FRANK D. MONSEGUE, SR., Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 25377
No. 17-13054-C
September 6, 2018, Decided

APPENDIX A

Editorial Information: Prior History

Appeal from the United States District Court for the Southern District of Georgia.Monsegue v. United States, 2018 U.S. App. LEXIS 19723 (11th Cir. Ga., July 17, 2018)

Counsel Frank D. Monsegue, Sr., Petitioner - Appellant, Pro se, Jesup, GA.
For United States of America, Respondent - Appellee: R. Brian Tanner, U.S. Attorney Service - Southern District of Georgia, U.S. Attorney's Office, Savannah, GA.

Judges: Before: WILSON and JULIE CARNES, Circuit Judges.

Opinion

BY THE COURT:

Frank D. Monsegue, Sr., has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated July 17, 2018, denying his motion for a certificate of appealability in the appeal of the denial of his motion to vacate sentence under 28 U.S.C. § 2255. Because Monsegue 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.

FRANK D. MONSEGUE, SR., Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 19723
No. 17-13054-C
July 17, 2018, Decided

Editorial Information: Subsequent History

Reconsideration denied by Monsegue v. United States, 2018 U.S. App. LEXIS 25377 (11th Cir., Sept. 6, 2018)

Editorial Information: Prior History

Appeal from the United States District Court for the Southern District of Georgia.Monsegue v. United States, 2017 U.S. Dist. LEXIS 99367 (S.D. Ga., June 27, 2017)

Counsel Frank D. Monsegue, Sr., Petitioner - Appellant, Pro se, Jesup, GA.
For United States of America, Respondent - Appellee: R. Brian Tanner, U.S. Attorney Service - Southern District of Georgia, U.S. Attorney's Office, Savannah, GA.

Judges: Julie E. Carnes, UNITED STATES CIRCUIT JUDGE.

Opinion

Opinion by: Julie E. Carnes

Opinion

ORDER:

Frank Monsegue is a federal prisoner serving an 87-month imprisonment sentence after pleading guilty, without a written plea agreement, to wire-fraud conspiracy, theft of government property, and aggravated identity theft. He did not file a direct appeal. He filed a *pro se* 28 U.S.C. § 2255 motion raising the following claims:

(1) no arrest warrant was presented at the time of his arrest or since;

(2) arraignment procedures were improperly followed;

(3) the summons used to obtain his bank records was invalid;

(4) the indictment remained sealed and was unavailable to him when he was taken into custody;

(5) counsel was ineffective for coercing his guilty plea and for failing to "aggressively challenge ... any of the government's allegations," contest the validity of the summons used to obtain his financial records, mail him a copy of the presentence investigation report ("PSI"), and notify him of the sentencing hearing; and the trial court improperly participated in plea discussions;

(6) his guilty plea was coerced by the threat of immediate incarceration, which his counsel did not challenge, nor did counsel secure a written plea agreement;

(7) the government committed perjury by inserting known false statements into his PSI;

(8) the government abused its power by issuing a bench warrant after his counsel informed the court that he had not received notice of a hearing;

(9) counsel failed to contest the use of sophisticated tracking software on his banking activities without legal authority or court approval;

(10) the prosecution failed to disclose evidence favorable to him;

(11) charges were brought outside of the five-year limitations period set forth in 18 U.S.C. § 3282;

(12) the court erred in its sentence calculation regarding his acceptance of responsibility and the number of identified victims;

(13) his sentence was accepted under duress after counsel advised him not to present his objections at sentencing in order to avoid the government's recommendation of a "high end" sentence;

(14) the court erred by including as "victims" in his offense "participants" who willingly provided their personal information;

(15) counsel failed to submit a motion to withdraw his guilty plea, discuss mandatory sentencing, make a plea offer prior to trial, or inform him of what to expect at a Rule 11 inquiry;

(16) counsel failed to argue that his initial appearance should have been in or adjacent to the district where he was arrested;

(17) the court erred in imposing a 14-level enhancement for the loss amount, the 2-level enhancement for the number of victims, and the 2-level enhancement for obstruction of justice in calculating his sentence;

(18) that he was indicted for 'Theft of Government Money" but was sentenced for "Theft of Government Property," both pursuant to 18 U.S.C. § 641;

(19) the court erred in its restitution and victim enhancement calculations; and

(20) he was denied his right to a speedy trial.1

After the government's response and three motions from Monsegue demanding release under 18 U.S.C. § 3145(b), a magistrate judge entered a report and recommendation ("R&R") that his claims were all waived by his guilty plea, procedurally defaulted because they were not raised on direct appeal, or meritless, and his motions for release were frivolous because Monsegue filed them pursuant to a statute that was inapplicable to him. Over Monsegue's objections, the district court adopted the R&R and denied his § 2255 motion. The district court also denied a COA. Monsegue now seeks a COA and appointment of counsel from this Court.

DISCUSSION:

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). When the district court decided the movant's claims in part on procedural grounds, the movant must demonstrate that reasonable jurists would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2)

whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quotation omitted).

