IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10676-H

EMMANUEL MATHIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Emmanuel Mathis is a federal prisoner serving a 180-month sentence after a jury convicted him of possessing controlled substances with intent to distribute, being a felon in possession of a firearm and ammunition, and possessing a firearm in furtherance of a drug-trafficking crime. He filed a 28 U.S.C. § 2255 motion to vacate his sentence, raising four grounds for relief:

(1) trial counsel was ineffective for failing to challenge prosecutorial misconduct, where the prosecution knowingly presented false testimony;

(2) trial counsel was ineffective for failing to challenge a biased juror, and counsel and the trial court erred in failing to investigate whether the jury had been tainted by extrinsic evidence;

(3) trial counsel was ineffective for failing to challenge the admission of his prior convictions; and

(4) trial counsel was ineffective for failing to properly contest his right to notice of

> the charged drug substances and failing to object to statutory and Sentencing Guidelines enhancements based on his prior Florida drug convictions.

After the government responded and Mr. Mathis replied, a magistrate judge prepared a report and recommendation ("R&R"), recommending that the district court deny § 2255 relief. Over Mr. Mathis's objections, the district court adopted the R&R, denied his § 2255 motion, and denied a certificate of appealability ("COA"). Mr. Mathis then moved for reconsideration under Fed. R. Civ. P. 59(e). The district court denied the Rule 59(e) motion and denied a COA. Mr. Mathis has appealed and now seeks a COA.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this requirement, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation marks omitted). To succeed on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, reasonable jurists would not debate the district court's denial of Mr. Mathis's § 2255 motion. The district court correctly denied Claim 1 for lack of deficient performance or prejudice. First, by alleging that the government presented false testimony about his confession, Mr. Mathis merely sought to relitigate the trial court's earlier denial of his motion to suppress, which we affirmed on direct appeal. Second, no evidence showed that the government presented false identifications. Finally, the testimony that Mr. Mathis challenged was not essential to the government's case.

The district court's rejection of Claim 2 also was correct. First, no evidence supported Mr. Mathis's contention that one juror was a detention deputy who was biased due to a prior

encounter with him. Second, Mr. Mathis failed to show that extrinsic evidence biased the jury. When a female juror reported that a man had approached her on the train, the trial court conducted a hearing, where it determined that the juror appropriately declined to discuss the case and that there was no taint "whatsoever" to the female juror or the rest of the jury. Considering the record, the district court correctly concluded that Mr. Mathis did not show either trial-court error or ineffective assistance of counsel, based on the failure to conduct a further hearing under *Remmer v. United States*, 347 U.S. 227, 229 (1954) (holding that, where there is private communication with a juror during a trial about the matter pending before the jury, the government must show that the contact was harmless to the defendant after notice and a hearing).

In addition, the district court correctly denied Claims 3 and 4. Mr. Mathis could not show deficient performance or prejudice for Claim 3 because counsel moved to exclude his prior convictions, and, as we concluded on direct appeal, the trial court properly admitted those convictions that were probative of Mr. Mathis's intent. As to Claim 4, the district court correctly concluded that (1) Mr. Mathis had notice of the drugs charged based on, among other things, his indictment, (2) 21 U.S.C. § 851's notice requirements did not apply because his sentence was not enhanced under that provision, and (3) the jury was not required to find the drug quantities, which did not affect his mandatory minimum sentence.

Finally, reasonable jurists would not debate the district court's denial of Mr. Mathis's Rule 59(e) motion for reconsideration, in which he alleged errors under *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (holding that a district court must resolve all claims for relief raised in a habeas petition). First, the district court squarely rejected Mr. Mathis's *Remmer*-hearing claim when it overruled his objections to the R&R. Second, although Mr. Mathis argued that the court failed to expressly address his argument about sentencing enhancements in Claim 4, the district

court fully resolved Claim 4 in concluding that Mr. Mathis did not receive an "enhancement," and that, in any event, counsel was not deficient because he argued that Mr. Mathis's criminal history category overrepresented his criminal history.

Accordingly, Mr. Mathis's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 14-23900-CIV-WILLIAMS

EMMANUEL MATHIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS MATTER is before the Court on Petitioner Emmanuel Mathis's motion for reconsideration (DE 26). On September 14, 2015, the Court entered an Order (DE 21) adopting the Report and Recommendation of the Magistrate Judge (DE 20) and dismissing Petitioner's motion to vacate. After receiving objections from Petitioner, the Court entered a second Order addressing those objections and adopting the Report and Recommendation (DE 24). Petitioner now asks the Court to reconsider those Orders.

