APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13746-H

ROBERT MARSHALL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

ORDER:

Robert Marshall moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Marshall has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

Marshall's motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13746-H

ROBERT MARSHALL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Robert Marshall has filed a motion for reconsideration of this Court's January 16, 2019, order denying his construed motion for a certificate of appealability to review the denial of his motion to vacate, 28 U.S.C. § 2255. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROBERT MARSHALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:16-CV-477-WKW
	)	[WO]
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

On May 21, 2018, the Magistrate Judge filed a Recommendation that Petitioner Robert Marshall's 28 U.S.C. § 2255 motion be denied. (Doc. # 42.) Petitioner timely filed objections. (Doc. # 31.) The court has conducted an independent and *de novo* review of those portions of the Recommendation to which objection is made. *See* 28 U.S.C. § 636(b). The court finds that the objections are due to be overruled and that the Recommendation is due to be adopted.

I. FACTS

On May 9, 2012, Petitioner Robert Marshall was indicted along with eleven other defendants, all of whom were charged with conspiracy to distribute or to possess with intent to distribute 5 or more kilograms of powder and crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Doc. # 1 in *United States v. Bledson, et al.*, Case No. 2:12-cr-87-WKW.) On August 9, 2012, a superseding indictment

was filed. Count 1 of the superseding indictment charged Petitioner and the other defendants with conspiracy to distribute 5 or more kilograms of powder and crack cocaine. The superseding indictment added numerous other counts, including Count 20, which charged Petitioner and codefendant Delmond Lamar Bledson with using a cellular telephone on or about April 2, 2012, to commit or facilitate the conspiracy alleged in Count 1, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2. (Doc. # 201 in *United States v. Bledson, et al.*, Case No. 2:12-cr-87-WKW.)

At trial, on Count 1 of the superseding indictment, the jury convicted a number of Petitioner's codefendants of conspiracy to distribute or possess with intent to distribute 5 or more kilograms of cocaine. However, on Count 1, the jury convicted Petitioner only of the lesser included offense of conspiracy to distribute or possess with intent to distribute 500 grams or more of cocaine powder. The jury also convicted Petitioner on Count 20. (Doc. # 528 in *United States v. Bledson, et al.*, Case No. 2:12-cr-87-WKW.)

It is not disputed that Defendants Bledson and Willie Jerome Davis were large-scale distributors of cocaine in Montgomery, Autauga, and Elmore counties, Alabama, who generally maintained separate supply sources from each other, but who purchased cocaine from each other when their own supplies were low. At trial, Defendant Rajneesh Dikka Daniels testified that she used her apartment to receive, break down, weigh, repackage, and distribute over 50 kilograms of cocaine for

Davis. Daniels knew Petitioner Marshall because she was his cousin. Daniels also testified that, on at least ten occasions since 2009, she delivered two 125 gram packages of cocaine to Petitioner. Therefore, per Daniels's testimony, she sold at least 2,500 grams of cocaine to Petitioner on Davis's behalf between March 2009 and May 2012. (Doc. # 16-7 at 52.) Unlike Daniels's other purchasers, including Defendant Bledson,[1] Petitioner did not arrange the drug purchases through Davis. Instead, he contacted Daniels directly. For each sale, Daniels would personally deliver the cocaine to Petitioner at his house or apartment; Petitioner would pay Daniels for the drugs; and Daniels would later give Petitioner's money to Davis. (Doc. # 16-7 at 52.)

At trial, Bledson testified that he also sold cocaine to Petitioner. Through testimony of Bledson and Defendant Tony Gardner, as well as through audio recordings of telephone calls and video recordings of the event, the Government presented evidence that, on March 31, 2012, in a meeting Gardner had arranged,[2]

[1] Daniels testified that, at Davis's direction, she sold two 125-gram packages of cocaine to Defendant Bledson on at least four occasions between March 2009 and May 2012, in meetings arranged by Davis.

[2] Defendant Gardner arranged the meeting because, prior to March 31, 2012, Petitioner and Defendant Bledson did not have each other's telephone numbers because Petitioner normally used a different supplier. (Doc. # 16-10 at 49.) Gardner was a cocaine dealer who, since 2010, had regularly purchased 31-gram quantities of powder cocaine from Bledson. Gardner and Petitioner had been friends since their school days. (Doc. # 16-10 at 47–48.) After the March 31, 2012 meeting, Petitioner and Bledson exchanged numbers, and Petitioner made direct contact with Bledson by telephone.

Bledson met Petitioner for the first time to sell Petitioner 62 grams of cocaine in exchange for $2,150.00 in cash. (Doc. # 16-10 at 4-9, 49-50.) The March 31, 2012 sale took place at a Pizza Hut in Millbrook, Alabama. (Doc. # 16-10 at 4-9.) In conjunction with the March 31, 2012 cocaine sale, Gardner collected $50 "for [his] time." (Doc. # 16-10 at 50.)

Two days later, on April 2, 2012, Petitioner contacted Bledson by telephone to arrange another purchase of cocaine. Although the attempted cocaine purchase failed, Petitioner gave Bledson his telephone number so that Bledson could contact Petitioner directly in the future when he had cocaine to sell to Petitioner. (Doc. # 16-10 at 9–10.)

II. DISCUSSION

Upon a *de novo* review of the record, the court finds that the portions of the Recommendation to which objections have been made are free from factual and legal error and that the Recommendation is due to be adopted.

For the most part, Petitioner's objection merely restates arguments that were adequately and correctly addressed in the Recommendation. However, further discussion is warranted with respect to one potentially significant argument raised by Petitioner that is not a mere reassertion of matters already fully addressed in the

Recommendation.[3] Specifically, Petitioner argues that the Magistrate Judge erred in denying him an evidentiary hearing to resolve factual conflicts between Petitioner's affidavit and that of his counsel. The affidavits conflict as to (1) whether Petitioner told his counsel that he wished to present a defense that he purchased the powder cocaine to support his own drug habit and to share with his friends, and (2) whether Petitioner's counsel failed to adequately advise him of his right to testify that the drugs he purchased were for his own personal use and for distribution to his friends. It is undisputed that Petitioner's counsel did not present the allegedly requested defense. Petitioner did not testify.

Ordinarily, when a habeas petitioner and his counsel have filed conflicting, nonconclusory affidavits that create a credibility issue for determination, an evidentiary hearing is appropriate to resolve the conflict. *See Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful." (citation and internal quotation marks omitted)); *Rizo v. United States*, 446 F. App'x 264, 265 (11th Cir. 2011) ("[C]ontested fact[ual] issues in § 2255 cases

[3] The court does not find any error in the Recommendation that presents grounds for rejecting or modifying the recommendation or returning the matter to the Magistrate Judge for further consideration, including the portion of the recommendation addressing the conflicts between the affidavits and the fact that a hearing is not necessary. However, in light of Petitioner's objections, further discussion is warranted to explain additional reasons why no hearing is necessary in this case.

must be decided on the basis of an evidentiary hearing, not affidavits." (quoting *Montgomery v. United States*, 469 F.2d 148, 150 (5th Cir. 1972)).[4] Because of the conflicting affidavits, the Government conceded that Petitioner was entitled to an evidentiary hearing as to whether his counsel was ineffective in failing to properly advise him as to his right to testify. (Doc. # 16 at 58–59.) *See Aron v. United States*, 291 F.3d 708, 714–15 (11th Cir. 2002) ("[I]f the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" (quoting *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989)).

