addressed).

Accordingly, the court adopts the report and recommendation (Doc. 26) and overrules Brand's objections. (Doc. 27) Relief based on Brand's claim that his former counsel rendered ineffective assistance of counsel by not appealling is **DENIED**. On or before **MONDAY, AUGUST 17, 2015**, the United States must show cause why the court should not grant the requested relief based on the remaining claims. On or before **MONDAY, SEPTEMBER 21, 2015** (or thirty days after the United States complies with this order, whichever occurs later), Brand may reply.

ORDERED in Tampa, Florida, on July 1, 2015.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:11-cr-380-T-23AEP
8:13-cv-2103-T-23AEP

ZAVIEN BRAND
_____/

ORDER

Brand's moves under 28 U.S.C. § 2255 (Doc. 1) to vacate and challenges the validity of his several convictions, for which he is imprisoned for a total of 372 months. An earlier order (Doc. 28) both adopts the magistrate judge's report and recommendation, which was issued based on testimony from an evidentiary hearing at which Brand was represented by appointed counsel, and denies Brand's claim asserted in Ground One that trial counsel rendered ineffective assistance by not appealing. A subsequent order (Doc. 34) both denies Brand's remaining grounds, which challenge Brand's 25-year minimum mandatory sentence, and declines to issue a certificate of appealability. Brand appealed. (Doc. 36)

Brand moves (Doc. 43) for a transcript at government expense of both the sentencing and the evidentiary hearing, neither of which were transcribed. Having previously declined to issue a certificate of appealability, the district court declines to authorize the requested transcripts at government expense.

APPENDIX B

Accordingly, Brand's "Motion of Preparation of Transcripts at Government Expense for Purposes of Appeal" (Doc. 43) is **DENIED**.

ORDERED in Tampa, Florida, on July 11, 2017.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12227-E

ZAVIEN BRAND,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Zavien Brand has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated March 21, 2018, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* in the appeal of the denial of his motion to vacate sentence, 28 U.S.C. § 2255. Because Brand has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

APPENDIX C