The only grounds for granting a motion to reconsider are newly-discovered evidence or the need to correct manifest errors of law or fact. *Smith v. Ocwen Financial*, 488 Fed. App'x 426, 428 (11th Cir. 2012). A motion to reconsider cannot be used to re-litigate old matters or raise arguments or present evidence that could have been raised prior to the entry of judgment. *Id.* Here, Petitioner's motion for reconsideration revisits the allegations and arguments made in Petitioner's Objections and his motion to vacate. The Court already considered those arguments before denying Petitioner's motion to vacate. Because Petitioner's motion to reconsider does not identify any newly-discovered evidence or manifest errors of law or fact that would

convince the Court to reconsider its Order, but merely reasserts the arguments already made by Petitioner, it is hereby **ORDERED AND ADJUDGED** that Petitioner's motion for reconsideration (DE 26) is **DENIED**.

Petitioner has also filed a motion for trial transcripts at government expense. In that motion, Petitioner states that he needs the transcript to "present an adequate record for either this Court's review or the Court of Appeal." (DE 25). The Court has already reviewed the transcripts and the record in reaching its decision in this matter. And, a request for trial transcripts is governed by 28 U.S.C. § 753 which provides:

> Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

28 U.S.C. § 753. The Court finds that any appeal would not be taken in good-faith and would be frivolous for the reasons set forth in the Court's prior Orders. Accordingly, Petitioner's motion for transcripts (DE 25) is **DENIED.**

DONE AND ORDERED in chambers in Miami, Florida, this 15 day of December, 2015.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc:
Emmanuel Mathis
84132-004
Coleman I-USP
Post Office Box 1033
Coleman, FL 33521

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-23900-CIV-WILLIAMS

EMMANUEL MATHIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS MATTER is before the Court upon Petitioner's objections to Magistrate Judge Patrick A. White's Report and Recommendation (DE 22). On August 18, 2015, Judge White entered his Report which gave the Parties until September 4, 2015 to file objections to the Report. On September 14, 2015, with no objections having been filed, the Court entered an Order adopting the Report (DE 22). On September 15, 2105, the Court received objections from Petitioner (DE 23). The objections indicate that they were sent on August 31, 2015 (DE 22 at 7). Because the objections were delivered to prison authorities for mailing prior to the deadline for objections, the Court will, pursuant to the mailbox rule, deem them timely. Accordingly, the Court issues this supplemental Order briefly addressing Petitioner's two objections.

During trial, a juror alerted the Court that she was approached by an individual on her train ride to Court and that the individual had attempted to talk to her. The Court spoke to the juror – with defense counsel and the prosecutor present but without the presence of the other jurors – and thanked the juror for reporting the incident. The juror

responded that she "diffused it and told him I cannot talk about anything that is proceeding." (CR. DE 161 at 41.) The Court again thanked the juror and asked if she knew the individual. The juror responded that she did not know the person and that he approached her on the train and "tried to go into conversation." (CR. DE 161 at 41). The juror explained that she told the individual "we can have no discussion of proceedings." (CR. DE 161 at 41). The juror then said that the individual "started going into other conversation" and that, in response, she "tried to get on my phone and made phone calls." (CR. DE 161 at 42). The Court then inquired whether the encounter would affect the juror's ability to be fair and impartial or to deliberate with her fellow jurors. The juror indicated it would not.

Based upon the discussion with the juror and her demeanor, the Court concluded that she was "fairly poised and took care of herself very well." (CR. DE 141 at 42). Both defense counsel and the prosecutor agreed. Accordingly, the Court concluded there was no taint to the proceedings and the trial continued. Petitioner argues that his counsel was ineffective and that his due process rights were violated when his counsel and the Court "failed to conduct a Remmer hearing" and failed to interview the other jurors regarding what, if anything, the approached juror had said to them (DE 22 at 2). The Court colloquied the juror with the presence of the prosecutor and defense counsel. The juror did not indicate whether she believed the individual was associated with either the government or the defense. Rather, the juror, who comported herself well, avoided discussing the case with the individual. The individual then tried to change the topic of the conversation and the juror again refused to interact with the individual. The Court finds that based on the totality of the circumstances, the limited nature of the interaction,

the demeanor of the juror and her assertion that the interaction would have no effect on her ability to be fair and impartial, and the strength of the government's case, Petitioner's claims are without merit.