In this case, however, despite the conflicting affidavits and the Government's concession, an evidentiary hearing is not necessary to resolve the petition because, even if the assertions in Petitioner's affidavit are true, he is not entitled to relief. *Hembree v. United States*, 307 F. App'x 412, 424 (11th Cir. 2009) ("Because [the petitioner] has not established that an evidentiary hearing would alter the analysis of his § 2255 motion, the district court did not abuse its discretion in denying such relief."). To prevail on a claim of ineffective assistance of counsel, including failure to properly advise as to the right to testify, a habeas "petitioner must establish [(1) that] his or her counsel's representation fell below an objective standard of

[4] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

reasonableness, and (2) but for the deficiency in representation, a reasonable possibility exists that the result of the proceedings would have been different." *Fishbone v. Sec'y for Dep't of Corr.*, 165 F. App'x 800, 801 (11th Cir. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The conflicts between the affidavits pertain solely to the first requirement because those conflicts concern whether Petitioner's counsel rendered objectively unreasonable assistance by either (1) failing to present the defense that Petitioner purchased drugs for his own personal use and distribution to friends, or (2) failing to adequately advise Petitioner of his right to testify in order to present that same defense. Petitioner has failed to satisfy the second requirement: He has not demonstrated a reasonable possibility that, if he had testified regarding that defense or if his counsel had presented that defense to the jury, the outcome of the case would have been different.

A conspiracy requires "(1) an agreement to achieve unlawful activity; (2) the defendants' knowing and voluntary participation in the conspiracy; and (3) the commission of an act in furtherance of the agreement." *United States v. Yarbrough*, 260 F. App'x 230, 234 (11th Cir. 2008) (quoting *United States v. Brenson*, 104 F.3d 1267, 1281–82 (11th Cir. 1997)). The agreement between the conspirators must have as its object the commission of an act made unlawful by the narcotics laws. *United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999). An agreement to sell or purchase drugs cannot, in and of itself, constitute a conspiracy, "for it has no separate

criminal object." *Id.* There must be "an agreement to commit some other crime beyond the crime committed by the [drug sale] agreement itself." *Id.* (citing *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993) (en banc)).

For example, as Petitioner points out, a single drug sale solely for the buyer's personal use is not generally considered a conspiracy to distribute drugs because the substantive crime (the sale agreement between buyer and purchaser) has no separate criminal object beyond the sale itself. *Lechuga*, 994 F.2d at 349; *see also Dekle*, 165 F.3d at 830 ("[E]vidence that the parties understood their transactions to do no more than support the buyer's personal drug habit is antithetical to a finding of conspiracy." (citing *Lechuga*, 994 F.2d at 348–49)); *United States v. Hardy*, 895 F.2d 1331, 1134–35 (11th Cir. 1990) (holding that the transfer of an eighth of an ounce of cocaine from the defendant to a guest in his home did not constitute a drug distribution conspiracy because there was no indication that the parties to that single transfer agreed to participate in drug distribution); *United States v. Brown*, 872 F.2d 385, 391 (11th Cir. 1989) (holding that "the mere fact of a purchase by a consumer of an amount of illegal substance" does not establish a drug distribution conspiracy).

Likewise, a single drug sale of resale quantities, without more, has no criminal object but the sale itself and, therefore, is not a conspiracy, even if the seller happens to know the buyer intends to distribute some or all of the drugs purchased. *Lechuga*, 994 F.2d at 349. "The same result holds where the [buyer] purchases a small

quantity of an illegal drug to share with another person." *Id.* Similarly, although usually a feature of a distribution conspiracy, a pattern of repeated purchases does not, without more, establish the existence of the conspiracy. *Dekle*, 165 F.3d at 830; *see, e.g.*, *Hardy*, 895 F.3d at 1134–35 (holding that no agreement to distribute drugs, and therefore no drug conspiracy, was established by evidence of simple possession, such as evidence that the defendant regularly hosted drug parties, frequently personally consumed cocaine, and jointly possessed an eighth of an ounce of cocaine with another person for their joint personal use).

However, a conspiracy *does* exist where the parties to the drug sale not only knew that the drugs were being sold for further distribution, but also "'join[ed] both mind and hand to make accomplishment of [the illicit further distribution] possible.'" *Lechuga*, 994 F.2d at 349 (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943)); *see also Brown*, 872 F.2d at 391 (holding that, to establish a conspiracy, the government must establish not only an illicit goal to distribute cocaine or possess cocaine with the intent to distribute, but the government must also show that the defendant in question knew of the illicit conspiratorial goal and voluntarily participated in it); *cf. Yarbrough*, 165 F. App'x at 230 (noting that, in *Dekle*, the court distinguished a doctor's scheme of personally illegally distributing drug prescriptions to individual patients from a "situation involving a purchaser in the chain of distribution in order to resell them"). It is not necessary that the

defendant "knew all of the details" of the drug distribution conspiracy; "knowledge of the essential objective is sufficient to impose liability." *United States v. Johnson*, 889 F.2d 1032, 1035–36 (11th Cir. 1989); *see also United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir. 1984) ("The knowledge requirement refers simply to knowledge of the essential objective of the conspiracy; a defendant may be found guilty notwithstanding that he did not have knowledge of all the details of the conspiracy or played only a minor role in the total operation."), *abrogated on other grounds by United States v. Lewis*, 492 F.3d 1219 (11th Cir. 2007).

Whether a drug transaction or series of transactions constitute a conspiracy — *i.e.*, whether the parties to the sale knew of larger distribution objectives and agreed to join their efforts to make the distribution enterprise possible — is largely dependent on the facts of each case. "The existence of a conspiracy may be demonstrated by circumstantial evidence such as inferences from the conduct of the defendant or circumstances indicating a scheme or plan." *Bascaro*, 742 F.2d at 1359; *Johnson*, 889 F.2d at 1035 ("Agreements to enter into conspiracies can be based on inferences from the conduct of the participants."). If evidence demonstrates that the defendant "knowingly assume[d] a role instrumental to the success of the conspiracy, the jury may properly infer that [the defendant was] a member in it." *Bascaro*, 742 F.2d at 1359. As Petitioner points out, "in a typical drug distribution scenario, involving a large-volume seller, several mid-level

distributors, and multiple street-level dealers, . . . all [participants] share the common goal of maximizing the cash returns of the business through the distribution of the drugs." *Dekle*, 165 F.3d at 829. Thus, in typical cases, evidence frequently found to support an inference of a conspiracy includes, but is not limited to, evidence of "a continuing relationship that resulted in the repeated" sale of drugs by or to a defendant, *Brown*, 165 F.3d at 830, that a defendant ran errands for the benefit of the distribution ring, that the defendant purchased the drugs on credit or that drugs were "fronted" in conjunction with the sale, and that the defendant in question assisted in transporting or arranging transport of drugs to be distributed. *See United States v. Beasley*, 2 F.3d 1551, 1560–61 (11th Cir. 1993); *Johnson*, 889 F.3d at 1035–36.

Petitioner contends that he was not part of the larger distribution conspiracy alleged in Count 1 of the indictment because he did not sell cocaine for the benefit of any of the defendants or collect money for them, because the other defendants had no direct pecuniary interest in what Petitioner did with the cocaine, and because Petitioner did not return a portion of the drug proceeds to the sellers, purchase on credit, or accept fronted drugs for resale. Petitioner contends that he was a cocaine user and was purchasing cocaine merely for "his personal use and the use of his friends." (Doc. # 43 at 3.)

In his memorandum in support of his petition, Petitioner states that he "and

several of his friends would pool their monies together so they could take advantage of the amount of cocaine they would receive if they all purchased cocaine together, instead of individual purchases," and that, after each purchase, "Petitioner and his friends would go to a predetermined location and enjoy their drugs with each other, *oftentimes, consuming it later.*" (Doc. # 2 at 6 (emphasis added).) In his reply brief in support of his petition, Petitioner characterized his purchases as being devoid of intent to join or further his codefendant's larger distribution business, but instead to make "*a bulk purchase of cocaine for the purpose of hosting a party in which the Petitioner was hosting where he would serve his guest[s] cocaine after those attending all contributed to the cost of the drugs at the party.*" (Doc. # 20 at 5 (emphasis added).) In an affidavit submitted in support of the Petition, sworn under penalty of perjury, Petitioner states:

> I HEREBY SWEAR, that I informed then counsel that I was on drugs and was purchasing these drugs for a group of friend[s] in which we would meet at various locations and consume these drugs. . . .
>
> . . . .
>
> Like I've always stated, every purchase I ever made was for not only myself, but for others in which we would get together and use the drugs.

