No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES GIBSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14790-G

JAMES L. GIBSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

James L. Gibson is a federal prisoner serving a total sentence of life imprisonment after a jury found him guilty of 1 count of conspiracy to distribute and possess with intent to distribute more than 5 kilograms of cocaine and more than 50 grams of cocaine base and 1 count of possession with intent to distribute more than 500 grams of cocaine. Mr. Gibson now seeks a certificate of appealability ("COA") in the appeal of the district court's denial of his claim, filed pursuant to 28 U.S.C. § 2255, that his Sixth Amendment right to a jury trial was violated because the district court imposed a mandatory-minimum sentence of life in prison based on a non-jury finding that he previously had been convicted of two or more felony drug offenses. In his motion seeking a COA, Mr. Gibson argues that reasonable jurists could debate whether the lack of a jury finding regarding his prior convictions violated his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013).

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Moreover, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

In *Almendarez-Torres v. United States*, the Supreme Court held that prior convictions are not an "element" that must be found by a jury. 523 U.S. 224, 226-27 (1998). In *Alleyne*, the Supreme Court noted that *Almendarez-Torres* excepted prior convictions from the requirement that a jury must make a finding of fact to impose a mandatory minimum, and stated that it was not revisiting *Almendarez-Torres* at that time. *Alleyne*, 570 U.S. at 111. This Court has stated that:

> We recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyne* and *Apprendi* on the other. However, we are not free to do what the Supreme Court declined to do in *Alleyne*, which is overrule *Almendarez-Torres*. As we have said before, we are bound to follow *Almendarez-Torres* unless and until the Supreme Court itself overrules that decision.

United States v. Harris, 741 F.3d 1245, 1250 (11th Cir. 2014) (quotation omitted). The Supreme Court has not yet overruled *Almendarez-Torres*.

Here, Mr. Gibson's case is squarely foreclosed by this Court's precedent in *Harris*. *See Harris*, 741 F.3d at 1250. No COA will issue where a claim is foreclosed by binding precedent. *See Hamilton*, 793 F.3d at 1266. Accordingly, because Mr. Gibson has failed to show that

reasonable jurists would find debatable the denial of his § 2255 motion, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 4:09cr9/MCR/CAS
4:14cv512/MCR/CAS

JAMES L. GIBSON
_____/

O R D E R

This cause comes on for consideration upon the magistrate judge's Report and Recommendation dated June 12, 2017. ECF No. 386. The parties have been furnished a copy of the Report and Recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of any timely filed objections.

Having considered the Report and Recommendation, and the objections thereto, I have determined that the Report and Recommendation should be adopted.

Accordingly, it is now **ORDERED** as follows:

1. The magistrate judge's Report and Recommendation is adopted and incorporated by reference in this Order.

2. The clerk shall enter an amended judgment of conviction to reflect that Defendant's sentence as to Count Two is **360 months**, in accordance with the oral pronouncement at sentencing.

3. The motion to vacate, set aside, or correct sentence, ECF No. 356, is in all other respects **DENIED**.

4. A certificate of appealability is **DENIED**

DONE AND ORDERED this 22nd day of September, 2017.

s/ *M. Casey Rodgers*

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

vs. Case Nos.: 4:09cr9/MCR/CAS
4:14cv512/MCR/CAS

JAMES GIBSON,
Defendant.

REPORT AND RECOMMENDATION

This matter is before the court upon Defendant's amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (ECF No. 356). The Government has filed a response (ECF No. 368) and Defendant filed a reply. (ECF No. 377). The case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive matters. See N.D. Fla. Loc. R. 72.2; see also 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). After a careful review of the record and the arguments presented, it is the opinion of the undersigned that, with the exception of the correction of a clerical error, Defendant has not raised any issue requiring an evidentiary hearing and that the § 2255 motion should be denied. *See* Rules Governing Section 2255 Cases 8(a) and (b).

BACKGROUND

Defendant James Gibson and three others were charged in a superseding indictment with conspiracy to distribute and possess with intent to distribute more than five kilograms of cocaine and more than 50 grams of cocaine base. (ECF No. 7). Defendant was also charged along with two of his co-defendants with a substantive count of possession with intent to distribute more than five hundred grams of cocaine on a date certain. Defendant proceeded to trial represented by Barbara Sanders, Esq. He was convicted after a six day jury trial and sentenced to a term of life imprisonment. (ECF Nos. 213, 250, 266-267, 294-300). His conviction and sentence were affirmed on appeal. (*United States v. Gibson,* 708 F.3d 1256 (11th Cir. 2013); ECF No. 341).

