IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10446-B

ONIEL WINSTON SCARLETT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Oniel Winston Scarlett's motion for a certificate of appealability ("COA") is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

ONEIL SCARLETT also known as ONEIL WINSTON SCARLETT, Movant, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2018 U.S. Dist. LEXIS 9792
CASE NO.: 17-80745-CIV-MARRA/WHITE,(16-80017-CR-MARRA)
January 18, 2018, Decided
January 19, 2018, Entered on Docket

Editorial Information: Subsequent History

Motion denied by **Scarlett** v. United States, 2018 U.S. App. LEXIS 16230 (11th Cir. Fla., June 15, 2018)

Editorial Information: Prior History

Scarlett v. United States, 2017 U.S. Dist. LEXIS 202679 (S.D. Fla., Dec. 7, 2017)

Counsel For Oniel Winston **Scarlett**, also known as **Oneil Scarlett**, Plaintiff: Richard Francis Della Fera, LEAD ATTORNEY, Richard F. Della Fera, PA, Law Office of Richard F. Della Fera, PA, Fort Lauderdale, FL.

For United States of America, Defendant: Noticing 2255 US Attorney, LEAD ATTORNEY; Diana Margarita Acosta, LEAD ATTORNEY, United States Attorney's Office, Fort Pierce, FL.

Judges: KENNETH A. MARRA, United States District Judge.

Opinion

Opinion by: KENNETH A. MARRA

Opinion

FINAL JUDGMENT AFFIRMING AND APPROVING REPORT AND RECOMMENDATION

This cause is before the Court upon the Movant's Motion to Vacate Sentence Under 28 U.S.C. § 2255 (DE 1). The Motion was referred to United States Magistrate Judge Patrick A. White for consideration and a report and recommendation.

Magistrate Judge White entered a Report on December 7, 2017 (DE 40) in which he recommends that the motion be denied and no certificate of appealability be issued. (*Id.* at 64.) The Movant filed Objections to the Report on December 16, 2017 (DE 43), and the United States filed a Response to the Objections (DE 44).

The Court, having conducted a *de novo* review of the entire file and record herein, agrees with the conclusion of the Magistrate Judge. The Court expressly affirms and adopts the Magistrate Judge's credibility determinations relative to the evidentiary hearing held in this case. In particular, the Court adopts the Magistrate Judge's finding that Movant did not request that his trial counsel file a direct appeal of the sentence imposed on him. The Court also adopts the Magistrate Judge's finding that Movant's trial counsel did not represent to Movant that he would receive a total sentence of imprisonment of 24 months. The Court also notes that in calculating Movant's advisory guideline range in his criminal case, the amount of loss attributable to him was only based on his conduct and

not the conduct of any other person in the conspiracy. Under those circumstances, there is no likelihood that Movant would have received a minor role reduction if he had sought one.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Report of Magistrate Judge **(DE 40)** is **AFFIRMED AND APPROVED** in its entirety over the Objections (DE 43) made by the Movant. As a result, the Motion to Vacate under 28 U.S.C. § 2255 **(DE 1)** is **DENIED**.

Under Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. The Court concludes under *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), that Petitioner cannot shown that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478. Therefore, the Court **DENIES** the issuance of a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, the Petitioner may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

The Clerk shall **CLOSE** this case. Any other pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 18th day of January, 2018.

/s/ Kenneth A. Marra

KENNETH A. MARRA

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-80745-CIV-MARRA/WHITE
(16-80017-CR-MARRA)

ONEIL SCARLETT also known as
ONEIL WINSTON SCARLETT,

Movant,

v.

UNITED STATES OF AMERICA

Respondent.
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Magistrate Judge's finding that Movant's trial counsel did not represent to Movant that he would receive a total sentence of imprisonment of 24 months. The Court also notes that in calculating Movant's advisory guideline range in his criminal case, the amount of loss attributable to him was only based on his conduct and not the conduct of any other person in the conspiracy. Under those circumstances, there is no likelihood that Movant would have received a minor role reduction if he had sought one.

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The Clerk shall **CLOSE** this case. Any other pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 18th day of January, 2018.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80745-Civ-MARRA
(16-80017-Cr-MARRA)
MAGISTRATE JUDGE P.A. WHITE

ONEIL SCARLETT also known as
ONEIL WINSTON SCARLETT,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE
FOLLOWING EVIDENTIARY HEARING

I. Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences for conspiracy to commit wire fraud, to receive, conceal, and retain monies stolen from the United States, and to possess a means of identification of another person without lawful authority during and in relation to the wire fraud offense; one count of wire fraud; and, one count of aggravated identity theft, entered following a guilty plea in **case no. 16-80017-Cr-Marra.**

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's §2255 motion (Cv-DE#1) with supporting memorandum (Cv-DE#1-1), the government's response thereto with multiple exhibits (Cv-DE#21), the pretrial narrative statements of the movant (Cv-DE#20) and the government (Cv-DE#24), the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the negotiated written plea agreement with stipulated facts (Cr-DE#30), the change of plea (Cr-DE#45) and sentencing (Cr-DE#46) transcripts.

II. Claims

This court, recognizing that the movant was proceeding *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). The movant raises the following grounds for relief:

1. He was denied effective assistance of counsel, where his lawyer failed to file a requested direct appeal. (Cv-DE#2:4; Cv-DE#1-1:3).[1]

2. He was denied effective assistance of counsel, where his lawyer failed to request a mitigating role reduction to the movant's advisory guideline range. (Cv-DE#1:5; Cv-DE#1-1:5).

3. His plea was not knowing and voluntary because it was premised on counsel's misadvice that he would receive a total of 24 months imprisonment. (Cv-DE#1:6; Cv-DE#1-1:7).

[1]The page numbers referenced herein are those imprinted by the Court's electronic docketing system on the top of the pleading.

III. Factual Background and Procedural History

A. Stipulated Facts

The stipulated facts first set forth the elements of each of the offenses for which the movant was entering a guilty plea. (Cr-DE#30:Stipulated Factual Proffer Attached to Plea Agreement). The government then proffered and the movant further agreed that on September 20, 2011, a Florida Highway Patrol ("FHP") Trooper conducted a vehicular traffic stop, following traffic offenses, of a black BMW, in the area of State Road 80 and Roosevelt Street in Palm Beach County, Belle Glade, Florida. (Id.:8).

The BMW was owned and operated by the movant, who was also the sole occupant of the vehicle. (Id.:8-9). After being stopped, movant identified himself to the FHP Trooper, and stated his date of birth as December 30, 1988. (Id.:8). At the time, the movant appeared nervous, and the FHP Trooper observed the vehicle had numerous air fresheners throughout its interior. (Id.). After seeking and obtaining movant's consent to search the interior of the BMW, movant advised the FHP Trooper that there were no guns inside the car. (Id.). Movant again gave his consent to search the vehicle. (Id.).

A search of the vehicle revealed a backpack in the trunk, which contained ninety-two Wal-Mart prepaid debit cards, five notebooks used as ledgers, and one ledger with card information and corresponding money amounts for each. (Id.:9). The notebooks and ledgers contained people's names, social security numbers ("SSNs"), dates of birth, and addresses (which are commonly referred to as personal identifiable information or "PII"). Another folder was

also discovered containing PII along with student information sheets from the Palm Beach County School Board ("PBCSB"). (Id.).

Inside the backpack there were also two laptop/notebook computers with accessories, two memory sticks (external electronic storage devices), a cell phone, and a phone book for the Belle Glade area. (Id.). The FHP Trooper retained the items seized, recognizing that they appeared to be contraband involving some type of fraud. (Id.). As a result, the movant was advised that the items were being seized for criminal investigative purposes. (Id.). The movant was given a citation for speeding and a property sheet for the items seized. The movant, however, was not arrested either before, during, or after his encounter with the FHP Trooper. (Id.). He was never cuffed, nor placed in the FHP Trooper's vehicle. (Id.). He was also not given any Miranda[2] warnings. (Id.).

Following the consensual search, the FHP Trooper questioned movant about the items located in the vehicle. (Id.). Movant responded, explaining that he worked for an individual out of Royal Palm Beach, and was paid $1,000 to $2,000 a week "doing the cards." (Id.:9-10). He did not know his boss' name or the company's name. (Id.:10). When asked what he did with the cards, movant responded that he sold them. (Id.). Movant further indicated he had all the PII because he needed that information in order to create the cards. (Id.). The items seized from the vehicle were later turned over to the FHP property/evidence division. (Id.). A Palm Beach County School District ("PBCSD") witness would authenticate and identify that the student printouts were generated from the PBCSD's mainframe database.

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

Next, the movant stipulated that in February 2015, the Internal Revenue Service ("IRS") obtained multiple search warrants authorizing forensic analysis of the notebook computers and cell phones seized from the movant, by the FHP Trooper, back in 2011 during the vehicular traffic stop. (Id.:10). Many of the Wal-Mart prepaid debit cards had a sticker attached to the top front of the card, and written thereon were user names, zip codes, dates of birth, and some even had a dollar amount. Some debit cards had blank stickers attached to the top front of the card, and some were wrapped with a post-it note, listing user names, a dollar amount, and the word "transmitting." (Id.). In a black, hard-cover ledger there was a listing of ten employers, with their respective employer identification number ("EIN"), and address, along with more than 50 Palm Beach County School System student information sheet print-outs. (Id.). These print-outs contained the students' name and SSN, together with the date of birth, and some even had a dollar amount. On that print-out, all of the listed students' last name started with the letter "A." (Id.).

In another spiral notebook, there were debit card numbers, routing numbers, account numbers, dates of birth, and dollar amounts. (Id.). Yet another notebook had a list of various addresses in Belle Glade and South Bay. (Id.). A 2010 Yellow Page phone book for Belle Glade was also seized, which had several addresses marked with a pen or marker. (Id.). Some of the Belle Glade addresses in the notebook matched those marked off in the phone book. (Id.). The 2010 phone book reveals it was mailed to the "Current Resident. 1705 Lake Circle, Belle Glade, FL 33430," which was also listed as the movant's address on his Florida driver's license. (Id.:10-11).

An orange pocket folder was also recovered, and it contained several print-outs of hundreds of PII, containing specific names, dates of birth, and SSNs. (Id.:11). Therein, there were sporadic notations of "bad" listed next to some of the names. (Id.:11).

A green spiral notebook seized from the movant's vehicle contained a notation for a Bank of America ("BofA") routing number and account number ending in 9474, in the name of "V.B.," movant's coconspirator. (Id.:11). V.B.'s BofA records demonstrate that several federal income tax refunds were wire transferred directly into the account located in Belle Glade, Florida, from the California Department of Treasury. (Id.). The seven fraudulent returns were filed using the names and SSNs that matched the PII found on MS-Word documents saved on the Toshiba laptop seized from the movant. (Id.). Each of the federal IRS returns contained false and fraudulent claims against the United States that were not authorized by the persons in whose names and SSNs the tax returns had been filed. (Id.).