(Doc. # 20-1 at 1, 4-5.)

Thus, although Petitioner claims that he purchased drugs in part for himself,[5]

[5] The fact that Petitioner had a drug addiction and/or partook of some of the drugs at the cocaine parties he hosted does not alter the analysis. The reason for the rule that an agreement to

he openly admits in his briefs and in sworn testimony that the purpose of his drug purchases was to obtain possession of drugs that he intended to distribute to others. *See* 21 U.S.C. § 802(11) ("The term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term 'distributor' means a person who so delivers a controlled substance or a listed chemical."); *id.* § 802(8) ("The terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship."). (*See also* Doc. # 526 in *United States v. Bledson, et al.*, Case No. 2:12-cr-87-WKW, at 14 (jury instruction stating that "'to intend to distribute' is to plan to deliver possession to someone else, even if nothing of value is exchanged").)

Thus, Petitioner admits he purchased the drugs in bulk, then distributed them to those individuals who attended his cocaine parties and who contributed to the cost

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purchase drugs for one's personal consumption does not constitute a conspiracy is that such a sale has no criminal object (such as drug distribution) beyond the sale itself. *Lechuga*, 994 F.2d at 349. That rationale is not relevant where, as here, the purchase was made to facilitate further drug distribution. (Doc. # 20-1 at 1, 4-5 ("Like I've always stated, every purchase I ever made was for not only myself, but for others in which we would get together and use the drugs.").) *Cf. Dekle*, 165 F.3d at 830 (holding that "evidence that the parties understood their transactions to *do no more than* support the buyer's personal drug habit is antithetical to a finding of conspiracy" (emphasis added)). Moreover, in this case, Petitioner personally partaking was incident and integral to his drug distribution scheme of hosting cocaine parties and charging guests to partake in the drugs as a group activity. (*See* Doc. # 20 at 5 (Petitioner's characterization of his purchases from his codefendants as "bulk purchase . . . for the purpose of hosting a party in which the Petitioner was hosting where he would serve his guest[s] cocaine after those attending all contributed to the cost of the drugs at the party").)

of the drugs he had already purchased. Even though Petitioner admits he used some of the cocaine at his parties, Petitioner's purchases are distinct from the sort of situation where the buyer uses pooled money (made up of contributions from specific people) to purchase drugs, then uses those drugs immediately together with the same people who had already contributed to the purchase money. Here, Petitioner used his own money to purchase drugs, then later determined who would receive the drugs based on who attended his parties and "reimbursed" him for the cost of the drugs. *Cf. Hembree*, 307 F. App'x at 414, 422 (holding that the defendant could not be guilty of participating in a cocaine distribution conspiracy where he and five or six of his friends would "pool their money to buy cocaine" from the drug distributors "for immediate use"); *Hardy*, 895 F.2d at 1134 (holding that two people jointly obtaining and using an eighth of an ounce ("a small amount") of cocaine for their joint personal use was not evidence that the joint users were engaged in a drug distribution conspiracy).

In any event, unlike in the cases Petitioner cites, the distribution conspiracy in question here is not between Petitioner and those to whom he distributed drugs for immediate consumption. The alleged distribution conspiracy here is between Petitioner and his codefendants for supplies of "bulk" quantities of cocaine needed to facilitate Petitioner's further cocaine party drug distribution activities. *Cf. Hardy* 895 F.2d at 1335 (holding that a single transfer of drugs from the defendant to a

guest in his home, without more, did not constitute a drug distribution conspiracy because there was no evidence of a "prior contemporaneous agreement" to distribute drugs beyond the single transfer itself).

If Petitioner's characterization of the transaction is to be believed, this is not a typical case in which a defendant, as a purchaser, sought to become a distributor for the benefit of a larger drug conspiracy.[6] Thus, the usual factors, such as whether Petitioner bought on credit or returned a portion of the proceeds to the sellers, are not particularly useful in evaluating whether Petitioner was guilty of a drug conspiracy. However, nothing in the case law or applicable statute requires that a drug conspiracy can *only* occur in the typical situation where the buyer acts as the seller's agent in reselling the drugs. As explained in *Lechuga*, "[v]ertical integration is not a condition of conspiracy." 994 F.2d at 349. "It should not make a difference whether an illegal agreement takes the form of an illegal simulacrum of an employment contract or of a 'relational' contract, implying something more than a series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise." *Id.* Further, there is no requirement that the

[6] Had the jury found Petitioner guilty of the larger drug conspiracy in Count 1, Petitioner's insistence that he did not participate in the sellers' larger distribution conspiracy might have more traction. Instead, the jury found Petitioner not guilty of the larger drug conspiracy in Count 1, but guilty of the lesser included charge of "conspiring to possess with intent to distribute or distribute" 500 grams or more of cocaine powder, an amount consistent with Petitioner's admitted purchases for his own distribution scheme. (Doc. # 528 in *United States v. Bledson, et al.*, Case No. 2:12-cr-87-WKW, at 10.)

buyer must be the one to "assume[ ] an integral role," *Bascaro*, 742 F.2d at 1359, in the seller's distribution activities, rather than the seller agreeing to assume an integral role for the benefit of the buyer's ongoing distribution activities. *See Lechuga*, 994 F.2d at 349 (noting that the existence of the conspiracy does not hinge on whether the buyer or the seller was the one who took the initiative to establish a long-term relationship for the purpose of distributing drugs).

As Petitioner freely admits, the reason he sought to obtain distribution quantities[7] of drugs ("bulk" quantities, in Petitioner's words (Doc. # 20 at 5)) from his codefendants was to supply his usual practice of distributing drugs to others. It is unlawful to distribute drugs *or* to possess drugs with the intent to distribute them. 21 U.S.C. § 841(a)(1). Petitioner does not argue that Daniels, Davis, and Bledson were unaware that he intended to obtain possession of the drugs for the purpose of personally distributing them to others. Further, based on the evidence and testimony presented, and based on the quantity and frequency of the drug purchases and attempted purchases (in at least one case only days apart), the jury could reasonably have inferred that Daniels, Davis, and Bledson knew that Petitioner intended to further distribute the drugs he purchased.

As Petitioner points out, a seller's mere knowledge that the buyer was

[7] At trial, Defendant Gardner testified that purchases for distribution usually involved 24 or more grams of powder cocaine. (Doc. # 16-10 at 47.)

distributing the drugs he purchased would not be enough, standing alone, to establish a drug distribution conspiracy. *Brown*, 872 F.2d at 391; *see also Lechuga*, 994 F.2d at 349; *cf. United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) ("Purchase or sale of contraband may, of course, warrant the inference of an agreement going well beyond the particular transaction. . . . . But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, *unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.*" (emphasis added)).

