IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-11424

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

JAMES HOWARD LOOMAN, III,

Defendant–Appellant.

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

O R D E R:

James Howard Looman, III, federal prisoner # 43786-177, moves this court for a certificate of appealability (COA) so that he may appeal the denial of his 28 U.S.C. § 2255 motion attacking his 84-month sentence for possessing a firearm as a felon. The court will grant Looman a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). That is, he must establish that (1) reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or (2) an issue he presents deserves encouragement to proceed further, *see Miller-El*, 537 U.S. at 327.

In his COA brief in this court, Looman broadly asserts that his counsel was ineffective for not objecting to a sentencing enhancement and neglecting

to pursue favorable plea negotiations. He also contends that he was entitled to an evidentiary hearing. Looman has abandoned his claims, however, by not adequately briefing them. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Accordingly, Looman's motion for a COA is DENIED. His motion for appointment of counsel is also DENIED.

Don R. Willett

DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11424

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAMES HOWARD LOOMAN, III,

Defendant - Appellant

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

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before CLEMENT, OWEN, and WILLETT, Circuit Judges.

PER CURIAM:

The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

Don R. Willett

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES HOWARD LOOMAN, III,	§	
	§	
Petitioner,	§	
v.	§	Civil Action No. **3:15-CV-679-L**
	§	(Criminal Case No. 3:11-CR-330-L)
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

On August 28, 2016, Magistrate Judge Irma Carrillo Ramirez entered the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report"), recommending that the court deny Petitioner's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255 and dismiss with prejudice this action. Petitioner filed objections to the Report, which were docketed on September 21, 2016.

In his objections, Petitioner clarifies that he is not asserting a due process claim or a claim based on the Supreme Court's holdings in *Johnson v. United States*, 135 S. Ct. 2551 (2015), or *Beckles v. United States*, 137 S. Ct. 886 (2017). Petitioner asserts that his claim instead rests on his contention that his attorney provided ineffective assistance of counsel by failing to put the Government to its burden of proof during sentencing to show that the predicate offense(s) for the enhancement under U.S.S.G. § 2K2.1(a)(4)(A) are not crimes of violence. Petitioner contends that, but for his attorney's omission, his advisory Guidelines range would have been lower because "the predicate offense(s) did not meet the applicable definition." Obj. 4. Alternatively or in addition, Petitioner reurges his argument that, if his attorney had pursued the plea negotiations indicated in the attorney's notes, the correct law may have been applied at sentencing.

The Report correctly notes that any claim by Petitioner that his prior felony convictions are not crimes of violence is not cognizable under section 2255. Report 4 (citing *United States v. Faubion*, 19 F.3d 226, 232 (5th Cir. 1994). The Report also addressed Petitioner's ineffective assistance of counsel claim that his attorney failed to seek or obtain a more favorable plea agreement. Petitioner's conclusory and speculative objection that "the correct law may have been applied" in calculating his Guidelines sentencing rangehad his counsel pursued the plea negotiations indicated in the attorney's notes or client file fails for the same reasons set forth in the Report.

Accordingly, having reviewed the pleadings, file, record in this case, and Report, and having conducted a de novo review of that portion of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge are correct, and **accepts** them as those of the court. The court, therefore, **overrules** Petitioner's objections to the Report, **denies** the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255, and **dismisses with prejudice** this action.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court **denies** a certificate of appealability.* The court determines that Petitioner has failed to

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* Rule 11 of the Rules Governing §§ 2254 and 2255 Cases provides as follows:

> **(a) Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> **(b) Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues

show: (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong;" or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). In support of this determination, the court accepts and incorporates by reference the Report filed in this case. In the event that Petitioner files a notice of appeal, he must pay the $505 appellate filing fee or submit a motion to proceed *in forma pauperis* on appeal.

It is so ordered this 12th day of October, 2017.

Sam A. Lindsay
United States District Judge

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a certificate of appealability.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES HOWARD LOOMAN, III,	)	
ID # 43786-177,	)	
Movant,	)	**No. 3:15-CV-0679-L-BH**
vs.	)	**No. 3:11-CR-0330-L**
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Pursuant to *Special Order 3-251*, this habeas case has been automatically referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the *Motion Under 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* should be **DENIED** with prejudice.