Movant agreed that a forensic computer examiner employed by the IRS conducted a judicially authorized forensic examination of the Toshiba laptop seized from the movant during the 2011 consensual search conducted by the FHP Trooper following a vehicular traffic stop. (Id.:11-12). The examiner confirmed that the seven IRS fraudulent returns matched seven names and SSNs found on a separate MS-Word document contained on the Toshiba laptop. (Id.:12). Additionally, the examiner confirmed that the returns were filed with the IRS through H&R Block's website utilizing user ID's forensically matching user Ids found on the seized laptop. (Id.). An IRS witness would also confirm the seven federal income tax returns were filed over the Internet and received by the IRS in

West Virginia and Pennsylvania. (Id.). Each of the seven returns listed a taxpayer filing address in Belle Glade, Florida, when none of the actual, real taxpayers on the returns actually resided at the addresses listed on the fraudulent returns, nor did they authorize the e-filing in their name. (Id.).

The examiner also confirmed that the Toshiba laptop had 228 separate log-in user Ids associated with H&R Block. (Id.:12). H&R Block business records would confirm that 228 of those identical user IDs were used to file fraudulent electronic federal income tax returns, Form 1040, through H&R Block, wherein each return sought a refund from the United States. (Id.). The total attempted loss amount was approximately $290,000.00. (Id.).

As to Count 2, movant agreed that a certified copy of a 2010, electronically filed 1040 income tax return for Gabrielle "Z" established the tax return was filed electronically with the IRS, over the Internet, through H&R Block, on or about August 17, 2011. (Id.). The return listed a false address for Gabrielle "Z," and Gabrielle "Z" would confirm she did not file the return, nor did she authorize its filing. (Id.). Examination of the laptop seized from movant also confirmed that Gabrielle "Z's" PII was found therein in a Word document, and a print-out of that document was also found in the movant's vehicle. (Id.). That printout contained Gabrielle "Z's" name and SSN. (Id.). The printout further contained a hand-written notation setting out the PIN ("personal identification number") used on the e-return. (Id.). The employer on the return was listed as "D Company, LLC," which was also listed with other companies in a black ledger recovered from the movant's vehicle. (Id.). Gabrielle "Z" never worked for that company, and the IRS was directed to send the $1,448.00 tax refund to a BofA

account in the name of "V.B." (Id.:13). On August 26, 2011, the $1,448.00 went into the BofA account ending in 9474. (Id.).

Movant agreed that V.B. was recruited by her boyfriend at the time, a coconspirator, known as "D.A." to open a bank account at BofA, and provided her with $50 with which to make the opening deposit. (Id.). V.B. did not deposit any of her own funds into that account. (Id.). Certified tax records also demonstrate that, within two weeks of V.B. opening the BofA account ending in 9474, a coconspirator was causing fraudulent 1040 tax filings to be filed over the Internet with the IRS, which was received in West Virginia and Pennsylvania, and which directed the IRS to send the refund monies by wire to V.B.'s account in Belle Glade. (Id.).

BofA records for that account and witnesses establish that nearly $77,000.00 in federal income tax refunds were directly deposited by the U.S. Department of Treasury, from San Francisco, California, between April 2011 and September 2011, into the V.B. BofA account. (Id.). During this period, the evidence shows fifty two separate fraudulent refund claims were filed, seven of which were linked forensically to the Toshiba laptop seized from the movant. (Id.).

After V.B. learned her account had multiple federal income tax refunds deposits made into it, she knowingly withdrew and/or caused to be withdrawn those stolen monies, providing most, but not all, of the funds to "D.A." (Id.:13-14). Each of the returns that resulted in a federal income tax refund being deposited in the BofA V.B. account had numerous elements in common, including the fact that each were electronically filed with the IRS over the Internet and received by the IRS in West Virginia and Pennsylvania. (Id.).

Each also contained a fraudulent claim seeking a tax refund from the United States. (Id.). None of the returns were actually filed, nor were they authorized by the actual person whose name and SSN was stated on the returns. (Id.). Finally, the returns filed with the IRS claimed an address within the Southern District of Florida. (Id.:14). Regarding the 2010 fraudulent tax return filed in Gabrielle "Z's" name, a refund of $1,448.00 was wired on August 26, 2011 from California to V.B.'s BofA account in Belle Glade. (Id.).

Further, movant stipulated that on September 20, 2011, the movant had in his possession an SSN ending in 7742, in Gabrielle "Z's" name, which was used in connection with the wire fraud described in Count 2 of the Superseding Indictment. (Id.:14-15). Regarding Count 1, the movant agreed that ninety-four separate prepaid debit cards were seized during movant's vehicular traffic stop. Most of the prepaid debit cards were issued by Green Dot and sold by Wal-Mart. Green Dot business records confirm that of the ninety-four separate cards, eleven had actual fraudulent federal income tax refunds loaded onto them. (Id.). The government would also be able to link the fraudulent tax refunds on those cards to PII found on the paper documents recovered from movant's vehicle. (Id.).

The registered owners of the eleven debit cards also consisted of stolen PII, different from the names of the stolen taxpayer PII whose refunds were loaded onto the cards. (Id.). The "registered owners" PII were also found in the movant's possession during the vehicular stop. (Id.). Finally, the evidence shows that none of the victims gave permission for their names to be used to register prepaid debit cards, nor to have fraudulent federal income tax returns, in their name, filed over the Internet. (Id.).

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On February 9, 2016, an Indictment was returned charging the movant with numerous federal offenses. (Cr-DE#1). A Superseding Indictment was returned on March 22, 2016, charging movant with various acts relating to identity theft, wire fraud, and aggravated identity theft. Specifically, movant was charged with conspiracy to commit wire fraud, in violation of 18 U.S.C. §1343, to receive, conceal, and retain monies stolen from the United States, in an amount that exceeded $1,000, in violation of 18 U.S.C. §641, to possess a means of identification of another person without lawful authority during and in relation to the wire fraud offense, in violation of 18 U.S.C. §1028(A), all in violation of 18 U.S.C. §371 (Count 1); eight counts of wire fraud, in violation of 18 U.S.C. §§1343 and 2 (Counts 2 through 9); and, six counts of aggravated identity theft, in violation of 18 U.S.C. §§1028A and 2 (Counts 10 through 15). (Cr-DE#8).

On June 21, 2016, the movant entered into a negotiated written plea agreement, agreeing to plead guilty to the conspiracy offense (Count 1), one count of wire fraud (Count 2), and one count of aggravated identity theft (Count 10). (Cr-DE#30). The government agreed to dismissal all remaining charges after sentencing. (Id.:1). The government also agreed to recommend up to a 3-level reduction to the movant's guideline base offense level based on the movant's timely acceptance of responsibility. (Id.:3).

Pursuant to the specific terms of the plea agreement, the movant acknowledged and understood that the court would impose sentence after considering the advisory guidelines, based in part

on a PSI, which would be prepared after the plea is entered. (Id.:1-2). The movant further acknowledged that the court was not bound to impose a guideline sentence, and was permitted to tailor the sentence in light of other statutory concerns, which may be more or less severe than the guidelines. (Id.). He next acknowledged that he could not withdraw his plea solely as a result of the sentence imposed. (Id.). Movant further understood that the sentence had not yet been determined by the court, and any estimate of the probable sentencing range or ultimate sentence from either defense counsel, the government, or the probation office is a prediction, not a promise, and therefore, not binding on the government, the probation office, or the court. (Id.:4).

Also, movant understood and acknowledged that the court could impose a statutory maximum term of up to 5 years imprisonment followed by 3 years supervised release. (Id.:2). As to Count 2, movant acknowledged he faced a statutory maximum of up to 20 years imprisonment to be followed by up to 3 years supervised release. (Id.). Finally, as to Count 10, movant understood he faced an additional 2-year term of imprisonment, to run consecutive to any other sentence imposed, pursuant to 18 U.S.C. §1028A, to be followed by a 1 year term of supervised release. (Id.:2-3).

Movant understood that any estimate from counsel, the government, or the probation officer regarding the probable sentencing range or the sentence movant may receive, is a prediction, not a promise, and is not binding on the government, the probation officer, or the court. (Id.:4). Movant further affirmed that he may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by the government, the defense, or by the parties jointly. (Id.).

On June 21, 2016, a thorough Rule 11 change of plea proceeding was conducted by the court. (Cr-DE#45). After movant was given the oath, movant understood that if he answered any question falsely it may later be used against him in another prosecution for perjury or for making a false statement under oath. (Id.:3). Next, movant provided background information regarding his age and education, and affirmed speaking English. (Id.:3). Movant denied taking any drugs, medicine, or alcohol that might affect his ability to understand the proceedings or affect his ability to make a knowing and intelligent decision regarding the case. (Id.:3). Movant denied being treated for any type of mental disease or illness, other than suffering from asthma. (Id.). Movant denied being tried for or otherwise suffering from any type of drug or chemical addictions. (Id.).

Movant affirmed that he had received, read, and reviewed the Indictment, and fully discussed the charges contained therein with counsel on several occasions. (Id.:3-4). Movant affirmed that he had a full and complete understanding of the charges brought against him. (Id.:4). He further confirmed having reviewed the government's evidence with counsel and any defenses that might apply in his case. (Id.). When asked if counsel had done everything he could to defend him in the case, the movant responded, "Yes, sir, to my knowledge." (Id.). When asked if there was anything his attorney had not done that he believed should have been done in order to defend the charges, movant responded, "Not that I know of, sir, no." (Id.:4). Next, movant stated that he was fully satisfied with the representation and advice provided by counsel. (Id.:5).

Movant also confirmed he had read, and fully discussed the plea agreement with counsel prior to signing it. (Id.:5). He also

affirmed having a full and complete understanding of the terms and provisions contained therein. (Id.). He conceded he had signed the plea agreement freely and voluntarily. (Id.). He denied being forced or threatened into signing the plea agreement. (Id.:5-6). He also denied being forced or threatened to change his plea to guilty, and was doing so freely and voluntarily. (Id.:6).

The court clarified, and movant understood that when he was asked whether he was pleading guilty to the Indictment, it was actually a Superseding Indictment. (Id.:6). He also confirmed having read and discussed the Superseding Indictment with counsel. (Id.). He confirmed discussing with counsel the government's evidence and any possible defenses in support thereof. (Id.). Next, movant confirmed that he was pleading guilty to Counts 1, 2, and 10 of the Superseding Indictment. (Id.:7). After setting forth each of the foregoing charges, movant affirmed he understood the nature of the charges. (Id.:7-8). Movant understood that the government would be dismissing all remaining charges of the Superseding Indictment after sentencing. (Id.:8).

As to the statutory maximum he faced, movant acknowledged that he faced a maximum of 5 years imprisonment as to Count 1, to be followed by 3 years supervised release. (Id.:8). As to Count 2, the wire fraud offense, movant understood he faced a statutory maximum of 20 years imprisonment; and, as to Count 10, the aggravated identity theft offense, movant understand that the court was required to impose a mandatory 2-year term of imprisonment, to run consecutive to any other sentence imposed. (Id.:8). He also acknowledged facing up to 3 years supervised release as to Count 2, and a potential of an additional 1 year supervised release as to Count 10. (Id.:9). Movant further understood that he would be

ordered to pay restitution in order to reimburse anyone that may have suffered a loss as a result of his unlawful conduct. (Id.:9).