However, unlike in one-time sale situations, Davis and Daniels had an ongoing relationship with Petitioner whereby they regularly provided a reliable source of supply for Petitioner's drug distribution activities. Unlike Davis's other customers to whom Daniels sold drugs only after Davis accepted and arranged for the sale, Petitioner would call Daniels directly to request cocaine, and she would personally deliver the cocaine to Petitioner's house or apartment. Moreover, by the time the conspiracy was interrupted by law enforcement, Petitioner had not only used Bledson as a supply source in an individual distribution quantity purchase, but, by exchanging telephone numbers with Bledson and instructing Bledson to contact him directly if he had cocaine to sell, Petitioner also took steps to establish an ongoing relationship in which Bledson also served as a regular, readily available

supply source for Petitioner's drug distribution activities. Regular supply sources of distribution quantities of cocaine are necessary to the success of a drug distribution scheme like Petitioner's, and regular wholesale customers are integral to the success of a wholesale distributor's business. *See United States v. Hess*, 691 F.2d 984, 988 (11th Cir. 1982) (recognizing that, while "a fence does not automatically become a conspirator by purchasing stolen property," the existence of a fence is necessary for the success of a hijacking conspiracy, and "[a] fence who holds himself out as a place to dispose of stolen goods . . . is a conspirator"); *cf. United States v. Parker*, 554 F.3d 230, 239 (2d Cir. 2009) (noting the limited nature of the buyer-seller rule and holding the evidence supported the finding of a conspiracy between wholesale drug sellers and each of three regular customers whom the wholesalers knew to be reselling the drugs because, due to the wholesalers' desire to cultivate repeat customers and the purchasers' desire to cultivate reliable supply sources, the wholesalers and their customers shared an interest in success of one another's distribution efforts; the court noted that "[t]he business of selling wholesale quantities depends on the ability of the customers to resell" and that the purchasers had an interest in the wholesalers' success as a reliable source of drugs for resale); *United States v. Hawkins*, 547 F.3d 66, 75 (2d Cir. 2008) (noting that exchange of telephone numbers and knowing where to find a supplier can indicate that a buyer was more than "just a . . . customer who happened to intend to redistribute cocaine

independently," but a participant in an agreement to facilitate ongoing drug distribution efforts).

Thus, a reasonable jury could have concluded that, in conjunction with the drug sales, Davis, Daniels, and Bledson agreed to something more than individual sales transactions that existed for their own sake, or to a series of transactions in which they had no interest in the ongoing success of Petitioner's drug distribution activities. A reasonable jury could have concluded that Davis, Daniels, and Bledson willingly "joined mind and hand" in a mutually beneficial arrangement or informal plan with Petitioner to make his drug distribution activities possible by serving in ongoing, instrumental roles as some of Petitioner's regularly available distribution-quantity powder cocaine supply sources.[8] *See Hembree*, 307 F. App'x at 422 (noting that, "[i]n *Hardy* and *Dekle*, we did not hold that a buyer/seller relationship cannot be characterized as a continued activity within an already existent conspiracy"); *Dekle*, 165 F.3d at 829 (citing *Lechuga* in noting that, in drug conspiracies, the buyer

[8] The court notes that, in general, the prolonged cooperation inherent in such a business relationship requires development of a higher degree of mutual risk and mutual trust than is inherent in arms-length, one-time sales transactions. The record contains evidence from which a relationship of mutual trust between Petitioner and his suppliers can reasonably be inferred, such as Petitioner's habit of arranging drug purchases with Daniels directly (rather than Davis screening and accepting the purchase request and directing Daniels to fill the order as was the practice with Davis's and Daniels's other customers), Daniels personally making deliveries to Petitioner's house or apartment, and Petitioner's encouragement to Bledson to store Petitioner's number in his cell phone and make direct contact for future sales. In particular, mutual trust and some degree of increased personal risk of exposure are inherent in divulging one's home and apartment addresses and cell phone number to a large scale drug supplier for ready accessibility, as Petitioner did to ensure ease of access to his supply sources and to facilitate deliveries.

and seller generally have some mutual interest in the success of the distribution activity); *Bascaro*, 742 F.2d at 1360 (holding that defendants were more than "mere purchasers" of marijuana where "[t]hey were among the selling group's best buyers, they purchased from the selling group on numerous occasions, and maintained a close relationship with the selling group"); *see also Lechuga*, 994 F.2d at 350 ("Prolonged cooperation is neither the meaning of conspiracy nor an essential element, but it is one type of evidence of an agreement that goes beyond what is implicit in any consensual undertaking, such as a spot sale."); *Bascaro*, 742 F.2d at 1359 (holding that, where one "assumes a role instrumental to the success of the conspiracy, the jury may properly infer that he is a member in it"); *cf., e.g., United States v. Pollet*, 588 F. App'x 340, 341 (5th Cir. 2014) (holding evidence supported a finding of a conspiracy between a regular purchaser of wholesale methamphetamine quantities and her wholesale dealer where, among other things, the "supplier often facilitated [the purchaser's] distribution activity by delivering the methamphetamine to her"); *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012) (finding evidence of a distribution conspiracy between a wholesaler and purchaser where the wholesaler undertook steps to cultivate the buyer as a repeat customer); *Hawkins*, 547 F.3d at 75 (holding that a reasonable jury could have found a conspiracy between a wholesaler and a regular customer known to be reselling the drugs on grounds that parties entered a "distribution agreement . . . that afforded [the

customer] a source of supply" for resale and the wholesaler "another outlet – albeit small – for his contraband" on "an ongoing basis").

Put another way, if presented at trial by Petitioner's counsel or testimony, Petitioner's admission that he used his codefendants as the supply sources for his own drug distribution activities would have been, in effect, an outright confession to the very charges on which the jury found him guilty. Thus, Petitioner has not established a reasonable possibility that, even if the allegations in his affidavit are true, and even if he had presented testimony or a defense that he purchased the drugs for himself and for distribution to his friends, the jury would not have found him guilty of the conspiracy (and, by extension, of using a cell phone in furtherance of the conspiracy). Therefore, Petitioner cannot prevail on his claim of ineffective assistance of counsel, and he is not entitled to an evidentiary hearing.

III. CONCLUSION

Accordingly, it is ORDERED that the Recommendation (Doc. # 42) is ADOPTED, the objections (Doc. # 43) are OVERRULED, the 28 U.S.C. 2255 motion is DENIED, and this case is DISMISSED with prejudice.

Final judgment will be entered separately.

DONE this 29th day of June, 2018.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROBERT MARSHALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:16-CV-477-WKW
	)	[WO]
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the court is Petitioner's motion to alter or amend judgment. (Doc. # 48.) The motion is due to be denied.

The only grounds for granting a Rule 59(e) motion in the Eleventh Circuit are newly discovered evidence or manifest errors of law or fact. *Metlife Life & Annuity Co. of Conn. v. Akpele*, 886 F.3d 998, 1008 (11th Cir. 2018) (citing *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. (2007)). "A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to entry of judgment." *Arthur*, 500 F.3d at 1343 (alterations and citation omitted).

Petitioner has presented no grounds entitling him to relief under Rule 59(e). He also has not submitted newly discovered evidence or shown the need to correct

a clear error that resulted in manifest injustice. Accordingly, Petitioner's motion (Doc. # 48) is due to be denied.

Petitioner also requests a certificate of appealability ("CoA"). Accordingly, Petitioner's Rule 59(e) motion is construed as containing a motion for a certificate of appealability for both the final judgment and Rule 59(e) motion. *See Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013) (requiring a CoA for an appeal from a district court order denying a petitioner's Rule 59(e) motion challenging a prior denial of federal habeas relief (citing 28 U.S.C. § 2253(c)(1))).

To merit a CoA, Petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). He has failed to make this required showing for the issuance of a CoA. Therefore, Petitioner is not entitled to a CoA from the denial of his § 2255 motion or his Rule 59(e) motion.

Accordingly, it is ORDERED as follows:

(1) Petitioner's motion to alter judgment (Doc. # 48) is DENIED; and

(2) Petitioner's motion for a CoA (Doc. # 48) is DENIED, and Petitioner is DENIED a CoA from the Final Judgment (Doc. # 45) and this Order denying Petitioner's Rule 59(e) motion to alter or amend judgment.

