APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11807-A

XAVIER HURON SANDERS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Xavier Huron Sanders is a federal prisoner, serving a 120-month sentence after pleading guilty to conspiracy to possess 500 grams or more of cocaine and being a felon in possession of a firearm and ammunition. He has moved for a certificate of appealability ("COA") in order to appeal the denial of his motion to vacate his sentence, 28 U.S.C. § 2255.

To obtain a COA, a § 2255 movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Claim 5(k)

In Claim 5(k), Sanders asserted that he requested that counsel pursue a direct appeal if he received a sentence of ten years' imprisonment or longer. Reasonable jurists would not debate

the district court's determination that counsel did not perform deficiently. The magistrate judge, after hearing testimony from Sanders and Zimet, found Sanders's assertion that he had repeatedly asked Zimet to file a direct appeal not to be credible. This Court must defer to that credibility finding. *See United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). Given that credibility finding, the record does not indicate that Zimet "disregard[ed] specific instructions" to file an appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

As to whether counsel otherwise had a responsibility to consult with Sanders about filing an appeal, the record does not indicate that such a consultation was necessary under the circumstances. *See id.* at 480. Additionally, it is unlikely that Sanders would have been able to challenge his sentence on appeal, given the scope of the sentence appeal waiver, which the court thoroughly explained to Sanders and which he confirmed his understanding of under oath.

Claims 5(b) & 5(f)

In Claim 5(b), Sanders argued that counsel was ineffective for failing to provide discovery to the government evidencing his buyer–seller and gambling relationship with Wesley Dareus, an unindicted co-conspirator from whom Sanders was alleged to have purchased drugs. In Claim 5(f), he argued that counsel should have objected to the factual proffer, which did not state that Sanders bought marijuana and cocaine from Dareus for personal use.

However, the facts, as laid out in the proffer that accompanied the plea agreement, indicate that Sanders was, in fact, engaged in a larger conspiracy. For example, the proffer stipulated that Sanders and Dareus, on several occasions, exchanged distribution-sized quantities of cocaine for money, and law enforcement recovered scales and a strainer containing cocaine residue, along with numerous bags and rubber bands that were consistent with packaging used for drugs and drug proceeds. Sanders also agreed, in both the proffer and the plea agreement,

that he was responsible for 15 to 50 kilograms of cocaine. Accordingly, reasonable jurists would not debate the district court's rejection of these claims.

Claim 5(e)

Sanders asserted that counsel failed to file a motion to correct an invalid plea agreement, where he was held responsible for over 15 kilograms of cocaine, despite the fact that he had pleaded guilty to a lesser included offense of conspiracy to possess with intent to distribute 500 grams or more of cocaine. However, as the district court noted, the 500-gram quantity of cocaine represented the floor, not the ceiling, of the drug quantity for which Sanders could be held responsible for sentencing purposes. Accordingly, there was no error in the plea agreement regarding the drug quantity, and counsel did not perform deficiently in failing to object to the alleged error.

Claims 5(a), 5(c) & 5(d)

These claims all involved counsel's alleged failure to file various pretrial motions. However, counsel did, in fact, file these motions, and, therefore, he did not perform deficiently in the manner alleged.

Claims 5(g), 5(h) & 5(i)

These claims all involved counsel's failure to raise various objections to the presentence investigation report ("PSI"). Sanders first argued that counsel should have objected to the base offense level in the PSI on the ground that he should have been held responsible for less than 2 kilograms of cocaine, which would have resulted in a base offense level of 24, rather than 32. However, both the plea agreement and the factual proffer stipulated that Sanders would be held responsible for 15 to 50 kilograms of cocaine. Sanders never objected to these portions of the plea agreement or the factual proffer.

Sanders next argued that counsel should have objected to the two-level firearm enhancement. However, counsel did, in fact, raise such an objection in the sentence memorandum filed on Sanders's behalf, although the issue was not directly argued during the sentencing hearing. In any case, the objection was without merit, and the court properly applied the enhancement. Finally, Sanders argued that counsel should have moved for a sentence reduction based on Sander's minor role in the conspiracy. As the district court noted, Sanders acknowledged, via the factual proffer, that he was responsible for receiving large distributable quantities of cocaine from Dareus. Therefore, he would not have been able to show that his role in the conspiracy was minor.

Claim 5(j)

Sanders next argued that counsel failed to move to vacate his purportedly illegal sentence. He appeared to believe that, because he was sentenced to the statutory maximum sentence of ten years' imprisonment for the felon-in-possession count, his sentence of ten years' imprisonment plus three years of supervised release exceeded the statutory maximum. However, a statutory maximum refers only to the term of imprisonment, not any additional term of supervised release. Counsel therefore would have had no basis on which to argue that the sentence as imposed exceeded the statutory maximum.

Claim 6

In his final ineffective-assistance claim, Sanders argued that he was forced by counsel to plead guilty to offenses that he did not commit. Specifically, he claimed that he would not have pleaded guilty had Zimet not misled him "about the entire defense that [Sanders] wanted to present." He offered no further details regarding how, specifically, Zimet misled him.

The record indicates that, at the plea hearing, Sanders confirmed to the district court that he had read the plea agreement before signing it, he had fully discussed the terms and conditions of the plea agreement with counsel, he understood the terms of the plea agreement, no promises were made to him that were not contained in the plea agreement, no one had forced or coerced him into pleading guilty, and he was entering a guilty plea of his own free will. His statements, made under oath during the plea colloquy, carry a strong presumption of veracity that he failed to overcome. *See United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988). Accordingly, reasonable jurists would not debate the district court's rejection of this claim.

Claims 1, 2, 3 & 4

In Claims 1, 2, 3, and 4, Sanders alleged various instances of government misconduct and trial court error. Reasonable jurists would not debate the district court's conclusion that these claims were unexhausted, as Sanders did not raise any of the identified claims on direct appeal. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). Sanders appeared to assert that his failure to raise these claims should be excused due to counsel's failure to file a notice of appeal. However, as discussed above, counsel did not perform deficiently in failing to pursue a direct appeal, and, in any case, the claims would have been barred by the appeal waiver, which, as discussed, he submitted to knowingly and voluntarily.

CONCLUSION

For the reasons discussed above, reasonable jurists would not find debatable or wrong the district court's denial of Sanders's § 2255 motion, and his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 18-11807-A

XAVIER HURON SANDERS.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11TH CIR. R. 27-2 MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER DENYING MOTION FOR CERIFICATE OF APPELABILITY BY APPELLANT XAVIER HURON SANDERS

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This case is entitled to preference as a 28 U.S.C 2255 appeal.

U.S. v. Sanders
No. 18-11807-A

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-1, the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

1. Cohn, James
2. Dobson, Brian
3. Sanders, Xavier
4. Smachetti, Emily
5. Wallace, Arthur
6. White, Patrick
7. Zimet, Bruce

11TH CIR. R. 27-2 MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER DENYING MOTION FOR CERIFICATE OF APPELABILITY BY APPELLANT XAVIER HURON SANDERS

Xavier Huron Sanders, by and through undersigned counsel, respectfully moves this Court to reconsider, vacate or modify the order denying motion for certificate of appealability, dated October 5, 2018 as to the following previously presented question:

Whether the district court erred by denying Appellant's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. §2255, alleging ineffective assistance of counsel in failing to file an appeal and additional issues?

PROCEDURAL HISTORY

On July 6, 2018, Appellant filed his Motion for Certificate of Appealability arguing that . On October 5, 2018, this court entered an order denying Appellant's Motion for Certificate of Appealability. Appellant requests this Court to reconsider this decision based upon the following arguments.

This Court's order as to Claim 5(k), pages one and two of the order, held that reasonable jurists would not debate the district court's determination that

counsel did not perform deficiently, based upon the magistrate court's determination that Appellant was not a credible witness as to Claim 5(k). The decision incorrectly concluded that Appellant (Sanders) asserted that he requested that counsel pursue a direct appeal if he received a sentence of ten years imprisonment or longer. The magistrate court held that: "The movant did not ask counsel to file a notice of appeal at the sentencing hearing or at any time before or after sentencing. The Undersigned found Zimet's testimony to be credible in all respects. Petitioner and Zimet decided to pursue a Rule 35 motion. As a result, Petitioner met with Federal Agents and the AUSA for a debriefing. If Petitioner had filed a direct appeal, any chance at a Rule 35 motion would come to an end. The Undersigned did not find the movant's testimony that he expressly requested Zimet to file a notice of appeal to be credible. It made no sense for Petitioner to file an appeal after he had begun to cooperate with the government and hoped that the AUSA would filed a Rule 35 motion. On redirect examination, Petitioner conceded that he was under the impression that a direct appeal would interfere with the cooperation process. He clearly believed that pursuing a Rule 35 motion was a priority. This was his mind set at the sentencing hearing, as a result, it is not believable that he asked his lawyer to

file a direct appeal. Based on the foregoing, it is reasonable to conclude that the movant did not expressly ask Zimet to file a notice or appeal more charges. Specifically, that he was dealing drugs while on supervised release. Zimet concluded that challenging any facts further in open court, could cause the AUSA to decide to file a superseding indictment. Petitioner appeared on board for the 120-month sentence, and submitted an allocution at the sentencing hearing. D.E. 16-29. Appellant wanted to appeal the sentence because he did not receive the benefit of his plea bargain which reduced his cocaine drug weight range to level 26 with a prison range of 63-78 months. If Appellant would have been satisfied with a ten year sentence then why would he negotiate the penalty trigger weight down from 5 kilograms to 500 grams of cocaine. His ultimate sentence was twice the minimum mandatory and almost double the low end of the guideline range for 500 grams of cocaine which is 63 months. Under these circumstances, at the very least, Appellant was entitled to consultation regarding appellate options. Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). Appellant argued in his pro se motion to vacate that "Movant would like the records to reflect that the Movant repeatedly requested that counsel (Bruce A. Zimet) file a Appeal Brief in Movant's behalf, in which counsel (Bruce A.

Zimet) had Movant to believe that Movant had a direct appeal pending before the honorable Eleventh Circuit Court of Appeals." (D.E.-1-6). Appellant submits that the court misconstrued this point and that reasonable jurists could debate this point in favor of the issuance of a certificate of appealablity.

Appellant further points out that as to Claims 5(b) and 5(f) on page 2-3 of the order, the court referenced facts outlined in the proffer filed with the plea agreement that Appellant agreed in the proffer that he was responsible for 15 to 50 kilograms of cocaine in denying a certificate of appealability as to Claims 5(b) and 5(f). Appellant submits that on page 5 of the factual proffer, the words five kilograms of are deleted by drawing a black line through the words making the sentence read Sanders received cocaine from Sanders. Also, as to Claim 5(e), the court held that the 500 grams represented the floor and not the ceiling, omits the fact that the 500 gram cocaine weight in the plea agreement was a lesser included offense based upon cocaine weight originally indicted of 5 kilograms. From the perspective of Appellant, there is no practical incentive or benefit to Appellant by pleading guilty to a lesser included offense with a five year versus ten year minimum sentence (while at the same time deleting the weight language five kilograms). There was a clear expectation that a lesser

sentence was being contemplated based upon 500 grams (Level 26; 63-78 monts) of cocaine versus 5 kilograms (Level 30; 97-121 months). The district court findings to the contrary could certainly be argued by reasonable jurists. These distinction supports Appellant's claim that a certificate of appealability should be granted in this case.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reconsider the prior order and grant a Certificate of Appealability in this case.

DATED this 26th day of November, 2018.

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/s/ A. Wallace

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

The Appellant hereby certifies that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7). It does not contain more than 14,000 words. This brief contains 1,261 words as computed using Microsoft Word 2000.

/s/ A. Wallace

Arthur L. Wallace III, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ECF electronic filing to:

U.S. Attorney's Office, Appellate Div.
99 N.E. 4th St.
Miami, FL 33132

on this 26th day of November, 2018.

/s/ A. Wallace

Arthur L. Wallace III, Esq.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11807-A

XAVIER HURON SANDERS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Xavier Huron Sanders has filed a motion for reconsideration of this Court's order dated October 5, 2018, denying his motion for a certificate of appealability, in the appeal from the denial of his 28 U.S.C. § 2254 petition. Because Sanders has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.

APPENDIX "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-22502-CIV-COHN/WHITE
(CASE NO. 15-20731-CR-COHN)

XAVIER HURON SANDERS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

THIS CAUSE is before the Court on the Report and Recommendation Following Evidentiary Hearing [DE 16] ("Report") submitted by Magistrate Judge Patrick A. White regarding Movant Xavier Huron Sanders's pro se Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. DE 1. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the Motion, the Government's response to the Court's order to show cause [DE 8] ("Response"), the pretrial narratives of Movant [DE 11] and the Government [DE 13], the Report, Movant's Objections [DE 35], and the record in this case, and is otherwise advised in the premises.