Movant understood that the court was required to consider not only the advisory guidelines, but also the statutory factors before imposing sentence. (Id.:10). Movant understood that the court's determination of the sentence to be imposed may be different than any estimate provided by counsel to the movant regarding movant's potential guideline exposure. (Id.:12). He also acknowledged that the court was under no obligation to follow any recommendations made by the government as to the sentence to be imposed. (Id.:13). More importantly, movant confirmed that he would be unable to withdraw his plea if he did not agree with the ultimate sentence imposed by the court. (Id.). He understood the sentencing guidelines were advisory and that the court could impose a more or less severe sentence than called for under the guidelines. (Id.). He further agreed that he could be sentenced up to the maximum sentence permitted by law. (Id.:13-14).

Movant then denied being made any promises or representations, other than as set forth in the agreement, regarding the sentence to be imposed in his case. (Id.:14). He further stated no one had made any promises or representations in order to convince him to plead guilty. (Id.). Movant was aware that the government had agreed to recommend up to a 3-level reduction to his base offense level, based on movant's timely acceptance of responsibility. (Id.:15). Movant again understood that the court was not required or obligated to accept a sentencing recommendation by the government. (Id.).

Regarding the waiver of his constitutional rights, movant understood that by entering into the guilty plea, he was waiving the right to a trial by jury, to be represented by an attorney at trial, to be presumed innocent, and that the government would be required to prove movant's guilt beyond a reasonable doubt. (Id.:15-16). He further understood and acknowledged that he was waiving his constitutional right to confront and cross-examine all government witnesses, to testify or not on his own behalf at trial, and to subpoena defense witnesses to testify at trial. (Id.:16). He was also aware that he need not testify or present any evidence at trial. (Id.:17). Movant understood that if he chose not to testify, the government could not use that decision against him. (Id.:17). If he were convicted by a jury, movant understood he would be able to appeal and challenge the conviction to a higher court. (Id.). However, by pleading guilty, he was giving up the foregoing constitutional rights. (Id.).

Movant next confirmed that if the court accepted his guilty plea, he would lose valuable civil rights, including the right to vote, to hold public office, to serve on a jury, and to possess any type of firearm. (Id.:17). If he was not a U.S. citizen, movant understood that he could be deported from the United States if the court accepted movant's guilty plea and adjudicated him guilty. (Id.:17).

Regarding the stipulated factual proffer, movant also confirmed that he had read the document and discussed it fully and completely with counsel. (Id.:18). When asked if he understood everything that was contained therein, including the elements of each of the offenses for which he was pleading guilty, movant responded that he did. (Id.). More importantly, movant also agreed

that the facts contained in the stipulated proffer were true and would support the charges for which he was pleading guilty. (Id.:18-19). Movant next conceded he had signed the stipulated factual proffer and did so freely and voluntarily. (Id.:19).

When asked how he wished to plead to Counts 1, 2, and 10 of the Superseding Indictment, movant responded, "Guilty, sir." (Id.:20). The court then accepted the plea, and adjudicated the movant guilty as to Count 1, 2, and 10 of the Superseding Indictment, finding that the movant was fully competent and capable of entering into an informed plea, that his plea of guilty was knowing and voluntary, supported by independent bases in fact, containing each of the essential elements of the offenses. (Id.:20). The court then adjudicated movant guilty as to Counts 1, 2, and 10 of the Superseding Indictment. (Id.).

Prior to sentencing, a PSI was prepared which set the initial base offense level at a level 7, based on the guideline for violation of 18 U.S.C. §1343, involving fraud or deceit. (PSI ¶48). A 14-level increase to the base offense level was given, because the amount of loss was more than $250,000.00, but less than $550,000.00, pursuant to U.S.S.G. §2B1.1(b)(1)(C), and because the offense involved 10 or more victims, pursuant to U.S.S.G. §2B1.1(b)(2)(A)(i). (PSI ¶¶49-50). A 3-level reduction to the base offense level was given based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 18. (PSI ¶¶56-58).

Next, the PSI reveals that movant had a total of 8 criminal history points, resulting in a criminal history category IV. (PSI ¶66). Based on a total offense level 18 and a criminal history

category IV, movant faced a term of 41 months imprisonment at the low end and 51 months imprisonment at the high end of the advisory guidelines, as to Counts 1 and 2, and a 24-month consecutive sentence as to Count 10. (PSI ¶106).

Statutorily, as to Count 1, movant faced a 5-year maximum term of imprisonment for violation of 18 U.S.C. §371. As to Count 2, movant faced a maximum of 20 years imprisonment for violation of 18 U.S.C. §1343. Finally, as to Count 10, movant faced a 2-year term of imprisonment, to run consecutive to any other terms of imprisonment imposed, in accordance with 18 U.S.C. §1028A(a)(1),(b)(2). (PSI ¶104). No objections to the PSI were filed by either the movant or the government.

On September 30, 2016, the movant appeared for sentencing. (Cr-DE#46). At the commencement of the hearing, after the defense and government voiced they had no objections to the PSI computations, the court adopted the findings contained therein. (Id.:3). Next, movant testified at sentencing that he lives with his father, and works for Thomas Mechanic doing electrical work. (Id.:3-4). According to the movant, the individual who provided him with the information that was used to create the debit cards was known as "Junior." (Id.5). He explained he first became involved with Junior a few weeks prior to being stopped by the FHP Trooper, having met Junior at Lakeside/Glades General, where Junior was doing security guard work. (Id.). He explained he did work on Junior's cars. (Id.). According to the movant, the Wal-Mart cards, the ledgers, computers, and other evidence seized from him were provided by Junior. (Id.6). The only handwriting in the notebooks that belonged to the movant were the numbers per card and how much money was going to go on each. (Id.).

Movant, however, denied having any involvement with stealing anyone's PII. (Id.). Movant also denied using the seized laptop to help anyone file tax fraudulent tax returns. (Id.:7). When Junior first spoke to movant about the unlawful activity, he came to movant's house and they activated two cards. (Id.). Movant, however, testified that Junior wanted the movant to activate almost a hundred cards, but movant could not do so. (Id.). As a result, Junior was going to pick up the information provided, but never did so. (Id.). On the morning that the movant was pulled over, movant claims he spoke with Junior, who was riding a motorcycle in the area, and witnessed when law enforcement seized everything. (Id.:8). As a result, Junior told movant he was "through." (Id.). Movant testified he never heard from Junior again since that day. (Id.). He also testified that Junior never paid him any money. (Id.). Junior did, however, provide him with the vehicle movant was driving, but then movant signed over the title to Junior. (Id.:8). Movant again denied knowing V.B. or having any involvement with putting money into V.B.'s bank accounts. (Id.:9). Movant further denied having any knowledge regarding the amount of money Junior intended to put on each of the debit cards. (Id.).

Immediately after his arrest, movant confirmed cooperating with law enforcement and informing them of all of the foregoing. (Id.:10). During cross-examination, movant denied knowing Junior's real name. (Id.:10-11). Movant conceded during the time he was involved with Junior, he received a motorcycle from a "T Junior" who is also known as "Junior." (Id.:11-12). Movant states he later sold the motor cycle to an individual he knows as "K" for $600.00, but denied knowing K's real name. (Id.:12).

The information seized from movant's car, relative to PII from the PBSCD was provided to him by Junior. (Id.:14). Movant confirmed that he never mentioned the name "Junior" to the FHP Trooper at the time of the vehicular stop and ensuing search. (Id.:15-16). Although movant claims he purchased from Junior the BMW he was driving at the time he was stopped, he explained that he later signed the title back over to Junior. (Id.:17). When asked by the court, movant again confirmed that Junior wanted him to activate a number of cards, but he was able to only activate two cards. (Id.:18).

Movant called two other witnesses at sentencing. Specifically, Thomas Wilson Buckhanan, the owner of Thomas Electric, testified that he met the movant at an electric parts house, and then hired him a few months later to do some work. (Id.:21). Winston Scarlett, the movant's father, testified that he is very ill, suffering from cancer, and requested that the court be lenient in sentencing his son. (Id.:23).

Thereafter, the court stated that it had considered the statements of all parties, the PSI containing the advisory guidelines, as well as the statutory factors set forth in 18 U.S.C. §3553(a)(1)-(7). In that regard, the court stated:

> My impression of this defendant's role in this offense is that he--someone higher up in the organization was looking for a guy who lives out in the Glades and could use some extra money to do the dirty work, and as Mr. Carlton said, you know, take all the risk, carry all the information around in his car, do the end-of-the-line work that needs to be done to get the cash, and he's staying back somewhere in Royal Palm Beach, letting, again, Mr. Scarlett, and probably others, you know, take the risk, and Mr. Scarlett's here, and who knows where that person is. I presume we don't know who this person

is.

So anyway, in my experience dealing with people from out in the Glades, I don't find it unusual that people just know people by their street names and don't have any idea what their last names are. I come across that all the time. So the fact that he may only know this person as Junior, is not surprising to me. So I'm not surprised by that, because I hear that all the time....

He's got a -- he's looking at a two-year mandatory sentence for the aggravated identity theft, and so I think a variance on the other counts is warranted, and I'm going to vary below the guideline range on the -- on counts 1 and 2.

So the Court has considered the statements of all parties--I already said that--the report, the advisory range, and the statutory factors set forth in 18 U.S.C. §3553(a).

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Oneil Scarlett, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 48 months. This term consists of 24 months as to counts 1 and 2, to run concurrently with each other, and 24 months as to Count 10 to run consecutively to counts 1 and 2.

It is further ordered that the defendant shall pay restitution in the amount of $188,570....

Upon release from incarceration, the defendant shall be placed on supervised release for a term of two years. This term consists of two years as to Counts 1 and 2 and one year as to Count 10, all to run concurrently.

(Id.:36-39).