The district court determined that Monsegue presented three categories of claims: (1) pre-plea; (2) post-plea and sentencing errors; and (3) ineffective assistance of counsel.

Pre-plea claims

Generally, a voluntary, unconditional guilty plea waives all nonjurisdictional defects in the proceedings. *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). Thus, a defendant who enters a guilty plea can attack only the knowing and voluntary nature of the plea. *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992). In order for a plea to be knowing and voluntary, the court accepting the plea must comply with Fed. R. Crim. P. 11, and, in particular, address three "core concerns" by ensuring that: (1) the guilty plea is voluntary and free from coercion; (2) the defendant understands the nature of the charges; and (3) the defendant knows and understands the consequences of the plea. *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985). In evaluating the knowingness and voluntariness of a plea, the representations of the defendant at the plea hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). This Court applies a strong presumption that statements made by a defendant during the plea colloquy are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). Therefore, when a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show that his statements were false. *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988).

A defendant can overcome the otherwise voluntary and intelligent character of his guilty plea only if he can establish that the advice he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases, in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See Premo v. Moore*, 562 U.S. 115, 121, 126, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011). To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In order to establish prejudice in the context of a guilty plea, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Premo*, 562 U.S. at 129.

Reasonable jurists would not debate the district court's finding that Monsegue voluntarily entered a guilty plea because all three of the core concerns of Rule 11 were addressed in the plea colloquy. The record reflects that Monsegue understood the nature of the charges because the court reviewed them and what the government would have to prove if the case went to trial. Additionally, Monsegue affirmed that he had reviewed the charges and possible defenses with his counsel. The record also reflects that Monsegue understood the consequences of his guilty plea. The court reviewed the trial rights that Monsegue had, including the right to a speedy trial, and Monsegue acknowledged that he would be giving up those rights with a guilty plea. Monsegue also acknowledged that his guilty plea would waive his right to appeal any action of the government, its agents, the prosecutor, his attorney, the magistrate judge, the district court, or anyone else regarding anything they did or failed to do in his case. The court also confirmed that Monsegue understood the maximum punishments for the charges to which Monsegue pled guilty and that he had reviewed advisory guideline sentencing information with his attorney.

Finally, the record reflects that Monsegue's guilty plea was voluntary and free from coercion. In his § 2255 motion and subsequent filings, Monsegue maintained that his plea was coerced by his counsel because she was unprepared for trial. He also claimed coercion by the government's threats of bond revocation and immediate incarceration if he did not plead guilty and its statement that going to trial would be "guaranteed to quadruple [his] time." However, Monsegue did not elaborate on how his counsel forced his plea, and conclusory allegations cannot support a claim for habeas relief. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Also, his allegations against the government, even if true, would not support invalidation of his plea. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) (holding that confronting a defendant with the risk of more severe punishment is permissible); *Brady v. United States*, 397 U.S. 742, 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (holding that a guilty plea is not invalid merely because it was entered to avoid the possibility of a death penalty). Moreover, at the plea colloquy, Monsegue acknowledged that he was pleading guilty because he was, in fact, guilty, that his plea was made freely and voluntarily, that his counsel had not tried to force or push him into pleading guilty, and that he was satisfied with her representation. He also affirmed that no one had done anything that he considered to be wrong or unfair that forced his guilty plea. Monsegue's sworn statements at the plea colloquy are presumed to have been truthful, and he has not met his heavy burden to rebut that presumption. *Medlock*, 12 F.3d at 187; *Rogers*, 848 F.2d at 168.

Monsegue also has not overcome the otherwise voluntary and intelligent character of his guilty plea by establishing that the advice that he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases. *Premo*, 562 U.S. at 121, 126. His claims of ineffective assistance relating to pretrial preparation are that his counsel did not contest the validity of the summons used to obtain his financial records (Claim 5) or the use of sophisticated tracking software on his banking activities without legal authority or court approval (Claim 9), counsel did not discuss mandatory sentencing or what to expect at a Rule 11 colloquy with him, or make a plea offer prior to trial (Claim 15), and that counsel did not argue that his initial appearance should have been in or adjacent to the district where he was arrested (Claim 16).

As background, Monsegue entered his plea on the first day of his trial, after four months of pretrial preparation. During jury selection, Monsegue indicated that he wanted to plead guilty. After jury selection, the court recessed so that he and the government could discuss what would be entailed in the plea. When court resumed several minutes later, the government announced that the parties had reached agreement about the plea's terms. Monsegue then changed his mind about pleading guilty because he was not prepared to be arrested that day. After a bench conference, the court recessed for several more minutes, and the parties reached an agreement that Monsegue would enter a guilty plea and the government would leave the issue of Monsegue's continued release on bond to the court. The court immediately commenced the change-of-plea hearing.