DONE this 28th day of August, 2018.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROBERT MARSHALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV. ACT. NO. 2:16-cv-477-WKW
	)	(WO)
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the court is Robert Marshall's ("Marshall") motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. Doc. # 1.[1] For the reasons that follow, the court concludes that Marshall's § 2255 motion should be denied without an evidentiary hearing and that this case should be dismissed with prejudice. Rule 8(a), *Rules Governing Section 2255 Proceedings in the United States District Courts*.

I. INTRODUCTION

In February 2013, a jury found Marshall guilty of conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 846 & 841(a)(1), and using a communication facility (a cell phone) to facilitate the conspiracy, in violation of 21 U.S.C. § 843(b). After a sentencing hearing on June 4, 2013, this court sentenced Marshall to 300 months in prison on the

[1] References to "Doc(s). #" are to the document numbers of the pleadings, motions, and other materials in the court file, as compiled and designated on the docket sheet by the Clerk of Court. Unless otherwise indicated, pinpoint citations are to the page of the electronically filed document in the court's CM/ECF filing system, which may not correspond to pagination on the "hard copy" of the document presented for filing.

conspiracy count and one year in prison on the use-of-a-communication-facility count, the terms to run concurrently.

Marshall appealed, arguing that (1) the court erred in granting the Government's "reverse *Batson*[2] challenge"; (2) the evidence against him was insufficient to establish he was guilty of either conspiracy to distribute cocaine or using a cell phone to facilitate the conspiracy and established only that he engaged in buy-sell transactions; and (3) the court erred in allowing the Government to introduce Fed.R.Evid. 404(b) evidence that he was convicted in 1999 of the sale of a controlled substance. *See* Doc. # 16-22.

On June 1, 2015, the Eleventh Circuit affirmed Marshall's convictions and sentence. *United States v. Reese*, 611 F. App'x 961 (11th Cir. 2015); Doc. # 16-23. Marshall filed a petition for writ of certiorari in the United States Supreme Court, which that court denied on November 2, 2015. Doc. # 16-25.

On June 17, 2016, Marshall, acting *pro se*, filed this § 2255 motion asserting claims that his trial counsel rendered ineffective assistance by (1) failing to present a defense that he was in merely a buyer/seller relationship with his codefendants, that he bought cocaine for his personal use and the use of his friends (and not for resale), and that he was a drug addict, not a drug distributor; (2) failing to challenge the accuracy of the Government's organizational chart depicting the structure of the drug ring and the roles of the various coconspirators; (3) failing to challenge the admission of Fed.R.Evid. 404(b) evidence of his prior drug-sale conviction on the ground the court made no finding that the probative

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

value of such evidence outweighed its prejudicial value; (4) failing to advise him of his right to testify and preventing him from testifying in his own defense; (5) failing to argue that a cell phone call he made to codefendant Delmond Bledson was to buy drugs for his personal use only, and thus he could not be guilty of the 21 U.S.C. § 843(b) count in the indictment; (6) failing to move for a severance of his trial from that of his codefendants; and (7) failing to investigate one of the prior convictions used to classify him as a career offender at sentencing. Doc. # 1 at 4–10; Doc. # 2 at 4–57. Marshall also asserts claims that he is actually innocent of the offenses of which he was convicted, *see* Doc. # 1 at 4; Doc. # 2 at 4–8, and that his guidelines sentence enhancement as a career offender violates the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), *see* Doc. # 2 at 53–56.

On February 13, 2017, Marshall amended his § 2255 motion to add a claim that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), his prior Alabama convictions for cocaine distribution should not have been used to classify him as a career offender because the convictions were obtained under a statute, § 13A-12-211, Ala. Code 1975, that defines a controlled substance offense more broadly than the definition of the offense contained in the career offender guideline at U.S.S.G. § 4B1.2(b). Doc. # 24.

II. DISCUSSION

A. General Standard of Review

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments under 28 U.S.C. § 2255 are limited. A prisoner may have 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; *United States v. Phillips*, 225 F.3d 1198, 1199 (11th Cir. 2000); *United States v. Walker*, 198 F.3d 811, 813 n.5 (11th Cir. 1999). "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).

B. Claims of Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel is evaluated against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 689. Second, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000).

Scrutiny of counsel's performance is "highly deferential," and the court indulges a "strong presumption" that counsel's performance was reasonable. *Chandler*, 218 F.3d at 1314 (internal quotation marks omitted). The court must "avoid second-guessing counsel's performance: It does not follow that any counsel who takes an approach [the court] would not have chosen is guilty of rendering ineffective assistance." *Id.* (internal quotation marks and brackets omitted). "Given the strong presumption in favor of competence, the

petitioner's burden of persuasion—though the presumption is not insurmountable—is a heavy one." *Id.*

As noted, under the prejudice component of *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The prejudice prong does not focus only on the outcome; rather, to establish prejudice, the petitioner must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) ("[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

Unless a petitioner satisfies the showings required on both prongs of the *Strickland* inquiry, relief should be denied. *Strickland*, 466 U.S. at 687. Once a court decides that one of the requisite showings has not been made, it need not decide whether the other one has been. *Id.* at 697; *Duren v. Hopper*, 161 F.3d 655, 660 (11th Cir. 1998).

1. Failure to Present Different Defense to Conspiracy Count

Marshall claims that his trial counsel, James R. Cooper, Jr., rendered ineffective assistance of counsel by failing to present a defense that Marshall was merely in a buyer/seller relationship with his codefendants, that he bought cocaine for his personal use

and the use of his friends (and not for resale), and that he was a drug addict, not a drug distributor. Doc. # 1 at 4; Doc. # 2 at 4–9. Marshall maintains that "a cursory investigation" by Cooper would have revealed evidence that Marshall was "a known drug user" who had been forced to enroll in a drug treatment program and had failed several state-ordered drug tests during the DEA's investigation of the drug ring. Doc. # 2 at 6–9. The presentation of such evidence, he says, would have countered the Government's evidence that he was involved in the conspiracy to distribute cocaine. *Id.*

In an affidavit addressing Marshall's allegations, Cooper avers that Marshall never told him he was chemically dependent or that he was only buying cocaine for his personal use. Doc. # 11 at 1. According to Cooper, in order to make the most of such a defense, Marshall would have had to testify, but Marshall chose not to testify after he was advised his prior drug convictions could be used to impeach him. *Id.* at 1–2. Cooper states he also advised Marshall that his codefendants Delmond Bledson, Tony Gardner, and Dikka Daniels could testify in rebuttal about Marshall's drug buys if he testified. *Id.* at 2.

The trial transcript reflects that Cooper presented a defense, through his arguments and witness cross-examination, that there was little evidence to connect Marshall to the conspiracy as compared to his codefendants; that there was no evidence connecting Marshall to the conspiracy until close to its end in late March or early April 2012; and that the Government's cooperating witnesses (particularly Tony Gardner and Dikka Daniels) were motivated to falsely incriminate Marshall because of favorable plea deals they had made. Cooper also emphasized that Bledson, a kingpin in the drug conspiracy, professed to have little familiarity with Marshall. *See, e.g.*, Doc. # 16-6 at 17 & 50–53; Doc. # 16-7

at 73–75; Doc. # 16-10 at 41–42 & 51–52; Doc. # 16-13 at 12; Doc. # 16-14 at 24–27. It was not professionally unreasonable for Cooper to choose this defense strategy over a strategy rooted in the claim that Marshall was merely in a buyer/seller relationship with his codefendants and that he bought cocaine only for his personal use.