The written Judgment was entered on the Clerk's docket on that same date, **September 30, 2016**. (Cr-DE#38). No direct appeal was filed. The judgment of conviction in the underlying criminal case, therefore, became final at the latest on **October 14, 2016**, fourteen days after entry of the judgment on the docket, when the time

expired for filing a notice of appeal therefrom.[3]

A few months later, on **December 6, 2016,** the court received an undated and unsigned *pro se* motion containing allegations regarding counsel's performance. (Cr-DE#39). Therein, movant narrated facts leading up to the execution of the plea, in addition to, a purported conversation with counsel after sentencing, in front of his dad, wherein counsel advised it would not be beneficial to appeal, but that he would explain why later. (Id.). Despite being legally deficient in that it was not signed or dated, on **December 6, 2016,** the court entered an order, in accordance with the requirements set forth by the Supreme Court in Castro v. United States, 540 U.S. 375, 381-82, 124 S.Ct. 786, 791-92, 157 L.Ed.2d 778 (2003). (Cr-DE#40). In that regard, the movant was advised of the court's intent to reclassify his motion as a first §2255 motion to vacate, and advised him of the consequences of such reclassification. (Id.). In Castro, the Supreme Court made clear that district courts are to advise a defendant if the court intends to re-characterize a pleading, and warn the defendant about the consequences of re-characterizing criminal post-conviction motions, as motions seeking relief pursuant to §2255. Failure to afford a defendant these Castro instructions will prevent the re-classified motion from being considered a motion to vacate for purpose of applying the restrictions for second or successive motions. Zelaya v. Sec'y, Fla. Dep't of Corr's, 798 F.3d 1360, 1366-67 (11th Cir. 2015). In response to the court's order, on **March 27, 2017,** movant

[3]Where, as here, a defendant does not pursue a direct appeal, the conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). In 2009, the time for filing a direct appeal was increased from 10 to 14 days after the judgment is entered on the docket, but it now includes counting intermediate Saturdays, Sundays, and legal holidays in the computation. See Fed.R.App.P. 4(b)(1)(A)(i); see also Fed.R.App.P. 26.

filed an undated and unsigned response to the court's Castro order, agreeing to the reclassification of his motion, and requesting an extension of time to file an amended §2255 motion. (Cr-DE#42).

On **June 15, 2017**, approximately three months after his conviction became final, the movant filed his operative motion to vacate with supporting memorandum after he signed and handed it to prison authorities for mailing, as reflected by the prison's mail stamp, in accordance with the mailbox rule.[4] (Cv-DE#1:15; Cr-DE#43:15).

IV. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if "it was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack...." See 28 U.S.C. §2255(a). If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." See 28 U.S.C. §2255(b). However, in order to obtain this relief on collateral review, the movant must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)(rejecting the plain error standard as not sufficiently deferential to a final judgment),

[4]See: Adams v. U.S., 173 F.3d 1339 (11 Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

reh'g den'd, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982).

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. §2255. However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. at 465-466, 127 S.Ct. 1933, 167 L.Ed.2d 836, reh'g den'd, 551 U.S. 1177, 128 S.Ct. 7, 168 L.Ed.2d 784 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous").

Because the movant asserts in his petition that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2071, 2078, 80 L.Ed.2d 674 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. at 689. This two-part standard is also applicable to ineffective assistance of counsel claims arising out of a guilty plea. Hill v. Lockhart, 474

U.S. 52, 57-59, 106 S.Ct. 366, 371-73, 88 L.Ed.2d 203 (1985).

Generally, a court first determines whether counsel's performance fell below an objective standard of reasonableness, and then determines whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Padilla v. Kentucky, 559 U.S. 356, 365, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). In the context of a guilty plea, the first prong of Strickland requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he would have entered a different plea. Hill, 474 U.S. at 56-59. If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr's, 480 F.3d 1092, 1100 (11th Cir.), cert. den'd, Dingle v. McDonough, 552 U.S. 990, 120 S.Ct. 530, 169 L.Ed.2d 339 (2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir.), reh'g and reh'g en banc den'd, 232 F.3d 217 (11 Cir. 2000), cert. den'd, Haley v. Holladay, 531 U.S. 1017, 121 S.Ct. 578, 148 L.Ed.2d 495 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1631-1632, 52 L.Ed.2d 136 (1977). See also Kelley v. Alabama, 636 F.2d 1082, 1084 (5th Cir. Unit B. 1981); United States v. Medlock, 12

F.3d 185, 187 (11th Cir. 1997). Moreover, a criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So.2d 782, 785 (Fla. 4 DCA 2007)("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); Iacono v. State, 930 So.2d 829 (Fla. 4 DCA 2006)(holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

V. Threshold Issue-Timeliness

The government concedes that this federal §2255 motion was timely filed. As narrated previously in this Report, it is evident that the filing of the §2255 motion on **June 15, 2017**, less than one year after movant's conviction became final, is timely. Since the filing was instituted before expiration of the one-year federal limitations period, for purposes of 28 U.S.C. §2255, review of the claims is warranted.

VI. Discussion

A. Evidentiary Hearing Claim

In **claim 1**, the movant specifically asserts that counsel was

ineffective for failing to file a requested direct appeal. (Cv-DE#1:5). In his supporting memorandum (Cv-DE#1-1), movant suggests that counsel may not have wanted to file an appeal, but he nonetheless had an obligation to do so. (Cv-DE#1-1:3,4). Because the claim was not conclusively refuted by the record, and warranted further evidentiary findings an evidentiary hearing was held on **December 5, 2017**, where testimony was taken from the movant and former defense counsel, Assistant Federal Public Defender Robert E. Adler ("AFPD Adler").

1. Applicable Law re Failure to File Requested Direct Appeal

The law is well settled that counsel's failure to file a direct appeal after being requested to do so by his client results in a per se constitutional violation of the movant's Sixth Amendment right to counsel, which entitles the movant to an appellate proceeding. Roe v. Flores-Ortega, 528 U.S. 470, 476-77, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) ("We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable")(emphasis added); United States v. Stanton, 397 Fed.Appx. 548, 549 (11 Cir. 2010)(unpublished)[5] (quoting Roe v. Flores-Ortega, supra.). The defendant can also demonstrate that his attorney acted unprofessionally by showing that, in the absence of specific instructions from the defendant, there was reason to believe that "a rational defendant would want to appeal." Roe v. Flores-Ortega, 528 U.S. at 478, 480, 120 S.Ct. 1029.

[5]Although unpublished opinions are not binding on this Court, they are persuasive authority. See 11th Cir. R. 36-2.

Where the defendant specifically requested that a direct appeal be filed, there is a presumption of prejudice "with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." Roe v. Flores-Ortega, supra at 484. A defendant need not establish that his direct appeal would have been arguably meritorious; he need only show that his counsel's constitutionally deficient performance deprived him of an appeal he would have otherwise taken--i.e., the defendant expressed to his attorney a desire to appeal. Id.; see also, McElroy v. United States, 259 Fed.Appx. 262, 263-64 (11th Cir. 2007); Gomez-Diaz v. United States, 433 F.3d 788, 792 (11th Cir. 2005).

Even if a defendant contractually waived his right to appeal, counsel may be ineffective for not filing a notice of appeal when directed to by the client because the merits of an appeal are not to be considered when determining whether an out-of-time appeal should be permitted. Gaston v. United States, 237 Fed.Appx. 495, 497 (11th Cir. 2007). The defendant also need not show that there were viable grounds for such an appeal. Martin v. United States, 81 F.3d 1083 (11th Cir. 1996); Montemoino v. United States, 68 F.3d 416, 417 (11th Cir. 1995); Restrepo v. Kelly, 178 F.3d 634, 641-42 (2d Cir. 1999)(holding that a habeas petitioner alleging ineffective assistance of counsel based on counsel's failure to file a requested notice of appeal need not demonstrate that his defaulted appeal would have succeeded in order to establish prejudice sufficient for habeas relief).

Prejudice is presumed when counsel fails to file a notice of appeal when requested to do so by a client. Gaston v. United

States, 237 Fed.Appx. at 496, citing, Roe v. Flores-Ortega, 528 U.S. at 483. Thus, "to satisfy the prejudice prong..., a defendant who shows that his attorney has ignored his wishes and failed to appeal his case need only demonstrate that, but for the attorney's deficient performance, he would have appealed." Gomez-Diaz v. United States, 433 F.3d at 792 (citing Roe v. Flores-Ortega, 528 U.S. at 483, 120 S.Ct. 1029).

In the case of an appeal following a guilty plea, however, the defendant is entitled only to an out-of-time appeal of sentencing issues. Flores-Ortega, 528 U.S. at 483. This is so, because "the few grounds upon which the guilty plea may be challenged are not limited to direct appellate review, but instead are more appropriately raised in §2255 proceedings." Montemoino v. United States, 68 F.3d at 417. It should also be noted that "[A] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues-indeed, it includes a waiver of the right to appeal blatant error." United States v. Howle, 166 F.3d 1166, 1169 (11th Cir. 1999). Moreover, "a vigorous dispute about an issue during the sentencing proceedings does not preserve that issue for appeal when the terms of the appeal waiver do not except it from the waiver." United States v. Bascomb, Jr., 451 F.3d 1292, 1296 (11th Cir. 2006).

2. Testimony at Hearing

Former counsel, AFPD Adler, a seasoned criminal defense attorney, testified that he has worked as an Assistant Federal Public Defender since June of 1991, and now specializes in representing defendants charged with "white collar" crimes. His job requires representing the defendant through trial, and includes

filing appeals therefrom if the client instructs him to do so. He also testified unequivocally that in representing his clients, he is not only a client's defense attorney, but is also an educator, ensuring that the client understands the legal process and issues. Regarding the filing of direct appeals, AFPD Adler explained that he has filed hundreds of appeal, but if there are no non-frivolous grounds for an appeal, he then files an Anders[6] brief, together with a motion to withdraw from further representation.

Specifically as to the movant's case, AFPD Adler testified that he met first met with the movant on April 5, 2016, at the Palm Beach County Jail. After giving details regarding the dates and nature of the numerous meetings and telephone calls with the movant during the course of his representation, counsel explained he had reviewed his file, and took notes thereof, which he used to refresh his recollection. In that regard, counsel testified that had three meetings with the movant in April 2016, on the 5th, 6th, and 11th, and two phones conferences, on April 18th and 27th. In May, counsel stated he had an extensive[7] meeting with the movant, lasting over an hour. He again met with the movant on two occasions, June 6 and June 21, and spoke with him telephonically on June 7, June 16, June 20, and June 28. On August 31st, counsel recalled having a brief telephone call with the movant. Then, another extensive meeting was held with the movant on September 21st, prior to sentencing. He again met with the movant immediately before and after sentencing on September 30th. Finally, between November and December he had four brief telephone calls with the movant on October 4, November 17 and 18, and December 2nd. During all of the foregoing meetings,

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[6]Anders v. California, 386 U.S. 738 (1967).

[7]Counsel clarified that an extensive meeting means that it lasted over an hour.

AFPD Adler testified he discussed the right to appeal with the movant in relation to a discussion of the charges, evidence, and the development of potential issues.

As to the June 6th meeting, counsel specifically recalled that it was particularly extensive, lasting approximately 2.5 hours, because he reviewed with the movant, not only the case in general and movant's direct appeal rights, but also went over, in detail, the government's first proposed written plea agreement and factual proffer. Counsel explained that the initial plea contained a waiver of movant's right to prosecute a direct appeal, which he explained to the movant. As a result, the initial agreement was not signed, because counsel wanted to negotiate its removal with government, which was later successfully obtained. Discussions were also had with the movant regarding the viability of certain procedural issues, the possible penalties he faced, including the movant's sentencing computation. In that regard, he advised the movant that if the court imposed a sentence within the guideline range, the movant would have little, if any, chance of success on appeal.