At that hearing, an Internal Revenue Service ("IRS") agent testified to the facts constituting the offense conduct. On cross-examination, Monsegue himself questioned whether a court order was issued to obtain his bank records and whether the failure to get a court order was a violation of his "right to privacy act under the Sixth Amendment." Monsegue filed a motion to withdraw his guilty plea roughly two months later, desiring to challenge the constitutionality of failing to obtain a court-issued subpoena to acquire access to his banking information.

Monsegue has not established that his counsel's failure to challenge the methods of tracking or obtaining his financial records was constitutionally ineffective. This Court has held that an IRS summons directed to a third party bank does not violate the Fourth Amendment rights of a taxpayer under investigation since the records belong to the summoned party and not the taxpayer, and the

taxpayer has no privacy interest in the documents. *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984). Monsegue's counsel cannot be deemed ineffective for failing to raise a meritless claim. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").

Monsegue also has not established that his counsel was constitutionally ineffective for failing to challenge the site of his initial appearance. He did not allege that, but for this error, he would not have pled guilty, and there does not seem to be a reasonable probability that he would have, given that the bargain he struck allowed him to plead guilty to only 3 counts in an indictment that originally contained 41 counts.2 Moreover, nothing in the record or in Monsegue's § 2255 motion indicates that he requested that his counsel make a plea offer prior to trial, so counsel did not perform deficiently by not doing so. Finally, Monsegue was not prejudiced by his counsel's failure to explain to him the maximum potential penalties that he faced or what to expect at the unanticipated Rule 11 hearing because the court informed him of the maximum penalties before accepting his guilty plea and Monsegue understood that he had a right to stop the hearing at any time and have any questions answered. Thus, he has not shown that any alleged error in counsel's pre-plea performance prejudiced him. *Premo*, 562 U.S. at 129.

Because Monsegue's guilty plea was knowing and voluntary, and he did not overcome the voluntary nature of his plea by establishing that his counsel rendered ineffective assistance in relation to it, reasonable jurists would not debate the district court's finding that Monsegue waived his challenges to the government's evidence, warrants, and indictments. Specifically, the magistrate judge found that Monsegue's guilty plea waived "all pre-plea claims, including claims. 1-4, 8-11, and his Speedy Trial Act claim," and the district court adopted this finding. No COA is warranted on these claims.

It is unclear why the magistrate judge did not include Claim Six-that his guilty plea was coerced by the threat of immediate incarceration and that his counsel did not secure a written plea agreement-in the list of pre-plea claims that were waived by Monsegue's guilty plea. However, both of the issues that Monsegue raised in Claim Six could fairly be read as included in the magistrate judge's determination that "all pre-plea claims" were waived by Monsegue's guilty plea. Additionally, the record supports the district court's findings that there was no written plea agreement because Monsegue waited until after jurors had been selected and counsel for both sides were ready to try his case "to accept, then reject, then accept" the government's offered plea, and that he was not entitled to a copy of a plea agreement that did not exist. No COA is warranted on Claim Six.

The magistrate judge also did not address the portion of Claim Five that alleged improper intervention by the district court in plea discussions or include it in its list of pre-plea claims that were waived by Monsegue's guilty plea. The district court addressed the claim in its order, and reasonable jurists would not debate its conclusion that Monsegue's allegation of impropriety was incorrect. The record reflects that the court stopped the trial proceedings after Monsegue indicated that he wanted to plead guilty so that the parties could work out the details of the agreement. After an agreement was reached, Monsegue changed his mind about entering the plea. At that point, the court held the bench conference that is the subject of Monsegue's complaint. In that conference, the district court repeatedly indicated that it was not involving itself in the discussions between Monsegue and the government, but only inquiring about Monsegue's vacillation on his plea, and encouraged further discussion before involving the jury further. No COA is warranted on this portion of Claim Five.

Post-plea and sentencing error claims

Under the procedural-default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). His

procedural default can be excused, however, if the movant establishes (1) cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error, or (2) a fundamental miscarriage of justice, which means actual innocence. *Id.*

Reasonable jurists would not debate the district court's finding that Monsegue's post-plea and sentencing-error claims were procedurally defaulted because he did not raise them on direct appeal. Monsegeue did not file a direct appeal and offered no explanation as to why he did not in his § 2255 motion or his objections to the R&R. He also did not argue that he was actually innocent of the offenses of conviction. Thus, as the district court found, his claims relating to false statements in the PSI (Claim 7), that he was sentenced under duress (Claim 13), and the trial court's sentencing errors (Claims 12, 14, 17, 18, and 19) are procedurally defaulted. No COA is warranted on these claims.

Ineffective-assistance-of-counsel claims

The Supreme Court decision applicable to ineffective-assistance-of-counsel claims is *Strickland v. Washington. See Premo*, 562 U.S. at 121. To make a showing of deficient performance under *Strickland*, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation omitted). Review of counsel's conduct is to be highly deferential, and there is a strong presumption that counsel's performance falls within the wide range of professional competence. *Strickland*, 466 U.S. at 689. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697.