Strategic choices of counsel made after investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690–91. Even if in retrospect the strategy to pursue one line of defense over another appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent lawyer would have chosen it. *Adams v. Wainwright*, 709 F.2d 1443, 1145 (11th Cir. 1983); *see also United States v. DiTommaso*, 817 F.2d 201, 215 (2d Cir. 1987) (reviewing courts are "not [to] second-guess trial counsel's defense strategy simply because the chosen strategy has failed"). Accordingly, tactical or strategic choices by counsel generally cannot support a collateral claim of ineffective assistance. *United States v. Costa*, 691 F.2d 1358, 1364 (11th Cir. 1982); *Coco v. United States*, 569 F.2d 367, 371 (5th Cir. 1978). The line of defense chosen by Cooper was not "so patently unreasonable that no competent lawyer would have chosen it." *Adams*, 709 F.2d at 1145.

Moreover, Marshall demonstrates no reasonable likelihood that Cooper would have succeeded by pursuing a different line of defense. The Eleventh Circuit rejected Marshall's argument on direct appeal that the evidence was insufficient to convict him of the conspiracy and established only that he engaged in buy-sell transactions. In rejecting the argument, the Eleventh Circuit held:

> Viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility determinations in the Government's favor, there was sufficient evidence for a reasonable jury to convict Marshall. Marshall's knowledge of and knowing participation in the conspiracy could reasonably be inferred from his repeated purchases from Rajneesh Dikka Daniels of [Willie] Davis's cocaine and from his relationship with Tony Gardner, who could reasonably be construed as a middle man between Marshall and Bledson; it could also be inferred from his meeting with Bledson, the drug purchase associated with that meeting, and his subsequent telephone conversation with Bledson arranging for further transactions. The jury was free to discount as unreliable Bledson's statement that Marshall was not a member of the conspiracy. *See [United States v.] Reeves*, 742 F.3d [487,] at 500 [(11th Cir. 2014)].

611 F. App'x at 966.

"While the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement, an agreement to distribute drugs may be inferred when the evidence shows a continuing relationship that results in the repeated transfer of illegal drugs to a purchaser." *United States v. Thompson*, 422 F.3d 1285, 1292 (11th Cir. 2005) (internal quotations omitted). Here, the evidence of Marshall's repeated purchases of large amounts of cocaine demonstrated both "a prior or contemporaneous understanding," *United States v. Beasley*, 2 F.3d 1551, 1560 (11th Cir. 1993), and a "continuing relationship," as opposed to a simple buyer-seller relationship, *Thompson*, 422 F.3d at 1292. *See United States v. Johnson*, 889 F.2d 1032, 1035 (11th Cir. 1989) (regularity of purchases of cocaine by defendant from his supplier viewed as a refutation that the evidence only showed a buyer-seller relationship). Given the evident weakness of such a defense, Marshall demonstrates no prejudice resulting from Cooper's failure to pursue a defense that he was in a mere buyer/seller relationship with his codefendants and bought cocaine for his personal use only

Marshall also fails to demonstrate that Cooper performed deficiently in failing to investigate his alleged drug use and failing to present a defense that he was a drug addict and not a drug distributor. As noted above, Cooper avers that Marshall never told him he was chemically dependent or that he was buying cocaine only for his personal use. *See* Doc. # 11 at 1. Such a defense would have required testimony from Marshall who, as explained more fully below, chose not to testify. *Id.* at 1–2. As the Government argues, Cooper's defense strategy emphasizing the lack of evidence tying Marshall to the conspiracy was "a much more reasonable strategy than painting Marshall as a drug addict." Doc. # 16 at 52. "[P]resenting evidence of a defendant's drug addiction to a jury is often a 'two-edged sword': while providing a mitigating factor, such details may alienate the jury[.]" *Pace v. McNeil*, 556 F.3d 1211, 1224 (11th Cir. 2009). Marshall's admission to buying cocaine, even if for personal use for his alleged drug addiction, would have constituted additional evidence that he purchased cocaine from his codefendants on numerous occasions—evidence that could bolster an inference that he was actually involved in the conspiracy. As the Government observes, Daniels testified that Marshall would pick up two packages of 125 grams of cocaine from her at a time. A claim that such purchases were for mere personal use would have been implausible and as weak as a "mere buyer/seller" defense.

Finally, Marshall demonstrates no reasonable likelihood that the outcome of his trial would have been different had Cooper investigated his drug addiction and used his alleged addiction in a defense. As noted above, evidence of Marshall's drug addiction would have provided further evidence that he purchased cocaine regularly from his codefendants. And

an argument that Marshall was buying cocaine for his own use would not be dispositive of his noninvolvement in the conspiracy. *See United States v. Burgos*, 518 F. App'x 728, 729–30 (11th Cir. 2013) (where methamphetamine addict asserted that he joined a drug conspiracy to feed his own addiction).

Marshall has not demonstrated that Cooper's decision to present the defense he did, instead of the one Marshall now favors, was professionally unreasonable. Nor does he demonstrate prejudice resulting from Cooper's decision to eschew other defenses. Therefore, Marshall is not entitled to any relief on this claim of ineffective assistance of counsel.

2. Failure to Challenge Organizational Chart

Marshall contends that Cooper rendered ineffective assistance of counsel by failing to challenge the accuracy of the Government's organizational chart depicting the structure of the drug ring and the roles of the various coconspirators. Doc. # 1 at 5; Doc. # 2 at 14–17. Marshall maintains that the chart was inaccurate and prejudicial and that Cooper should have objected to its admission.[3] Doc. # 2 at 14–17.

The trial judge instructed the jury that the organizational chart was valid only to the extent it reflected the underlying evidence and that jurors should give the chart only so

[3] Regarding the organizational chart, Cooper states in his affidavit:

> The government had a poster with the names and faces of all defendants so the jury and all participants could keep track of the parties involved. That was all it was used for. It was not suggestive of being some chart of the organization but only of putting a name to a face. While Mr. Cooper did not like the poster, it was not legally objectionable and thus he could not have prevented its use.

Doc. # 11 at 2.

much weight as they believed it deserved. Doc. # 16-14 at 38. Although Marshall argues that the chart was inaccurate, the alleged inaccuracies he cites were supported by evidence presented at trial. Marshall objects to lines drawn on the chart connecting him to Willie Davis and Delmond Bledson, maintaining there was no actual connection between him and these two members of the conspiracy. *See* Doc. # 2 at 16. However, the Government presented testimony from witnesses connecting Marshall to both Davis and Bledson regarding activities to further the conspiracy. *See* Doc. # 16-7 at 52; Doc. # 6-10 at 4–10 & 49–50. Therefore, Marshall fails to identify any apparent inaccuracies on the chart to which Cooper might have successfully objected. As the district court instructed the jury, the weight to assign the chart was up to the jurors. Thus, an objection to admission of the chart on grounds it was inaccurate would not have been successful. *See Cape v. Francis*, 741 F.2d 1287 (11th Cir. 1984) (Where evidence is admissible, counsel's failure to object does not constitute ineffective assistance of counsel). Consequently, Marshall is entitled to no relief on this claim of ineffective assistance of counsel.

3. Failure to Challenge 404(b) Evidence

Marshall contends that Cooper was ineffective for failing to challenge admission of Fed.R.Evid. 404(b) evidence that he was convicted in 1999 of the sale of a controlled substance, on the ground the court made no finding that the probative value of the evidence outweighed its prejudicial value.[4] Doc. # 1 at 6; Doc. # 2 at 18–22.

[4] Federal Rule of Evidence 404(b) provides that "[e]vidence of a crime, wrong, or other act" may be used to "prov[e] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed.R.Evid. 404(b). Before evidence of a prior criminal act may be admitted, the district court must determine, among other things, that "the probative value of the evidence" is not "substantially outweighed by its undue prejudice." *United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995).