Moreover, counsel further advised the movant that he was unaware of any Eleventh Circuit opinion granting vacatur of a sentence, based on a defendant's appeal of a sentence that was the result of the granting of a downward variance from the low end of the applicable advisory guideline range. As to the merits of a downward variance, counsel testified he explored this issue with the movant, advising him that there was a likelihood that a variance would be granted, especially in light of movant's post offense rehabilitation, given the fact that movant had been working and a significant amount of time had elapsed since the vehicular traffic stop and ensuing seizure of evidence and the filing of

federal charges. Counsel also informed movant that argument regarding the fact that movant's culpability was overrepresented in the guidelines which would also lend support for a downward variance.

Counsel next testified that during that meeting, he reviewed the factual proffer with the movant, and it too was not signed, because a change needed to be made thereon. As a result, counsel recalled hand writing in the corrections, and then emailing it to the government. He also testified he provided a copy of the proposed plea and factual proffer, with the proposed corrections, to the movant at the conclusion of the June 6 meeting. The following day, June 7th, the government agreed to the changes in the agreement and factual proffer, and returned the corrected documents to defense counsel. Counsel testified he advised the movant that he had received the revised documents, and asked movant to pass by the office to sign both documents. Counsel admits he was not present on June 8th when the movant showed up at his office and signed the plea agreement and factual proffer. However, counsel explained there was no need for his presence at that time as the movant was fully aware of the changes that were contained in the final plea and final factual proffer, since he had previously been provided with copies of the originals and could compare them to the final revised documents.

After movant's change of plea and the court's acceptance thereof, counsel recalled another extensive meeting took place with the movant on September 21st wherein they discussed the contents of the PSI prior to sentencing. Counsel explained he was initially concerned that the PSI would contain additional loss amounts for the unauthorized access devices found in movant's possession at the

time of the vehicular stop. Counsel recalled there were approximately 800 PIIs which could be considered unauthorized access devices under the guidelines, which in turn calls for a $500 loss amount attributable to each. Counsel worried that the PSI would compute the loss amount at approximately $400,000.00, but was relieved to see the loss computation was significantly less. He did not file objections to the PSI, nor did movant ever request that he do so.

Counsel denied ever advising or otherwise promising the movant that he would write the court regarding a 2-year plea offer, and further denied ever advising the movant that he was facing a total sentence exposure of only two years imprisonment. When there is no mandatory minimum, AFPD Adler testified he advises clients that the judge has the full authority over the sentence to be imposed. As applied to the movant, AFPD Adler recalled there was no minimum mandatory required, but did remember advising the movant that he faced a 2-year consecutive term of imprisonment as to Count 10. During this meeting, the issue of a direct appeal was again discussed with the movant in light of the contents of the PSI. During cross-examination, counsel testified that he advised the movant that even if a variance were granted, he could still file a notice of appeal, challenging its reasonableness on direct appeal.

At sentencing, counsel recalled successfully arguing for a downward variance, which resulted in a 17-month reduction to the movant's low end of the guideline range. Although counsel explained that he objected to the amount of the variance at sentencing, thereby preserving any potential error, he explains that he does so because the reasonableness of a sentence can always be appealed, if the client so chooses. Therefore, in order to ensure the issue was

preserved, as to the movant's case, he preserved the objection for review on appeal, in the event the movant desired that an appeal be filed. More importantly, however, counsel also recalled that the government preserved its objection to the variance, because it found the amount of the variance was not warranted and/or was otherwise unreasonable.

Next, counsel testified that after sentence was imposed, he met with the movant in the attorney conference room outside Judge Kenneth A. Marra's courtroom. At that time, he had a discussion with the movant regarding his right to prosecute a direct appeal. He informed the movant that the sentence imposed came out as he had hoped. Counsel explained to the movant that there were no procedural or guideline computation errors, and because he had received a downward variance there was no likelihood of success if the movant took an appeal attacking the reasonableness of the sentence imposed. More importantly, counsel stressed to the movant that if he did, in fact, file an appeal, he was risking the government filing a cross-appeal which could result in the loss of the variance if the government prevailed on its cross appeal.

At the conclusion of the discussion, counsel recalled that the movant had no questions and agreed that the wiser course of action was not to prosecute a direct appeal. Counsel was unequivocal that movant never vacillated about filing an appeal. In fact, counsel testified that the movant never directly requested that he file an appeal. Specifically, after that meeting, counsel recalled speaking with the movant on a few occasions before the movant surrendered on December 5, 2016, and insisted that never once during these discussions did the movant direct him to file an appeal. Counsel also testified that the movant never left him a voice mail message

either at his office or on his cellular phone instructing him to file an appeal.

Finally, counsel testified that, as is his custom, post-sentencing, in an October 4, 2016 letter addressed to the movant at 1705 Lake Circle, Belle Glade, Florida 33430, he stated:

> Enclosed please find a copy of the judgment in your case. As we discussed, because Judge Marra sentenced you below the advisory guideline range, there are no viable issues for an appeal. In other words, an appeal would be futile in that the Eleventh Circuit Court of Appeals has never reversed a below guideline sentence on the ground that the district court should have given an even more lenient sentence.
>
> **Accordingly, it was decided that no appeal will be filed.** I wish you the best. Please be sure to surrender as indicated by the district court at sentencing.
>
> I wish you the very best...

(Gov't Ex. 5:10/4/16 Letter from Counsel to Movant). Regarding the foregoing letter, counsel indicated that he sent it to the same address he had previously mailed all correspondence to the movant. None of the prior correspondence to the movant had been returned as undeliverable. To the contrary, counsel insisted that after mailing letters to the movant, and the movant's receipt thereof, he would receive a call from the movant in response thereto. The address on the letter was, in fact, the address provided by the movant as part of his bond, as set forth in his presentence report. Counsel again denied being advised at any time by the movant to file an appeal. He also denied telling the movant during their meeting in the attorney conference room that he would again contact the movant to further discuss the movant's appellate rights. Counsel admits he did not file a notice of appeal, but is confident that the movant

was advised of his rights concerning a direct appeal and knowingly and intelligently waived the right.

The movant, however, suggested during his direct testimony that he only met with counsel two or three times, "give or take." He denied being advised by counsel during their initial visit what an appeal meant or the process involved in prosecuting an appeal. Movant does not contest meeting with counsel and reviewing the initial plea and factual proffer. He further does not contest the fact that changes needed to be made to both documents. However, movant testified that, notwithstanding this fact, counsel tried to "get" movant to sign the documents, but movant resisted because he wanted to discuss the plea with his family. According to the movant, counsel responded stating that, if movant did not accept the plea, he would have to prepare for trial. Movant testified he told counsel to prepare for trial. A few hours later, movant testified he was called by counsel and advised that the government had extended the time for acceptance of the plea until Friday. Movant testified that he had an appointment with counsel to review the documents, but counsel never showed, because he was in court. As a result, movant signed the documents in front of counsel's secretary.

Movant does not dispute that the plea agreement was explained to him, but denies being advised by counsel what language contained therein needed changing. As to the factual proffer, movant agreed he signed that document as well. He understood he was pleading guilty to Counts 1, 2, and 10, and understood that Count 10 carried a 2-year consecutive not concurrent term of imprisonment. He was also aware that the plea agreement set forth the maximum sentences as to Counts 1 and 2.

Movant testified on direct that his attorney informed him he was going to write a letter to the government on movant's behalf, but he did not know what the contents thereof was going to be. When asked what he meant by that statement, movant provided a nonresponsive answer, stating at first that he knew nothing about the law, but then confirming he had done research regarding the guidelines, and had asked counsel "to do many things," that he did not do. This statement, under oath here, is directly contradicted by the movant's sworn testimony at the Rule 11 change of plea proceeding wherein movant testified that counsel had done everything he had asked him to do, and was satisfied with counsel's representation. Movant next insisted at the hearing that he advised counsel on several occasions that he wanted to go to trial, but counsel said the movant did not have a winnable case. Movant also testified that counsel informed him that he would also write a letter to the court, on movant's behalf, seeking the imposition of a total of 2 years imprisonment.

Movant further testified that counsel never told him at any time prior to sentencing that he had a right to file a direct appeal. Movant insists he asked counsel to file an appeal, but counsel indicated he would not, and would call him later to explain why. Movant also denies ever receiving counsel's October 4, 2016 letter. In fact, movant insists he never heard from counsel, either in writing or by phone, after their brief meeting following conclusion of the sentencing proceeding. Movant admits, however, that he was out on bond until December 5, 2016, at which time he voluntarily surrendered. He claims he called counsel on his cell phone, but counsel never returned his calls. He concedes, however, he never left counsel a message at his office to call him, nor did he leave a message at counsel's office directing him to file an

appeal.

During cross-examination, movant testified that he was aware his sentence on Count 10 was to run consecutive to any other sentence imposed. However, movant insists that, after reading the guidelines, the judge could have fashioned the sentences so that they all ran concurrently. Moreover, movant insists counsel advised him that the court could impose a variance that would result in a total term of 2 years imprisonment. Although he knew what his advisory guideline range was prior to sentencing, movant insists that the ultimate sentence imposed was higher than he expected, and told his attorney he was unhappy with the sentence imposed. He also insists he told counsel to file an appeal.

3. **Analysis**

Having carefully attended to the testimony at the evidentiary hearing, the witnesses' demeanor, and the record as a whole, the undersigned credits the testimony of movant's counsel, AFPD Adler, that, contrary to the movant's testimony and representations in his §2255 motion, counsel met with the movant on a plethora of occasions. During his numerous meetings and calls with the movant, he discussed the case in general, and in particular, the movant's direct appeal rights. The court also credits counsel's testimony that the movant never instructed counsel to file a direct appeal. Had the movant insisted on prosecuting a direct appeal, the movant finds counsel's testimony credible and compelling that a notice would have been filed, together with an Anders brief and motion to withdraw since the movant had no non-frivolous grounds for an appeal. The court also credits counsel's testimony that he advised the movant about the risk associated with pursuing a direct appeal,

including the fact that the government could cross-appeal the downward variance, resulting in a higher sentence if the government prevailed on appeal.

The court rejects as incredible movant's testimony that he expressly instructed counsel to file a direct appeal at any time, much less during the post-sentencing meeting conducted in the attorney room after sentence was imposed. Unlike other defendants who are pretrial detained, movant remained out on bond after sentence was imposed. Here, there was no testimony from either party that this meeting was either brief or hurried. To the contrary, from counsel's testimony, which this court credits, the court finds counsel advised the movant about the pros and cons of pursuing a direct appeal, including the risks associated therewith. Movant's demeanor during the evidentiary hearing was oftentimes equivocal and movant offered no objective evidence to support his testimony that he called counsel numerous times on his cellular phone after sentencing, but the calls were unanswered or unreturned. Movant could have requested or obtained cellular log records to establish whether or not such calls in fact occurred. He did not do so here. Movant's representation that he did not receive the last letter sent by counsel regarding his appeal rights is also highly suspect and thus rejected as disingenuous.