District courts must resolve all claims for relief that were raised in a § 2255 motion. *See Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992); *see also Rhode v. United States*, 583 F.3d 1289, 1291 (11th Cir. 2009) (applying *Clisby* in a § 2255 proceeding). In *Clisby*, this Court stated that, if the district court failed to consider a claim that was raised in a § 2255 motion, this Court will remand the case in order to allow the district court to consider the claim. 960 F.2d at 938.

Reasonable jurists would not debate the district court's denial of some of Monsegue's claims of ineffective assistance of counsel. As the district court found, Monsegue's claim that the summons for his bank records violated his privacy rights would have failed as a matter of law, and, thus, counsel was not ineffective for failing to raise that objection, as Monsegue asserted in Claim Five. Also, the record supports the district court's determinations that counsel submitted a motion to withdraw Monsegue's guilty plea, contrary to his assertion in Claim 15, and that he was sent a copy of his PSI, contrary to his assertion also in Claim 5. Finally, as the district court found, Monsegue was given the opportunity to air his objections and report any alleged coercion at sentencing, but he did not report the duress from counsel that he asserted in Claim 13. Thus, Monsegue has not demonstrated his counsel's deficient performance in these regards. No COA is warranted on these claims.

However, the district court arguably committed a *Clisby* error by failing to address Monsegue's remaining ineffective-assistance claims. Specifically, the court did not address his claims that his counsel was ineffective for failing to argue that his initial appearance should have been in or adjacent to the district where he was arrested, contest the use of sophisticated tracking software on his banking activities without legal authority or court approval, or notify him of the sentencing hearing (Claims 16, 9, and 5, respectively). Claims 16 and 9, however, related to counsel's performance before Monsegue's guilty plea, and, thus, were waived by that plea. No COA is warranted on these claims.

As to Claim Five, even if counsel's performance was deficient by failing to notify him of the sentencing hearing, he has not established that he was prejudiced by it. After his guilty plea, the

court released Monsegue on bond. His failure to appear at his originally set sentencing hearing six months later resulted in the court issuing a warrant for his arrest. Monsegue then fled the jurisdiction and was arrested five months later in New York. At sentencing, represented by new counsel, he argued that there had been a complete breakdown in communication between himself and his prior counsel, one instance of which was her failure to notify him of the original sentencing hearing. Monsegue believed that he had been prejudiced and adversely affected, and, but for the lack of communication and proper notice, he would have maintained his Sentencing Guidelines three-level acceptance-of-responsibility credit and would not have received a two-level enhancement for obstruction of justice. However, nothing in the record indicates that the increase in his offense level was due to his counsel's performance, and not his fleeing the jurisdiction. No COA is warranted on this claim

Motions for release

After sentencing, Monsegue filed three motions for release on bond under § 3145(b). The magistrate judge recommended denying the motions as plainly frivolous, reasoning that § 3145(b) concerns detention of a person pursuant to a court order and has nothing to do with a convicted, incarcerated felon seeking habeas relief. The R&R warned that failure to file timely objections waived appeal rights. Though Monsegue filed objections to the R&R, he did not object to the recommendation on these motions. The district court adopted the R&R, but did not specifically deny these motions.

Pursuant to § 3145, following a magistrate judge's order that a detainee be held without bond pending trial, the detainee may move the district court to revoke or amend the magistrate judge's pretrial detention order. *United States v. King*, 849 F.2d 485, 490 (11th Cir. 1988); 18 U.S.C. § 3145(b). The district court did not err in determining that this statute was inapplicable to Monsegue, and no relief is warranted on this claim.

CONCLUSION:

Because Monsegue did not demonstrate that jurists of reason would find debatable the district court's denial of the claims raised in his § 2255 motion, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484. His motion for appointment of counsel and motion to expedite are DENIED AS MOOT.

/s/ Julie E. Carnes

UNITED STATES CIRCUIT JUDGE

Footnotes

1

Monsegue enumerated only 19 claims in his § 2255 motion. He raised the Speedy Trial Act claim in his "Index of Grounds and Points of Discussion," and the district court considered the claim.

2

Monsegue asserted that he did not know until after his plea hearing that the government had moved to dismiss without prejudice nine counts of the indictment four days before.

FRANK D. MONSEGUE, Sr., Movant, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION
2017 U.S. Dist. LEXIS 43282
CV416-021,CR414-019
March 24, 2017, Decided
March 24, 2017, Filed

APPENDIX B

Editorial Information: Subsequent History

Adopted by, Post-conviction relief denied at, Certificate of appealability denied Monsegue v. United States, 2017 U.S. Dist. LEXIS 99367 (S.D. Ga., June 27, 2017)

Counsel For USA, Plaintiff (4:14-cr-00019): Daniel R. Crumby, LEAD ATTORNEY, U.S. Attorney's Office - Augusta, Augusta, GA; T. Shane Mayes, LEAD ATTORNEY, Brian T. Rafferty, Edward J. Tarver, James D. Durham, U.S. Attorney's Office - Savannah, Savannah, GA.