I. BACKGROUND

James Howard Looman, III (Movant) challenges his federal conviction and sentence in Cause No. 3:11-CR-330-L. The respondent is the United States of America (Government).

A. Plea and Sentencing

On November 15, 2011, Movant was charged by indictment with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). (*See* doc. 1.)[1] Movant pled guilty on June 21, 2012. (*See* doc. 44.)

On September 11, 2012, the United States Probation Office (USPO) prepared a Presentence Report (PSR), applying the 2011 United States Sentencing Guidelines Manual (USSG). (*See* doc. 49-1 at 6, ¶ 20.) Because Movant had two prior felony convictions for crimes of violence offense that were counted as a single sentence, the base offense level under USSG § 2K2.1(a)(4)(A) was 20.

[1] Unless otherwise indicated, all document numbers refer to the docket number assigned in the underlying criminal action, 3:11-CR-330-L.

(*See id.*, ¶ 21.) Two offense levels were added under USSG § 2K2.1(b)(1)(A) because the offense involved three firearms. (*See id.*, ¶ 22.) While on pretrial release, Movant tested positive for and admitted marijuana. (*See id.* at 5, ¶ 19.) Because he had not withdrawn from criminal conduct, the offense level was not reduced for acceptance of responsibility under USSG § 3E1.1, comment (n.1(B)). (*See id.*) With a total offense level of 22 and a criminal history category of five, the resulting guideline range was 77-96 months of imprisonment. (*See id.* at 6, ¶ 29; 18, ¶ 77.)

At the sentencing hearing on December 17, 2012, the Court stated that a sentence at the top end of the range based on Movant's use of pretrial use of marijuana would not be appropriate since that conduct had been taken into account when he was denied credit for acceptance of responsibility. (*See* doc. 63 at 20-21.) Movant received a sentence of 84 months' imprisonment. (*See id.* at 21, doc. 57 at 2.) The judgment was affirmed on appeal. (*See* doc. 67); *United States v. Looman*, No. 13-10004 (5th Cir. Oct. 22, 2013).

B. Substantive Claims

In his initial and amended motions to vacate, Movant raises the following grounds:

(1) Counsel was ineffective for:

(a) failing to properly argue for a reduction for acceptance of responsibility;

(b) failing to seek or procure a favorable plea agreement;

(2) His sentence was improperly enhanced with prior convictions for a crime of violence in light of *Johnson*.

(3:15-CV-679-L, docs. 1 at 7, 11-6; 9 at 1-3.) The Government filed a response to the § 2255 motion on May 1, 2015. (*Id.*, doc. 5.) Movant filed a reply. (*Id.*, doc. 6.)

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for

a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that "a collateral challenge may not do service for an appeal." *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

A failure to raise a claim on direct appeal may procedurally bar an individual from raising the claim on collateral review. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Defendants may only collaterally attack their convictions on grounds of error omitted from their direct appeals upon showing "cause" for the omission and "actual prejudice" resulting from the error. *Shaid*, 937 F.2d at 232. However, "there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal" because "requiring a criminal defendant to bring [such] claims on direct appeal does not promote the[] objectives" of the procedural default doctrine, "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 503-04 (2003). The Government may also waive the procedural bar defense. *Willis*, 273 F.3d at 597.

III. *JOHNSON* CLAIM

Movant contends that the use of prior convictions for a crime of violence to increase his sentence under the sentencing guidelines violated his right to due process under *Johnson v. United States*, 135 S.Ct. 2551 (2015). His claim lacks merit.

In *Johnson*, the Supreme Court held that the imposition of an increased sentenced under the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), (2)(B) (regarding a prior conviction that "otherwise involves conduct that presents a serious potential risk of physical

injury to another"), violates the Constitution's guarantee of due process because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The holding of *Johnson* is retroactively available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

Johnson does not apply to Movant because he was not sentenced under the ACCA. His offense level was based on prior convictions for crimes of violence under USSG § 2K2.1(a)(4)(A). The sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause. *Beckles v. United States*, 137 S.Ct. 886, 895 (2017).