Petitioner also asserts that counsel was constitutionally ineffective for failing to object to Petitioner's sentencing being enhanced based on his prior criminal convictions. Petitioner argues that the Court lacked jurisdiction to enhance his sentence based on his prior convictions because the government failed to comply with 21 U.S.C. § 851. This argument is misguided as this statute had no bearing on his case or sentence. Title 21 U.S.C. § 851 pertains to statutory enhancements that are imposed as a result of prior convictions for felony drug offenses. The "enhancement" to which Petitioner refers was actually an ordinary part of guideline calculations by which a defendant's criminal history category is determined based on prior convictions. Based upon a total offense level of 24 and a criminal history category VI, Petitioner's guideline range for Counts 1 and 2 was 100 to 125 months, with a consecutive term of 60 months for Count 3. The Court sentenced Petitioner to a term of 180 months, consisting of 120 months as to Counts 1 and 2, to be served concurrently, and 60 months as to count 3, to be served consecutively. The Court plainly had the authority to sentence a Petitioner within the guideline range.

Moreover, prior to sentencing, Petitioner's counsel argued that Petitioner's criminal history was overrepresented and that he should have been awarded a criminal history category of IV, which would have resulted in a guideline range of 51 to 63 months. Because counsel argued that Petitioner's criminal history was

overrepresented, the Court finds that Petitioner's argument that counsel was ineffective to be without merit.

Upon review of the Report and Recommendation, the record, and applicable case law, and for the reasons set forth above, it is hereby **ORDERED AND ADJUDGED** that Judge White's recommendation is **ACCEPTED** and the analysis contained in the Report (DE 20) is **ADOPTED** and incorporated herein by reference. Petitioner's petition (DE 1) and all pending motions are **DENIED.** No certificate of appealability shall issue. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers in Miami, Florida, this 5th day of October, 2015.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc:
Emmanuel Mathis
84132-004
Coleman I-USP
Post Office Box 1033
Coleman, FL 33521

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-23900-Civ-WILLIAMS
(11-20780-Cr-WILLIAMS)
MAGISTRATE JUDGE P. A. WHITE

EMMANUEL MATHIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The movant, a federal prisoner, has filed the instant motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences, entered following a jury verdict in case no. 11-20780-Cr-Williams.

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

The Court has reviewed the movant's §2255 motion (CV-DE#1) with supporting memorandum (Cv-DE#4), together with the government's response to an order to show cause (Cv-DE#12), the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the transcripts of trial and sentencing.

II. Claims

This court, recognizing that the movant was proceeding *pro se*, has afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). In his §2255 filings, the movant raises the following four grounds for relief:

1. Ineffective assistance of counsel for failing to challenge alleged prosecutorial misconduct relating to the presentation of false testimony;

2. Ineffective assistance of counsel for failing to challenge biased jurors;

3. Ineffective assistance of counsel for failing to challenge the admission of Petitioner's prior convictions, and;

4. Ineffective assistance of counsel for failing to properly contest the Petitioner's right to notice of proof of the drug substances at issue.

III. Factual Background and Procedural History

Given the nature of the claims, a detailed factual and procedural history is warranted in this case.

A. Facts Adduced at Trial

During the trial, the United States called a number of witnesses to testify about the criminal conduct of Mathis, including the officers who initially responded to the scene and detailed finding Mathis dealing drugs outside a drug trap that contained more drugs, lots of cash, and a loaded firearm (Cr DE# 158). That testimony was sufficient to place Mathis at the scene, in the presence of the drugs and gun that were the subject of the charges against Mathis. In addition, the United States called Jonas Pierre and Marie Pierre, a couple who had rented out the residence

in question to an individual a couple months before Mathis was arrested there with the gun, drugs, and cash (Cr DE# 158). At trial, Jonas Pierre first failed to identify Mathis as the person he rented the residence to, but he was quickly recalled and testified that Mathis was indeed the person to whom he had rented the residence (Cr DE# 158:112-13, 120-21). Mary Pierre testified next, and also identified Mathis as the person to whom they had rented the apartment (Cr DE# 158:124-25). Separately, a criminalist with the Miami-Dade Police Department testified that she analyzed the drugs found in Mathis's presence and determined that they in fact tested positive for the presence of cocaine, cocaine base, and marijuana (Cr DE# 158:114-19).