I. Background

A. Factual Background

In or around March 2014, the Federal Bureau of Investigation and the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives began a joint investigation into the drug trafficking activities of Terell Lorenzo Bibby and Wesley Dareus taking place in

the Miami Gardens neighborhood of Miami, Florida. Cr. DE 307 at 1.[1] Through various forms of physical and video surveillance, as well as judicially-authorized intercepts of Dareus's cellphone, investigators discovered that Bibby and Dareus used a house at 1630 NW 153rd Street in Miami as a stash house where cocaine was stored, diluted, and repacked for distribution. Id.

From December 2014 to August 2015, fixed surveillance installed at the stash house revealed that numerous people would enter the stash house to meet with Bibby and Dareus, and then leave with bags, boxes, and backpacks. Id. at 2-3; see id. at 3-6 (detailing instances of drug trafficking observed by law enforcement surveillance). One of those individuals was Movant Xavier Huron Sanders. Id. at 3.

On August 26, 2015, law enforcement executed a search warrant at Movant's house in Belle Glade, Florida. Id. at 6. A search of the house led to the recovery of two scales and a strainer containing cocaine residue, and numerous bags and rubber bands that are consistent with drug packaging and the packaging of drug proceeds. Id. A search of the Ford F-150 truck registered to Movant led to the recovery of a loaded Glock 26 pistol. Id. A criminal history check indicated that Movant was a previously convicted felon prohibited from possessing a firearm and ammunition. Id. It was later determined that the firearm and ammunition had travelled in interstate commerce. Id.

B. Procedural History

1. Criminal Proceedings. On September 17, 2015, a federal grand jury sitting in the Southern District of Florida returned an eleven-count indictment charging Movant and eleven others with various drug and firearms offenses. Cr. DE 13. Movant was charged in two of those counts: Count 1 charged conspiracy to possess with intent to

[1] Record citations to "Cr. DE" refer to S.D. Fla. Case No. 15-20731-CR-COHN.

distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A)(ii); and Count 11 charged felon in possess of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Id. at 2-3, 11.

Movant's counsel, Bruce A. Zimet, Esq., filed five pretrial motions: (1) a motion to dismiss indictment [Cr. DE 158]; (2) a motion to bifurcate forfeiture and request for jury trial [Cr. DE 159]; (3) a motion to sever Movant [Cr. DE 160]; (4) a motion to suppress physical evidence [Cr. DE 161]; and (5) a motion to suppress wiretap evidence [Cr. DE 163]. At a January 6, 2016 hearing, the Court denied Movant's motion to dismiss, motion to sever Movant, and Motion to suppress physical evidence, and granted the motion to bifurcate and request for jury trial. Cr. DE 197. On March 17, 2016, the Court issued a written order denying Movant's Motion to Suppress Wiretap Evidence. Cr. DE 296.

On March 23, 2016, pursuant to a plea agreement [Cr. DE 306], Movant pleaded guilty to conspiracy to possess 500 grams or more of cocaine, a lesser included offense of Count 1, as well as Count 11, felon in possession of a firearm and ammunition. Cr. DE 308. Movant and the Government stipulated that, for purposes of Movant's sentence, he be held accountable for at least fifteen but less than fifty kilograms cocaine, resulting in a base offense level of 32. Cr. DE 306 ¶ 7(a). The Government agreed to recommend that the Court impose a Guidelines sentence of 120 months. Id. ¶ 8. The parties also agreed that the 120 month recommendation did not prevent Movant from asking for a sentence at the lowest end of the advisory guideline range, nor did it preclude Movant from arguing for a departure or variance. Id. The agreement also contained an appellate waiver as well. Id. ¶ 11.

At the change of plea hearing, the Court engaged in a colloquy with Movant in accordance with Federal Rule of Criminal Procedure 11. Specifically, the Court reviewed and determined, inter alia, that Movant understood the penalties he faced by pleading guilty, understood the elements of Counts 1 and 11, and understood the nature of the plea agreement's appellate waiver. During the colloquy, Movant confirmed that he was satisfied with Mr. Zimet's representation. The Court also reviewed with Movant his factual proffer, and Movant stated that he signed the proffer to indicate that it was truthful and accurate. Movant stated that he accepted the factual proffer as amended by crossing out the "five kilograms" amount regarding a July 2015 cocaine deal. Movant then pleaded guilty.

On June 7, 2016, the U.S. Probation Office issued its Presentence Investigation Report ("PSI"). Cr. DE 409. The PSI calculated Movant's base offense level at 32, consistent with a quantity of cocaine of at least fifteen but less than fifty kilograms, in accordance with USSG § 2D1.1(c)(4). Id. ¶ 131. Pursuant to USSG § 2D1.1(b)(1), Movant received a two-level increase because a firearm was possessed in the instant offense. Id. ¶ 132. And pursuant to USSG § 3E1.1(a), the PSI deducted three points for Movant's acceptance of responsibility. Id. ¶ 138. The PSI also assigned Movant three criminal history points, producing a criminal history category of II. Id. ¶ 143. The three points were based on Movant's 1997 federal felony conviction for conspiracy to possess with intent to distribute cocaine and cocaine base. Id. ¶ 142. Movant's adjusted offense level of 31 and criminal history category of II yielded a Guidelines range of 121 to 151 months' imprisonment. Id. ¶ 180. As a statutory matter, Count 1 held a mandatory minimum sentence of five years and a maximum sentence of forty

years, 21 U.S.C. § 841(b)(1)(B), while Count 11 held a maximum sentence of 10 years, 18 U.S.C. § 924(a)(2).

On June 15, 2016, Movant's counsel filed a sentencing memorandum that objected to the PSI's two-level enhancement for possession of a firearm and invoked 18 U.S.C. § 3553(a) to urge the Court to recognize a differentiation in the manner in which the firearm was used in the offense, and to adjust Movant's sentence accordingly. Cr. DE 413 at 3. Movant's counsel recommended that the Court sentence Movant to the mandatory minimum term of 5 years, followed by supervised release. Id. at 4.

Movant's sentencing was held on June 17, 2016. Cr. DE 415. At the hearing, Movant acknowledged having received and reviewed the PSI. Cr. DE 468 at 3. The Court followed the PSI's recommended Guidelines calculation of 121 to 151 months. Id. And consistent with the plea agreement, the Government recommended a sentence of 120 months. Id. at 3-4. The Court accepted this recommendation and sentenced Movant to a term of 120 months' imprisonment. Id. at 5.

No appeal was filed.

2. Habeas Proceedings. Movant filed the instant § 2255 Motion on June 30, 2017. DE 1.[2] Liberally construed, the Motion contains the following claims:

[2] The instant § 2255 Motion was timely filed. A federal prisoner must file a motion under 28 U.S.C. § 2255 within one year after his judgment of conviction becomes final. See 28 U.S.C. § 2255(f)(1). Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. See Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). Under Federal Rule of Appellate Procedure 4(b)(1)(A)(i), Movant had fourteen days following the entry of judgment to file his direct appeal. Movant's conviction was entered on the docket on June 17, 2016. Cr. DE 416. Because Movant filed no direct appeal, his conviction became final on July 1, 2016. Pursuant to § 2255's one-year statute of limitation, Movant had until July 1, 2017 to file the instant § 2255 Motion. See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008). Movant delivered his § 2255 Motion to prison authorities for mailing on June 29, 2017. DE 1 at 29-30. Under the prison mailbox rule, the Motion was considered filed on that date. See Fed. R. App. P. 4(c)(1); Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009).

Claims 1 & 2: The Government unlawfully secured an indictment by presenting perjured testimony to the grand jury on two occasions, id. at 7-12;

Claim 3: The Government presented an invalid plea agreement, id. at 13-16;

Claim 4: The Court lacked jurisdiction when it sentenced Movant pursuant to an invalid plea agreement, id. at 16-20;

Claim 5: That Mr. Zimet rendered constitutionally ineffective counsel for:

a. Failing to file a motion to suppress an illegal affidavit in support of a wiretap, id. at 21;

b. Failing to turn over Movant's discovery to the Government evidencing his buyer/seller and gambling relationship with unindicted coconspirator, Wesley Dareus, id. at 22;

c. Failing to file a motion to suppress the firearm and ammunition found in his vehicle, id. at 23;

d. Failing to file a motion to dismiss the indictment, id. at 24;

e. Failing to file a motion to correct the invalid plea agreement, id.;

f. Failing to file a motion to correct the erroneous factual proffer, id.

g. Failing to object to the PSI regarding Movant's base offense level, which should have been calculated pursuant to a quantity of at least 500 grams of cocaine but less than 2 kilograms of cocaine, id. at 25;

h. Failing to object to the two-level enhancement in the PSI pursuant to USSG §2D1.1(b)(1) for possessing a firearm, id. at 26;

i. Failing to file a motion for a minor role reduction, id.;

j. Failing to file a motion to vacate Movant's illegal sentence of 120 months plus three years' supervised release, id. at 27;

k. Failing to file a direct appeal, id.; and

6. That Mr. Zimet also rendered constitutionally ineffective counsel when he forced Movant to enter a guilty plea, id. at 28.

Magistrate Judge White subsequently ordered the Government to show cause why the Motion should not be granted. DE 4. Judge White also determined that Claim 5(k)—that Movant was denied effective assistance of counsel when Mr. Zimet did not

file a direct appeal—warranted an evidentiary hearing. DE 6 at 1-2. Judge White also appointed Movant counsel for purposes of these § 2255 proceedings. Id. at 2-4.

Judge White held an evidentiary hearing on October 17, 2017. DE 15. Movant testified on his own behalf and also presented testimony from his fiancé, Intheay Martin. Id. The Government presented testimony from Mr. Zimet. Id.

Three days later, Judge White issued his Report recommending that all of Movant's claims be rejected, that the Motion be denied, and that no certificate of appealability be issued. DE 16. Movant timely filed Objections to the Report. DE 35.

II. Discussion

A. Ineffective Assistance of Counsel

The Court first address Movant's long list of allegations that his trial counsel was constitutionally ineffective. In considering these claims, the Court is guided by the familiar principles set out in Strickland v. Washington, 466 U.S. 668 (1984). In order to show that his counsel's performance was constitutionally ineffective, a defendant must prove, by a preponderance of the evidence: (1) that his counsel's performance was deficient, i.e., that his counsel's representation was objectively unreasonable under prevailing professional norms; and (2) that counsel's deficient performance prejudiced the defendant, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 687-96; Chandler v. United States, 218 F.3d 1305, 1312-19 (11th Cir. 2000) (en banc). In determining whether counsel's performance was deficient, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Strickland's two-part test applies

in the context of plea bargaining and the entry of guilty pleas. See Missouri v. Frye, 566 U.S. 134, 140-49 (2012); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

As noted, Judge White held an evidentiary hearing on Movant's claim that Mr. Zimet was ineffective for failing to file a direct appeal. The Court will therefore consider that claim first.

1. Claim 5(k). "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). On the one hand, "an attorney who fails to file an appeal on behalf of a client who specifically requests it acts in a professionally unreasonable manner per se." Gomez-Diaz v. United States, 433 F.3d 788, 791-92 (11th Cir. 2005). And on the other, "even if the client does not directly request an appeal, counsel generally has a duty to consult with him about an appeal." Devine v. United States, 520 F.3d 1286, 1288 (11th Cir. 2008) (per curiam).

"[W]here a defendant has not specifically instructed his attorney to file an appeal," a court "'must still determine whether counsel in fact consulted with the defendant about an appeal.'" Thompson v. United States, 504 F.3d 1203, 1206 (11th Cir. 2007) (quoting Flores-Ortega, 528 U.S. at 478). In this context, the term "consult" means, "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." Flores-Ortega, 528 U.S.at 478. The Supreme Court's precedent instructs that "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. In making this determination, the court 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." Otero v. United States, 499 F.3d 1267, 1270 (alterations and internal quotation marks omitted).

Consistent with Strickland's teachings, prejudice is presumed absent a "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." Flores-Ortega, 528 U.S. at 484. Finally, when it comes to an out-of-time guilty plea "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id.

Applying these principles, the Court holds as follows: First, a rational convicted defendant in Movant's circumstances would not have wanted to file an appeal. And second, Movant did not reasonably demonstrate to Mr. Zimet that he was interested in appealing. Having sat through the evidentiary hearing—the details of which are comprehensively detailed in the Report, see DE 16 at 23-29—Judge White concluded that, at no point before, during, or after the sentencing hearing did Movant ask Mr. Zimet to file a notice of appeal. Id. at 29. In reaching this conclusion, Judge White found Movant's testimony that he expressly requested Mr. Zimet to file an appeal of any ten-year sentence to lack credibility. Id. Having conducted a de novo review of the record, the Court discerns no reason to question this credibility determination.