To the extent that Movant is claiming that his prior convictions were not crimes of violence, this claim is not cognizable under § 2255. *See United States v. Faubion*, 19 F.3d 226, 232 (5th Cir. 1994) (defendant's claim that district court erred in making upward departure under Sentencing Guidelines could not be considered in a § 2255 proceeding); *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1995) ("A district court's calculation under or application of the sentencing guidelines standing alone is not the type of error cognizable under section 2255.").

Movant is not entitled to relief on his *Johnson* claim.

IV. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner claims that his trial counsel was ineffective for failing to properly argue for a reduction for acceptance of responsibility and to seek or procure a favorable plea agreement.

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. art. VI. The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel, both at trial and on appeal. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). To successfully state a claim of ineffective

assistance of counsel, the prisoner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his or her defense. *See Strickland*, 466 U.S. at 687. A failure to establish either prong of the *Strickland* test requires a finding that counsel's performance was constitutionally effective. *See* 466 U.S. at 696. The Court may address the prongs in any order. *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000).

In determining whether counsel's performance is deficient, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Strickland*, 466 U.S. at 689. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000) (inquiry focuses on whether counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair). Reviewing courts must consider the totality of the evidence before the finder of fact in assessing whether the result would likely have been different absent counsel's alleged errors. *Strickland*, 466 U.S. at 695-96.

To show prejudice in the sentencing context, the petitioner must demonstrate that the alleged deficiency of counsel created a reasonable probability that his or her sentence would have been less harsh. *See Glover v. United States*, 531 U.S. 198, 200 (2001) (holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established *Strickland* prejudice"). One cannot satisfy the second prong of *Strickland* with mere speculation and conjecture. *Bradford v.*

Whitley, 953 F.2d 1008, 1012 (5th Cir. 1992). Conclusory allegations are insufficient to obtain relief. *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989); *United States v. Daniels*, 12 F. Supp. 2d 568, 575-76 (N.D. Tex. 1998); *see also Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (holding that "conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding").

A. Acceptance of Responsibility

Movant was denied a reduction of the offense level for acceptance of responsibility because he used marijuana while on pretrial release. (*See* doc. 49-1 at 5, ¶ 19.) He argues that counsel should have objected because his marijuana use was not related to the felon in possession offense.

A factor considered by courts in determining whether a defendant qualifies for the acceptance of responsibility reduction under USSG § 3E1.1 is whether the defendant has voluntarily terminated or withdrawn from criminal conduct. *See United States v. Watkins*, 911 F.2d 983, 985 (5th Cir. 1990). Under that factor, the defendant need not only refrain from criminal conduct associated with the offense of conviction in order to qualify for the reduction; acceptance of responsibility can include refraining from any criminal conduct. *Id.* Because Movant used marijuana while on pretrial release, there was no error in denying a reduction for acceptance of responsibility. *See United States v. Rickett*, 89 F.3d 224, 227 (5th Cir. 1996) (no error when a court denies acceptance of responsibility based on a defendant's drug use while on pretrial release). Counsel was not ineffective for failing to raise a meritless objection. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections").

In addition, although counsel did not object, he pointed out at sentencing that after Movant

tested positive for marijuana, he showed acceptance of responsibility. (*See* doc. 63 at 9.) The Court noted that the Government was seeking a sentence at the high end of the guideline based on the use of marijuana during pretrial release, but Movant was also being denied acceptance of responsibility for that same conduct. (*See id.* at 16-17.) The Court stated that a sentence at the high end of the guideline range based on the use of marijuana, while also denying acceptance of responsibility, would inappropriately punish Movant twice for that conduct. (*See id.* at 21.) In determining the appropriate sentence, the Court took into account the effect of the denial of acceptance of responsibility on other sentencing factors. Movant has not shown that his sentence would have been less harsh if counsel would have objected. *See Glover*, 531 U.S. at 200.

B. Plea Agreement

Movant also contends that counsel failed to seek and procure a favorable plea agreement. In his reply, he asserts that counsel's case file contains "notes presumably indicating a tentative plea agreement" was offered, but that counsel failed to inform him about a plea offer. (Doc. 6 at 1.)