Frank D. Monsegue, Sr., Petitioner (4:16-cv-00021-WTM-GRS), Pro se, Jesup, GA.

For United States of America, Respondent (4:16-cv-00021-WTM-GRS): R. Brian Tanner, LEAD ATTORNEY, U.S. Attorney's Office - Savannah, Savannah, GA.

Judges: G. R. Smith, UNITED STATES MAGISTRATE JUDGE, SOUTHERN DISTRICT OF GEORGIA.

Opinion

Opinion by: G. R. Smith

Opinion

REPORT AND RECOMMENDATION

Movant Frank Monsegue, proceeding *pro se*, moves under 28 U.S.C. § 2255 to vacate the sentence this Court imposed following his guilty plea to wire fraud conspiracy, theft of government property, and aggravated identity theft. Doc. 116;1 *see* docs. 3 (indictment), 29 (superseding indictment), 109 (minute entry), 110 (judgment for 87 months' imprisonment), 111 (signed post-conviction certification declining to appeal conviction). He claims that numerous errors by the Court, Government, and his attorney resulted in a significantly higher sentence than he would have otherwise received. *See* doc. 116.

I. BACKGROUND

Movant seeks, essentially, to relitigate the case that he nearly took to trial. He argues, among other things, that his plea was made unknowingly and involuntarily and that counsel was deficient. Though he contends otherwise, the record shows that Monsegue was provided with quite a bit of information prior to his conviction. At his initial appearance hearing, movant affirmed he had received a copy of the indictment, the Court reviewed the charges against him, and movant represented that he

understood the charges he was facing. Doc. 118 at 3-7. Although Monsegue initially chose to plead not guilty, docs. 119 & 120, he changed his mind midway through voir dire of the jurors for his trial. Doc. 121 at 17 (counsel gave a note to the Court indicating that movant "now wishes to change his plea."). He then vacillated again, *see* doc. 125 at 6 ("Your Honor, we do not have an agreement. The defendant has changed his mind."), because he was "not prepared" to be taken immediately into custody, *id.* at 7, but after counsel conferred again on the proposed plea agreement, Monsegue (again) elected to enter a last-minute plea of guilt while the empaneled jury waited in the wings. Doc. 75 (Rule 11 hearing) at 4.

At his plea hearing, the Court reviewed the charges in the initial and superseding indictment, and confirmed Monsegue had reviewed the charges with counsel and understood what the Government would have to prove to convict him of those charges. Doc. 75 at 8, 13-17. The Court then explained the rights he was giving up by pleading guilty, including the rights to a trial, to put forth a defense, and to remain silent. Movant swore that he understood. *Id.* at 10-11.

The Court also explained the possible sentences he could face for pleading guilty and that he would be sentenced under the advisory Sentencing Guidelines. Monsegue testified that counsel had gone over the Guidelines information with him and that he understood. Doc. 75 at 17-19. He represented to the Court that he had not been forced or pressured into pleading guilty (*Id.* at 21 & 24), that he was pleading guilty because he was, in fact, guilty (*Id.* at 22), and that he was satisfied with his attorney's representation (*Id.* at 13).

The Court concluded that Monsegue understood "the substance and meaning of the charges, the consequences of his plea, and the facts which the Government must prove and which, by his plea of guilty, admits all the essential elements of the offense." Doc. 75 at 24. It further concluded that he had "engaged in this proceeding with intelligence and competence" and that he had "offered his plea of guilty as a matter of his own free choice." *Id.; see also Id.* at 5 (cautioning Monsegue that "if you ever seek to undo or set aside what occurs here today, you're going to be confronted by the answers you give me"); *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *United States v. Stitzer*, 785 F.2d 1506, 1514 n. 4 (11th Cir. 1986) ("[I]f the Rule 11 plea-taking procedure is careful and detailed, the defendant will not later be heard to contend that he swore falsely.").

Vacillating yet again, Monsegue unsuccessfully attempted to withdraw his guilty plea several times. He also missed his sentencing hearing (apparently due to counsel's failure to notify him), and fled to New York when a bench warrant was issued for his arrest. *See* doc. 122 at 7-10, 19-20. The Court sentenced him to 87 months, with credit for time served, and ordered $432,583.86 in restitution to the Internal Revenue Service, to be paid jointly and severally with his codefendant. *Id.* at 24.

II. ANALYSIS

Monsegue presents three categories of claims: (1) pre-plea claims, (2) post-plea and sentencing errors, and (3) ineffective assistance of counsel. Doc. 116.2 All of them fail.

Four sets of governing principles must be applied here. First, Monsegue "bears the burden of establishing the need for § 2255 relief, as well as that of showing the need for an evidentiary hearing." *Mikell v. United States*, 2011 U.S. Dist. LEXIS 38006, 2011 WL 830095 at *2 (S.D. Ga. Jan. 26, 2011); *see also Williams v. Allen*, 598 F.3d 778, 788 (11th Cir. 2010). He thus must demonstrate that any claimed error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979) (quotes and cite omitted).