The Court also agrees with Judge White that Movant's plea agreement with the Government and subsequent entry of his guilty plea was based off of his cooperation with the Government and hope for a future reduction of sentence under Federal Rule of Criminal Procedure 35. Id. Indeed, on redirect examination at the evidentiary hearing, Movant conceded that he was under the impression that a direct appeal of his guilty plea would interfere with his cooperation with the Government and anticipated Rule 35 motion. Id. Against this background, the Court holds that a reasonable defendant like Movant—who negotiated a plea with the Government and entered that plea with the hope that his cooperation with the Government would result in a reduction of sentence—would not want to file a direct appeal. It follows that Mr. Zimet did not render constitutionally ineffective counsel when he declined to file an appeal.

2. Claims 5(b) & 5(f). In Claim 5(b), Movant argues that his counsel was ineffective for failing to provide discovery to the Government evidencing his buyer-seller and gambling relationship with unindicted coconspirator Wesley Dareus. In Claim 5(f), Movant contends that his counsel was ineffective for failing to correct an erroneous factual proffer to state that Movant bought marijuana and cocaine from Dareus for personal use and to bet on gambling tickets. Both points lack merit, as neither can be squared with the law and the record in this case.

Taking Claim 5(b) first, Movant's assertion that he was in a buyer-seller and gambling relationship with Dareus ignores "the critical distinction between a conspiratorial agreement and a buyer-seller transaction." United States v. Mercer, 165 F.3d 1331, 1335 (11th Cir. 1999) (per curiam). A conspiracy is demonstrated when the Government proves (1) an agreement between the defendant and one or more persons,

(2) the object of which is to do either an unlawful act or a lawful act by unlawful means. Id. at 1333. "The essence of a conspiracy, then, is an agreement, not a commission of the substantive offense." Id. at 1335. In a buyer-seller relationship, by contrast, the parties reach an agreement, but that agreement amounts to nothing more than a mere exchange of drugs for money. Id. This type of transaction "is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." Id. (internal quotation marks omitted). Thus, "[w]here the buyer's purpose is merely to buy and the seller's purpose is merely to sell, and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown." Id. (internal quotation marks omitted).

When it comes to drug distribution conspiracies, evidence of the details of a drug delivery may be sufficient. See United States v. Carcaise, 763 F.2d 1328, 1331 n.6 (11th Cir. 1985). An inference of intent to distribute can be drawn, moreover, from a person's possession of a large quantity of illegal drugs. See United States v. Madera-Madera, 333 F.3d 1228, 1233 (11th Cir. 2003). And that intent can be proven circumstantially based on the "existence of implements such as scales commonly used in connection with the distribution of cocaine." United States v. Poole, 878 F.2d 1389, 1392 (11th Cir. 1989).

The facts in this case portray all of the features of a drug conspiracy involving Movant and Dareus. Movant stipulated in the factual proffer that, on several occasions, he and Dareus exchanged distribution-sized quantities of cocaine for money. See Cr. DE 307. Movant acknowledges as well that a search of his home in Belle Glade, Florida revealed two scales and a strainer that contained cocaine residue, together with

numerous bags and rubber bands consistent with drug packaging and the packaging of drug proceeds. Id. at 6.

When asked at the Rule 11 change of plea hearing whether he had reviewed the seven-page factual proffer, Movant answered affirmatively. Cr. DE 467 at 12. He further represented to the Court that he agreed with all of the facts contained in the factual proffer, and that he signed and dated the factual proffer, indicating his agreement as to the truthfulness of the facts contained in it. Id. Movant also acknowledged that he made and initialed changes to the factual proffer and that he agreed with those changes. Id. at 8, 12. He indicated as well that he signed the revised plea agreement and agreed to it. Id. at 8. Finally, Movant agreed in both the factual proffer and the plea agreement that he was responsible for "over fifteen kilograms but less than fifty kilograms of cocaine" in the drug conspiracy. Cr. DE 306 ¶ 7(a); Cr. DE 307 at 7.

At no point during the Rule 11 hearing did Movant indicate that he did not agree with the contents of the factual proffer. Cr. DE 467 at 12. And when asked by the Court whether he had any questions about his entry of a guilty plea, Movant responded, "No, sir." Id. at 13. Again, at sentencing, Movant declined to express any concerns to the Court when given the opportunity to do so. See Cr. DE 468 at 4.

Accordingly, Claims 5(b) and 5(f) lack merit and must be rejected.

3. Claim 5(e). In Claim 5(e), Movant asserts that his counsel was ineffective due to a failure to file a motion to correct an invalid plea agreement. This argument is frivolous. The plea agreement was invalid, Movant says, because he pleaded guilty to the lesser included offense of conspiracy to possess with the intent to distribute more

than 500 grams of cocaine, but was held accountable for at least fifteen but less than fifty kilograms cocaine. See Cr. DE 306 ¶¶ 1, 7(a); Cr. DE 468 at 3. The 500-gram quantity of cocaine that Movant pleaded guilty to sets a floor, not a ceiling. Whatever inconsistency Movant may perceive between the two drug amounts, none exists. That being so, there was simply no basis for Movant's counsel to object to the plea agreement. It follows that counsel's performance was not deficient.

4. Claims 5(a), 5(c), & 5(d). In Claims 5(a), 5(c), and 5(d), Movant claims that his counsel was ineffective for failing to file the following pretrial motions: a motion to suppress wiretap evidence (Claim 5(a)); a motion to suppress the firearm and ammunition discovered in Movant's Ford F-150 (Claim 5(c)); and a motion to dismiss the indictment (Claim 5(d)). Movant's counsel did, in fact, file those motions. See Cr. DE 158 (Motion to Dismiss Indictment); Cr. DE 161 (Motion to Suppress Physical Evidence); Cr. DE 162 (Motion to Suppress Wiretap Evidence). These claims are therefore rejected.

5. Claims 5(g), 5(h), & 5(i). In Claims 5(g), 5(h), and 5(i), Movant asserts that his counsel was ineffective for failing to make various objections to the PSI. Each claim lacks merit.

In Claim 5(g), Movant says that his counsel should have objected to the base offense level in the PSI. Specifically, Movant argues that his base offense level should have been 24, rather than 32, because he is responsible for "500 grams but less that 2 kilograms of cocaine." DE 1 at 25. As already noted, in both the plea agreement and factual proffer, Movant stipulated that he would be held responsible for at least fifteen but not more than fifty kilograms of cocaine. And as spelled out in the plea agreement,

that amount produces a base offense level of 32. Movant did not object to this calculation in the factual proffer, the plea agreement, or when he entered his guilty plea. His counsel was not deficient for failing to object to the base offense level.

With regard to Claim 5(h), Movant contends that his counsel was ineffective for failing to object to the two-level enhancement he received under USSG § 2D1.1(b)(1) based on the firearm found in his Ford F-150. According to Movant, because no drugs were found near the firearm and Movant was not at his residence in Belle Glade when the vehicle was searched, § 2D1.1(b)(1)'s firearm enhancement does not apply and his counsel was obliged to object.

Section 2D1.1(b)(1) provides that a defendant's base offense level is increased by two levels if he possessed a dangerous weapon during a drug-trafficking offense. The Guidelines commentary instructs that the firearm enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG § 2D1.1(b)(1) cmt. n.11(A). "The government has the burden under § 2D1.1 to demonstrate the proximity of the firearm to the site of the charged offense by a preponderance of the evidence. If the government is successful, the evidentiary burden shifts to the defendant to demonstrate that a connection between the weapon and the offense was clearly improbable." United States v. Audain, 254 F.3d 1286, 1289 (11th Cir. 2001) (citation and internal quotation marks omitted). The Government is not required to prove, however, that the firearm was used to facilitate the distribution of drugs; all the Government needs to prove is that the firearm was present during drug-trafficking activity. Id. at 1289-90.

The Government adequately demonstrated that Movant received several kilograms of cocaine from Dareus in his Ford F-150 on truck more than one occasion. To add onto the Government's proof, law enforcement searched the truck and discovered the firearm while it was parked outside of Movant's home. And as already noted, during the physical search of the home law enforcement also found drug scales and paraphernalia. "[P]roximity between guns and drugs, without more, is sufficient to meet the government's initial burden under § 2D1.1(b)(1)." United States v. Carillo-Ayala, 713 F.3d 82, 91 (11th Cir. 2013). Such a showing by the Government creates "a strong presumption that a defendant aware of the weapon's presence will think of using it if his illegal activities are threatened." Id. at 92. Movant has offered no evidence—not in his § 2255 Motion or before his sentence was imposed—to show that the connection between the firearm and his drug-trafficking was clearly improbable. Movant's counsel was thus not ineffective for failing to object to the firearm enhancement.

Finally, in Claim 5(i), Movant argues that his counsel was deficient during the sentencing phase for failing to pursue a sentence reduction based on his alleged minor role in the drug-trafficking conspiracy. Section 3B1.2 of the Guidelines permits a three-level reduction in a defendant's offense level if he was a "minor participant in any criminal activity." To determinate whether a minor participant reduction is appropriate, a district court must (1) measure the defendant's role against the relevant conduct for which he has been held accountable, and (2) measure the defendant's role against the other participants, to the extent that they are discernable, in that relevant conduct. United States v. Rodriguez De Varon, 175 F.3d 930, 945 (11th Cir. 1999) (en banc). The first factor is oftentimes dispositive. Id. And in the drug courier context, "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.

Movant was anything but a minor participant. He was found responsible for multiple purchases of distributable quantities of cocaine from Dareus—quantities ranging from fifteen to fifty kilograms. As a result, Movant cannot establish that he was a minor player in the conspiracy and likewise cannot show that his counsel was deficient for failing to pursue a minor participant reduction.

6. Claim 5(j). In Claim 5(j), Movant argues that his counsel was deficient for failing to move to vacate Movant's purportedly illegal sentence of 120 months' imprisonment plus three years' supervised released. This contention is legally incorrect. Movant appears to arrive at his conclusion by adding his term of imprisonment to his term of supervised release. But a statutory maximum term of imprisonment refers to the term of imprisonment only. The statutory maximum term of imprisonment for Movant's drug conspiracy conviction under 21 U.S.C. § 846 is forty years, while his statutory maximum term of imprisonment for his felon in possession conviction under 18 U.S.C. § 922(g) is ten years. Grouped together, the PSI recommended a Guidelines range of 121 to 151 months. The Court sentenced Movant to 120 months, below not only both of the statutory maximums, but also his Guidelines range. Because Movant's sentence was altogether legal and proper, his counsel did not render ineffective assistance by failing to move to vacate it.

7. Claim 6. In Claim 6, Movant's final ineffective assistance of counsel claim, he asserts that he was forced by his counsel to plead guilty to offenses that he is innocent

of. But at his Rule 11 change of plea hearing, Movant confirmed to the Court that he read the written plea agreement before he signed it, that he fully discussed the terms and conditions of the written plea agreement with his counsel, that he understood the terms of the plea agreement, that no promises were made to him that were not contained in the plea agreement, that he signed the plea agreement, that no one forced him or coerced him to sign the plea agreement, that no one forced him or coerced him to plead guilty to a lesser included offense, and that he was entering a guilty plea of his own free will. Cr. DE 467 at 8-9. Based on Movant's answers to these questions the Court found that his guilty plea was knowing, intelligent, and voluntary.

"[T]he representations of the defendant, his lawyer, and the prosecutor at such a [change of plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). There is therefore "a strong presumption that the statements made during the [plea] colloquy are true." United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). In light of the sworn answers given by Movant at his Rule 11 hearing, his conclusory allegations in the § 2255 Motion do nothing to indicate that he was forced by his counsel to enter a guilty plea.

B. Remaining Allegations

In Claims 1, 2, 3, and 4, Movant alleges various instances of misconduct on behalf of the Government, as well as additional challenges to his plea agreement. In its Response, the Government asserts that these four claims are procedurally defaulted because Movant failed to raise them on direct appeal. See DE 8 at 21 n.9, 28 n.12. The Court agrees.

As a general matter, claims not raised by a criminal defendant on direct appeal cannot be made for the first time on collateral review unless a showing of cause and prejudice can be made. See United States v. Frady, 456 U.S. 152, 167-68 (1982); Bousley v. United States, 523 U.S. 614, 621-22 (1998).[3] To show cause and prejudice a habeas petitioner "must show that some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [his] own conduct." Lynn v. United States, 365 F.3d 1225, 1235 (11th Cir. 2004).

Movant's only conceivable attempt to make a showing of cause and prejudice to excuse his procedural default is his argument that he requested an appeal that his counsel failed to file. The Court, however, has already rejected this argument and concluded that Movant did not in fact request that his counsel file an appeal. It follows that Movant's claims of misconduct by the Government and additional challenges to the validity of his plea agreement are procedurally defaulted and therefore not properly presented for this Court's review.

C. Certificate of Appealability

The Court will deny a certificate of appealability. Petitioner has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000).