The record reflects that, before ruling that evidence of Marshall's 1999 conviction was admissible, the court heard and weighed arguments from both Cooper and the Government regarding the probity of the conviction and its potential for creating undue prejudice. Doc. # 16-13 at 4–7. By ruling that the evidence was admissible, the court found that the probative value of the evidence outweighed its prejudicial value. Further, on direct appeal, Marshall argued that the district court erred in allowing the Government to introduce evidence of his 1999 conviction, and the Eleventh Circuit held that the district court did not abuse its discretion in admitting the prior conviction. *See* 611 F. App'x at 966–67. The Eleventh Circuit's opinion indicates that the appellate court considered the court to have assessed the probative versus prejudicial value of the evidence. *Id.*

Marshall does not demonstrate deficient performance in Cooper's failure to object to the district court's ruling admitting Marshall's prior conviction based on the argument that the court failed to determine if the probative value of the evidence outweighed its prejudice. Nor does Marshall demonstrate any resulting prejudice from Cooper's failure to object on this ground. Consequently, Marshall is entitled to no relief on this claim of ineffective assistance of counsel.

4. Right to Testify

Marshall claims that Cooper rendered ineffective assistance of counsel by failing to advise him of his constitutional right to testify and preventing him from testifying in his own defense. Doc. # 1 at 4 & 8; Doc. # 2 at 23–25. Besides alleging that Cooper never told him he had a right to testify, Marshall maintains that he informed Cooper "he would

like to testify," but Cooper told him to "just hold on if that's what you want to do" and then did not call him to the stand. Doc. # 2 at 23–24.

The Sixth Amendment right of a defendant to testify at his criminal trial is both fundamental and personal to him.

> Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the [Sixth] Amendment," . . . , is an accused's right to present his own version of the events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

Rock v. Arkansas, 483 U.S. 44, 52 (1987). *See also United States v. Teague*, 953 F.2d 1525, 1532 (1992). When counsel prevents a defendant from exercising this fundamental right, counsel's actions fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *Gallego v. United States*, 174 F.3d 1196, 1197 (11th Cir. 1999). Even in the context of a denial of the right to testify, a defendant who establishes the performance prong of the *Strickland* analysis must still demonstrate prejudice by showing there is a reasonable probability that the results of the proceeding would have been different. *Fishbone v. Sec'y for Dep't. of Corrs.*, 165 F. App'x. 800, 801 (11th Cir. 2006) (citing *Strickland*).

Addressing Marshall's claim that he failed to advise him of his right to testify and prevented him from testifying, Cooper states:

> Alas for Mr. Marshall that is just not true. Mr. Cooper informed him that all his past criminal convictions would be laid out before the Jury. Such a display would not be viewed favorably. Mr. Cooper then inquired whether or not Mr. Marshall wanted to testify. Mr. Marshall declined.

> As is often the case, no one but the parties was present. But consider, Mr. Marshall had at that time extensive experience with the criminal justice system. He had two prior drug convictions. He had several other arrests and convictions for DUI, Attempting to Elude, False names etc. He had been on and off probation. He had a lot of street knowledge about the perils of testifying. He knew all those convictions would be brought up if he testified. He knew that once on the stand his past life of crime would be fodder for the Government. He just did not want to testify as he knew the risks.

Doc. # 11 at 2.

At trial, just before the Government was to rest its case, the following exchange took place between the court and the defendants' lawyers, including Cooper:

> [THE COURT:] The last item I need—and we can go ahead and conclude now and maybe take a short break—is the issue of the 18 defendants testifying. Off the record yesterday I was informed by counsel for—each counsel for each defendant that the defendant would not be testifying. And it's my practice to make that—outside the presence of the jury to make that determination, that it's a voluntary decision on the part of a defendant after consulting with his counsel. So now, I would ask—I'm going to address all the defendants at once, but I would ask counsel, starting with Mr. Davis's counsel, has there been any change in your position on this matter or your client's position on this matter?
>
> . . . .
>
> THE COURT: All right. Mr. Cooper?
>
> MR. COOPER: Jim Cooper for Robert Marshall. I discussed the pros and cons with my client of testifying. He chooses not to testify, Your Honor.

Doc. # 16-13 at 14.

The district court then questioned Marshall regarding whether he wished to testify:

> [THE COURT:] Mr. Marshall, I'll ask you the same questions. You understand you have a right to testify in this case; is that correct?
>
> DEFENDANT MARSHALL: Yes, sir.

THE COURT: And you've consulted with your lawyer about this, and have you decided that you do not want to testify in this case?

DEFENDANT MARSHALL: Yes, sir, Your Honor.

THE COURT: Have you decided that's in your best interests?

DEFENDANT MARSHALL: Yes, sir.

THE COURT: Okay. Thank you. You may be seated.

Doc. # 16-13 at 14–15.

As the trial transcript shows, Marshall affirmed to the district court that (1) he understood his right to testify, (2) he discussed whether or not to testify with Cooper, (3) it was his (Marshall's) decision not to testify, and (4) he believed this decision was in his best interests. Thus, regarding the factual issue whether Cooper failed to advise Marshall of his right to testify and prevented him from testifying in his own defense, Marshall's current version of events is so discredited by the record that no reasonable trier of fact could believe it. A party's sworn account of events may be disregarded if it is "blatantly contradicted by the record, so that no reasonable [trier of fact] could believe it." *Scott v. Harris*, 550 U.S. 372, 380 (2007). *See also, e.g., Van T. Junkins & Assoc., Inc. v. U.S. Indus.*, 736 F.2d 656, 658–59 (11th Cir.1984) ("When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.").

Further, even if Marshall may have desired to testify, his statements to the district court constituted a waiver of that right. "[I]f an accused desires to exercise [his]

constitutional right to testify the accused must act affirmatively and express to the court [his] desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred." *United States v. Kamerud*, 326 F.3d 1008, 1017 (8th Cir. 2003) (citation omitted).

For the foregoing reasons, the court concludes that no evidentiary hearing is required on this claim. A district court need not hold on evidentiary hearing on allegations in a § 2255 motion that are "affirmatively contradicted by the record." *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (citations omitted). In open court, Marshall told the trial judge that he had discussed his right to testify with counsel, he understood the right, and it was his decision not to testify. Therefore, he cannot be heard to claim now that his trial counsel Cooper interfered with this right. This claim of ineffective assistance of counsel is due to be denied without an evidentiary hearing.

5. Cell Phone Call to Bledson

Marshall contends that Cooper was ineffective for failing to argue that his recorded cell phone call to Delmond Bledson was to buy drugs for his personal use only, and therefore he could not be guilty of the § 843(b) count, which required that the cell phone be used to facilitate a felony.[5] Doc. # 1 at 10; Doc. # 2 at 26–29.

[5] Title 21 § 843(b) provides, in pertinent part:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. . . . For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs,

Marshall's conviction under the § 843(b) count was based on a cell phone call he made to Bledson in April 2012 to arrange the purchase of cocaine. *See, e.g.*, Doc. # 16-1 at 10. On direct appeal, Marshall challenged the sufficiency of the evidence to sustain his § 843(b) conviction. The Eleventh Circuit rejected the claim, holding that "[t]he same evidence from which a reasonable jury could conclude Marshall was involved in a conspiracy to distribute cocaine would allow a jury to conclude Marshall's telephone call with Bledson was intended to facilitate the conspiracy." 611 F. App'x at 966.

The evidence at trial showed that Marshall bought large quantities of cocaine on numerous occasions from conspiracy kingpin Willie Davis and, on at least one occasion, bought a large quantity of cocaine from Bledson, the other kingpin in the conspiracy.[6] Testimony indicated that coconspirator Tony Gardner originally put Marshall in touch with Bledson and, in March 2012, operated as a middle man in Marshall's purchase of 63 grams of cocaine from Bledson. *See, e.g.*, Doc. # 16-10 at 8–10 & 49–52. In April 2012, Marshall contacted Bledson directly by cell phone, seeking to purchase another large amount of cocaine. Doc. # 16-10 at 9–10. During this phone conversation, Bledson told Marshall he only had a "31," street slang for 31 grams of cocaine.[7] Marshall told Bledson that this

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> signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

21 U.S.C. § 843(b).

[6] *See* Doc. # 16-10 at 39 (where Bledson acknowledges his role as a kingpin in the conspiracy).