Defendant timely filed the instant motion to vacate, represented by retained counsel Michael Ufferman, raising six grounds for relief. The Government concedes that the written judgment contains an error that should be corrected but otherwise opposes the motion.

ANALYSIS

General Legal Standards

Collateral review is not a substitute for direct appeal, and therefore the grounds for collateral attack on final judgments pursuant to § 2255 are extremely limited. A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. § 2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . . ."

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014); *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012); *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000); *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. *Nyhuis*, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. *Sanders v. United States*, 373 U.S. 1, 16 (1963) ("identical grounds may often be proved by different factual allegations . . . or supported by different legal arguments . . . or couched in different language . . . or vary in immaterial respects"). Because a motion to vacate under section 2255 is not a substitute for direct appeal, issues which could have been raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. *Lynn*, 365 F.3d at 1234–35; *Bousley v. United States*, 523 U.S. 614, 621 (1998); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir.

2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." *Lynn*, 365 F.3d at 1232 n.14 (quoting *Mills*, 36 F.3d at 1055). Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider the ground in a section 2255 motion unless the defendant establishes (1) cause for not raising the ground on direct appeal, and (2) actual prejudice resulting from the alleged error, that is, alternatively, that he is "actually innocent." *Lynn*, 365 F.3d at 1234; *Bousley*, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a defendant must show that "some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [defendant's] own conduct." *Lynn*, 365 F.3d at 1235. A meritorious claim of ineffective assistance of counsel can constitute cause. *See Nyhuis*, 211 F.3d at 1344.

Ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a § 2255 motion regardless of whether they could have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503 (2003); *see also United States v.*

Franklin, 694 F.3d 1, 8 (11th Cir. 2012); *United States v. Campo*, 840 F.3d 1249, 1257 n.5 (11th Cir. 2016). In order to prevail on a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Darden v. United States*, 708 F.3d 1225, 1228 (11th Cir. 2013). In applying *Strickland*, the court may dispose of an ineffective assistance claim if a defendant fails to carry his burden on either of the two prongs. *Strickland*, 466 U.S. at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("[T]he court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

In determining whether counsel's conduct was deficient, this court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; *see also Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Reviewing courts are to examine counsel's performance in a

highly deferential manner and "must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Hammond v. Hall*, 586 F.3d 1289, 1324 (11th Cir. 2009) (quoting *Strickland*, 466 U.S. at 689); *see also Chandler v. United States*, 218 F.3d 1305, 1315–16 (11th Cir. 2000) (discussing presumption of reasonableness of counsel's conduct); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (emphasizing that petitioner was "not entitled to error-free representation"). Counsel's performance must be evaluated with a high degree of deference and without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler*, 218 F.3d at 1315. "[T]he fact that a particular defense ultimately proved to be unsuccessful [does not] demonstrate ineffectiveness." *Chandler*, 218 F.3d at 1314. When reviewing the performance of an experienced trial counsel, the presumption that counsel's conduct was reasonable is even

stronger, because "[e]xperience is due some respect." *Chandler*, 218 F.3d at 1316 n.18.

With regard to the prejudice requirement, defendant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*). For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (quoting *Strickland*, 466 U.S. at 687). Or in the case of alleged sentencing errors, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less

harsh due to a reduction in the defendant's offense level. *Glover v. United States*, 531 U.S. 198, 203–04 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

To establish ineffective assistance, Defendant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012); *Garcia v. United States*, 456 F. App'x 804, 807 (11th Cir. 2012) (*citing Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir. 1993)); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (*citing Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Furthermore, counsel is not constitutionally deficient for failing to preserve or argue a meritless claim. *Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (*citing Freeman v. Attorney General, Florida*, 536 F.3d 1225, 1233 (11th Cir. 2008)). This is true regardless of whether the issue