For the defense, Mathis chose not to testify at trial, but the defense did call two of Mathis's brothers and Mathis's girlfriend to testify to a story similar to the one Mathis gave at the suppression hearing (Cr DE# 159, 162). In short, the story was that Mathis showed up at the residence after police officers were already there, the police detained Mathis, then after detaining Mathis, broke into the apartment where the drugs, gun, and cash were subsequently found, then arrested Mathis (Cr DE# 159:87-93, 162:3-8). That testimony was completely inconsistent with the testimony of the officers.

Before closing arguments, a juror reported that she had been approached by an associate of the defense on her train ride that morning, and the individual had attempted to talk to her (Cr DE# 161:37-43). The Court specifically asked the juror whether the encounter would affect the juror's ability to be fair and listen and deliberate with her other fellow jurors, and the juror said that it would not (Cr DE# 161:43). Accordingly, the Court concluded that the juror "was fairly poised and took care of herself very

well," and that the juror had not been tainted (Id.).

At the close of the case, and following deliberations, the jury convicted Mathis of all three counts against him (Cr DE# 125).

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

On November 3, 2011, Emmanuel Mathis was indicted in the Southern District of Florida in a three-count indictment (Cr DE# 1). Count 1 charged Mathis with possessing with the intent to distribute controlled substances, that is, crack cocaine, cocaine, and marihuana, in violation of Title 21, United States Code, Section 841(a)(1) (Id.). Count 2 charged him with possessing a firearm and ammunition after having previously been convicted of a felony, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1) (Id.). Count 3 charged Mathis with possessing a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i) (Id.).

On February 17, 2012, Mathis filed a motion to suppress statements that he made to law enforcement officers after his arrest for dealing drugs and having a firearm in the Little Haiti area of Miami (Cr DE# 41). The Court held a hearing on that matter, and several officers testified, as did Mathis (Cr DE# 53, 54, 79). Mathis's version of events was different than that of the officers, and, at the end of the hearing, the Court credited the officer's testimony. (Cr DE# 79:131-133).

Prior to sentencing, a PSI was prepared, applying the 2011 Federal Sentencing Guidelines Manual, which reveals as follows.

Pursuant to U.S.S.G. §2K2.1(a)(4)(A), because the defendant committed the instant offense subsequent to sustaining at least one felony conviction of either a crime of violence or a controlled substance offense, the base offense level was 20. (PSI ¶13). Because the firearm was stolen, the offense level was increased by two levels, § 2K2.1(b)(4)(A). (PSI ¶14). Because the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct or a closely related offense, the offense level was increased by two levels, § 3C1.1. (PSI ¶17). This increase was based on Mathis's materially false statements at the suppression hearing. The total offense level was set at 24. (PSI ¶21).

The probation officer next determined that the movant a total of 13 criminal history points, resulting in a criminal history category VI. (PSI ¶35).

Statutorily, as to Count 1, movant faced a term of 0 to 20 years imprisonment pursuant to 21 U.S.C. §841(b)(1)(C), as to Count 2, he faced 0 to 10 years imprisonment pursuant to 18 U.S.C. §924(a)(2), and as to Count 3, he faced 5 years to life imprisonment (consecutive to any other term of imprisonment) pursuant to 18 U.S.C. §924(c)(1)(A)(i). (PSI ¶76). Based on a total offense 24 and criminal history VI, the guideline imprisonment range, at the low end was 100 months and at the high end was 125 months imprisonment. (PSI ¶77). As to count 3, a consecutive term of imprisonment of five years was required, §5G1.2(a). (PSI ¶77).

On September 5, 2012, the movant appeared for sentencing. (Cr DE# 147). The court sentenced him to 180 months' imprisonment. (Id.).

Movant prosecuted a direct appeal. (Cr DE# 148). On appeal, Mathis challenged the Court's admission of several of Mathis's prior convictions under Rule 404(b), claimed that the Court erred in denying Mathis's motion for a new trial (a motion in which Mathis also asserted that the Pierres' identification of him was improper), erred by not granting Mathis's motion to suppress, and erred by not granting a judgment of acquittal based on the alleged lack of evidence against him (Cr DE# 165). The court of appeals reviewed and rejected every one of those claims, affirming Mathis's convictions (Id.).