III. Conclusion

For the reasons stated, the Court agrees with Judge White's well-reasoned Report and the recommendations contained therein. Accordingly, it is

[3] The procedural default rule does not apply to claims of ineffective assistance of counsel, which "may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504 (2003).

ORDERED AND ADJUDGED as follows:

1. Magistrate Judge White's Report [DE 16] is **ADOPTED**.
2. Movant's Objections [DE 35] are **OVERRULED**.
3. Movant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 1] is **DENIED**.
4. A certificate of appealability is **DENIED**. The Court notes that, pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Petitioner may now seek a certificate of appealability from the Eleventh Circuit.
5. The Clerk of Court is directed to **CLOSE** this case and **DENY** any pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 27th day of March, 2018.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF

APPENDIX "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 17-CV-22502-COHN
(15-CR-20731-COHN)
MAGISTRATE JUDGE P.A. WHITE

XAVIER HURON SANDERS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE FOLLOWING EVIDENTIARY HEARING

I. Introduction

Xavier Huron Sanders, has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences entered following a guilty plea in case 15-CR-20731-Cohn.

This case 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 Proceedings in the United States District Courts.

The court has reviewed the movant's motion (Cv-DE#1), the government's response (Cv-DE# 8) to this court's order to show cause, the movant's pretrial narrative (Cv DE# 11), the government's pretrial narrative (Cv-DE# 13), the Presentence Investigation Report ("PSI"), the Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file including the plea agreement (Cr DE# 306), factual proffer (Cr DE# 307), change of plea hearing transcript (Cr DE# 467), and sentencing hearing transcript (Cr DE# 468).

The movant, who has appeared *pro se*, has been afforded liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the movant raises the following grounds for relief:

Claims 1 & 2: The government unlawfully secured the indictment by presenting perjured testimony to the grand jury (Cv DE# 1:7-12);

Claim 3: The government presented an invalid plea agreement (Cv DE# 1:13-16);

Claim 4: The court lacked jurisdiction because the plea agreement was invalid (Cv DE# 1:16-20);

Claim 5a: Ineffective assistance of counsel for failing to file a motion to suppress an illegal affidavit in support of a wiretap (Cv DE# 1:21);

Claim 5b: Ineffective assistance of counsel for failing to turn over Movant's discovery to the Government evidencing his buyer/seller and gambling relationship with unindicted coconspirator, Wesley Dareus (Cv DE# 1:22);

Claim 5c: Ineffective assistance of counsel for failing to file a motion to suppress the firearm and ammunition found in his vehicle (Cv DE# 1:23);

Claim 5d: Ineffective assistance of counsel for failing to file a motion to dismiss the indictment (Cv DE# 1:24);

Claim 5e: Ineffective assistance of counsel for failing to file a motion to correct the invalid plea agreement (Cv DE# 1:24);

Claim 5f: Ineffective assistance of counsel for failing to file a motion to correct the erroneous factual proffer (Cv DE# 1:24);

Claim 5g: Ineffective assistance of counsel for failing to object to the PSI regarding his base offense level, which should have been calculated pursuant to a quantity of at least 500 grams of cocaine but less than 2 kilograms of cocaine(Cv DE# 1:25);

Claim 5h: Ineffective assistance of counsel for failing to object to the two point enhancement in the PSI pursuant to USSG §2D1.1(b)(1) for possessing a firearm (Cv DE# 1:26);

Claim 5i: Ineffective assistance of counsel for failing to file a motion for a minor role reduction (Cv DE# 1:26);

Claim 5j: Ineffective assistance of counsel for failing to file a motion to vacate Movant's illegal sentence of 120 months plus three years' supervised release (Cv DE# 1:27);

Claim 5k: Ineffective assistance of counsel for failing to file a direct appeal (Cv DE# 1:27);

Claim 6: Ineffective assistance of counsel for Ineffective assistance of counsel for forcing Petitioner to enter a guilty plea (Cv DE# 1:28).

II. Factual Background and Procedural History

For an appreciation of this case and the claims and arguments raised herein, a full review of the procedural history and facts underlying the criminal convictions is essential.

A. Facts Underlying the Offense

Beginning in or around March 2014, the Federal Bureau of Investigation ("FBI") and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") began a joint investigation into the drug trafficking activities of co-defendant Terell Lorenzo Bibby and un-indicted co-conspirator Wesley Dareus who were distributing quantities of cocaine in the Miami Gardens neighborhood of Miami. (Cr-DE# 307, Factual Proffer). The investigation included various forms of surveillance including physical, video camera, and cell

phone wiretaps. (Id.). The investigation revealed that Bibby and Dareus utilized a house located at 1630 NW 153rd Street in Miami, Florida (the "stash house") where they stored, diluted, and repackaged cocaine for distribution. (Id.:1). Fixed camera surveillance from December 2014 through August 2015 revealed numerous individuals meeting with Bibby and Dareus at the stash house and delivering to Dareus and Bibby bags, boxes, and backpacks. These individuals, in exchange, received objects that they took with them as they left the stash house. (Id.). Movant was one of those individuals. (Id.).

On January 3, 2015, Dareus met with Movant in Movant's Ford F-150. (Id.:2). Law enforcement observed Dareus receive something from Movant and then start counting money while seated in Movant's passenger seat. (Id.). Another meeting between Movant and Dareus occurred at the stash house on January 22, 2015. (Id.). On this day, Movant received a bulk quantity of cocaine from Dareus in exchange for money. (Id.:2-3).

On February 16, 2015, law enforcement observed Dareus receive a plastic bag with spherical objects inside of it from an unknown male outside of the stash house. (Id.:3). Law enforcement concluded, based upon their training and experience, that the plastic bag contained bulk quantities of cocaine. (Id.). Law enforcement further observed Dareus and the unknown male unload three blue plastic containers from the unknown man's minivan and load them into the rear passenger seat and trunk of Dareus's Honda. (Id.). Law enforcement concluded that the blue plastic containers likewise contained bulk quantities of cocaine. (Id.).

On the same day, at approximately 3:00 p.m., Movant arrived at the stash house in his Ford F-150 truck. (Id.). Dareus exited the

stash house and met Movant at the rear passenger door of Dareus's Honda. (Id.:4). Dareus reached into the Honda where the blue plastic containers were located and pulled out a spherical object and handed it to Movant. (Id.). Movant looked at the object, stuck his head into the rear passenger seat area of the Honda, and appeared to be looking at something. (Id.). Movant also smelled the spherical object that he was holding. (Id.). Movant returned to his Ford F-150 truck, parked it next to Dareus's Honda, and Dareus removed one of the blue containers from his Honda and placed it in the bed of Movant's truck. (Id.). Movant then drove away. (Id.).

On May 4, 2015, at approximately 11:45 a.m., law enforcement observed Movant arriving at the stash house in his Ford F-150. (Id.). Law enforcement observed Dareus—from his silver minivan parked outside the stash house—and Movant—from his Ford F-150 truck—exchange soft-sided bags that appeared to contain something inside them. (Id.). Based upon their observations, law enforcement concluded that Movant had paid Dareus for a bulk quantity of cocaine, which Movant had unloaded in his Ford F-150 truck. (Id.). Law enforcement surveilled several other meetings between Dareus and Movant where bags were exchanged. (Id.).

In addition to the surveilled meetings between Dareus and Movant, law enforcement also intercepted several text messages between Dareus and Movant discussing drug transactions. For example, on July 28, 2015, Movant sent a text message to Dareus asking, "Do I need to bring a check or you keeping the check for casket?" Dareus responded, "How many do you need?" Movant called Dareus and asked for the "norm," or normal amount of cocaine. Movant later sent another text message to Dareus stating, "I'll bring 28 and just give me 5," which meant that Movant was bringing $28,000 as a partial payment for a previous cocaine delivery and

requesting five kilograms on consignment. On another intercepted call, Movant and Dareus agreed to meet at the "barber shop." (Id.:5).

On a day in July of 2015, law enforcement observed Dareus travel to his stash house, and then to other houses, ultimately arriving at a barber shop located near NW 95th Street and NW 31st Avenue. (Id.). At approximately 11:15 a.m., law enforcement observed Movant arrive at the barber shop in a van, and walk over to Dareus who was inside of his vehicle. (Id.). Movant then handed something to Dareus, and Dareus handed what appeared to be a bag to Movant. (Id.). Movant placed the bag in the front seat of the van that he arrived in and appeared to be examining its contents. (Id.). Based upon the above conversations and observations by law enforcement, Movant received cocaine from Dareus and paid Dareus money from a prior drug delivery. (Id.). The factual proffer originally stated that the movant received "five kilograms" of cocaine from Dareus, however, this amount was crossed out and initialed by the parties. (Id.).

Another intercepted conversation that occurred between Dareus and Movant on August 21, 2015 revealed Dareus's agreement to deliver a kilogram of cocaine to Movant. (Id.). That same evening, law enforcement observed Dareus arrive at Movant's house in Belle Glade, Florida. (Id.). Movant met with Dareus outside, where Movant received one kilogram of cocaine from Dareus. (Id.:6).

On August 26, 2015, law enforcement executed a search warrant at Movant's house in Belle Glade and recovered approximately $12,300, as well as documents in Movant's name. (Id.). Also recovered from Movant's home were two scales and a strainer that contained cocaine residue, as well as numerous bags and rubber

bands typically used to package drugs and drug proceeds. (Id.). A search of Movant's Ford F-150 further revealed a loaded Glock 26 pistol inside a small bag on the floorboard behind the driver's seat. (Id.). The Ford F-150 was registered to Movant. A criminal history check confirmed that Movant was a previously convicted felon who was not authorized to possess a firearm or ammunition. (Id.). An analysis of the firearm and ammunition located inside of Movant's truck verified that both had traveled in interstate commerce. (Id.). According to the factual proffer, Movant was responsible for over fifteen but less than fifty kilograms of cocaine. (Id.:7).

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

On September 17, 2015, a federal grand jury in the Southern District of Florida charged Movant and eleven co-conspirators with various drug and firearm offenses. Specifically, Movant was charged in two counts of an eleven-count indictment: (1) conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of Title 21, United States Code, Section 846 (Count 1); and (2) felon in possession of a firearm and ammunition, in violation of Title 18, United States Code, Section 922(g)(1) (Count 11) (Cr-DE# 13).

Movant's counsel filed various motions on Movant's behalf prior to Movant's guilty plea. In total, Movant's counsel filed five pretrial motions: (1) motion to dismiss indictment; (2) motion to bifurcate forfeiture and request jury trial; (3) motion to sever Movant; (4) motion to suppress physical evidence; and (5) motion to suppress wiretap evidence (Cr-DE# 158-162). On January 6, 2016, the district court, ruling from the bench, denied all of Movant's motions for relief with the exception of his motion to suppress

wiretap evidence, which the district court took under advisement (Cr-DE# 197). On March 17, 2016, the district court denied Movant's motion to suppress wiretap evidence by written order (Cr-DE# 296).

On March 23, 2016, the district court conducted a change of plea hearing wherein Movant entered a guilty plea to the lesser included offense of Count 1 of the indictment for conspiring to possess with intent to distribute 500 grams or more of cocaine, and Count 11 charging him with being a felon in possession of a firearm and ammunition, pursuant to a plea agreement (Cr-DE# 467, Change of Plea Hearing Transcript). The plea agreement provided that as to the lesser included offense in Count 1 of the indictment, the district court must impose a statutory minimum mandatory sentence of five years (Cr-DE# 306, Plea Agreement, ¶3). The plea agreement further stipulated that the parties would jointly recommend that the Movant be held accountable for at least fifteen but less than fifty kilograms of cocaine, resulting in a base offense level of 32. (Id.:¶7(a)). The parties further agreed to recommend that the district court impose an advisory guideline sentence of 120 months' imprisonment, recognizing that this recommendation was not binding on the district court or the probation office. (Id.:¶8). The parties also agreed that the recommendation of 120 months did not prevent the Movant from asking for a sentence at the "lowest end of the advisory guideline range, and the [Movant] may still argue for a departure or variance." (Id.). The plea agreement further included an appellate waiver. (Id.:¶11).

The district court conducted a colloquy with Movant during which he answered questions under oath regarding his decision to plead guilty. The district court specifically reviewed with Movant his understanding of the penalties he faced because of his guilty plea and the movant stated he understood. (Cr-DE# 467:4-5). The

Movant further acknowledged his understanding of the elements of both Counts 1 and 11. (Id.:5-6).

The plea agreement contained an appellate waiver that the district court thoroughly reviewed with Movant. Upon reviewing the waiver with Movant, and confirming that he fully had discussed it with his counsel and understood it, the district court found that Movant had made a "knowing[], intelligent[], and voluntary[] waive[r] [of] his right to appeal in accord with the language contained in paragraph 11 of the plea agreement." (Id.:10).