is a trial or sentencing issue. *See, e.g.*, *Sneed v. Florida Dep't of Corrections*, 496 F. App'x 20, 27 (11th Cir. 2012) (failure to preserve meritless *Batson* claim not ineffective assistance of counsel); *Lattimore v. United States*, 345 F. App'x 506, 508 (11th Cir. 2009) (counsel not ineffective for failing to make a meritless objection to an obstruction enhancement); *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002) (counsel was not ineffective for failing to raise issues clearly lacking in merit); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (counsel not ineffective for failing to object to "innocuous" statements by prosecutor, or accurate statements by prosecutor about effect of potential sentence); *Meeks v. Moore*, 216 F.3d 951, 961 (11th Cir. 2000) (counsel not ineffective for failing to make meritless motion for change of venue); *Jackson v. Herring*, 42 F.3d 1350, 1359 (11th Cir. 1995) (counsel need not pursue constitutional claims which he reasonably believes to be of questionable merit); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (no ineffective assistance of counsel for failing to preserve or argue meritless issue); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (counsel was not ineffective for informed tactical decision not to make what he believed was a meritless motion challenging juror selection

procedures where such a motion has never been sustained because such a motion would not have been successful).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Chandler*, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather whether counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Regardless of how the

standard is framed, under the prevailing case law it is abundantly clear that a moving defendant has a high hurdle to overcome to establish a violation of his constitutional rights based on his attorney's performance. A defendant's belief that a certain course of action that counsel failed to take might have helped his case does not direct a finding that counsel was *constitutionally ineffective* under the standards set forth above.

An evidentiary hearing is unnecessary when "the motion and files and records conclusively show that the prisoner is entitled to no relief." *See* 28 U.S.C. § 2255(b); *Rosin*, 786 F.3d at 877; *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). Not every claim of ineffective assistance of counsel warrants an evidentiary hearing. *Gordon*, 518 F.3d at 1301 (*citing Vick v. United States*, 730 F.2d 707, 708 (11th Cir. 1984)). To be entitled to a hearing, a defendant must allege facts that, if true, would prove he is entitled to relief. *See Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015). A hearing is not required on frivolous claims, conclusory allegations unsupported by specifics, or contentions that are wholly unsupported by the record. *See Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (explaining that "a district court need

not hold a hearing if the allegations [in a § 2255 motion] are . . . based upon unsupported generalizations") (internal quotation marks omitted); *Peoples v. Campbell*, 377 F.3d 1208, 1237 (11th Cir. 2004). Even affidavits that amount to nothing more than conclusory allegations do not warrant a hearing. *Lynn*, 365 F.3d at 1239. Finally, disputes involving purely legal issues can be resolved by the court without a hearing.

Defendant's Individual Claims

Ground One

Defendant first claims that the sentence for Count Two which is contained in the written judgment conflicts with the sentence orally imposed at sentencing. Defendant is correct. At sentencing, the court imposed a term of life imprisonment as to Count One and 360 months as to Count Two. (ECF No. 300 at 33). The written judgment of conviction, however, reflects a life sentence as to each count. (ECF No. 266 at 2). The Government has indicated that it does not oppose the correction of this previously unnoticed clerical error in accordance with Rule 36 of the Federal Rules of Criminal Procedure. See *United States v. Portillo*, 363 F.3d 1161, 1164-65 (11th Cir. 2004).

Ground Two

In his second ground for relief, Defendant claims to have obtained newly discovered evidence that his conviction and sentence were procured in reliance upon false and perjurious testimony of numerous Government witnesses. Defendant asserts, without any evidentiary support, that five of the Government's cooperating witnesses, Gary Sheppard, Daniel Durden, Mario Larry, Chaddrick Quinn and Carlos Peace, "have admitted that substantial portions of their testimony were fabricated, particularly the drug quantities." (ECF No. 356 at 2). The same individuals allegedly confirmed that the witnesses who were housed together met and shared information following their debriefings with Government agents and "would then coordinate the fabrication of testimony based on the Government's perceived need for evidence." (*Id.*). This claim is identical to the claim raised by Defendant's co-defendant and brother Leondray Gibson in his § 2255 motion. (*See* ECF No. 350 at 17).

In its response, the Government references the response it filed to Leondray Gibson's § 2255 motion. The Government also notes that AUSA Simpson discussed this claim with Defendant James Gibson's counsel, Mr. Ufferman. Mr. Ufferman advised that he was relying on Leondray

Gibson's attorney, Mr. Kent, and that he had no personal knowledge of evidence supporting this claim. (ECF No. 368 at 2-3). In Defendant's reply memorandum, counsel concedes that he is "not aware of any newly discovered evidence in the Defendant's case." (ECF No. 377 at 1). This corresponds to the reply filed by co-defendant Leondray Gibson in which his attorney admitted that his limited independent investigation was unable to confirm the factual assertions made in the initial pleading, and that an interview with one of the five named witnesses did not support the claim. (ECF No. 376 at 9).