Moreover, the court also finds telling that the movant, who was out on bond for over two months, did nothing to verify whether an appeal had, in fact, been filed. Movant testified he only called counsel's cellular phone, but not the office phone. He also never indicated whether he attempted to write counsel or this court, nor is there anything of record suggesting he did so, regarding the status of an appeal. His first communication with the court was

received on December 5, 2016. Oddly enough that document was not only undated, but it was also not signed by the movant.

Thus, although not dispositive on the issue before the court, the court finds the movant's lack of diligence from the time sentence was imposed until he surrendered on December 5th indicative of an individual who was not interested in pursuing a direct appeal. Movant neither wrote or called counsel's office, and certainly did not reach out to this court until December 5th.

As is often the case with far too many *pro se* litigants, the filing of a §2255 motion, challenging counsel's effectiveness for failing to file a purportedly requested direct appeal appears "indicative of a systematic attempt by petitioners around the country to throw as much mud against the wall with the hope that courts will sift through to see what sticks...," but the "Constitution commands no such inquiry." See Buitrago v. United States, 1:96-CR-00067-KMM, 2016 WL 4366486, at *3 (S.D. Fla. Aug. 16, 2016) (citing Casado v. United States, No. 1:99-CR-00125-KMM, 2016 WL 4196659, at *3 (S.D. Fla. Aug. 9, 2016)).

In conclusion, the court credits counsel's testimony that movant at no time expressed any desire to prosecute a direct appeal. The court finds movant's testimony that he unequivocally advised counsel that he wanted a direct appeal filed to be disingenuous and highly suspect. As such, the court hereby rejects as incredible movant's testimony that he expressly asked counsel to prosecute a direct appeal.[8] In fact, counsel was forthright that

[8]In passing, it is worth noting that the movant, in his initial filing, and then after the close of all evidence in this case, during closing argument, made much ado about the present of his father during the meeting with counsel after sentence was imposed wherein movant claims to have requested that a direct appeal

had he specifically discussed the pros and cons of pursuing a direct appeal, including the risk of the government cross-appealing. After thorough consultation with the movant, the court finds the movant agreed that no appeal should be prosecuted. Moreover, the court finds the absence of any inquiry by the movant to counsel, in writing or by phone to his office, much less to this court regarding the status of an appeal supports the finding that no request was ever made. The court further finds that movant was aware that he had a right to an appeal and waived those rights after thorough consultation with his attorney. Consequently, counsel was not ineffective and the movant is not entitled to an out-of-time appeal. In sum, the undersigned does not find credible the movant's testimony that he asked his lawyer to file an appeal.

4. Failure to Consult About an Appeal

Even if the court were to assume, without deciding, that the record were unclear whether an actual request was made, it must then be determined whether counsel adequately consulted with the movant about an appeal, and if not, whether counsel had a duty to do so either because (a) a rational defendant would have wanted to appeal, or (b) the movant reasonable demonstrated an interest in appealing. Roe v. Flores-Ortega, 528 U.S. at 480. "[W]here a defendant has not specifically instructed his attorney to file an appeal, we must still determine 'whether counsel in fact consulted with the defendant about an appeal.'" Thompson v. United States,

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be filed. Although the court noted that movant's father was present in court, movant did not call or present any evidence to support his testimony at the evidentiary hearing. In fact, in his pretrial narrative (Cv-DE#20), and at the outset of the hearing, but for his own testimony, movant indicated he would not be calling any witnesses to testify on his behalf.

504 F.3d 1203 (11th Cir. 2007)(quoting Flores-Ortega, 528 U.S. at 478).

Relying on the Supreme Court's definition of the term "consult," the Eleventh Circuit has held that "adequate consultation requires: (1) informing a client about his right to appeal, (2) advising the client about the advantages and disadvantages of taking an appeal, and (3) making a reasonable effort to determine whether the client wishes to pursue an appeal, regardless of the merits of such an appeal." Thompson v. United States, 504 F.3d 1203, 1206 (11th Cir. 2007)(citing, Frazer v. South Carolina, 430 F.3d 696, 711 (4th Cir. 2005)); Gomez-Diaz v. United States, 433 F.3d 788, 792 (11th Cir. 2005). A defendant should be provided with enough information to either "intelligently and knowingly assert[] or waive[] his right to an appeal." Thompson v. United States, 504 F.3d at 1206. If, however, two of the three elements of adequate consultation are not satisfied, then it is apparent that counsel failed to consult with the movant regarding his appellate rights. Flores-Ortega, 528 U.S. at 478.

After considering the testimony of the witnesses, together with their demeanor, the court makes the following findings. First, counsel was unequivocal that he discusses with his clients their appellate rights at all stages of the proceedings. Second, the court credits counsel's testimony that he fully explored the viability of a direct appeal with the movant after sentence was imposed. At that time, movant was advised that he received a significant downward variance under the guidelines, to which the government objected. Movant was cautioned that if he prosecuted an appeal, he ran the risk of the government cross-appealing and if the government prevailed on appeal, he would run the risk of losing

the variance. As a result, if the case were remanded for resentencing, movant would face an even longer term of imprisonment. Movant agreed with counsel's advice that, under the circumstances of his case, especially in light of the downward variance, he should forego pursuit of an appeal. The court also credits counsel's testimony that movant never instructed nor expressed any desire thereafter about pursuing an appeal. The court rejects movant's testimony as incredible that, notwithstanding counsel's advice, he told counsel to file the appeal.

Although the Eleventh Circuit has made clear in Thompson v. United States, 504 F.3d 1203 (11th Cir. 2007), that "[S]imply asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense." Id. at 1207. Here, however, the court finds that counsel consulted with the movant and discussed his appellate rights. Moreover, the court finds counsel had a meaningful consultation with his client after sentence was imposed, explaining that he had the absolute right to challenge the reasonableness of the sentence on direct appeal, while cautioning about the risks associated therewith.

It is true that a criminal defense lawyer is not under a *per se* constitutional obligation to consult with his or her client about an appeal. See Otero v. United States, 499 F.3d 1267, 1270 (11th Cir. 2007)(quoting, Flores-Ortega, 528 U.S. at 479). In some cases, the Sixth Amendment requires such consultation; in others, it does not. Otero v. United States, 499 F.3d at 1270. "We cannot say, as a constitutional matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." Otero v. United States, 499 F.3d at 1270 (quoting Flores-Ortega, 528 U.S. at 479).

The Supreme Court has rejected such a bright line rule in this context finding it would be "inconsistent with Strickland's[1] holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" Flores-Ortega, 528 U.S. at 478.

As noted previously, however, **"counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."** Flores-Ortega, 528 U.S. at 480; (emphasis added). This inquiry is informed by several "highly relevant" factors, including: whether the conviction follows a guilty plea, whether the defendant received the sentence he bargained for, and "whether the plea [agreement] expressly ... waived some or all appeal rights." See Otero v. United States,[2] 499 F.3d at 1270 (quoting Flores-Ortega, 528 U.S. at 480).

In this case, the movant's conviction was the result of a negotiated, written plea agreement, which tends to confirm the fact that the movant was "seek[ing] an end to judicial proceedings." Flores-Ortega, 528 U.S. at 480. Moreover, the court further finds that, under the particular facts of this case, the movant has not demonstrated that he expressly directed counsel to file an appeal.

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[1]Strickland v. Washington, 466 U.S. 668 (1984).

[2]In Otero, the Eleventh Circuit noted that "[A] criminal defense lawyer is not under a *per se* constitutional obligation to consult with his or her client about an appeal," because in "some cases, the Sixth Amendment requires consultation; in others, it does not." Otero v. United States, 499 F.3d at 1270.

Even if he did not do so, the court does not find that a reasonable defendant, in movant's position, would have wanted to pursue a direct appeal, especially if it meant risking the grant of the downward variance.

Thus, movant has not shown that he reasonably demonstrated to counsel he was interested in pursuing an appeal. Further, the court finds that there was reasonable consultation, and even if there was not, a reasonable defendant in the movant's position would not have wanted to prosecute an appeal. See Roe v. Flores-Ortega, 528 U.S. at 478, as applied in Thompson, 504 F.3d at 1206-07. The Court finds there was adequate consultation, and given how the sentencing proceeding unfolded, including the granting of a downward variance from the low end of the guideline range, coupled with the lack of any objective evidence regarding inquiries in writing to counsel or this court regarding the status of an appeal during the two months post-sentencing while movant was out on bond, all support a finding that movant did not direct or otherwise instruct counsel to file a direct appeal. Here, the court does not find that the movant reasonably demonstrated to counsel that he an interest in pursuing an appeal, notwithstanding counsel's advice to the contrary.

Moreover, any challenge to the sentence on appeal by the movant would thus not have been successful as the movant's sentence was more than reasonable. Under the totality of the circumstances present here, the Court finds no rational defendant in the movant's position would have sought to appeal. This is so given the sentence imposed, which was not only well below the statutory maximum, but also well below the low end of the advisory guideline range. Thus, the court finds the movant has failed to demonstrate that, even if the court assumes that counsel failed to adequately consult with

the movant about an appeal, he would have timely appealed. See Flores-Ortega, 528 U.S. at 484. Thus, the movant's claim fails on this alternative basis.

B. Remaining Claims

In **claim 2**, the movant asserts that he was denied effective assistance of counsel, where his lawyer failed to request a minor or minimal role reduction to the movant's advisory guideline range, despite the Sentencing Commission having made changes to the guidelines based on a defendant's role in the offense. (Cv-DE#1:5; Cv-DE#1-1:5). Movant suggests he is less culpable than the others who were involved in the criminal offense. (Cv-DE#1-1:5). He suggests he was a "small spoke" in a "larger wheel" and was unable to obtain any major gains from the criminal episode, did not oversee others, nor was he a manager or organizer. (Id.). Movant suggests that, in light of the then recent amendment to U.S.S.G. §3B1.2, he was entitled to a reduction to his base offense level based on his role in the offense. (Id.:6-7).

"The proponent of the downward adjustment ... always bears the burden of proving a mitigating role in the offense by a preponderance of the evidence." United States v. Rodriguez de Varon, 175 F.3d 930, 939 (11th Cir. 1999)(*en banc*). Section 3B1.2 of the Sentencing Guidelines provides for a reduction of the base offense level where a defendant was a "minor participant" or a "minimal participant" in criminal activity, by two or four levels respectively. U.S.S.G. §3B1.2. A "minor participant" is one "who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. §3B1.2, comment. (n.5). A "minimal participant" is one who "lack[s] of knowledge or

understanding of the scope and structure of the enterprise and of the activities of others." U.S.S.G. §3B1.2, comment. (n.4).

The Eleventh Circuit has held, in pertinent part, that a district court "must measure the defendant's role against his relevant conduct, that is, the conduct for which he has been held accountable under U.S.S.G. §1B1.3. In addition, where the record evidence is sufficient, the district court may also measure the defendant's conduct against that of other participants in the criminal scheme attributed to the defendant." See United States v. Keen, 676 F.3d 981, 997 (11th Cir.), cert. den'd, ___ U.S. ____, 133 S.Ct. 573, 184 L.Ed.2d 377 (2012).