The district court further inquired about Movant's satisfaction with counsel and his review of the indictment and plea agreement. Movant confirmed that his counsel had reviewed these documents and movant stated he was satisfied with counsel's representation. (Id.:3-4; 8-9).

The district court also reviewed the factual proffer with Movant, who stated he signed the proffer to indicate that the facts contained therein were truthful and accurate. (Id.:12). Movant specified that he accepted the factual proffer as amended by crossing out the "five kilograms" amount regarding the cocaine deal in July of 2015. (Id.). After the court thoroughly explained the plea agreement, proffer, and consequences of his plea; Movant pled guilty. (Id.:13).

On June 7, 2016, U.S. Probation issued the final PSI (Cr-DE# 409). The PSI calculated Movant's base offense level at 32, consistent with a quantity of cocaine of at least fifteen but less than fifty kilograms, pursuant to USSG §2D1.1(c)(4). (PSI ¶131). The PSI further reflected a 2-point increase in Movant's offense level because a firearm was possessed in the instant offense,

pursuant to USSG §2D1.1(b)(1). (PSI ¶132). The PSI deducted three points for Movant's acceptance of responsibility, pursuant to USSG §3E1.1(a). (PSI ¶138). The total offense level was set at 31. (PSI ¶139).

The movant had a total of three criminal history points, yielding a criminal history category 2. (PSI ¶143).

Statutorily, as to Count One, the minimum term of imprisonment was 5 years and the maximum term was 40 years, 21 U.S.C. §841(b)(1)(B); as to Count 11, the maximum term of imprisonment was 10 years, 18 U.S.C. §924(a)(2). (PSI ¶179). With a total offense level of 31 and a criminal history category 2, the guideline imprisonment range was set at 121-151 months' imprisonment. (PSI ¶180).

On June 15, 2016, Movant's counsel filed a sentencing memorandum objecting to the two-point enhancement for the possession of a firearm as calculated in the PSI and also advocating various 18 U.S.C. §3553 factors the district court should take into account in sentencing Movant below the adjusted offense level that "incorporate[ed] the involvement of the firearm" (Cr-DE# 413). Movant's counsel ultimately recommended the imposition of the five-year mandatory minimum prison sentence with "strict supervision and restrictions imposed upon [Movant]" to follow. (Id.).

On June 17, 2016, the District Court conducted a sentencing hearing (Cr-DE #415, Sentencing Hearing Transcript). Movant acknowledged receiving and reviewing the PSI. (Id.:3). Movant opted to address the district court prior to being sentenced:

> **The Defendant:** Yes, sir. I allowed some personal circumstances to make me make bad decisions, and I regret that because I should not have put my family in this position again, and I apologize to my mother for that. She's 66 years old. I'm leaving her again, and I regret it, Your Honor. I hate it. I hate I've done this to her. But I ask that you have mercy on me today. And if you can go below my guideline range, I will greatly appreciate it. And I thank you.

(Id.:4). The district court followed the PSI calculations, finding that Movant's total offense level was 31, with a criminal history category 2, and a resulting guidelines range of 121 to 151 months. (Id.:3). The Government, consistent with the plea agreement, recommended a sentence just below the guidelines range at 120 months. (Id.:3-4). The district court sentenced Movant to 120 months' imprisonment. (Id.:5). Movant did not take a direct appeal from his conviction or sentence.

The Judgment was entered on the docket on **June 17, 2016**. (Cr-DE#416). No direct appeal was prosecuted. Thus, the Judgment became final on **July 1, 2016**, fourteen days after the entry of the judgment, when time expired for filing a notice of appeal.[1] The movant had one year from the time his conviction became final, or no later than **July 1, 2017**,[2] within which to timely file this

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[1]Where, as here, a defendant does not pursue a direct appeal, his 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). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1).

[2]See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09

federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

From the time his conviction became final on **July 1, 2016**, just under a year passed before movant timely filed the instant petition under 28 U.S.C. §2255 on **June 29, 2017**. (DE#1).[3]

The Undersigned concluded that Petitioner's claim that is his counsel failed to file a direct appeal as requested warranted an evidentiary hearing. As a result, this Court appointed counsel and set an evidentiary hearing. (Cv DE# 6). The government filed a response to this court's order to show cause and a pre-trial narrative. (Cv DE# 8, 13). The movant also filed a pre-trial narrative. (DE# 11).

III. Threshold Issues: Timeliness

(7th Cir. 2000)); see also, 28 U.S.C. §2255.

[3]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

As narrated previously, the movant's judgment of conviction became final on **July 1, 2016**. The movant had until **July 1, 2017** to timely file his §2255 motion. Movant timely filed the instant §2255 motion on **June 29, 2017**.

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 federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. 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." Id. To obtain this relief on collateral review, however, a petitioner 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).

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." 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. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (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").

It should further be noted that the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005). The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. Id.

A. Guilty Plea Principles

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 she 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). See also United States v. Ruiz, 536 U.S. 622, 629 (2002); Hill v. Lockhart, 474 U.S. 52, 56 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n. 13 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005); United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, she may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, United States v. Patti, 337 F.3d 1317, 1320 (11th Cir. 2003), cert. den'd, 540 U.S. 1149 (2004),

attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U.S. 258, 267 (1973); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, United States v. Fairchild, 803 F.2d 1121, 1123 (11th Cir. 1986). To determine that a guilty plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id. See United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005) (per curiam); United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005).[4]

In other words, 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). A guilty plea must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. Mabry, 467 U.S. at 509, quoting, Brady v. United States, 397 U.S. at 748. If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty

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[4]In Moriarty, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

plea under the Due Process Clause. Mabry, 467 U.S. at 509. See also Santobello v. New York, 404 U.S. 257 (1971).

B. Ineffective Assistance of Counsel Principles

Because the movant asserts in the 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 (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 (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, ___ U.S. ___, ___, 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., 480 F.3d 1092, 1100 (11th Cir. 2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 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 (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.").

As will be demonstrated in more detail *infra*, the movant is not entitled to vacatur on any of the arguments presented. 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).

V. Discussion

A. Evidentiary Hearing Claim

In **claim 5k**, movant asserts that counsel was ineffective for failing to file a direct appeal as requested. (Cv-DE# 1:27).

On its face, movant's §2255 motion provides facts which may support his claim that his lawyer erroneously failed to file a direct appeal. As a result, the claim was not conclusively refuted by the record, and warranted further evidentiary findings.

Complying with this court's order setting an evidentiary hearing, the parties filed pre-trial narrative statements. The movant's pre-trial narrative provides as follows:

> 1. Movant submits that the following represents a fair narrative written statement of this case. Movant submits that he requested his lawyer to file a notice of appeal in his case. The record will show that no notice of appeal was ever filed on any date after his sentencing hearing.
>
> 2. Movant submits that the following facts will be demonstrated by Movant's testimony. MOvant was sentenced by the District Court on June 17, 2016. (Cr DE# 416). Movant requested his lawyer to file a notice of appeal, no notice of appeal was filed. Movant's issues on appeal

are meritorious, specifically, that his guideline computations were incorrect and that his sentence was unreasonable.

3. Movant's prejudice stems from the lack of a direct appeal to raise his claims regarding his conviction and sentence, specifically, that he received an illegal and unreasonable 10 years sentence.

4. Movant submits that the following exhibits will be offered in support of his claim: (1) the docket sheet from his criminal case, (2) the judgment, and (3) the motion to vacate with attachments. Movant submits that he will testify in support of his claims and that he requested an appeal with his counsel in person after his sentencing hearing and telephoned his counsel thereafter as did his wife. Both movant and his wife phoned counsel and left messages which were not returned. Movant was not visited at FDC Miami by counsel after his sentencing. Movant believes that his counsel had a duty to consult with him regarding his right to a direct appeal. Movant further contends that additional grounds exist to vacate his sentence which would have been raised on direct appeal: (1) perjured testimony was presented to the Grand Jury, (2) his plea agreement was invalid, (3) the District Court lacked jurisdiction, (4) counsel was ineffective for not filing a motion to suppress the wiretap, (5) for failing to provide discovery to the government regarding his buyer/seller gambling relationship with Wesley Dareus, (6) for failing to move to suppress the firearm and ammunition seized from his vehicle, (7) for failing to file a motion to dismiss the indictment, (8) for failing to correct his invalid plea agreement, (9) for failing to file a motion to correct his erroneous factual proffer, (10) for failing to object to the drug quantity in his PSI report, (11) for failing to object to the +2 level increase for firearm, (12) for failing to seek a minor role reduction, (13) for failing to file a motion to vacate his sentence, and (14) for forcing movant to plea guilty.

5. Intheay Martin, address available upon request of undersigned counsel, movant's wife, will testify that she made telephone calls to the office of movant's trial counsel and left messages regarding movant's appeal and requesting that counsel return her call and visit movant at FDC Miami to discuss his appeal.

(Cv DE# 11).

The government's pre-trial narrative first reiterates the facts described above and then asserts as follows:

> Facts that will be demonstrated at the hearing:
>
> This Court has ordered a hearing on the issue of whether Movant requested that Mr. Zimet file an appeal on his behalf. (CV DE# 6). The Court has not yet ruled whether the remaining issues filed by Movant require an evidentiary hearing. As to the first issue, the United States will demonstrate that Movant never requested that Mr. Zimet file an appeal on his behalf. After Movant's sentencing, Mr. Zimet and Movant met to discuss Movant's options, but Movant did not direct Mr. Zimet to file an appeal. Moreover, Movant had waived his right to appeal in the plea agreement.
>
> List of Exhibits that the Government intends to offer into evidence at the hearing:
>
> 1. Indictment against Movant, Case Number 15-20731-CR-COHN.
>
> 2. Movant's Executed Plea Agreement.
>
> 3. Movant's Executed Stipulated Factual Proffer.
>
> 4. Transcript of Movant's Change of Plea Hearing on March 23, 2016.
>
> 5. Defendant's Sentencing Memorandum and Motion for Variance, filed by Mr. Zimet.
>
> 6. Transcript of Movant's Sentencing Hearing on June 17, 2016.
>
> 7. Trial counsel's notes regarding meetings with Movant about the plea documents, Movant's change of plea, Movant's sentencing, and appellate options.
>
> List of witnesses the Government intends to call at the hearing:
>
> 1. Bruce A. Zimet, Esquire

600 S. Andrews Avenue, Suite 500
Ft. Lauderdale, FL 33301

It is anticipated that Mr. Zimet would testify that he has been a criminal defense attorney in good standing with the Florida State Bar. Mr. Zimet was hired to represent Movant. As part of that representation, Mr. Zimet reviewed the discovery provided in this case. Mr. Zimet also had meetings with Movant, where Mr. Zimet reviewed the discovery with Movant and discussed Movant's options at trial. Mr. Zimet and Movant also discussed a possible change of plea.

Mr. Zimet then negotiated a plea agreement on behalf of Movant, which resulted in the government agreeing to allow Movant to plead to a lesser included offense as to Count 1 with a lower statutory mandatory minimum sentence. Mr. Zimet presented the plea agreement and stipulated factual proffer to Movant, which they discussed. Movant agreed to the terms of the plea agreement and the facts in the stipulated factual proffer, and Movant executed the plea documents.

After Movant's change of plea, Mr. Zimet and Movant discussed the Presentence Investigation Report. After those discussions, Mr. Zimet filed a sentencing memorandum with objections to the PSI. Mr. Zimet discussed his sentencing arguments and the sentencing possibilities with Movant. After the sentencing hearing, Mr. Zimet met with Movant to discuss possible appellate options. Movant did not direct Mr. Zimet to file an appeal on his behalf.

(Cv DE# 13).

At the evidentiary hearing on October 17, 2017, testimony was taken from the movant; movant's fiancé, Intheay Martin; and the movant's former trial counsel, Bruce A. Zimet, Esquire.

1. Failure to Consult Re: Direct Appeal

To prevail on an ineffective-assistance-of-counsel claim, movant must establish (1) his counsel's performance was deficient,

and (2) he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The Strickland test also applies to claims of ineffective assistance based on counsel's failure to file an appeal. United States v. Diggs, 610 Fed.Appx. 901, 902-904 (11th Cir. 2015) (citing Roe v. Flores-Ortega, 528 U.S. 470, 476-77, 120 S.Ct. 1029, 1034, 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")); Stanton v. United States, 2010 WL 3705964 (11th Cir. 2010) (quoting Flores-Ortega, 528 U.S. at 470). When counsel disregards specific instructions from a convicted defendant to file a notice of appeal, counsel acts in a manner that is professionally unreasonable. Id. at 477, 120 S.Ct. at 1035.