Absent even any evidence to support Defendant's claim, it must be denied.

Ground Three

Defendant's third claim is that his sentence on Count One violates his Sixth Amendment right to a jury trial. He claims that the district court could not impose a minimum mandatory sentence of life imprisonment based on the finding that Defendant had been convicted of two or more felony drug offenses when the finding about his prior convictions was not made beyond a reasonable doubt by a jury.

Defendant's argument is squarely foreclosed by *United States v. Harris*, 741 F. 3d 1245 (11th Cir. 2014), which held that judicial factfinding regarding prior convictions does not violate a Defendant's Sixth Amendment right to a jury trial. *Harris*, 741 F.3d at 1249 (*citing Almendarez-Torres v. United States*, 523 U.S. 224, 226-227 (1998)). This is because a prior conviction is not an "element" of a crime that must be found by a jury. *Almendarez-Torres*, 523 U.S. at 226-227. The court in *Harris* noted that the Supreme Court has explicitly stated that prior convictions are excepted from the general rule that a jury must find any fact that will increase the penalty for an offense. *Harris*, 741 F.3d at 1249 (*citing Alleyne* 133 S. Ct. 2151, 2160 n.1). Defendant is not entitled to relief.

Ground Four

Defendant next asserts that the Government presented perjured or inconsistent testimony to the grand jury or the trial jury. He notes that during the grand jury proceedings, DEA Agent Greg Millard stated that he received information from an "informant" regarding a trip Defendant was scheduled to take to South Florida to pick up drugs. Defendant contrasts

that testimony with his trial testimony that Millard did not have any informants that were in contact with Defendant.

Defendant Gibson was not the target of the March 3, 2009, grand jury proceedings he now cites. (ECF No. 385 at 21). At these proceedings, Agent Millard testified about the investigation and mentioned the use of informants. The following testimony took place:

> Q: Let's talk about this. On February 19 of 2009 was James Gibson operating this Chevrolet Avalanche?
>
> A: I believe it was Wednesday the 18th he left. We got information he was leaving Tallahassee. I was able to catch up to him on the Parkway, right when he was turning on 59, the first Jefferson County exit out there.

(ECF No. 385 at 7).

Agent Millard also stated the following in response to questioning by one of the grand jurors:

> Q: When the vehicle left you thought Gibson was in it?
>
> A: I believe Mr. Gibson was in it when it left.
>
> Q: You think he might have done the drug transaction. Is there a chance that Burton didn't know the drugs were in the car at the time?
>
> A: Sure. There is a chance. There is a chance but our informant told us that –

(ECF No. 385 at 22).

At trial, the following exchange took place on cross-examination:

Q: You drew a conclusion, right?

A: That Mr. Burton was working for Mr. James Gibson, yes, ma'am.

Q: And despite that conclusion, you still did nothing to try to get an undercover buy from Mr. James Gibson, right?

A: We would have loved to. We did not –

Q: Did you try?

A: We didn't have any informants that could do it.

Q: And you didn't try to do any tape recording or phone tapping or any other evidence to back up your theory, correct?

A: Trust me, if we could have had an undercover buy, if we could have cultivated one – they don't grow on trees – or if we could have got the probable cause to get a wiretap, I would have loved to have done it, yes, ma'am.

Q: In your opinion, it wasn't even probable cause, was it?

A: I didn't have the informants to do it with.

(ECF No. 299 at 1512-1513).

Defendant now contends that "contrary to Agent Millard's testimony before the grand jury, the Government did not have an active informant working in/on this case." (ECF No. 357 at 14). The problem with this

contention is that Defendant offers only a partial citation of the relevant portions of the transcript.

In response to the Government's question as to whether there was a chance that Burton didn't know the drugs were in the car at the time, Agent Millard's full response was:

> A: Sure. There is a change. There is a chance but our informant told us that – Mr. Bryant, Alvin Bryant, and Robert Sherrell Glanton had informed us that Mr. Burton would be the one that drives to Ocala to pick-up the drugs.

(ECF No. 385 at 7). Bryant and Glanton were individuals in custody who had provided information to law enforcement, not "informants" who were at liberty to conduct undercover drug buys.