There is no constitutional right to be offered a plea agreement. *Missouri v. Frye*, 566 U.S. 133, 148 (2012). Movant has not shown that the government would have offered a plea agreement if counsel had sought one, or that he would have accepted it. *See United States v. Johnson*, No. 4:14–CV–196, 2014 WL 1930220 at *4 (N.D. Tex. May 14, 2014) (citing *Wolfe v. Dretke*, 116 F. App'x 487, 495 (5th Cir. 2004) ("The district court also applied well-established principles to [the] complaint that [counsel] failed to negotiate a plea bargain agreement. Specifically, the district court concluded that [the defendant] could not prove prejudice because he did not establish that the State would have offered a plea bargain even if [counsel] had pursued one.")); *see also United States v. Armstrong*, No. 2:12-CV-406, 2013 WL 5592331 at *10 (S.D. Tex. Oct. 10, 2013) (movant not

entitled to relief for claim of ineffective assistance for failure to negotiate a plea agreement, where record did not show what plea discussions took place and movant did not allege he would have accepted a plea offer). Movant has not shown deficient performance or prejudice, and he is not entitled to relief on this claim.

To the extent that Movant's reply raises a claim that counsel was ineffective for failure to inform him about a plea offer, he does not affirmatively allege as a factual matter that there was a plea offer or set out the terms of any plea offer. He only alleges that notes in counsel's file presumably indicated a tentative plea offer in an unsworn reply. A movant's unsworn allegations are insufficient to create a factual issue regarding whether he received ineffective assistance of counsel. *See United States v. Gonzalez*, 493 F. App'x 541, 544 (5th Cir. 2012). A movant is not entitled to relief if there are no independent indicia of the likely merit of allegations that counsel failed to inform him of any plea offer. *See id.* His speculative, conclusory claim does not entitle him to an evidentiary hearing or to relief. *See United States v. Reed*, 719 F.3d 369, 373-74 (5th Cir. 2013); *United States v. Woods*, 870 F.2d at 288 n.3.

Movant has also not alleged prejudice because he does not assert that he would have accepted any plea offer. *See Missouri*, 132 S.Ct. at 1408; *Chapman v. United States*, No. EP-14-CV-0062; 2015 WL 2339114, at *9 (W.D. Tex. May 13, 2015); *United States v. Hennis*, No. 3:14-CV-248, 2015 WL 251261, at *6 (S.D. Miss. Jan. 20, 2015).

V. EVIDENTIARY HEARING

No evidentiary hearing is required when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. A movant is entitled to an evidentiary hearing on his § 2255 motion only if he presents "independent indicia of the likely

merit of [his] allegations." *United States v. Reed*, 719 F.3d 369, 373 (5th Cir. 2013). "[B]are, conclusory allegations unsupported by other indicia of reliability in the record, do not compel a federal district court to hold an evidentiary hearing." *Ross v. Estelle*, 694 F.2d 1008, 1012 n. 2 (5th Cir. 1983); *accord United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (noting that "[i]f the defendant produces independent indicia of the likely merit of her allegations, typically in the form of one or more affidavits from reliable third parties, she is entitled to an evidentiary hearing on the issue"); *United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing). Upon review of the motion to vacate and the files and records of this case, an evidentiary hearing appears unnecessary. Movant's unsupported allegations do not entitle him to an evidentiary hearing. In this instance, the matters reviewed by the Court conclusively show that movant is entitled to no relief.

VI. RECOMMENDATION

The motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 should be **DENIED** with prejudice.

SO RECOMMENDED this 28th day of August, 2017.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

No. 17-11424

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
v.
JAMES LOOMAN, III

On appeal from the
United States District Court for the Northern District of Texas
Dallas Division / U.S.D.C. No. 3:15-cv-679

MOTION FOR CERTIFICATE OF APPEALABILITY
AND INCORPORATED BRIEF IN SUPPORT

COMES NOW James Looman III, pro se, and moves the Court for a COA as to the final judgment of the District Court below disposing of his action under 28 U.S.C. §2255. This Court has jurisdiction[1] pursuant to 28 U.S.C. §2253(c), F.R.A.P. Rule 22(b).