In the absence of specific instructions, an attorney nonetheless has a constitutional duty to consult with his client about an appeal, when (1) a rational convicted defendant would want to appeal, or (2) the convicted defendant reasonably demonstrated to counsel an interest in appealing. Id. at 480, 120 S.Ct. at 1036. Further, in the "vast majority of cases," the Supreme Court expects courts will find "that counsel had a duty to consult with the defendant about an appeal." Id. at 481, 120 S.Ct. at 1037.

The Eleventh Circuit considers the following factors in determining whether a rational defendant would want to appeal: (1) whether the conviction follows a guilty plea, (2) whether the defendant received the sentence bargained for as part of a plea agreement, (3) whether the plea agreement waived appellate rights, and (4) whether there are nonfrivolous grounds for appeal. Id. at 480, 120 S.Ct. at 1036; Otero v. United States, 499 F.3d 1267, 1270 (11th Cir. 2007). A guilty plea both "reduces the scope of potentially appealable issues" and indicates "the defendant seeks an end to judicial proceedings." Flores-Ortega, 528 U.S. at 480, 120 S.Ct. at 1036.

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." Flores-Ortega, 528 U.S. at 484. A defendant 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 McElroy v. United States, 259 Fed. Appx. 262 (11th Cir. 2007); Gomez-Diaz v. United States, 433 F.3d 788, 792 (11th Cir. 2005). This holds true whether the defendant pled guilty or was convicted after jury trial. 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)(habeas petitioner need not demonstrate that his defaulted appeal would have succeeded in order to establish prejudice sufficient for habeas relief). Appellate counsel must both perfect an appeal and file a brief to perform effectively as an advocate. Cannon v. Berry, 727 F.2d 1020 (11th Cir. 1984); Mylar v. Alabama, 671 F.2d 1299 (11th Cir. 1982); Perez v. Wainwright, 640 F.2d 596 (5th Cir. 1981). The failure to file an appeal despite the defendant's timely request constitutes ineffective assistance *per se*, so no showing of actual prejudice is necessary. Cannon, 727 F.2d at 1020.

Notwithstanding, in the case of an appeal following a guilty plea, the movant is only entitled to an out-of-time appeal of sentencing issues. Flores-Ortega, 528 U.S. at 483. Only sentencing claims may be raised on an out-of-time appeal following a plea 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 at 417.

The movant testified under oath as follows on direct

examination at the evidentiary hearing. He hired Bruce Zimet to represent him after law enforcement searched his house and car, but before he was arrested. After he was arraigned on September 28, 2015, he remained in custody. He met with Mr. Zimet at least once a week. During these meetings, they would review the discovery and discuss his case. In March of 2016, he decided he wanted to settle the case and enter a plea. As a result, Mr. Zimet negotiated a plea deal with the AUSA. Petitioner believed he could get a five-year prison sentence. On March 23, 2016, he signed the factual proffer and plea agreement, after reviewing both documents with his counsel. He did not agree to the "five kilograms" language regarding the July 2015 exchange with Dareus. This figure was crossed out and the parties initialed next to the change. He agreed to the appellate waiver because he planned to cooperate with the government.

Following the change of plea hearing, he met with the AUSA and two Federal Agents for a debriefing. He expected the debriefing to result in an indictment against his co-conspirators and a Rule 35 motion from the government. However, the government never filed an indictment against others or a Rule 35 motion in Petitioner's case.

A week before the sentencing hearing, Mr. Zimet brought him a copy of the PSI. Mr. Zimet told Petitioner to review the PSI and write down any objections before their next meeting. Mr. Zimet said they would meet again before the sentencing hearing and review the objections, at which point Mr. Zimet would file written objections with the court. Mr. Zimet did not return before the sentencing hearing. Although Mr. Zimet did file a sentencing memorandum with objections to the PSI, Petitioner did not get a chance to review it before the sentencing hearing.

Before the sentencing hearing began, Petitioner told Zimet that if he got a ten-year sentence, Petitioner wanted to appeal.

Petitioner also expressed frustration to Mr. Zimet regarding the amount of drugs, the gun enhancement, and the government's failure to file a Rule 35 motion. The court proceeded to sentence him to ten years. He was not satisfied because he thought he would only receive a five-year sentence. The District Court informed him he had fourteen days to appeal. Immediately following the hearing, he again told Mr. Zimet to file a direct appeal.

Subsequent to the sentencing hearing, he attempted to contact Mr. Zimet several times without success. He called, emailed, and sent letters. Petitioner received a letter dated November 22, 2016 from Mr. Zimet which the Movant introduced into evidence. (Movant Exhibit C). The letter explained the steps Mr. Zimet was taking to retrieve some jewelry in the government's possession. Mr. Zimet also stated that he believed the AUSA was in the process of developing a case against Petitioner's co-conspirators based on the debriefing which would result in an indictment and, ultimately, a Rule 35 motion in Petitioner's case. This was the only communication Petitioner received from Mr. Zimet after the sentencing hearing.

On April 2, 2017, Petitioner emailed Mr. Zimet to inquire regarding the jewelry and the indictment. (Movant's Exhibit A). On May 31, 2017, Petitioner emailed Mr. Zimet and asked for copies of the plea agreement, factual proffer, and transcripts in his case. (Movant's Exhibit B). He did not receive a response to either email.

On cross-examination, Petitioner acknowledged that beginning in 1997 he served fourteen years in prison. His supervised release term came to an end shortly before the facts described in the Factual Proffer. The AUSA asked Petitioner about his responses during the change of plea hearing. Petitioner did not dispute any of the statements he made under oath at the change of plea hearing. However, he strongly disputed the drug amount identified in the

Plea Agreement and the PSI. The AUSA pointed out that paragraph 7(a) of the Plea Agreement, which Petitioner signed, found him responsible for more than fifteen kilograms but less than fifty kilograms of cocaine. Petitioner strongly disputed this language. Petitioner noted that the "five kilograms" language was crossed out in the Factual Proffer. He believed that he was not going to be held responsible for more than 500 grams of cocaine, notwithstanding paragraph 7(a) in the Plea Agreement.

Petitioner conceded that in his emails to Mr. Zimet, he did not mention an appeal and instead was focused on the Rule 35 motion.

On re-direct examination, Petitioner explained that he did not mention the appeal in his emails to Mr. Zimet because he felt that the Rule 35 was a priority. He then stated that he found out an appeal had not been filed in February of 2017. He reiterated that right before the sentencing hearing started, he told his lawyer to file an appeal if the District Court imposed a ten-year sentence.

Petitioner's fiancé, Intheay Martin, testified under oath as follows. She spoke with Petitioner on a daily basis once he was incarcerated. She attended several court proceedings, but not the sentencing hearing. After the sentencing hearing, Petitioner told Ms. Martin that he could not reach Mr. Zimet and asked her to call him and tell him that Petitioner needed to get in touch. She reached Mr. Zimet and passed on this message. She does not know if Mr. Zimet he ever reached Petitioner. She also testified that law enforcement did eventually return her jewelry.

Former counsel, Bruce Zimet, Esq., testified to the following during direct examination. When Petitioner learned he was the target of an investigation, he hired Zimet, who had been representing Petitioner's brother in another matter. Once

Petitioner was arrested and arraigned, Zimet received a voluminous amount of discovery from the government. He reviewed the discovery which included wiretap evidence, videos, and applications for search warrants etc. He met with Petitioner to discuss the discovery, the charges, and potential defenses. He also went to the FBI offices to review additional evidence.

Originally, Petitioner denied any involvement, then claimed he an the co-conspirators were simply gambling, then he claimed he was dealing marijuana, and, finally, admitted to dealing cocaine. Zimet explained potential Fourth Amendment issues with Petitioner and then filed several pre-trial motions. However, the court denied all the motions following a hearing.

Zimet was concerned that if Petitioner proceeded to trial, the government would seek an 851 enhancement of the ten-year sentence under count 1 to twenty years. At this point, he met with Petitioner to discuss sentencing guidelines, explained the strength of the government's evidence, and advise him to consider entering a plea and cooperating with the government. Zimet explained the cooperation process, namely, that Petitioner would be debriefed by Federal Agents and the AUSA. After an evaluation, the AUSA could use Petitioner as a witness in a superceding indictment against his co-conspirators. This process would continue after Petitioner's sentencing. Eventually, the government would file a Rule 35 motion, which would reduce the sentence he received at the sentencing hearing. Zimet stressed that neither he nor the AUSA could guarantee a Rule 35 motion. Petitioner directed Zimet to conduct plea negotiations with the AUSA and begin the cooperation process.

Zimet reviewed the written Plea Agreement and Factual Proffer with Petitioner and explained the following to Petitioner, who confirmed that he understood: The agreement included a standard appellate waiver because an appeal would derail the cooperation process. If Petitioner wanted the government to file a Rule 35

motion, he could not challenge the government in a direct appeal. By signing the factual proffer, Petitioner was admitting to the truth of those facts. Although the "five kilograms" amount was crossed out with respect to one exchange with Mr. Dareus, Petitioner stipulated to dealing cocaine on several other occasions.

Zimet met with Petitioner to discuss the PSI before sentencing. They did not discuss a potential appeal. Petitioner did not state that he was unhappy with the PSI, which recommended 121 months' imprisonment on the low end, and/or that he wanted to appeal. Zimet did not make any promises not contained in the Factual Proffer and/or Plea Agreement.

Following the sentencing hearing, Petitioner's reaction was not unusual. He was not happy, however, he seemed to accept the sentence as it was the sentence agreed to by the parties in the plea agreement. Both Zimet and Petitioner were optimistic that the debriefing would ultimately result in a Rule 35 motion.

Zimet did not recall meeting with Petitioner again after sentencing. He did speak with several family members regarding the jewelry in the government's possession.

Petitioner never asked him to appeal, however, if he had, Zimet would have explained that it would derail the cooperation process. Furthermore, Zimet did not believe there were any valid issues to appeal.

On cross-examination, Zimet reiterated much of what he said on direct examination. When asked why he did not raise the arguments contained in his sentencing memorandum during the sentencing hearing, Zimet explained that he wanted to avoid "opening Pandora's box" regarding the facts. He learned that Petitioner had admitted to additional facts at the debriefing, which could have resulted in

more charges. Specifically, that he was dealing drugs while on supervised release. Zimet concluded that challenging any facts further in open court, could cause the AUSA to decide to file a superceding indictment. Petitioner appeared on board for the 120-month sentence, and submitted an allocution at the sentencing hearing. As a result, Zimet decided not to re-raise all the issues which he raised in the written sentencing memorandum.

As is indicated above, because the final judgment was entered on **June 17, 2016,** the movant had until **July 1, 2016** to file a timely notice of appeal. Having carefully attended to the testimony at the evidentiary hearing, the witnesses' demeanor, and the record as a whole, the undersigned accepts the following version of events.

The movant did not ask counsel to file a notice of appeal at the sentencing hearing or at any time before or after sentencing. The Undersigned found Zimet's testimony to be credible in all respects. Petitioner and Zimet decided to pursue a Rule 35 motion. As a result, Petitioner met with Federal Agents and the AUSA for a debriefing. If Petitioner had filed a direct appeal, any chance at a Rule 35 motion would come to an end. The Undersigned did not find the movant's testimony that he expressly requested Zimet to file a notice of appeal to be credible. It made no sense for Petitioner to file an appeal after he had begun to cooperate with the government and hoped that the AUSA would filed a Rule 35 motion. On redirect examination, Petitioner conceded that he was under the impression that a direct appeal would interfere with the cooperation process. He clearly believed that pursuing a Rule 35 motion was a priority. This was his mind set at the sentencing hearing, as a result, it is not believable that he asked his lawyer to file a direct appeal.

Based on the foregoing, it is reasonable to conclude that the movant did not expressly ask Zimet to file a notice or appeal

and/or the movant did not make any statements which would have triggered his attorney's duty to consult him regarding the filing of a direct appeal.

The testimony which this court found credible does not establish that (1) a rational convicted defendant would want to appeal, or (2) the convicted defendant reasonably demonstrated to counsel an interest in appealing. Thus, the court finds that counsel was not ineffective and the movant is not entitled to an out-of-time appeal.

B. Remaining Claims Re Ineffectiveness of Counsel

Under **claims 1 & 2,** the movant alleges the government unlawfully secured the indictment by presenting perjured testimony to the grand jury (Cv DE# 1:7-12). Specifically, Movant claims the Government failed to present to the grand jury evidence of Movant's "buyer-seller relationship" with Dareus wherein he purchased "marijuana and personal use [amounts of] cocaine," as well as his gambling relationship with Dareus, which the Government knew about. (Id.:8). Movant also argues that he was not in "actual, sole, joint, [or] constructive" possession of the firearm and ammunition found in the 2007 Ford F-150. (Id.:10).

Similarly, Movant argues in **claims 5b** that his counsel was ineffective for failing to provide discovery to the Government evidencing his buyer-seller and gambling relationship with Dareus and in **claim 5f,** movant argues that counsel was ineffective in failing to correct the erroneous factual proffer to state that Movant bought marijuana and cocaine from Dareus for personal use and bet on gambling tickets. (Id.:22, 24-25).