Furthermore, in response to a question posed by one of the grand jurors, Agent Millard clarified the source of his "information" that Defendant was leaving Tallahassee to be a satellite tracking device. (ECF No. 385 at 23).

Agent Millard's testimony was not that he had not informants, but rather that he had no informants who could make controlled buys from the Defendant. The incarcerated witnesses who testified against Defendant were not able to do so. The Government notes that ideally, the agent

would make the source of each bit of information precisely clear, the record suggests neither incorrect nor false information. The undersigned concurs, and Defendant is not entitled to relief.

Ground Five

With respect to the allegations in Ground Four, Defendant submits that if the Government used an informant in this case, the Government's failure to disclose this informant constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As noted above, a reasonable interpretation of the record is that Millard used the word "informant" to refer to the incarcerated witnesses who were not, of course, available to conduct controlled buys from James Gibson. Millard did not lie at trial, and Defendant has not shown a *Brady* violation.

Ground Six

Defendant's final ground for relief is that counsel was constitutionally ineffective because she did not establish that Defendant was the "*de facto*" owner of the Chevrolet Avalanche to which the GPS tracking device was affixed. Before trial, co-defendant Kelvin Burton moved to suppress all evidence obtained as a result of the tracking device, which he

characterized as a warrantless search. (ECF No. 107).[1] Defendant moved for permission to attend the scheduled hearing, conceding that he did not have standing to object to the Fourth Amendment violation but noting that the evidence seized would be used against him. (ECF No. 99). The district court denied both of Burton's motions after a hearing, which Defendant attended. (ECF No. 113, 136). Subsequently, Defendant Gibson filed a Motion to Adopt Motion to Suppress and Motion for Reconsideration. (ECF No. 143). He argued therein that the testimony adduced at the hearing established that the tracking device was established while he had possession of the vehicle, and that he sometimes drove it, although he also drove other vehicles. The court denied the motion. (ECF No. 173).

Defendant challenged the denial of the motion to suppress on appeal. He argued that installation of the device was a warrantless search and that he had standing to challenge the search because of his "subjective and

[1] The initial motion was to suppress evidence seized due to an illegal arrest. (ECF No. 93). Burton's second motion addressed the warrantless placement of the tracking device. It was not until after Defendant's trial that the United States Supreme Court overturned Eleventh Circuit precedent in holding that the installation of an electronic tracking device on a vehicle is a search which generally requires a warrant. *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

objective expectation of privacy in the Avalanche." *Gibson*, 708 F.3d at 1276. The Eleventh Circuit noted that he was not the owner of the Avalanche although he paid for its insurance and maintenance and often drove it. *Id.* at 1277. The court also noted that an individual who borrows a vehicle with the owner's consent has a legitimate expectation of privacy in the vehicle and standing to challenge its search while it is in his possession. *Id.* (*citing United States v. Miller*, 821 F. 2d 546, 548 & n.2 (11th Cir. 1987)). It concluded that Defendant Gibson had standing to challenge the installation and use of the tracking device while the vehicle was in his possession, but he did not have standing to challenge the use of the tracking device to locate the Avalanche when it was moving on public roads and he was neither the driver nor a passenger. *Gibson*, 708 F.3d at 1277. In sum, because he had no possessory interest in the vehicle at the time of its seizure, he did not have standing to challenge the search and seizure. *Id.*

Defendant now claims that counsel should have presented his testimony, as well as testimony from Kelvin Burton, that Defendant was the "de facto" owner of the Avalanche and that he and he alone had a possessory interest in the vehicle at all times. The Eleventh Circuit noted

that Defendant was not the owner of the vehicle under Florida law. *Gibson*, 708 F.3d at 1277. Section 322.01(31), Florida Statutes defines the "owner" of a vehicle as the person who holds the legal title to a vehicle. Defendant himself said at sentencing that the vehicle did not belong to him. (ECF No. 300 at 27). Defendant has not explained what evidence counsel could or should have presented beyond what was already before the court and how this would have changed the ruling on standing.

Defendant offers no new arguments and nothing to rebut the Government's position in his reply. His bare, conclusory allegations do not establish that his attorney's performance was constitutionally ineffective under *Strickland* or that he is entitled to relief.