Second, any claims not raised on direct appeal are procedurally defaulted, *Lynn v. United States*,

365 F.3d 1225, 1234 (11th Cir. 2004), though claims of ineffective assistance of counsel (IAC)3 generally are not. *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). Third, "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Lalani v. United States*, 315 F. App'x 858, 860-61 (11th Cir. 2009).

And fourth, a defendant who enters an unconditional plea of guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior* to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973) (emphasis added). That is, "[a] defendant's plea of guilty, made knowingly, voluntarily, and with the benefit of competent counsel, waives all non-jurisdictional defects in that defendant's court proceedings." *United States v. Pierre*, 120 F.3d 1153, 1155 (11th Cir. 1997); *see also United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). The bar applies both on appeal and on collateral attack. *See United States v. Broce*, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). "A defendant who wishes to preserve appellate review of a non-jurisdictional defect while at the same time pleading guilty can do so only by entering a 'conditional guilty plea' in accordance with Federal Rule of Criminal Procedure 11(a)(2)." *Pierre*, 120 F.3d at 1155.

Defendants who have entered an unconditional guilty plea therefore may challenge their pre-plea constitutional claims only by showing that the advice they received from counsel undermined "the voluntary and intelligent character of the plea." *Tollett*, 411 U.S. at 267. This includes

> defects in the procedure by which the plea was received or circumstances which make the plea other than voluntary, knowing and intelligent. It also includes cases where the guilty plea was induced through threats, misrepresentations, or
>
> improper promises, such that the defendant cannot be said to have been fully apprised of the consequences of the guilty plea. . . .*Mikell*, 2011 U.S. Dist. LEXIS 38006, 2011 WL 830095 at *2 (cites and quotes omitted). Otherwise, all substantive claims that could have been raised before the plea, such as suppression-based claims, are waived. *Franklin v. United States*, 589 F.2d 192, 194-95 (5th Cir. 1979) ("By entering a knowing, voluntary, intelligent guilty plea on the advice of competent counsel, [petitioner] has waived all nonjurisdictional complaints . . . [such as] claims regarding *Miranda* warnings, coerced confessions, perjury and illegal searches and seizures. . . ."); *Washington v. United States*, 2010 U.S. Dist. LEXIS 94278, 2010 WL 3338867 at * 15 (S.D. Ala. Aug. 5, 2010) (collecting Eleventh Circuit cases denying habeas relief on suppression-based IAC claims and concluding that, [b]ecause all of Washington's asserted claims of ineffective assistance of counsel relate to the suppression issue, the denial of which has been waived . . . they have been waived by petitioner's entry of a knowing and voluntary plea. . . .").

A. Pre-Plea Claims

Monsegue's various challenges to the Government's evidence, warrants, and indictments were all waived by the entry of his guilty plea. *Haring V. Prosise*, 462 U.S. 306, 321, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case."). Monsegue, who pled guilty unconditionally, cannot litigate his pre-plea, non-jurisdictional claims masquerading as an TAC claim, since he gave up that right in return for the Government's agreement to drop the remaining counts against him. *See Mikell*, 2011 U.S. Dist. LEXIS 38006, 2011 WL 830095 at *3. So, he has instead attacked his guilty plea, doc. 116, by alleging that the advice counsel gave him undermined "the voluntary and intelligent character of [his] plea." *Tollett*, 411 U.S. at 267; *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

Movant, however, is bound by his sworn testimony. Doc. 75 at 5 (cautioning Monsegue he would be held to his word); *Blackledge*, 431 U.S. at 73-74 ("Solemn declarations in open court carry a strong presumption of verity."). He swore under oath that no one, *including his attorney*, had made him any promises not contained in that agreement. Doc. 75 at 22. He also swore that he fully understood the rights he was giving up by entering a guilty plea, the possible sentence he faced, and was fully satisfied with counsel's performance. *Id.* at 11, 13 & 17-18. When asked whether he was pleading guilty to the reduced counts, because he was "in fact, guilty," Monsegue answered yes. *Id.* at 22.

Though he may have harbored doubts about just how much the Government could actually prove against him or whether its case was vulnerable to attack, his solemn declarations before the Court carry a presumption of verity and rightly constitute a formidable barrier for him to overcome in these collateral proceedings. *Blackledge*, 431 U.S. at 74; *Rasco v. United States*, 2014 U.S. Dist. LEXIS 123280, 2014 WL 10754131 at * 1-2 (S.D. Ga. Sept. 3, 2014) (Rasco's guilty-plea transcript "negates [his] claim that counsel 'coerced' him and 'altered' the plea agreement that he signed."). Monsegue falls far short of overcoming that barrier.