Under the guidelines, relevant conduct in conspiracy cases, by which a defendant's role is measured, includes acts and omissions: (1) by the defendant; (2) by others in furtherance of jointly undertaken criminal activity, if they are reasonably foreseeable; and (3) that were part of the same course of conduct or common scheme as the offense of conviction. See U.S.S.G. §1B1.3(a)(1)-(2). A defendant cannot prove that he played a minor role in the relevant conduct attributed to his offense by pointing to a broader criminal conspiracy for which he was not held accountable. De Varon, 175 F.3d at 941. The purpose of restricting the analysis to solely the conduct for which the defendant is held accountable is "to punish similarly situated defendants in a like-minded way." Id.

Even where a defendant played a smaller role in a conspiracy than other co-conspirators, a defendant still may not be entitled to a role reduction if he played a significant role in the conduct of the relevant offense. Keen, 676 F.3d at 997. See also, United States v. Zaccardi, 924 F.2d 201, 203 (11th Cir. 1991)("It is

entirely possible for conspiracies to exist in which there are no minor participants.... [T]he fact that a participant defendant may be the least culpable among those who are actually named as defendants does not establish that he performed a minor role in the conspiracy.").

Here, movant provides no objective support that a minor/minimal role reduction is warranted. Movant's sentencing was held long after Amendment 794 to the Guidelines became effective on November 1, 2015. See Sentencing Guidelines For United States Courts, 80 Fed.Reg. 25,782, 25,782 (May 5, 2015) (stating that on April 30, 2015, the Sentencing Commission proposed amendments to §3B1.2 to become effective November 1, 2015). Amendment 794 "left the text of §3B1.2 unchanged." United States v. Gomez, ___ F.3d ____, 2016 WL 3615688, at * 3 (5th Cir. July 5, 2016); see also United States v. Quintero-Leyva, 823 F.3d 519, 523 (9th Cir. 2016); United States v. Casas, 632 Fed.Appx. 1003, 1004 (11th Cir. 2015). Rather, the amendment modified §3B1.2's application notes by introducing a list of non-exhaustive factors that a sentencing court should consider in determining whether to apply a mitigating role adjustment. See Quintero-Leyva, 823 F.3d at 523. It is also worth noting that, generally, a court is required to use the guidelines manual in effect on the date a defendant is sentenced. See Dorsey v. United States, 132 S. Ct. 2321, 2332 (2012); U.S.S.G. §1B1.11(a) (requiring use of "the Guidelines Manual in effect on the date that the defendant is sentenced"). Amendment 794 was issued on **November 1, 2015**. See Quintero-Leyva, 823 F.3d at 521. Thus, it was enacted months **before** the movant's **September 2016** sentencing hearing.

Even if a request for a mitigating role adjustment had been

made, as suggested, the movant has not demonstrated here that the court would have granted such a request. Consequently, movant cannot rely on Amendment 794 to obtain the relief requested. Also, the Sentencing Commission did not make the amendment retroactively applicable to cases on collateral review. See U.S.S.G. §1B1.10(d). Notwithstanding, the amendment also made no substantive change to U.S.S.G. §3B1.2. Rather, it merely "clarified the factors to consider for a minor-role-adjustment." See United States v. Casas, 632 Fed.Appx. 1003, 1004 (11th Cir. 2015). In fact, the Sentencing Commission specifically explained that Amendment 794 is intended only as a clarifying amendment. U.S.S.G. Supp. App. C, Amend. 794 (Reason for Amend.) ("This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies.").

Thus, the court must first determine whether the movant's "claim that [his] sentence is contrary to a subsequently enacted clarifying amendment is cognizable under §2255." See Burke v. United States, 152 F.3d 1329, 1331 (11th Cir. 1998). The movant here, like the movant in Burke, is not entitled to relief under §2255. This is so because neither here, nor in Burke, was a direct appeal prosecuted. Id. 152 F.3d at 1331. Before movant's sentencing, the Sentencing Commission added a clarifying amendment to the federal sentencing guidelines. The movant here, like the movant in Burke, moved under §2255 to modify his sentence based on a clarifying change to the guidelines. Id. Yet because "§2255 is not a substitute for direct appeal," nonconstitutional claims, such as clarifying amendments to the Guidelines, "can be raised on collateral review only when the alleged error constitutes a 'fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the

rudimentary demand of fair procedure.'" Id. (quoting Reed v. Farley, 512 U.S. 339, 348 (1994)).

Because Amendment 794 is a clarifying amendment resulting in no change to the substantive law, the movant had the opportunity to challenge the denial of a minor-role adjustment at his original sentencing and then on direct appeal. Even if he had attempted to do so, he has not demonstrated here that the court would have granted the mitigating role adjustment.

Therefore, this claim is not cognizable here, since the movant has not demonstrated a fundamental defect, nor that a complete miscarriage of justice will result from the failure to consider this claim.[3] While it is true that, in the direct appeal context, the Eleventh Circuit has recently held that Amendment 794 applies retroactively, it has yet to determine whether it applies retroactively to cases on collateral review. See e.g., United States v. Herrera Villareal, __ F.3d __, 2016 WL 6123493 (11th Cir. Sept. 20, 2016)(citing, United States v. Cruickshank, ___ F.3d ____, 2016 WL 5075936 at *7 (11th Cir. Sept. 20, 2016)). On this basis alone, the movant's §2255 motion should be denied.

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[3]Movant is cautioned that arguments not raised by movant before the magistrate judge cannot be raised for the first time in objections to the undersigned's Report. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). "Parties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)). Thus, "[W]here a party raises an argument for the first time in an objection to a report and recommendation, the district court may exercise its discretion and decline to consider the argument." Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). Here, if movant attempts to raise a new claim or argument in support of this §2255 motion, the court should exercise its discretion and decline to address the newly-raised arguments.

Notwithstanding, assuming the movant were entitled to review on the merits, the movant is not entitled to relief. The Sentencing Guidelines provide for a two-level decrease to a base offense level if a defendant was a minor participant in the criminal activity. U.S.S.G §3B1.2(b). A minor participant is one "who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." Id. cmt. n.5. The Eleventh Circuit, in United States v. De Varon, 175 F.3d 930 (11th Cir. 1999) (*en banc*), has held that when considering a request for a minor-role reduction, court are to consider: "first, the defendant's role in the relevant conduct for which [he] has been held accountable at sentencing, and, second, [his] role as compared to that of other participants in [her] relevant conduct." De Varon, 175 F.3d at 940. The De Varon court explained that "[t]hese principles advance both the directives of the Guidelines and our case precedent by recognizing the fact-intensive nature of this inquiry and by maximizing the discretion of the trial court in determining the defendant's role in the offense." Id. at 934.

In De Varon, the defendant was a drug courier, who ingested and smuggled 70 heroin-filled pellets into the United States from Colombia. Id. The Eleventh Circuit recognized that "when a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs." Id. at 942-43. The court, however, declined to "create a presumption that drug couriers are never minor or minimal participants, any more than that they are always minor or minimal." Id.

Instead, the Eleventh Circuit held that "the district court must assess all of the facts probative of the defendant's role in his/her relevant conduct in evaluating the defendant's role in the offense." Id. at 943. Therein, the Eleventh Circuit also offered examples of relevant factors, including the "amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution." Id. at 945. The Eleventh Circuit emphasized that the examples are "not an exhaustive list," nor is "any one factor...more important than another," given that the court's determination is factually driven and "falls within the sound discretion of the trial court." Id. Ultimately, the Eleventh Circuit concluded that the trial court had the discretion to deny a minor-role adjustment, after it determined that the defendant was central to the importation scheme, had carried a substantial amount of high-purity heroin on her person, it was unclear from the record that he/she was less culpable than the other described participant in the scheme, and that he/she had furnished $1,000 of her own money to finance the smuggling enterprise. Id. at 945-46.

Through Amendment 635, the Sentencing Commission, adopted the Eleventh Circuit's De Varon findings that U.S.S.G. §3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled. See United States v. Cruickshank, 2016 WL 5075936, at *5-8 (11th Cir. 2016); see also, U.S.S.G. App. C, Amend. 635, Reason for Amendment. At the time of Amendment 635, the guidelines instructed that "a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other

defendants are charged." Id.

In Amendment 794 to the U.S. Sentencing Guidelines, which went into effect in November 2015, **before** the movant's sentencing hearing, the Commission further clarified "the factors for a court to consider for a minor-role adjustment, and still continue to embrace the approach taken by the Eleventh Circuit in De Varon." Id. Specifically, Application Note 3(C) to U.S.S.G. §3B1.2, provides:

> In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:
>
> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
>
> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
>
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
>
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
>
> (v) the degree to which the defendant stood to benefit from the criminal activity.
>
> For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an

> adjustment under this guideline.
>
> The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity....

U.S.S.G. Supp. App.C, Amendment 794 (November 1, 2015).

In Cruickshank, the Eleventh Circuit recently recognized that Amendment 794 contained the "non-exhaustive list of factors" which it had previously "delineated in De Varon, including the defendant's role in planning and carrying out the scheme, as well as the amount the defendant stood to be paid." Cruickshank, supra (citing De Varon, 175 F.3d at 945.

Here, as previously narrated in this Report, the stipulated factual proffer reveals that the movant was an essential player in the offenses. In fact, movant cannot demonstrate either deficient performance or prejudice under Strickland arising from counsel's failure to pursue this issue. Counsel did not seek a minor role reduction, but instead strategically focused on the more meritorious argument to support a 5-level downward variance which was ultimately granted by the district court. In that regard, counsel focused on the fact that the movant failed to activate all of the cards, did not engage in further criminal activity after the vehicular traffic stop and resulting seizure of evidence, but instead attempted to rebuild his life, getting a steady job and helping his ill father. Thus, even if counsel had argued for a minor or minimal role adjustment, no showing has been made that the court would have granted such an adjustment, and then additionally

granted a downward variance.

Given the stipulated factual proffer, together with the movant's testimony at sentencing, under the factors set forth by the Eleventh Circuit in De Varon, and as clarified by Amendment 794, the court finds that even had the issue been raised at sentencing or on appeal, the movant would not have been entitled to a mitigating role determination. As set forth in the stipulated factual proffer, there is nothing of record to suggest that the movant played anything other than an integral role in the offenses.

After considering all of the facts probative of the defendant's role and his relevant conduct in the offenses of conviction, the movant is not entitled to a mitigating role adjustment nor application of Amendment 794. It cannot be said that had the sentencing court considered a mitigating role adjustment under the guidelines, that such a request would have been granted. To the contrary, it is clear that the movant was facing a higher term of imprisonment if convicted following a jury trial. The movant has not met his burden of proof, nor has he established that his sentence was rendered fundamentally unfair or that it constituted a miscarriage of justice sufficient to form the basis for collateral relief. See Burke, 152 F.3d at 1332. Therefore, movant is entitled to no relief on this claim. Thus, he has not demonstrated deficient performance or prejudice under Strickland arising from counsel's failure to pursue this nonmeritorious issue.