Conclusion

For all of the foregoing reasons, the court finds that Defendant has failed to show that any of the claims raised in his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 have merit. Nor has he shown that an evidentiary hearing is warranted. Therefore Defendant's motion should be denied in its entirety.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), § 2255 Rules.

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Based on the foregoing, it is respectfully **RECOMMENDED**:

1. The judgment of conviction (ECF No. 266) be amended to reflect that Defendant's sentence as to Count Two should be 360 months, and in all other respects the motion to vacate, set aside, or correct sentence (ECF No. 356) should be **DENIED**.

2. A certificate of appealability be **DENIED**.

At Tallahassee, Florida, this 12th day of June, 2017.

s/ Charles A. Stampelos
CHARLES A. STAMPELOS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

-vs-

Case # 4:09cr9-002-MCR

JAMES L. GIBSON

USM # 12337-017

Defendant's Attorney:
Barbara S. Sanders (Appointed)
80 Market Street
Apalachicola, FL 32329

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts One and Two of the Superseding Indictment on August 16, 2010. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such counts which involve the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
21 U.S.C. §§ 841(b)(1)(A)(ii), 841(b)(1)(A)(iii), and 846	Conspiracy to Distribute and Possession With Intent to Distribute More Than 5 Kilograms of Cocaine and More Than 50 Grams of Cocaine Base	June 2, 2009	One
21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(ii)	Possession With Intent to Distribute More Than 500 Grams of Cocaine	February 20, 2009	Two

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:
November 22, 2010

M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

Date Signed: December 2d, 2010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **Life imprisonment as to Counts One and Two, with the terms to run concurrently, one with the other**.

The Court recommends that the defendant be designated to FCI Marianna, Florida or to a Bureau of Prisons facility for confinement as near to Tallahassee, Florida, as possible.

The Court recommends that the defendant participate in the Residential Drug Abuse Program or other such similar program for treatment of substance abuse as deemed eligible by the Bureau of Prisons.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years as to Count One and 8 years as to Count Two, with each count to run concurrently, one with the other.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall be evaluated for substance abuse and referred to treatment as determined necessary through an evaluation process. The defendant may be tested for the presence of illegal controlled substances or alcohol at any time during the term of supervision.

The defendant shall cooperate with the Probation Department and/or the Florida Department of Revenue's Child Support Enforcement Program in the establishment of support and shall make all required child support payments.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	Fine	Restitution
$200.00	**Waived**	**None**

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of **$200.00** is imposed.

No fine imposed.

No restitution imposed.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; and (7) penalties in full immediately.

Breakdown of fine and other criminal penalties is as follows:
Fine: Waived SMA: $200.00 Restitution: None Cost of Prosecution: None

The $200.00 monetary assessment shall be paid immediately. Any payments of the monetary assessment and the fine made while the defendant is incarcerated shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATE OF AMERICA,

Plaintiff,

v. **Case No.: 4:09CR9/MCR**

JAMES L. GIBSON, LEONDRAY GIBSON, and SIDNEY BRIAN GIBSON,

Defendants.
_____/

VERDICT FORM

We, the jury, in the above entitled and numbered case, unanimously find the defendant, **JAMES L. GIBSON**

COUNT ONE

_____ **NOT GUILTY**.

__12__ **GUILTY** beyond a reasonable doubt of the offense of conspiring to distribute or possess with intent to distribute a controlled substance, as charged in the indictment.

If you have found the Defendant not guilty, then your work with regard to Count One is done. If you have found the Defendant guilty of this offense, you must specify the type and weight of the controlled substance(s) involved in the conspiracy, indicating your unanimous decision by checking the appropriate spaces.

FILED IN OPEN COURT THIS
August 16, 2010
CLERK, U. S. DISTRICT COURT, NORTH. DIST. FLA.

We, the jury, in the above entitled and numbered case, unanimously find the Defendant, JAMES L. GIBSON, responsible for conspiring to distribute or possess with intent to distribute (check all that apply):

__✓__ Cocaine, more than 5 kilograms

_____ Cocaine, 5 kilograms or less, but more than 500 grams

_____ Cocaine, 500 grams or less

__✓__ Cocaine base, more than 50 grams

_____ Cocaine base, between 5 and 50 grams

_____ Cocaine base, less than 5 grams

COUNT TWO

_____**NOT GUILTY**.

__12__**GUILTY** beyond a reasonable doubt of the offense of possession of cocaine with intent to distribute, as charged in the indictment.