A "§ 2255 action is not designed to account for buyer's remorse." *Falgout v. United States*, 2013 U.S. Dist. LEXIS 97491, 2013 WL 3712336 at * 6 (N.D. Ala. July 12, 2013). And that is all that is at issue here. *Nelson v. United States*, 2015 U.S. Dist. LEXIS 106846, 2015 WL 4756975 at * 1 (S.D. Ga. Aug. 11, 2015) ("Nelson has wasted this Court's time with a 'buyer's remorse' filing. He chose to plead guilty with full knowledge of the consequences. Now he must live with those consequences."). Monsegue's plea was knowingly and voluntarily made, and part of that plea agreement included the waiver of all pre-plea claims, including claims 1-4, 8-11,4 and his Speedy Trial Act claim. Doc. 75 at 12; *see Tollett*, 411 U.S. at 267 ("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."); *United States v. Pierre*, 120 F.3d 1153, 1155 (11th Cir. 1997) (the right to a speedy trial is non-jurisdictional and is waived by the entry of a guilty plea).

B. Plea Proceeding and Sentencing Claims

Movant's post-plea claims are procedurally defaulted because he did not raise them on direct appeal. *Lynn*, 365 F.3d at 1234 (a movant may not use his collateral attack as "a surrogate for a direct appeal."). He has also not shown cause and prejudice sufficient to defeat this procedural bar. *See United States v. Montano*, 398 F.3d 1276, 1280 (11th Cir. 2005) (to excuse the procedural bar, a § 2255 movant must "demonstrate a cause for [her] default and show actual prejudice suffered as a result of the alleged error.").

They also fail on the merits. Monsegue first contends that the PSR contained false statements about his codefendant, who pled guilty to an information in May 2014 and was sentenced to seven months' imprisonment and one year of supervised release on March 18, 2015. PSR at 2. He argues that the fact that his codefendant was in state custody in August 2014 and had a baby in November 2014 somehow renders these dates impossible. Doc. 116 at 16 ("Defendant believes that her activities could not have been done while in custody. Either the government lied, or a baby wasn't born."). The claim is nonsensical: the fact that Campbell was in state custody in the fall of 2014 does not contradict her entry of a guilty plea in May 2014 or sentencing in March 2015. *See United States v. Campbell*, No. CR414-123 (S.D. Ga. Mar. 18, 2015). The information was not erroneous, so counsel had no reason to object to its inclusion in the PSR.

Monsegue next claims that he was sentenced under duress, coercion, and other pressure from the Government and his attorney. He was given the opportunity to air his objections and report any

alleged coercion at sentencing, however, and he didn't. Doc. 122 at 5 (admitting the factual accuracy of the PSR and application of the Sentencing Guidelines), 15-21 (movant's personal statement to the Court). More to the point, he contends that the coercion (and IAC) is somehow proven by the absence of a written plea agreement -- there was no written plea agreement because Monsegue waited until the 11th hour, with jurors selected and counsel for both sides ready to try his case, to accept, then reject, then accept the Government's offered plea. He was not entitled to a copy of a plea agreement that didn't exist (until he changed his mind, yet again) *before* he changed his mind to plead guilty.

Monsegue also contends that counsel was deficient for failing to move to withdraw his guilty plea. This claim, too, is contradicted by the record. *See* doc. 77 (motion to withdraw guilty plea) & 78 (order denying motion on the merits); *see also* doc. 116 at 42 (admitting counsel filed the motion). Counsel filed the motion pursuant to Monsegue's wishes; that the Court disagreed does not render her performance deficient.

Finally, movant contends a variety of sentencing errors occurred: he should have received a 2-level decrease for acceptance of responsibility; counsel failed to contest the 14-level enhancement for the loss amount, the 2-level enhancement for the number of victims, and the 2-level enhancement for obstruction; he was sentenced under the wrong Sentencing Guideline; and the amount of restitution and number of victims are far higher than they should be. Doc. 116 at 17, 21-25. These claims are procedurally defaulted, *Lynn*, 365 F.3d at 1234 (a collateral attack is not "a surrogate for a direct appeal."), and are not cognizable in a § 2255 motion, *Martin v. United* States, 81 F.3d 1083, 1084 (11th Cir.1996) ("Because a defendant has the right to directly appeal a sentence pursuant to the Sentencing Guidelines, the defendant is precluded from raising Guidelines issues in collateral proceedings under § 2255."); *Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009) (restitution cannot be challenged in a § 2255 motion). His challenge to his bail forfeiture, too, is not cognizable in a § 2255 motion. Doc. 116 at 37-38. *See United States v. Harris*, 546 F. App'x 898, 901 (11th Cir. 2013) (§ 2255 claims do "not offer relief from the non-custodial features of a criminal sentence.").

In sum, all of Monsegue's claims fail.

III. CONCLUSION

Frank Monsegue, Sr.'s 28 U.S.C. § 2255 motion (doe. 116) therefore should be DENIED.5 His various motions demanding release under 18 U.S.C. § 3145(b)6 (docs. 126, 132 & 133), are plainly frivolous and are DENIED. For the reasons set forth above, it is plain that he raises no substantial claim of deprivation of a constitutional right. Accordingly, no certificate of appealability should issue. 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2255 ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). Any motion for leave to appeal *in forma pauperis* therefore is moot.