On May 17, 2013, the Eleventh Circuit Court of Appeals *per curiam* affirmed the judgment in a written, but unpublished opinion. United States v. Mathis, 519 Fed.Appx. 643 (11th Cir. 2013)(unpublished). Mathis petitioned for rehearing en banc on June 7, 2013, and that petition was denied in a judgment issued July 18, 2013. Because Mathis did not petition the Supreme Court, his conviction became final 90 days later, on **October 16, 2013.**[1]

Movant returned to this court filing his initial pro se motion to vacate (Cv-DE#1), pursuant to 28 U.S.C. §2255, close to a year

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[1]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

later, on **October 14, 2014.**[2]

IV. Threshold Issues-Timeliness

The government rightfully does not challenge the timeliness of the movant's motion (Cv-DE#1), which was filed prior to the expiration of the federal one-year limitations period. See 28 U.S.C. §2255(f).

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). The "fundamental miscarriage of justice"

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[2]"[U]nder 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); See also 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).

exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent ...."

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Furthermore, a motion to vacate under section 2255 is not a substitute for direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. Lynn, 365 F.3d at 1234-35; Bousley v. United States, 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); McKay v. United States, 657 F.3d 1190, 1195 (11th Cir. 2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." Lynn, 365 F.3d at 1232 n. 14 (quoting Mills, 36 F.3d at 1055). Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider the ground in a section

2255 motion unless the defendant establishes (1) cause for not raising the ground on direct appeal, and (2) actual prejudice resulting from the alleged error, that is, alternatively, that he is "actually innocent." Lynn, 365 F.3d at 1234; Bousley, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a defendant must show that "some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [defendant's] own conduct." Lynn, 365 F.3d at 1235.

A meritorious claim of ineffective assistance of counsel can constitute cause. See Nyhuis, 211 F.3d at 1344. However, ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010).[3]

The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show a violation of his constitutional right to counsel, a defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. Id., 466 U.S. at 686; Williams v.

[3]In this case, man of the claims could have been, but were not raised on direct appeal. Construing movant's arguments liberally, he appears to fault appellate counsel for failing to assign them as error on appeal. Consequently, the claims have been analyzed under Strickland to ascertain whether he is entitled to relief sufficient to circumvent the procedural bar.

Taylor, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); Darden v. United States, 708 F.3d 1225, 1228 (11th Cir. 2013). The standard is the same for claims challenging appellate counsel's effectiveness. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)(quoting Strickland, 466 U.S. at 688).

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 368, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006)(citing Chandler v. United States, 218 F.3d at 1313).

As noted by the Supreme Court:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings,

> knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed .2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690, 104 S.Ct. 2052.

Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011). See also Premo v. Moore, 562 U.S. 115, 121-22, 131 S.Ct. 733, 739-740, 2011 WL 148253, *5 (2011). If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs). See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Brown v. United States, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." Gordon v. United States, 518 F.3d 1291, 1301 (11th Cir. 2008)(citations omitted); Chandler, 218 F.3d at 1315. With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been

different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Allen v. Secretary, Florida Dep't of Corr's, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369 (quoting Strickland, 466 U.S. at 687).

Or, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. Glover v. United States, 531 U.S. 198, 203-04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." Id. at 203.

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 F. App'x 936, 939 (11th Cir. 2005).

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

As will be demonstrated in more detail infra, the movant is not entitled to vacatur on the claims presented.[4] When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively,

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[4]Briefly, the evidence against the movant was more than sufficient to support his convictions. The movant has not shown that the result of the trial or appeal would have been affected had counsel proceeded differently. Further, no denial of due process has been demonstrated. To the contrary, it is clear after independent review of the record that the movant received a fair trial, and that no constitutional violations occurred. Consequently, he has failed to demonstrate that he is entitled to relief in this collateral proceeding.

Moreover, after independent review of the record in its entirety, any other claims, subclaims, or arguments not specifically addressed in this Report, individually identified, or otherwise subsumed within each of the claims presented herein, have been considered by the undersigned and are found to be without merit, warranting no further discussion.

infused the proceedings with unfairness as to deny the movant a fundamentally trial and due process of law. The movant therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9th 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 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the movant'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).

VI. Discussion of the Claims

In **claim 1**, the movant asserts ineffective assistance of counsel for failing to challenge alleged prosecutorial misconduct relating to the presentation of false testimony. Mathis asserts that the undersigned prosecutor knowingly and intentionally presented false testimony of Mathis's confession, as well as testimony of Jonas and Mary Pierre that identified Mathis as the person who rented the apartment where the drugs, gun, and $5,000 in cash were found. (Cr DE# 4,p. 2).