A prosecutor violates due process when he, without coercion, knowingly allows a governmental witness to testify falsely. Napue

v. People of State of Ill., 360 U.S. 264, 265, 269 (1959). "To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." United States v. McNair, 605 F.3d 1152, 1208 (11th Cir. 2010). "Perjury is defined as testimony 'given with the willful intent to provide false testimony and not as a result of a mistake, confusion, or faulty memory.'" Id. (quoting United States v. Ellisor, 522 F.3d 1255, 1277 n. 34 (11th Cir. 2008)). Further, to show a due process violation based on prosecutorial misconduct, a defendant must show not only misconduct but also must show prejudice. Smith v. Phillips, 455 U.S. 209, 219-20 (1982).

As a preliminary matter, Movant does not identify exactly what testimony was false that the Government presented to the grand jury. Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012).

Even if it were true that the Government possessed the above-referenced evidence and, as Movant claims, failed to present that evidence to the grand jury, such conduct does not rise to the level of misconduct. First, an alleged failure to present particular testimony to the grand jury does not constitute perjury. Second, even if Movant is arguing that such evidence is somehow exculpatory, the Government has no duty to bring exculpatory evidence before the grand jury. United States v. Waldon, 363 F.3d 1103, 1109-1110 (11th Cir. 2004), citing United States v. Williams, 504 U.S. 36, 51-55 (1992) ("Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with the system"). See also United States v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999) ("To begin with, it is settled law that the prosecution is not required to include exculpatory evidence in its presentation to the grand jury").

Rather, the issue of exculpatory evidence applies only in the context of trial. See Gilbert, 198 F.3d at 1304 ("The obligation to disclose exculpatory evidence under Brady v. Maryland applies only in regard to trials") (internal citations omitted). To require the government to present exculpatory evidence to the grand jury would transform it into a judicial body, rather than an accusatory one. See, e.g., United States v. Williams, 504 U.S. 36, 51, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992) ("[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body").

Even if the evidence suggested by Movant was viewed as exculpatory, the Government was under no obligation to disclose this evidence to the grand jury. Furthermore, Movant has failed to show that the grand jury would not have indicted if presented with this evidence.

Movant appears to be arguing that the evidence of his participation in the drug conspiracy was false because his relationship with Dareus was merely that of a buyer-seller and/or was related to gambling. This argument also fails. There is a "critical distinction between a conspiratorial agreement and a buyer-seller transaction." United States v. Mercer, 165 F.3d 1331, 1335 (11th Cir. 1999). In a buyer-seller relationship, the parties come to an agreement, but the agreement amounts to the mere exchange of drugs for money. Id. This type of transaction "is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." Id. (internal citation omitted). Put another way, "[w]here the buyer's purpose is merely to buy and the seller's purpose is merely to sell, and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown." Id. (internal citation omitted).

However, a conspiracy has been demonstrated where (1) the government can establish a continuing relationship between buyer and seller or a continuing course of conduct; or (2) there are numerous references to other conspirators and details regarding the conspiratorial agreement. Id.; see also United States v. Williams, 151 Fed. Appx. 804, 805 (11th Cir. 2005). Details of a drug delivery have been deemed sufficient to convict. United States v. Mercer, 165 F.3d at 1336. An inference of an intent to distribute may be drawn from a person's possession of a large quantity of illegal drugs. United States v. Madera-Madera, 333 F.3d 1228, 1233 (11th Cir. 2003). Moreover, an intent to distribute may be proven circumstantially from the "existence of implements such as scales commonly used in connection with the distribution of cocaine." United States v. Poole, 878 F.2d 1389, 1392 (11th Cir. 1989) (internal citations omitted).

In this case, Movant stipulated that he met with Dareus several times and purchased distributable quantities of cocaine from him. The factual proffer details several meetings at the stash house, the barber shop, and Movant's home where Movant and Dareus exchanged distributable quantities of cocaine and money. Movant's participation in the conspiracy—as outlined in the factual proffer—is evidenced by physical surveillance by law enforcement, video camera surveillance, and wiretaps. (Cr-DE # 307, Factual Proffer). Movant further acknowledged that a search of his home in Belle Glade, Florida revealed two scales and a strainer that contained cocaine residue, as well as numerous bags and rubber bands consistent with drug packaging and packaging of drug proceeds. (Id.:6).

During the change of plea hearing, Movant confirmed under oath that he reviewed the factual proffer and agreed with all facts

contained therein.[5] (Cr DE# 467:12). Movant expressly agreed in both the factual proffer and plea agreement that he was responsible for "over fifteen kilograms but less than fifty kilograms of cocaine" in the drug conspiracy. (Cr DE# 467:7; Cr-DE #306:4).

Movant also claims the government presented perjured testimony regarding count 11, possession of the firearm and ammunition found in his Ford F-150 truck—in violation of 18 U.S.C. §922(g). (CV DE# 1:10). He argues that he did not have actual, sole, joint, or constructive possession of the firearm and ammunition because other individuals had access to the Ford F-150 truck. (Id.). Thus, Movant argues that the Government also presented perjured testimony to the grand jury regarding Count 11. (Id.).

"A defendant has constructive possession if he exercises ownership, dominion, or control over the firearm. A defendant also has constructive possession if he has the power and intention to exercise dominion or control. The defendant may exercise that dominion and control either directly or through others." United States v. Gunn, 369 F.3d 1229, 1235 (11th Cir. 2004), citing United States v. Crawford, 906 F.2d 1531, 1535 (11th Cir. 1990); United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979); United States v. Thomas, 321 F.3d 627, 636 (7th Cir. 2003); United States v. Van Horn, 277 F.3d 48, 55 (1st Cir. 2002); United States v. Hardin, 248 F.3d 489, 498 (6th Cir. 2001). Constructive possession can be established by showing the defendant had "dominion or control over the premises or the vehicle" where the firearm was found. United States v. Derose, 74 F.3d 1177, 1185 (11th Cir. 1996).

The record confirms that the Ford F-150 truck was registered to Movant (Cr-DE #181, Movant's Response in Opposition to Government Re Motion to Suppress, p. 7). Moreover, at the time of

[5] He did note that the "five kilograms" amount had been crossed out regarding the July 2015 cocaine exchange with Dareus.

the search of Movant's Ford F-150 truck—pursuant to a search warrant—the truck was parked in the driveway of Movant's residence in Belle Glade, Florida. (Id.). Additionally, as stipulated to by Movant in the factual proffer, Movant drove this Ford F-150 multiple times when picking up cocaine from Dareus at various locations. (Id.).

Movant states in his petition that he maintained automobile insurance coverage for himself and others on the Ford F-150. The fact that other individuals may have been on the insurance plan for the Ford F-150 truck, or had access to it, is not relevant. "Constructive possession need not be exclusive . . . ." Poole, 878 F.2d 1389, 1392 (11th Cir. 1989) (Court found constructive possession of cocaine where defendant owned the home where the cocaine was found and exercised dominion and control over the home despite the fact that she had just arrived back home from a trip when the cocaine was found, and she did not have "exclusive control over the premises"); United States v. Montes-Cardenas, 746 F.2d 771, 778 (11th Cir. 1984) ("Constructive possession may be shared with others, and can be established by circumstantial or direct evidence"), accord United States v. Marx, 635 F.3d 1342, 1346 (11th Cir. 2006) (holding evidence was sufficient to show defendant had constructive possession of cocaine in apartment even though his wife also lived there and was the sole signatory on the renewal lease).

In light of the foregoing, Movant's claim under counts 1 and 2 are without merit. It follows that counsel was not ineffective for failing to raise the arguments contained in counts 1 and 2. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (counsel is not ineffective in failing to raise a meritless claim). As a result, Movant is not entitled to relief under claims 5b or 5f.

Under **claim 3**, the movant argues the government presented an

invalid plea agreement (Cv DE# 1:13-16). Under **claim 4**, the movant argues that the court lacked jurisdiction because the plea agreement was invalid (Cv DE# 1:16-20). Finally, under **claim 5e**, movant alleges ineffective assistance of counsel for failing to file a motion to correct the invalid plea agreement; (Cv DE# 1:24).

In all three claims, Movant alleges that his plea agreement was invalid because of an inherent contradiction regarding the quantity of cocaine. Specifically, Movant claims that the plea agreement was invalid because while he pled to the lesser included offense of possessing and distributing 500 grams or more of cocaine, he was held responsible for possessing and distributing at least fifteen kilograms but less than fifty kilograms of cocaine. These arguments are without merit.

Movant pled to conspiring to possess and distribute "**more than** 500 grams of cocaine" (Cr-DE # 306, ¶1) (emphasis added). The five hundred grams set the floor, not the ceiling. Hence, the amount of cocaine Movant was held responsible for—between fifteen and fifty kilograms—is more than 500 grams. Furthermore, the final paragraph of the Factual Proffer provided:

> Based upon the video surveillance, intercepted conversations, and search warrant, the investigation learned that Sanders was responsible for **over fifteen kilograms of cocaine but less than fifty kilograms of cocaine.**

(Cr DE# 307:7). The plea agreement provided:

> Quantity of narcotics: In assessing the defendant's relevant conduct, the quantity of cocaine involved in the offense, for purposes of Section 2D1.1(a) and (c) of the Sentencing Guidelines, was **at least fifteen kilograms but less than fifty kilograms of cocaine**, resulting in a base offense level of 32.

(Cr DE# 306, ¶7a). Movant signed both documents and stated under oath at the change of plea hearing that he agreed to the contents.

Movant now argues that by crossing out the "five kilograms" language in connection with the July 2015 drug exchange with Dareus, it follows that he was not responsible for more than 500 grams of cocaine.[6] His argument is refuted by the record. In crossing out "five kilograms" he was not held responsible for that specific amount during that isolated exchange with Darius. The factual proffer listed multiple drug exchanges with Dareus over the course of several months. Furthermore, he did not insist that the other language, indicating his responsibility for at least fifteen kilograms of cocaine, be crossed out. At no time did he challenge his responsibility for more than fifteen but less than fifty kilograms of cocaine.

For sentencing purposes, a district court may rely on evidence heard during a trial, the defendant's admissions during his guilty plea, undisputed statements in the PSI, or evidence presented at the sentencing hearing. United States v. Wilson, 884 F.2d 1355, 1356 (11th Cir. 1989). The failure to object to factual findings in the PSI, including drug quantity findings, is deemed an admission of those facts. United States v. Williams, 438 F.3d 1272, 1274 (11th Cir. 2006). Moreover, after United States v. Booker, 534 U.S. 220, 229 (2004), under an advisory guidelines system, the district courts remain free to impose sentencing enhancements based on judge-made findings by a preponderance of the evidence so long as the sentence imposed does not exceed the statutory maximum sentence. See United States v. Dean, 487 F.3d 840, 854 (11th Cir. 2007); United States v. Dudley, 463 F.3d 1221, 1227-28 (11th Cir. 2006).

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[6]He made this argument while testifying at evidentiary hearing on the failure to file an appeal issue.

Further, while "sentencing cannot be based on calculations of drug quantities that are merely speculative, [it] may be based on fair, accurate, and conservative estimates." United States v. Zapata, 139 F.3d 1355, 1359 (11th Cir. 1998). In determining amounts, the court has wide discretion to consider relevant information provided that information has sufficient indicia of reliability and the defendant has the opportunity to challenge evidence against him. United States v. Query, 928 F.2d 383, 384-85 (11th Cir. 1991).

Here, the district court relied on the PSI for purposes of drug quantity, which was also supported by Movant's stipulated factual proffer and plea agreement. Moreover, Movant agreed to possess and distribute at least fifteen but less than fifty kilograms of cocaine. His representation to the contrary in his §2255 motion to vacate is directly contradicted by his sworn testimony at the change of plea hearing, as well as the statements in the factual proffer and plea agreement that he confirmed and executed. At no time has Movant stated he was coerced or otherwise unaware of the contents of the factual proffer or plea agreement, nor does he dispute that he executed either document. Because there was sufficient evidence to support the quantity of drugs, the district court did not err in accepting the PSI's findings in this regard.

Furthermore, the district court did not "lack subject matter jurisdiction" in sentencing Movant. "Congress has provided the district courts with jurisdiction . . .of 'all offenses against the laws of the United States.' Where an indictment charges a defendant with violating the laws of the United States, [18 U.S.C.] §3231 provides the district court with subject matter jurisdiction and empowers it to enter judgment on the indictment." United States v. Quinto, 264 Fed. Appx. 800, 801-802 (11th Cir. 2008), quoting 18 U.S.C. § 3231; Alikhani v. United States, 200 F.3d 732, 734-735 (11th Cir. 2000) (per curiam).