To the extent the movant suggests that he is entitled to a further downward variance under the §3553(a) statutory factors, as well as the Sentencing Commission's Police Statements, because of his role in the offenses, that claim warrants no relief. (Cv-DE#1-

1). None of the arguments raised in his §2255 motion or supporting memorandum individually or cumulatively warrants habeas corpus relief. As will be recalled, the court at sentencing considered all of the statutory factors and the movant's role in the offenses. Given the court's detailed findings, even if counsel had a requested a further downward variance, or further argued for imposition of a total, combined 24-month term of imprisonment, no showing has been made that the court would have granted such a departure. Consequently, movant has not shown deficient performance or prejudice arising from counsel's failure to pursue a mitigating role adjustment or further downward variance at sentencing. Strickland v. Washington, supra.

Moreover, it is worth mentioning at this juncture that movant's work history and his father's ill health were all made part of the sentencing proceeding, and other factors were included in the PSI which the court had before it at sentencing, and which it adopted, subject to the changes noted at sentencing. (SOR). Movant is thus entitled to no relief on this claim.

In **claim 3**, the movant asserts that his plea was not knowing and voluntary because it was premised on counsel's misadvice that he would receive a total of 24 months imprisonment. (Cv-DE#1:6; Cv-DE#1-1:7). As narrated in detail previously in this Report, this claim is clearly refuted by the record.

The purpose of a §2255 motion is "to safeguard a person's freedom from detention in violation of constitutional guarantees," but "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea." See Winthrop-Redin v. United States, 767 F.3d 1210, 1216 (11

Cir. 2014)(quoting Blackledge v. Allison, 431 U.S. 63, 71, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). The Supreme Court has thus instructed that "'the representations of the defendant, his lawyer, and the prosecutor at [a 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. at 73-74, 80 n.19, 97 S.Ct. at 1621-1622, 1630 n.19 (explaining that if the record reflects the procedures of plea negotiation and includes a verbatim transcript of the plea colloquy, a petitioner challenging his plea will be entitled to an evidentiary hearing "only in the most extraordinary circumstances").

It is also well settled that a knowing and voluntary guilty plea waives all non-jurisdictional errors, including non-jurisdictional defects and defenses. United States v. Brown, 752 F.3d 1344, 1347 (11 Cir. 2014). It also bears mentioning that "[A]s a matter of public policy, no court should tolerate claims of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant appears to suggest here generally, that "my lawyer told me to lie" or that he was otherwise threatened/coerced by counsel, the government, or the court into doing so. See Gaddis v. United States, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished).

His allegations here are clearly refuted by his sworn declarations at the Rule 11 proceeding. "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." See Irick v. United States, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). Consequently, the movant is entitled

to no relief in that his plea was knowing and voluntary, and his sentences were more than generous, lawful, and reasonable in light of the negotiated plea and the sentence exposure he faced if convicted at trial.

Finally, when viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner due process of law. The petitioner therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9 Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10 Cir. 1990)(stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the petitioner's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

Notwithstanding, careful review of the record confirms that the movant's plea was knowing and voluntary, and his sentences lawfully entered. See United States v. Moriarty, 429 F.3d 1012, 1019 (2005); See generally United States v. Clayton, 447 Fed.Appx. 65 (11th Cir. 2011) (defendant received close assistance of counsel where, during plea colloquy, defendant "confirmed that he had discussed the charges, plea agreement, and guidelines with his lawyer, had been given adequate time to consult with his lawyer, and was satisfied with his lawyer's representation," and had not

"overcome the strong presumption that statements made during the plea colloquy are true"); United States v. Price, 139 Fed.Appx. 253 (11th Cir. 2005) (no abuse of discretion in denying motion to withdraw guilty plea where plea hearing transcript "makes clear that the district court went through Price's rights with him, that Price understood those rights, that Price was satisfied with his counsel, and that—despite any factual disputes—Price persisted in pleading guilty" and where hearing transcript included defendant's confirmation "that he had consulted his counsel about how to proceed and that he had been 'extremely' satisfied with his counsel's representation").

As will be recalled, at the Rule 11 proceeding, the movant acknowledged he had received a copy of the Superseding Indictment, had discussed the charges with counsel, and confirmed understanding the nature and elements of the offenses. He further confirmed he reviewed the Superseding Indictment and the government's evidence with counsel, and discussed pursuit of any defenses prior to execution of the written plea agreement. Movant affirmed at the Rule 11 hearing that counsel had done everything he had asked, and he did not identify at that time anything further he wanted done on his case. To the contrary, he was unequivocal that he was fully satisfied with counsel's representation and advice. Moreover, he reiterated on multiple occasions that he was entering into the negotiated written plea agreement knowingly and voluntarily, and denied that it was the result of any coercion or threats. Movant's allegation here that he was misadvised he was only going to receive a 24-month sentence is contrary to the representations made at the Rule 11 proceeding, and the written plea agreement, and as such, is evidently disingenuous and contradicted by the record. Movant understood he was facing a significantly greater term of

imprisonment, and was aware that as to Count 10, he was required to serve a consecutive 2-year term of imprisonment, to commence after completion of any other sentence imposed. Therefore, movant has not demonstrated either deficient performance or prejudice in this regard. He cannot satisfy the Strickland standard and is entitled to no relief on that basis.

The movant also suggests he did not want to enter into the plea because he felt the evidence stemmed from an unlawful stop. He claims counsel was required to seek suppression of the evidence seized as a result of the unlawful stop. (DE#1-1:8). Movant's claim the stop was unlawful is bereft of any factual support. Regardless, by entering into a knowing and voluntary plea, movant was advising counsel not to conduct further investigation or pursue further defenses in his case. Additionally, movant waived the right to seek suppression of the evidence by entering into a knowing and voluntary plea. Finally, he has not shown here that even if such a motion had been filed, that he would have prevailed and the evidence seized as a result of the vehicular stop would have been suppressed. Again, as will be recalled, by entering into a knowing and voluntary plea, movant waived all rights to challenge any non-jurisdictional defects and defenses he had to the charged offenses.

Furthermore, the movant entered into a knowing and voluntary stipulated factual proffer in which he agreed to the facts giving rise to the charges, including that he was given a traffic citation resulting from the vehicular traffic stop by the FHP Trooper. Here, he does not dispute he consented to a search of his vehicle thereafter. Regardless, movant has not demonstrated here that, had counsel filed such a motion, the evidence seized as a result of movant's consensual search would have been suppressed. Regardless,

movant also does not appear to allege, let alone demonstrate that, but for counsel's failure to file such a motion, he would not have pleaded guilty and would have proceeded to trial. Failure to make such a showing is fatal to this claim. Hill v. Lockhart, supra.

When faced here with such self-serving allegations in which the movant "has every incentive to embellish," the plea transcript is dispositive on the movant's claims. Movant has not demonstrated here that the plea was anything other than knowing and voluntarily entered. This claim is thus contradicted by his representations and admissions at the Rule 11 change of plea proceedings. In other words, to be entitled to relief under Strickland, the movant must demonstrate not only deficient performance, but that he suffered prejudice as a result of counsel's failure to pursue to do as suggested. No such showing has been made here.

It should also be recalled that by entering into a negotiated plea, the movant benefitted from a downward departure in sentence based on acceptance of responsibility; and, as is evident from the record here, the court further granted an even greater downward variance from the low end of the guideline range. Had he insisted on proceeding to trial, movant faced up to a maximum statutory term of 5 years imprisonment as to the conspiracy offense, a violation of 18 U.S.C. §371 (Count 1), a statutory term of 20 years imprisonment as to the wire fraud offenses, a violation of 18 U.S.C. §1343 (Counts 2-9), and six consecutive terms of 2 years imprisonment as to the aggravated identity theft offenses, in violation of 18 U.S.C. §1028A(1) (Counts 10-15) (Cr-DE#8).

Movant has not demonstrated that had counsel done as suggested, that the evidence seized from the vehicle arising from

a consensual search, would have ben suppressed, much less that the charges would have been dismissed, or that he would have obtained an acquittal of all offenses following a jury trial. His allegations that counsel failed to discuss possible defenses with him so that he could make an informed decision regarding whether or not to plead guilty is clearly refuted by the record. Movant stated under oath that he had discussed the case in general and the government's evidence and possible defenses with counsel prior to changing his guilty plea.

Finally, movant has not demonstrated that he was factually innocent of the charged offenses. To the contrary, the stipulated factual proffer, coupled with the change of plea proceedings, more than amply supports the offenses of conviction. Movant's allegations here to the contrary border on the perjurious. A habeas petitioner attempting to establish "actual innocence" must meet a high standard. Bousley v. United States, 523 U.S. 614 (1998). He must demonstrate that "in light of all the evidence, 'it is more likely than not that no reasonable juror would have convicted him.'" Bousley, supra at 623, quoting, Schlup v. Delo, 513 U.S. 298, 327-328 (1995). The Court emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id. See also High v. Head, 209 F.3d 1257 (11 Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8 Cir.2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2 Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States,153 F.3d 1305 (11 Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him).

To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here, and in fact, the movant's protestations of innocence are refuted by the record. Under the totality of the circumstances present here, the movant is entitled to no relief on this basis. Further, he also cannot fault counsel for failing to pursue this nonmeritorious claim.

Therefore, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to conduct further investigation or pursue further pretrial strategies prior to the movant's change of plea proceeding. Relief is therefore not warranted, and claim 3 fail on the merits in its entirety.

Finally, it should further be noted that this court has considered all of the movant's arguments raised in his §2255 motion. (Cv-DE#s1,1-1). See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, movant has failed to demonstrate he is entitled to vacatur of his convictions and sentences. Thus, to the extent a precise argument, subsumed within the foregoing ground for relief, was not specifically addressed herein, the claim was considered and found to be devoid of merit, warranting no discussion herein. To the extent he attempts to raise new arguments for the first time in objections to this Report, those claims

should be barred.

In conclusion, the record reveals that movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brady v. United States, 397 U.S. 742, 748 (1970).[4] See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984). Moreover, he received a downward variance from the low end of the advisory guideline range. Consequently, he cannot show that the total sentence imposed was either unreasonable or that there was error in the sentencing proceeding. He is thus entitled to no relief on any of the claims presented.

VII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See

[4]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S. 504, 508 (1984).

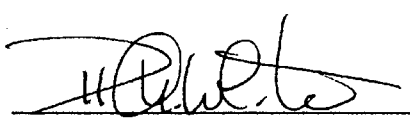
28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Recommendations

It is therefore recommended that this motion to vacate be denied; that a final judgment be entered; a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 7th day of December, 2017.



UNITED STATES MAGISTRATE JUDGE

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ONIEL WINSTON SCARLETT, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 16230
No. 18-10446-B
May 22, 2018, Decided

Notice:

Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Opinion

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Oniel Winston Scarlett has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated May 22, 2018, denying his construed motion for a certificate of appealability in the appeal of the denial of his motion to vacate, 28 U.S.C. § 2255. Because Scarlett 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.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10446-B

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Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

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