The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11 Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial, Hance v.

Zant, 696 F.2d 940 (11 Cir.), cert. denied, 463 U.S. 1210 (1983); and "[s]uch a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." Williams v. Weldon, 826 F.2d 1018, 1023 (11 Cir.), cert. denied, 485 U.S. 964 (1988). Moreover, none of the errors complained of either individually or cumulatively had a substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 (1993). Here, no prejudice has been established arising from counsel's failure to pursue this claim.

Regardless, the record is devoid of any objective evidence that the government suborned any perjurious testimony. In order to prevail on a Giglio claim, the movant must establish that 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. Vallejo, 297 F.3d 1154, 1163-64 (11th Cir. 2002); Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir. 1999)(quoting, United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995)). Under Giglio, "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. (quoting, United States v. Agurs, 427 U.S. 97, 103 (1976)). The government is also required to turn over to a criminal defendant any impeachment evidence that is likely to cast doubt on the reliability of a witness whose testimony may be determinative of guilt or innocence. United States v. Jordan, 316 F.3d 1215, 1226 n.16, 1253 (11th Cir. 2003).

With respect to the confession, Mathis offers no new evidence that supports a claim of false testimony. Instead, he seeks to relitigate the previous suppression hearing and trial. Mathis,

through his attorney, moved to suppress his confession before trial. At the suppression hearing, Detective Wayne Tillman testified that he advised Mathis of his Miranda rights, and that Mathis made several incriminating statements about the gun and drugs where Mathis was arrested by police. (Cr DE# 79:33-41). Mathis also testified, but denied that he ever met Detective Tillman and denied making any incriminating statements. (Cr DE# 79:89-93). At the close of the hearing, the Court denied the motion to suppress, specifically crediting Detective Tillman's testimony and refusing to credit Mathis's testimony. (Cr DE# 79:131-33). At trial, Detective Tillman again testified about Mathis's confession, and that testimony was consistent with his previous testimony at the suppression hearing. (Cr DE# 159:51-63). Mathis chose not to testify at trial.

The record does not support Mathis's assertion that the prosecutor procured false testimony regarding his confession. Detective Tillman testified twice, both times subject to cross examination, regarding Mathis's confession, and both the Court and the jury credited that testimony. The Court further refused to credit Mathis's testimony. Accordingly, there was no ineffective assistance of counsel with respect to this issue. In this case, there is no reasonable probability of a different outcome based on Mathis's allegation. Even without a confession, there was the testimony of Officer Dairon Williams that he found Mathis in front of the drug trap, chased him into the residence, saw Mathis throw a bottle containing crack cocaine as he entered, and found additional drugs, a gun, and almost $5,000 in cash in the residence into which Mathis ran. (Cr DE# 158:9-22). The government's evidence would have been sufficient even without Mathis's confession. Accordingly, Mathis cannot establish prejudice under Strickland.

The same is true for Mathis's allegation with respect to the testimony of the Pierres. Mathis alleges that after Jonas Pierre initially failed to identify Mathis as the person who rented the apartment where the drugs, gun, and cash were found, the prosecutor "threatened the Pierres of being charged with the drugs and firearm found in the apartment involved in the case, if they did not testify and identify the petitioner as being the individual who rented the apartment from them . . . and also informed them that they would not be allowed to leave the court house." (Cv DE# 4:9). There is simply no evidence to support that claim. Mr. Pierre first failed to identify Mr. Mathis at trial as the person who rented the apartment, but then returned immediately after the next witness was excused and identified Mathis as the person who rented the apartment (Cr DE# 158:109-114, 120-21). Mrs. Marie Pierre then testified and immediately identified Mathis as the one to whom they rented the apartment. (Cr DE# 158:124-25). Mathis's attorney did all he could to challenge those identifications.

Accordingly, there is no evidence of ineffective assistance because there is nothing to suggest that any other attorney could have done a better job challenging the testimony of Jonas and Marie Pierre. There is also no reasonable probability of a different outcome because the identification of Mathis as the person who rented the apartment was not critical to the case. While those identifications certainly helped corroborate the testimony of the officers who actually found Mathis in front of the apartment with drugs, a gun, and approximately $5,000 in cash, it also would have been entirely possible and reasonable that Mathis might have had a co-conspirator rent the apartment that Mathis subsequently used to sell drugs. Thus, the identity of the person who rented the apartment did not change the fact that the officers found Mathis in the presence of the drugs and gun that were the subject of the

charges in the indictment, and there is no reasonable probability of a different outcome under Strickland.