If you have found the Defendant not guilty, then your work with regard to Count Two is done. If you have found the Defendant guilty of this offense, you must specify the weight of the cocaine for which the Defendant is responsible, indicating your unanimous decision by checking the appropriate space.

We, the jury, in the above entitled and numbered case, unanimously find the Defendant, JAMES L. GIBSON, responsible for possessing with intent to distribute (check one):

__✓__ More than 500 grams of Cocaine

_____ Less than 500 grams of Cocaine

SO SAY WE ALL, this 16th day of August, 2010.

Foreperson's Signature

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. **Case No.: 4:09cr9-SPM**

JAMES L. GIBSON

_____/

AMENDED INFORMATION AND NOTICE OF INTENT

COMES NOW THE UNITED STATES OF AMERICA, pursuant to Section 851 of Title 21 of the United States Code, and gives this amended notice that should defendant James L. Gibson be convicted of the drug offenses charged in this Indictment, then the United States will seek an enhanced penalty as provided under Section 841 of Title 21 of the United States Code.

1. The defendant has been charged in Count One of the Indictment with conspiracy to distribute and possess with intent to distribute controlled substances involving more than five (5) kilograms of a mixture and substance containing a detectable amount of cocaine and more than fifty (50) grams of a mixture and substance containing cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(A)(iii), and 846. This offense is charged as occurring between in or about 2000 and on or about June 2, 2009. Based upon the quantity of cocaine and cocaine base which the government anticipates proving on Count One, the defendant would normally be subject to penalties including a mandatory minimum term of ten years imprisonment, a maximum of life imprisonment, a fine of

up to $4,000,000, and a five year term of supervised release.

2. The defendant has also been charged in Count Two of the Indictment with possession of a controlled substance involving more than five hundred (500) grams of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii). This offense is charged as occurring on or about February 20, 2009. Based upon the quantity of cocaine which the government anticipates proving on Count Two, the defendant would normally be subject to penalties including imprisonment from five to forty years, a fine of up to $2,000,000, and a four year term of supervised release for this offense.

3. On or about February 1, 1990, James L. Gibson was convicted of the felony drug offense of Possession of Cocaine, in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, in Case No. 89-2738CF.

4. On or about October 7, 1999, James L. Gibson was convicted of the felony drug offense of Possession of Cocaine, in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, in Case No. 96-3300AF.

5. On or about June 26, 2003, James L. Gibson was convicted of the felony drug offense of Possession of Cocaine With Intent To Sell, in the Circuit Court, Fifth Judicial Circuit, in and for Marion County, Florida, in Case No. 00-4008-CF-A-Z.

6. On or about June 26, 2003, James L. Gibson was convicted of the felony drug offense of Possession of Cocaine, in the Circuit Court, Fifth Judicial Circuit, in and for Marion County, Florida, in Case No. 01-0306-CF-A-Z.

7. On or about June 12, 2006, James L. Gibson was convicted of the felony drug offense of Possession of Cocaine, in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, in Case No. 2005CF000128A.

8. On or about June 12, 2006, James L. Gibson was convicted of the felony drug offense of Possession of More Than 20 Grams Cannabis, in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, in Case No. 2005CF000128A.

9. Additional details may be obtained through the state court files and in the discovery which will be made available to the defendant in this case.

10. It is submitted that the previous convictions set out above will subject the defendant on Count One to a mandatory minimum term of life imprisonment, a fine of up to $8,000,000, and a ten year term of supervisory release, and on Count Two, to a mandatory minimum term of imprisonment of ten years, a maximum of life imprisonment, a fine of up to $4,000,000, and an eight year term of supervisory release.

11. The United States will seek all enhanced penalties which are available in this case.

Respectfully submitted,

THOMAS F. KIRWIN
United States Attorney

/s/ *Stephen M. Kunz*
STEPHEN M. KUNZ
Senior Litigation Counsel
Florida Bar No. 0322415
111 North Adams St., 4th Floor
Tallahassee, FL 32301
(850) 942-8430

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Notice of Electronic Filing this 26th day of June, 2009, to, William E. Bubsey, Esquire, 210 South Monroe Street, Tallahassee, Florida 32301, counsel for defendant James L. Gibson.

/s/ *Stephen M. Kunz*
STEPHEN M. KUNZ
Senior Litigation Counsel