This Report and Recommendation (R&R) is submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 72.3. Within 14 clays of service, any party may file written objections to this R&R with the Court and serve a copy on all parties. The document should be captioned "Objections to Magistrate Judge's Report and Recommendations." Any request for additional time to file objections should be filed with the Clerk for consideration by the assigned district judge.

After the objections period has ended, the Clerk shall submit this R&R together with any objections to the assigned district judge. The district judge will review the magistrate judge's findings and

recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to timely file objections will result in the waiver of rights on appeal. 11th Cir. R. 3-1; *see Symonett v. VA. Leasing Corp.*, 648 F. App'x 787, 790 (11th Cir. 2016); *Mitchell v. United States*, 612 F. App'x 542, 545 (11th Cir. 2015).

SO REPORTED AND RECOMMENDED, this 24th day of March, 2017.

/s/ G. R. Smith

UNITED STATES MAGISTRATE JUDGE

SOUTHERN DISTRICT OF GEORGIA

Footnotes

1

The Court is citing to the criminal docket in CR414-019 unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

2

In order (and as best the Court can discern) Monsegue presents 20 claims for relief: (1) that no arrest warrant was presented at the time of arrest or since; (2) the arraignment proceedings were improper; (3) the summons used to obtain his bank records was invalid; (4) he was not given a copy of the indictment when he was taken into custody; (5) counsel failed to challenge "any" of the governments allegations; (6) his guilty plea was the result of coercion; (7) the probation office "knowingly" inserted "false statements and lies" on his PSR; (8) the Court erred in issuing a bench warrant after Monsegue failed to appear for his sentencing hearing; (9) counsel failed to challenge the government's use of "sophisticated tracking software on [his] banking activities without legal authority or court approval"; (10) an unidentified *Brady* violation; (11) charges were brought outside the 5-year limitations period set forth in 18 U.S.C. § 3282; (12) sentence calculation errors; (13) that movant only failed to object on the record at sentencing due to "time" pressures; (14) the Court erred by considering "participants" in his tax fraud scheme as "victims" for enhancement purposes; (15) counsel failed to submit a motion for withdrawal of Monsegue's guilty plea post-sentencing; (16) counsel failed to argue that his initial appearance should have been in (or adjacent to) the (unnamed) district where he was arrested; (17) more sentence calculation errors; (18) that the indictment and sentence named the same statute, 18 U.S.C. § 641, but called it slightly different names; (19) the Court erred in its restitution and victim enhancement calculations; (20) he was denied his right to a Speedy Trial. Doc. 116. 5

3

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court created a two-part test for determining whether counsel's assistance was ineffective. First, the movant must demonstrate that his attorney's performance was deficient, which requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, he must demonstrate that the defective performance prejudiced the defense to such a degree that the results of the trial cannot be trusted. *Id.* 6

4

Monsegue's allegations also fail on the merits. For example, his claim that counsel failed to send him a copy of the **PSR** is contradicted by the record. *See* doc. 122 at 5 (affirming that he had an

opportunity to read and discuss the **PSR** and addendums with counsel prior to sentencing, and that he had no objections to the facts set forth in the **PSR** or application of the sentencing guidelines). His claim that the subpoena for his bank records violated his privacy rights fails as a matter of law. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984 ("An Internal Revenue summons directed to a third party bank or accountant does not violate the Fourth Amendment rights of a taxpayer under investigation since the records belong to the summoned party and not the taxpayer: the taxpayer has no privacy interest in the documents."); *see also United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (counsel is not ineffective for failing to raise meritless arguments). And his allegation that the charges exceeded the 5-year statute of limitations is hogwash. *See* doc. 3 (original indictment returned February 6, 2014, alleging wire fraud conspiracy and aggravated identify theft beginning *(less than* five years before on) February 25, 2009 and continuing through June 23, 2011); doc. 29 (superseding indictment returned March 5, 2014); *see also United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003) (the Government need only prove that the conspiracy continued into the limitations period); *United States v. Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001) (a superseding indictment brought after the limitations period has expired is valid where the original indictment was timely, is still pending, and is not substantially narrower than the superseding indictment).

5

Because Monsegue's motion is entirely without merit and his contentions are unambiguously contradicted by the record, his request for an evidentiary hearing is **DENIED**. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (a hearing is unnecessary "if the allegations are 'patently frivolous,' based upon unsupported generalizations,' or 'affirmatively contradicted by the record."); *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989) (same); *Lynn v. United States*, 365 F.3d 1225, 1239 (11th Cir. 2004) (where the motion "amount[ed] to nothing more than mere conclusory allegations, the district court was not required to hold an evidentiary hearing on the issues and correctly denied Lynn's § 2255 motion.").

6

18 U.S.C. § 3145(b) concerns *detainment* of a person pursuant to Court order. It has nothing to do with a convicted, incarcerated felon seeking habeas relief.