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1. A motion under F.R.Civ.P. Rule 59(e) remains pending in the District Court.

I

The District Court incorrectly mischaracterized Petitioner's claims. See Order (Doc. 20) at 2. His claim regarding the application of a Guidelines enhancement is not foreclosed by the rationale in U.S. v. Faubion, 19 F.3d 226, 232 (5th Cir. 1994). Petitioner did not raise a due process claim, but argued that counsel was ineffective for failing to investigate and object to the enhancement where effective representation would have revealed that it could not apply to the facts of Mr. Looman's case under law.

II

Further, Petitioner's claim that counsel failed to effectively pursue available favorable plea negotiations was not "speculative" because it was supported by attorney notes comprising independent indicia of the claim's reliability. Where the claim could not be conclusively refuted by the record, Mr. Looman should have been afforded an opportunity to develop proof thereof, e.g., by deposition of trial counsel.

III

The District Court should have held an evidentiary hearing on these facts, and the summary rejection of Mr. Looman's claims was an abuse of discretion. See §2255(b).

"Ineffective assistance claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical," Gaylord v. U.S., 829 F.3d 500,

506-507 (7th Cir. 2016) (quoting Osagiede v. U.S., 543 F.3d 399, 412 (7th Cir. 2008)). The record and the law are of such a state that reasonable jurists could debate the outcome of the proceedings below.

CONCLUSION

The Court should grant a COA and appoint counsel so as to enable Mr. Looman to effectively present his case.

WHEREFORE, Petitioner prays that a COA shall issue.

Respectfully submitted,

JAMES LOOMAN III

CERTIFICATE

I hereby certify that on the date subscribed I placed the original plus one copy of the instant pleading with prison officials[2], first-class postage pre-paid, for mailing addressed to the Clerk of the U.S. Court of Appeals for the Fifth Circuit at 600 S. Maestri Place, New Orleans, LA 70130.

I hereby affirm, under penalty of perjury, that the foregoing is true and correct. 28 U.S.C. §1746.

Executed on _____.

JAMES LOOMAN III

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2. See Medley v. Thaler, 660 F.3d 833, 835 (5th Cir. 2011) (citing Spotville v. Cain, 149 F.3d 374, 376 (5th Cir. 1998) (citing Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)) ("prison mailbox rule").

No. 17-11424

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
v.
JAMES LOOMAN, III

On appeal from the
United States District Court for the Northern District of Texas
Dallas Division / USDC Nos. 3:15-cv-679, 3:11-cr-330

PETITION FOR REHEARING AND REHEARING EN BANC

COMES NOW James Looman III, pro se, and petitions the Court for review of the 8/20/2018 Order disposing of his request for a Certificate of Appealability, 28 U.S.C. §2253(c), as to the underlying final judgment in his habeas case.

Following the District Court's denial of his §2255 motion on 10/12/2017, Looman filed a Notice of Appeal and was granted permission to proceed in forma pauperis on appeal. See D.E. 22,

25, below; see also D.E. 26 (acknowledging transmission of record on appeal, electronically, to the Fifth Circuit). (A motion for reconsideration under F.R.Civ.P. Rule 59(e) remains pending in the District Court.)

Looman timely submitted his request for a COA in this Court, raising three issues in plain language:

> 1. The District Court incorrectly mischaracterized Petitioner's claims. See Order (Doc. 20) at 2. His claim regarding the application of a Guidelines enhancement is not foreclosed by the rationale in U.S. v. Faubion, 19 F.3d 226, 232 (5th Cir. 1994). Petitioner did not raise a due process claim, but argued that counsel was ineffective for failing to investigate and object to the enhancement where effective representation would have revealed that it could not apply to the facts of Mr. Looman's case under law.
> 2. Further, Petitioner's claim that counsel failed to effectively pursue available favorable plea negotiations was not "speculative" because it was supported by attorney notes comprising independent indicia of the claim's reliability. Where the claim could not be conclusively refuted by the record, Mr. Looman should have been afforded an opportunity to develop proof thereof, e.g., by deposition of trial counsel.
> 3. The District Court should have held an evidentiary hearing on these facts, and the summary rejection of Mr. Looman's claims was an abuse of discretion. See §2255(b). "Ineffective assistance claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical," Gaylord v. U.S., 829 F.3d 500, 506-507 (7th Cir. 2016) (quoting Osagiede v. U.S., 543 F.3d 399, 412 (7th Cir. 2008)). The record and the law are of such a state that reasonable jurists could debate the outcome of the proceedings below.