Under the totality of the circumstances present here, the movant has failed to establish prosecutorial misconduct. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11th Cir. 1984). Therefore, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to pursue the issue as suggested in this §2255 proceeding. Relief must therefore be denied under claim 1.

Under **claim 2**, the movant alleges ineffective assistance of counsel for failing to challenge biased jurors.

Mathis first refers to a juror he claims was a detention deputy and who Mathis says encountered him while Mathis was at Metro-West Detention Center in Miami between April 2010 and November 2011 (Cv DE# 4:13-15). Mathis also claims that the same juror was biased because the juror had a brother killed in some way related to drugs or guns (Cv DE# 4:14). The record contains no evidence to support these assertions. The movant is not entitled to relief in connection with conclusory allegations, not supported by the record. See Lynn v. United States, 365 F.3d 1225, 1238 (11th Cir. 2004) (finding that the district properly denied § 2255 relief without a hearing where Lynn supported claim only with "mere conclusory allegations"). Accordingly, there is nothing to support an ineffective assistance claim because in the absence of any evidence at all, there is nothing to suggest that a better attorney would have done anything differently with respect to the alleged bias by the juror, or that such actions would have created a reasonable probability of a different outcome at Mathis's trial.

See Strickland.

Mathis next alleges bias with respect to a second juror who was approached by one of Mathis's associates the day of jury deliberations (Cv DE 4:15-18). At trial, the juror alerted the Court that she was approached by an individual on her train ride to court, and that the individual had attempted to talk to the juror (Cr DE# 161:37-43). The Court then specifically asked the juror whether the encounter would affect the juror's ability to be fair and listen and deliberate with her other fellow jurors, and the juror said that it would not (Cr DE# 161:43). Accordingly, the Court concluded that the juror "was fairly poised and took care of herself very well," and that there was no taint there whatsoever (Id.).

Mathis cannot establish that counsel was deficient in failing to challenge the court's conclusion and fails to provide evidence that the outcome would have been different had this juror been dismissed. See Strickland. As a result, he is not entitled to relief under claim 2.

Under **claim 3**, the movant alleges ineffective assistance of counsel for failing to challenge the admission of Petitioner's prior convictions. (Cv DE# 4:19-23).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity ...." Fed.R.Evid. 404(b). Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. When a defendant is charged as a felon in possession of a firearm, evidence concerning the nature of the prior felony offense is improperly admitted when the defendant otherwise admits his status as a felon because the risk of unfair prejudice substantially outweighs the probative value of the evidence. Old Chief v. United States, 519 U.S. 172, 174, 185 n.8 (1997).

However, movant made intent and knowledge issues in the case by choosing to plead not guilty and go to trial. See United States v. Zapata, 139 F.3d 1355, 1358 (11th Cir. 1998)("A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent...."); United States v. Jernigan, 341 F.3d 1273, 1281 n.7 (11th Cir. 2003)("[B]y pleading not guilty, [the defendant] placed [the knowledge] element of the §922(g) offense in issue.").

Mathis contested all the charges against him completely, including knowing possession of the firearm and drugs that were found in close proximity to him when he fled from Officer Williams. Accordingly, the Court properly admitted evidence of Mathis's prior convictions under Rule 404(b) of the Federal Rules of Criminal Procedure for possession of a firearm or ammunition by a convicted felon, for cocaine possession, and for cocaine sale or possession with intent to help prove the knowledge and intent elements that the United States was required to prove. (Cr DE# 159:80-82). The Court gave the proper limiting instruction about what the evidence could be used for at the time the convictions were admitted (Cr DE# 159:80-81). The Court made its decision to allow some of Mathis's

convictions (but not all) after thorough briefing from counsel and careful consideration by the Court (Cr DE# 59, 68-69, 157:7-8).

Consequently, the government was entitled to use Rule 404(b) evidence to meet its burden of proof because movant did not take affirmative steps to remove intent or knowledge as issues. See Zapata, 139 F.3d at 1358. Evidence of his other drug dealing was relevant to the issue of whether movant intended to distribute the drugs he possessed at the time of his arrest. See United States v. Diaz-Lizaraza, 981 F.2d 1216, 1224 (11th Cir. 1993)("[E]vidence of [the defendant's prior] arrest for possessing marijuana with intent to distribute was relevant to the issue of his intent to conspire to possess and distribute cocaine in the present case."). Evidence that movant possessed another firearm is relevant to whether, at a later date, he knowingly possessed a firearm. See United States v. Jernigan, 341 F.3d 1273, 1281-82 (11th Cir. 2003)("Put simply, the fact that [the defendant] knowingly possessed a firearm in a car on a previous occasion makes it more likely that he knowingly did so this time as well, and not because of accident or mistake.").