Movant's claim that the district court lacked jurisdiction to adjudicate the charged drug offense is thus without merit. The indictment charged Movant and his codefendants with violations of the laws of the United States: 21 U.S.C. §846 and 18 U.S.C. §922(g). This invoked the district court's subject matter jurisdiction under 18 U.S.C. §3231.

Likewise, Movant's claim that his counsel was ineffective in failing to move the Government to correct the "invalid plea agreement" is frivolous. As explained above, there was no inconsistency in the plea agreement, and therefore, no basis upon which his counsel could object. As explained above, in sentencing Movant, the district court relied on the findings of the PSI. Therefore, Movant cannot show that a different outcome was possible had his counsel raised this specific argument. Because he is unable to show deficient performance, much less prejudice under the Strickland standard, this claim also fails.

Under **claims 5a, 5c, and 5d,** Movant argues that counsel was ineffective for failing to file the following pretrial motions: (5a) motion to suppress the wiretap; (5c) motion to suppress the firearm and ammunition discovered in Movant's Ford F-150; and (5d) motion to dismiss the indictment. (Cv DE# 1:21, 23, 24).

Movant's arguments are refuted by the record. Before Petitioner entered a guilty plea, his attorney filed a motion to suppress the wiretap evidence, motion to suppress the firearm and ammunition, and motion to dismiss the indictment. (Cr DE# 158, 161, 162). Movant's counsel filed several additional pretrial motions on Movant's behalf, including a motion to bifurcate the forfeiture section of the indictment and a motion to sever Movant. (Cr-DE# 159 -160). After both sides litigated the issues in these motions, and the court conducted a hearing, the court denied the motions. (Cr-DE# 197, 296). As a result, Movant is not entitled to relief.

Under **claims 5g, 5h, and 5i**, Movant argues that his counsel was ineffective for failing to make certain objections to the PSI regarding enhancements and for failing to raise his alleged entitlement to a minor role reduction.

With respect to claim 5g, movant argues that his counsel should have objected to the offense level in the PSI. He asserts that his base offense level should have been a 24 (instead of 32) because he was responsible for between "500 grams but less than 2 kilograms of cocaine" (Cv-DE #1:25). As is explained above, the movant expressly stipulated during the change of plea proceedings that he was responsible for at least fifteen, but less than fifty, kilograms of cocaine. The base offense level of 32 was the result of this stipulation. Counsel had no basis to object to the PSI on these grounds. Counsel's performance was neither deficient nor can Movant show any prejudice for counsel's failure to raise this non-meritorious PSI objection. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001).

Under claim 5h, Movant asserts counsel was ineffective in failing to object to the two-level enhancement under U.S.S.G. §2D1.1(b)(1) based on the firearm found in his F-150. (Cv DE# 1:25). He argues that the enhancement did not apply because no drugs were found in the car. (Id.).

Pursuant to USSG §2D1.1(b)(1), if a defendant possessed a dangerous weapon during a drug-trafficking offense, his offense level should be increased by two levels. The commentary to §2D1.1 explains that this firearm enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG §2D1.1, comment, n.3. "The government has the burden under §2D1.1 to demonstrate the proximity of the firearm to the site of the charged offense by a preponderance of the evidence." United States v. Audain, 254 F.3d

1286, 1289 (11th Cir. 2001), citing United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995). "If the government is successful, the evidentiary burden shifts to the defendant to demonstrate that a connection between the weapon and the offense was 'clearly improbable.'" Id. Neither the plain language of §2D1.1 nor Eleventh Circuit precedent requires the Government to prove that the firearm was used to facilitate the distribution of drugs. Id. The Government is only required to prove that the firearm was present during drug-trafficking activity. Id. (citing United States v. Hansley, 54 F.3d 709, 716 (11th Cir. 1995); United States v. Trujillo, 146 F.3d 838, 847 (11th Cir. 1998)). "The enhancement . . . reflects the increased danger of violence when drug traffickers possess weapons." USSG §2D1.1(b)(1), comment, n. 11(A).

Here, the Factual Proffer demonstrated that Movant had received large quantities of cocaine from Dareus in his Ford F-150 truck on various occasions. Also Movant had parked his truck on his property where officers found drug scales and other paraphernalia. This evidence was sufficient to support the §2D1.1(b)(1) enhancement. Indeed, the Government needed only to show that "the weapon was located . . . where part of the transaction occurred." United States v. Flores, 149 F.3d 1272, 1280 (10th Cir. 1998) (quotation omitted). See also United States v. Hall, 473 F.3d 1295, 1312 (10th Cir. 2007) (upholding 2D1.1(b)(1) enhancement where "shotgun was found in a car sitting right outside [defendant's] residence and easily accessible through the top of the vehicle . . . [and] other drug paraphernalia was found at the house, including scales with cocaine residue on them").

Movant cannot meet his burden that it was "clearly improbable" the firearm located in his truck, which he used on multiple occasions to receive distributable quantities of cocaine from Dareus, was connected to the offense. Thus, counsel did not render deficient performance for failing to raise a frivolous and non-meritorious objection to the PSI. See Chandler, supra.

Movant argues under claim 5i that his attorney was ineffective in failing to seek a minor roll reduction. (Cv DE# 1:26). Section 3B1.2 of the USSG provides for a reduction in a defendant's offense level if he played a minor or minimal role in the offense. The commentary to that guideline provides: "This section provides a range of adjustment for a defendant who plays a part in committing the offense that makes him *substantially* less culpable than the average participant." USSG §3B1.2, comment n.3 (emphasis added).

Based on the Eleventh Circuit's decision in United States v. De Varon, 175 F.3d 930, 934 (11th Cir. 1999), Movant's argument should be rejected. In De Varon, the Court held that two legal principles should guide the district court in its fact-finding endeavor: First, the district court must measure the defendant's role against his relevant conduct, that is, the conduct for which he has been held accountable at sentencing. Second, 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. Id. at 934. "These 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.

As to the first principle, sentencing courts must assess whether the defendant is a minor or minimal participant in relation to the relevant conduct attributed to the defendant in calculating his base offense level. Id. at 941. Where a defendant is held responsible only for his own criminal actions, that is, when the relevant conduct attributed to the defendant is identical to the defendant's actual conduct, a defendant cannot prove that he "is entitled to a minor role adjustment simply by pointing to some broader criminal scheme in which [he] was a minor participant but for which [he] was not held accountable." Id. In the drug courier

context, the De Varon Court held that "when a drug courier's relevant conduct is limited to [his] own acts 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 record reflects that the Movant was not a minor player. In fact, he was responsible for multiple purchases of distributable quantities of cocaine from Dareus amounting to between fifteen and fifty kilograms of cocaine. Moreover, as the PSI made clear, each of the twelve defendants charged in the indictment with conspiracy were "held responsible for the amount of drugs they each possessed and/or distributed and not the entire amount involved in the conspiracy." (PSI ¶14). Movant has failed to establish that he was a minor participant in the conspiracy. Consequently, he cannot show that counsel's performance was deficient for failing to pursue this meritless claim. See Chandler, supra.

Under **claim 5j**, Movant alleges ineffective assistance of counsel for failing to file a motion to vacate Movant's illegal sentence of 120 months plus three years' supervised release (Cv DE# 1:27). Movant claims that he received a sentence over the ten-year statutory maximum. He arrives at this conclusion by adding his ten-year term of imprisonment to his three years of supervised release. The statutory maximum refers to the term of imprisonment only. The statutory maximum term of imprisonment for the drug conspiracy conviction under 21 U.S.C. §846 is 40 years. The statutory maximum term of imprisonment for the felon in possession conviction under 18 U.S.C. §922(g) is ten years. Both charges were grouped together in the PSI, yielding a guidelines range of 121 to 151 months' imprisonment. Movant received a sentence of 120 months, which is within both statutory maximums for Counts 1 and 11, and below Movant's guideline range. Movant's sentence is legal and proper. Thus, counsel cannot be deemed ineffective for failing to

object to Movant's sentence of 120 months.

Lastly, under **claim 6,** movant asserts ineffective assistance of counsel for forcing Petitioner to enter a guilty plea (Cv DE# 1:28).

The following exchange took place at the change of plea hearing:

> **The Court:** Now, Mr. Sanders, did you read the written plea agreement before you signed it?
>
> **The Defendant:** Yes, I did.
>
> **The Court:** Did you fully discuss with Mr. Zimet the terms and conditions contained in the written plea agreement?
>
> **The Defendant:** Yes, sir.
>
> **The Court:** Do you understand the terms of the plea agreement?
>
> **The Defendant:** Yes, sir.
>
> **The Court:** Were there any promises made to you that are not contained in the written plea agreement?
>
> **The Defendant:** No, sir.
>
> **The Court:** Did you sign the plea agreement?
>
> **The Defendant:** Yes, I did.
>
> **The Court:** Did anyone force you or coerce you to sign the plea agreement?
>
> **The Defendant:** No, sir.
>
> **The Court:** Is anyone forcing you to enter a guilty plea to the lesser included offense as to Count 1 or Count 11?
>
> **The Defendant:** No, sir.

The Court: Are you entering a guilty plea of your own free will?

The Defendant: Yes, I am.

(Cr DE# 467:8-9).

A defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his/her 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 (1977); United States v. Medlock, 12 F.3d 185, 187 (11th Cir.), cert. den'd, 513 U.S. 864 (1994); United States v. Niles, 565 Fed.Appx. 828 (11th Cir. May 12, 2014) (unpublished). In light of Petitioner's sworn testimony during the change of plea hearing, Petitioner is not entitled to relief under claim 6.

Petitioner is also not entitled to relief on any of the grounds raised as it is apparent from the 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, as appears to now be suggested. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brady v. United States, 397 U.S. 742, 748 (1970).[7] See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984). Moreover, even if the movant was misinformed by counsel prior to the change of plea proceeding as to the strength of the

[7]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).

government's case, given the stipulated factual proffer, coupled with the apparent thorough Rule 11 proceeding conducted by the court, there is nothing of record to suggest that the plea was anything other than knowingly and voluntarily entered. Consequently, the movant cannot demonstrate that he suffered either deficient performance or prejudice under Strickland arising from any purported misadvice by counsel regarding the facts of his case.

As set forth by the factual proffer at the change of plea hearing, there was sufficient evidence to prove beyond a reasonable doubt that movant was guilty of the offenses charged. The movant stated on the record and under oath that the facts put forth in the factual proffer by the government were true and correct. (CV DE# 467, Change of Plea Hearing Transcript, p. 12). Thus, counsel's performance cannot be considered deficient for advising movant to plead guilty when the evidence clearly supported his conviction. See Cox v. McNeil, 638 F.3d 1356, 1362 (11th Cir. 2011) ("Because a petitioner's failure to show either deficient performance or prejudice is fatal to a Strickland claim, a court need not address both Strickland prongs if the petitioner fails to satisfy either one of them") (internal quotation marks omitted).

Given the facts narrated above, the movant cannot demonstrate that he was lied to or otherwise misadvised by counsel regarding the facts relating to his offense of conviction. His representations herein to the contrary are disingenuous and border on the perjurious. A defendant's **sworn answers** during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his/her 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 (1977); United States v. Medlock, 12 F.3d 185, 187 (11th Cir.), cert. den'd, 513 U.S. 864 (1994); United States v. Niles, 565 Fed.Appx. 828 (11th

Cir. May 12, 2014)(unpublished).[8]

A criminal defendant is bound by his/her 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."). The movant is not entitled to relief.

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).[9] See also

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[8]"Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. The Court notes this same rule applies to other Fed. Appx. cases cited herein.

[9]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).

Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984). Moreover, he received a sentence below the advisory guideline range originally set forth in the PSI. 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.

Finally, it should further be noted that this court has considered all of the movant's arguments raised in his §2255 motion. (Cv-DE#1). See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013) (citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). This Court is mindful of the Clisby[10] rule that requires district courts to address and resolve all claims raised in habeas proceedings, regardless of whether relief is granted or denied. Clisby, 960 F.2d at 935-36 (involving a 28 U.S.C. §2254 petition filed by a state prisoner); see Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (holding that Clisby applies to §2255 proceedings). However, nothing in Clisby requires, much less suggests, consideration of claims or arguments raised for the first time in objections. Therefore, to the extent the movant attempts to raise arguments or new claims in objections to this Report, the court should exercise its discretion and refuse to consider the arguments not raised before the magistrate judge in the first instance.[11]

V. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a)

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[10]Clisby v. Jones, 960 F.2d 925, 936 (11th Cir.1992).

[11]The petitioner is cautioned that any attempt to provide due diligence in objections to this Report may not be considered in the first instance by the district court. 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). This is so because "[P]arties 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)).

provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VI. Conclusion

It is therefore recommended that this motion to vacate be denied; that 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 20th day of October, 2017.

UNITED STATES MAGISTRATE JUDGE

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