Id. (emphasis in original). Looman concluded: "The Court should grant a COA and appoint counsel so as to enable Mr. Looman to effectively present his case." Id. at 2-3.

On 8/20/2018 Judge Willett denied Looman's request for a COA (and his motion for appointment of counsel) because "Looman has abandoned his claims ... by not adequately briefing them," Order at 2. The Order rests this conclusion on two 25-year-old cases in the Fifth Circuit.

In Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993), the petitioner had filed his appeal pro se after having been granted a Certificate of Probable Cause by the district court. In response to the magistrate judge's order that Yohey "file a 'brief written advisory' identifying all his grounds for relief," Yohey had submitted "a long document ... [containing] 45 issues," which earlier document he sought to "adopt" on appeal -- on appeal, i.e., not in his COA application; there was no COA application because Yohey had already been granted a CPC. But because "Yohey's incorporation of arguments from other pleadings would lengthen a brief already at the 50-page limit," the Fifth Circuit held, "Yohey has abandoned these arguments." The Court then proceeded to address "only the issues presented and argued in the brief," Id.

Similarly, in Hughes v. Johnson, 191 F.3d 607, 612-13 (5th Cir. 1999), the Court held that "issues not raised in the brief filed in support of Hughes's COA application are waived," but the Court went on to address the "eleven issues" he did raise.

What these two cases cited by Judge Willett have to do with Looman's application is difficult to discern -- unlike the nature of the issues raised by Looman's application per se, which Looman purposefully stated clearly and concisely for the Court's benefit.

Looman's legal assistant, pursuant to 28 C.F.R. §543.11(f), understands that court clerks cannot give legal advice; he would prefer it if there were a clear statement from the Court explaining away the mystery which gives prisoner litigants license to cram so much junk into the system. This Order, however, is as good as a directive to the contrary, reinforcing the notion among prisoner litigants that more is better (in consideration of the fact that we don't know which omitted word might do us in).

The trend has for decades been for courts to impose rules, restrictions, even sanctions guiding prisoners toward the "brief written advisory" format mentioned in Yohey. When Looman showed this Order to several "jailhouse lawyers," they gleefully condemned the brief style prepared by Looman's assistant, clamoring that a "proper" COA application must contain unending references to Miller-El v. Cockrell, 537 U.S. 322 (2003) and even a healthy slathering of Buck v. Davis, 137 S.Ct. 759, 192 L.Ed.2d 1 (2017).

Looman submits in this Petition for Rehearing that the clearing of the Court's docket cannot be conflatable with the administration of justice. If there was a deficiency, Looman should have been afforded an opportunity to correct it. But if further briefing of Looman's issues is required, counsel should be appointed to prosecute the appeal. To treat Looman's careful statement of his issues in compliance with §2253 and Rule 22(b) of the F.R.A.P. in this manner does a real disservice not just to Looman, but to future prisoner litigation, by confusing the already-confused masses of pro se prisoners and encouraging the degradation of the quality of COA pleadings. The Court should instead lead by example and clearly condone concise adherence

to legal requirements.

Although a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," §2253(c)(2), this "showing" need not be made by way of lengthy and complicated briefing in the appellate courts. Indeed, Rule 22(b)(2) explicitly states that if "no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."

A Notice of Appeal, as in Looman's case, see Doc. 22 below, is surely more spare than Looman's application for a COA. Courts of appeals have before them the entire record of the proceedings below, see, e.g., Porter v. Gramley, 112 F.3d 1308, 1312 (7th Cir. 1997) ("Preliminary review of the history of this case ... shows that [the] claim is not frivolous and presents a debatable issue"); see also U.S. v. Mitchell, 216 F.3d 1126, 1129 (D.C. Cir. 2000) (appointing counsel on notice of appeal alone to brief COA question); F.R.A.P. Rule 22(b)(1); D.E. 26 below.