Mathis also challenged the admission of the prior convictions on appeal, and that challenge was rejected by the Eleventh Circuit (Cr DE# 165:3-6). Thus, although Mathis now couches the argument as an ineffective assistance claim, as he is permitted to do, there is nothing to support an argument the outcome would have been different had counsel taken a different approach on this issue. See Strickland. Mathis is not entitled to relief under claim 3.

Under **claim 4**, Mathis alleges ineffective assistance of counsel for failing to properly contest the Petitioner's right to notice of proof of the drug substances at issue. (Cv DE# 4:24-36). Specifically, Mathis alleges "[t]he prosecutor in this case, like

all other federal prosecutors when prosecuting cases involving blacks and cocaine base, has knowingly and intentionally evaded the ethical and professional rules, regulations, and standards set forth above, by seeking conviction and sentence for enhanced penalties of crack cocaine without proof beyond a reasonable doubt" (Cv DE# 4:29).

The indictment did specifically set forth the drugs that Mathis was alleged to knowingly possess with the intent to distribute, including cocaine base, cocaine, and marijuana (Cr DE# 1). Thus, Mathis was on notice about the drugs charged. Second, Mathis actually contested the nature of the drugs at trial, and the United States offered the expert testimony of Melissa Darby, a criminalist with the Miami-Dade Police Department (Cr DE# 158:114). Ms. Darby testified that she tested the drugs recovered in the case, and they tested positive for the presence of cocaine, cocaine base, and marijuana, as charged in the indictment (Cr DE# 158:116-18). The Court instructed the jury that if they unanimously found Mathis guilty beyond a reasonable doubt of the Count 1 charge of possession of controlled substances with the intent to distribute, the jury should also make specific findings as to what drugs Mathis possessed (Cr DE# 161:50, 56). As part of its unanimous guilty verdict on all counts, the jury specifically found that Mathis possessed cocaine base, cocaine, and marijuana, as charged in the indictment (Cr DE# 125). Thus, Mathis was on notice of the drugs with which he was charged, and convicted beyond a reasonable doubt with respect to those charges.

Mathis cites in Alleyne v. United States, 133 S. Ct. 2151 (2013) in connection with this claim, but Alleyne is inapposite here. In Alleyne v. United States, 133 S. Ct. 2151 (2013), the Supreme Court held that any fact that increases a mandatory minimum

sentence must be submitted to the jury and found beyond a reasonable doubt." Id. at 2155. None of the drug quantities at issue subjected Mathis to a mandatory minimum sentence. To the extent that Mathis complains about his sentence and the severity of the penalties for cocaine base, the length of his overall sentence did not depend on the sentence for the cocaine base. Mathis received a total sentence of 15 years, which consisted of concurrent 120-month sentences for both the drug and gun counts, and an additional consecutive 5 years for the 18 U.S.C. § 924(c) count (Cr DE# 147).

Thus, although Mathis frames his drug challenge as an ineffective assistance claim, there is neither deficient performance by counsel nor any reasonable probability of a different outcome under Strickland. Accordingly, Mathis is not entitled to relief under claim 4.

VII. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on these claims, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he/she would only be entitled to a hearing if his/her allegations, if proved, would establish his/her right to collateral relief. See Townsend v. Sain, 372 U.S. 293, 307 (1963). A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979). As discussed in this Report, the claims raised are unsupported by the record or without merit. No evidentiary hearing is required.

VIII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) 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 int his case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Conclusion

It is therefore recommended that this motion to vacate be denied; that all pending motions, not otherwise ruled upon be dismissed, as moot; 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 18th day of August, 2015.

UNITED STATES MAGISTRATE JUDGE

cc: Emmanuel Mathis, Pro Se
Reg. No. 84132-004
Coleman I-USP
United States Penitentiary
Inmate Mail/Parcels
Post Office Box 1033
Coleman, FL 33521

John Gonsoulin
United States Attorney's Office
99 NE 4 Street
Miami, FL 33132
Email: john.gonsoulin@usdoj.gov

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