This is not to suggest that Looman's request for a COA in this Court was deficient. On the contrary, Looman contends that his issues were clearly presented therein so as to focus the Court's attention on the record based on the asserted constitutional issues and debatability, or entitlement to "proceed further," thereof. The "showing" per se is in the record.

Looman's first constitutional claim under the Sixth Amendment charged that the District Court had "incorrectly mischaracterized" his "ineffective assistance" claim. In stating this issue Looman clearly argued that the determination below -- that his "claim

regarding the application of a Guidelines enhancement" was "foreclosed by the rationale in U.S. v. Faubion"--was wrong (that is, debatable) because he "did not raise a due process claim, but argued that ... effective representation would have revealed that [the enhancement] could not apply to the facts of [his] case under law," but for counsel's "fail[ure] to investigate and object to the enhancement."

In his second issue, Looman asserted another Sixth Amendment claim, "that counsel failed to effectively pursue available favorable plea negotiations." He explained that the District Court's conclusion that this ground was "speculative" was also wrong (debatable) "because it was supported by attorney notes comprising independent indicia of the claim's reliability." He argued that, because the "claim could not be conclusively refuted by the record, Mr. Looman should have been afforded an opportunity to develop proof thereof, e.g., by deposition of trial counsel."

Looman stated these two constitutional claims, and described the nature of his reasoning in disputing the outcome of the proceeding below. He then argued that, "on these facts," the "summary rejection" of his claims amounted to an "abuse of discretion" under §2255(b).

Looman submitted that, because "ineffective assistance claims generally require an evidentiary hearing" in such cases as here devoid of explanation by counsel indicating that his actions could be shielded by strategy, the "record and the law are of such a state that reasonable jurists could debate the outcome ... below." Thus Looman had stated a third basis

for review in his application for a COA to this Court. See also Order at 1-2 ("Looman broadly asserts that his counsel was ineffective for not objecting to a sentencing enhancement and neglecting to pursue favorable plea negotiations [and] contends that he was entitled to an evidentiary hearing").

Judge Willett understood Looman's claims, but in finding that Looman had "abandoned" them by his concise briefing thereof the Court seemed to hold that a full appellate briefing is needed in order to meet the requirements of §2253 and Rule 22. Looman cannot find this requirement in any relevant statute or rule, and it would appear to be contrary to the Supreme Court's instructions in Miller-El, 537 U.S. at 338 ("Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail"), in seeming to put the cart before the horse.

The issuance of a COA is a certification that "the petitioner is not abusing the writ through frivolous litigation," Van Pilon v. Reed, 799 F.2d 1332, 1335 (9th Cir. 1986). See also Barefoot v. Estelle, 463 U.S. 880, 892 (1983) ("Congress established the requirement that a prisoner obtain a [COA] to appeal in order to prevent frivolous appeals").

Requiring a request for a COA to detail the issues to be raised on appeal to the degree demanded by the Order in Looman's case would be a redundant hurdle inconsistent with Congressional intent. A petitioner's claims are established in his habeas petition and developed through the record of pleadings below,

and that record suffices to substantiate his request for a COA, whether comprised of a clear and concise statement of issues, as here, or whether based only on a notice of appeal, see, e.g., Stuart v. Gagnon, 837 F.2d 289, 290-91 (7th Cir. 1986).

"Nothing in the plain language of 28 U.S.C. §2253 or its legislative history indicates that a petitioner for a [COA] need detail the grounds upon which the petition is based or the substantial questions to be raised on appeal," Id. at 290. There is "no reason to require the petitioner to restate his claims in a petition for a [COA]," Id. at 291 ("carefully review[ing] the final order of the district court and the record on appeal" to determine the existence of "a substantial showing of the denial of a federal right ... [and] that the questions deserve further proceedings"). That being said, Looman went much further and gave the Court a clear explication of his issues, so as to focus the Court's attention and avoid unnecessary rummaging. Yet he has been penalized for his efforts.

In U.S. v. Orozco, 1996 U.S. App. LEXIS 41291 (5th Cir. 1996), the Fifth Circuit, applying the newly-enacted AEDPA and amended F.R.A.P. Rule 22(b), noted that a notice of appeal may be construed as a request for a COA even though "the notice is bare bones":

> As we have done previously in such circumstances, however, when construing a notice of appeal as a request for [a COA], we also look to [the petitioner's] other papers ... to evaluate the issues he presents. E.g., Jones v. Whitley, 938 F.2d 536, 538-39 (5th Cir.) (reviewing all materials filed with the district court in evaluating issuance of certificate of probable cause ...) ... (1991). See also Lucas v. Johnson, 101 F.3d 1045, 1996 WL 696777 (5th Cir. 1996) (... relying on appellant's brief for enumeration

> of issues on appeal, even though application for certificate of probable cause had been filed).

Id.

It is true that a "petitioner seeking a COA must prove something more than the absence of frivolity," Busby v. Davis, 699 Fed.Appx. 884, 887 (5th Cir. 2017) (citing Miller-El, 537 U.S. at 338). But a COA should not be denied "merely because [the court] believes the appellant will not demonstrate an entitlement to relief," Miller-El, at 337. "At the COA stage, the only question is whether the appellant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," Buck v. Davis, supra, 137 S.Ct. at 773-74. But the analysis of a COA application entails only a "threshold inquiry": "We look to the District Court's application of the AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable," Miller-El, at 336.

It is plain that the questions pertinent to §2253 and Rule 22 are asked and answered within the record on appeal as provided by the District Court; further COA briefing is not required. Looman provided a brief that limited this Court's review and focused it to specific issues, and he not only explained what his issues were but why the District Court's resolution was wrong. To the extent that the law requires more words, Looman herein has quoted all manner of relevant cases (as well as shown that Judge Willett's citations were

themselves subject to debatability in application hereto).

Looman maintains that the rejection of his request for a COA amounts to a repeat of the short shrift he got from the District Court, about which he complained in his request. Worse, this treatment of a prisoner petition degrades the state of pro se litigation by means of the prison grapevine, and warrants consideration by the en banc Court to protect the integrity of its own system. If left uncorrected, the Court can reasonably expect to have to wade through a lot more convoluted boilerplate junk from FCI Seagoville (and other prisons to which the interpretation aforementioned spreads) in the future, because no clear statement of just how much volubility it takes to satisfy the already-ambiguous ("Petitioner has not made the requisite showing") COA standard has ever been pronounced.

If, on the other hand, the Court recognizes that Congress intended to streamline, rather than bloat, the process of habeas review, then Looman would respectfully suggest that the Court supply some guidance as to what really is minimally necessary (and what kinds of overreliance on caselaw is not) when a prisoner applies for a COA (cf. the highly restrictive stock forms for §2255, §2241, even Bivens filings). Though perhaps counterintuitive, many prisoners are not such bad guys -- give us clear direction and we fall right in line. No other area of law open to prisoner litigation is so amorphously defined as how to meet the COA standard; and in terms of the "requisite showing," "it is what it is." But the Court has the power to set basic guidelines. Until it does, Judge Willett's removal

of Looman's request for a COA from the Court's docket without even evaluating the record is unfairly and improperly prejudicial to pro se litigants, as well as to Looman himself.

If a Notice of Appeal can suffice to prompt review of the record provided by the District Court, then Looman's statement of issues can not have resulted in "abandonment" of anything. Barring an absurd situation in which, perhaps, an applicant raises issues wholly unrepresented in the record below, the Venn diagram of COA issues and habeas issues below should contain enough overlap that some judicial review is retained, even in the case of the most inept pro se prisoner litigation.

CONCLUSION

The Court should vacate the 8/20/2018 Order, consider Looman's request for a COA as presented under §2253(c) and Rule 22(b), and appoint counsel for further proceedings in the interest of justice.

The Court should also consider expounding guidelines for future prisoner litigation in this area.

Finally, Looman would respectfully advise the Court that his projected release date is 4/12/2019. He has been pressing his §2255 action diligently since 2015. In order for the relief sought to have any effect, he would respectfully urge the Court to expedite the consideration of the instant Petition.

Respectfully submitted,

JAMES LOOMAN, III