[7] *See* Doc. # 16-8 at 53 (Bledson's testimony that 31-gram packages of cocaine were referred to as "31s" and commonly sold for $1,050); Doc. # 16-10 at 9–10 (Bledson's testimony regarding cell phone conversation with Marshall).

amount would do him no good, indicating that he wanted to buy a larger amount. Marshall also told Bledson to save his phone number on his own phone, so when he called Bledson in the future about further cocaine buys, Bledson would recognize that the call was coming from Marshall. *See* Doc. # 16-10 at 9–10.

As Cooper observes in his affidavit addressing Marshall's ineffective-assistance claim, 31 grams of cocaine is much more than an individual would acquire for personal use and is an amount typically broken down into smaller quantities before being sold off to ultimate users. Doc. # 11 at 3. In light of the trial evidence indicating that Marshall purchased 63 grams of cocaine from Bledson in March 2012, sought to make another purchase of more than 31 grams in April 2012, and asked Bledson to save his phone number to facilitate future calls about cocaine buys, an argument by Cooper that Marshall's April 2012 phone call to Bledson was merely to buy drugs for personal use would have been implausible. Rather than presenting such an argument, Cooper sought to present a defense that there was little evidence to connect Marshall to the conspiracy as compared to his codefendants and that he was a minimal participant in the criminal organization.

Because the evidence did not support a claim that Marshall's April 2012 phone call to Bledson was merely to buy drugs for his personal use, Cooper did not render ineffective assistance of counsel by failing to make such an argument.[8] Marshall is entitled to no relief on this claim.

[8] Marshall's argument in support of this claim is similar to his argument in support of his first claim discussed previously in this Recommendation (*see* Part II.B.1, above).

6. Failure to Move for Severance

Marshall says Cooper was ineffective for failing to move to sever his trial from that of his codefendants. Doc. # 2 at 30–33.[9] According to Marshall, his joint trial with his codefendants enabled the Government to present unduly prejudicial evidence of unlawful acts by his codefendants in which he was not involved. *Id.* at 30.

As a general rule, defendants who are jointly indicted should be tried together. *United States v. Morales*, 868 F.2d 1562, 1571 (11th Cir. 1989); *United States v. Morrow*, 537 F.2d 120, 136 (5th Cir. 1976). This is particularly true in conspiracy cases, where charges against multiple defendants may be proven with substantially the same evidence. *United States v. Dorsey*, 819 F.2d 1055, 1058 (11th Cir. 1987). Severance is only justified when a defendant can show prejudice from which the trial court cannot provide adequate protection. *Dorsey*, 819 F.2d at 1058; *Morrow*, 537 F.2d at 136. The fact that a defendant may suffer some prejudice is not enough to justify severance, as a degree of prejudice is inherent in joint trials. *United States v. Harris*, 908 F.2d 728, 736 (11th Cir. 1990). Defendants' allegations of prejudice must be balanced against the interest of judicial economy and concomitant policy favoring joint trials in conspiracy cases. *United States v. Kopituk*, 690 F.2d 1289, 1318 (11th Cir. 1982).

Prejudice is not established simply because a defendant claims to be a minor figure and argues that much of the evidence at trial may apply only to codefendants. *See United States v. Smith*, 918 F.2d 1501, 1509–10 (11th Cir. 1990). A defendant does not suffer

[9] Marshall did not list this claim on the § 2255 motion form he filed. *See* Doc. # 1. He presents the claim in the Memorandum of Law he filed in support of his § 2255 motion. Doc. # 2.

compelling prejudice even if much of the evidence actually produced at trial applies only to codefendants. *Id.*; *United States v. Casamayor*, 837 F.2d 1509, 1511 (11th Cir. 1988). The possible prejudicial effects of such disparity can be significantly alleviated if the trial court instructs the jury that it must consider the evidence against each defendant on a separate and independent basis. *United v. Pritchett*, 908 F.2d 816, 822 (11th Cir. 1990).

Here, Marshall's cursory assertions about the Government's presentation of evidence of unlawful acts by his codefendants in which he was not involved do not establish compelling prejudice sufficient to justify severance. Nor does Marshall demonstrate a degree of prejudice sufficient to outweigh the interest of judicial economy and the policy favoring joint trials in conspiracy cases. *Kopituk*, 690 F.2d at 1318. Marshall demonstrates no reasonable likelihood that a motion for severance of his trial from that of his codefendants would have succeeded. Further, the trial court instructed the jury that it must consider the evidence against each defendant on a separate and independent basis, alleviating the possible prejudicial effects of the presentation of evidence of unlawful acts by Marshall's codefendants in which Marshall was not involved. *Pritchett*, 908 F.2d at 822. *See* Doc. # 16-14 at 41.

Marshall does not demonstrate deficient performance in Cooper's failure to move to sever his trial from that of his codefendants, and he fails also to demonstrate any resulting prejudice. He is entitled to no relief on this claim of ineffective assistance of counsel.

7. Failure To Investigate Prior Conviction

Marshall argues that Cooper rendered ineffective assistance of counsel by failing to investigate one of the prior convictions the court relied on to classify him as a career

offender. Doc. # 2 at 34–37.[10] Marshall maintains that the prior conviction was too stale to be considered for career offender status. *Id.*

Section 4B1.1 of the Sentencing Guidelines classifies a defendant as a career offender if (1) he was at least 18 years old when he committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. 4B1.1(a).

Under U.S.S.G. § 4A1.2(e)(1), if a defendant is incarcerated during any part of a sentence exceeding one year and one month within fifteen years of the defendant's commencement of his instant offense, that sentence is countable for computing a defendant's criminal history, and, if it otherwise qualifies, it is countable as a prior conviction for purposes of the career offender enhancement. *See* U.S.S.G. § 4A1.2(e)(1); U.S.S.G. § 4B1.2 cmt. n.3 (providing that "[t]he provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1," the career offender guideline).

Here, one of the prior drug convictions the district court relied on to enhance Marshall's sentence under the career offender guideline was Marshall's April 1997

[10] Marshall did not list this claim on the § 2255 motion form; he presents it in the supporting Memorandum of Law. Doc. # 2.

Autauga County, Alabama conviction for cocaine distribution.[11] *See* Doc. # 16-17 at 10–11 & 43. For that conviction, Marshall was sentenced to 15 years' imprisonment, split to serve three years in confinement with the balance on probation. *Id.* Marshall maintains that the presentence investigation report ("PSI") erroneously states that the balance of his 15-year sentence after the three-year split was "suspended" for probation. Doc. # 2 at 35. According, to Marshall, the state trial court did not "suspend" the balance of his sentence. *Id.* He argues that Cooper was ineffective for failing to investigate and discover this fact. Marshall seems to believe this fact somehow places his 1997 controlled substance conviction outside the 15-year window from his commencement of his instant offense disqualifying that conviction from being considered for career offender status. *Id.*

Marshall's argument notwithstanding, the terminology applied to the probationary portion of Marshall's sentence for his 1997 conviction—i.e., whether the balance of his 15-year sentence after the three-year split was technically "suspended" for probation—is of no consequence, certainly not as to whether the conviction could be used to enhance Marshall's sentence under the career offender guideline. It is undisputed that Marshall's probation on the 1997 conviction was revoked in October 1998, whereupon Marshall was re-incarcerated to serve the balance of his original 15-year sentence. *See* Doc. # 16-17 at 10–11, & 43; # 16-17 at 22; Doc. # 16-18 at 32–34. Following the revocation of his probation, Marshall was incarcerated on his 1997 conviction from 1998 to 2012. Doc. #

[11] Marshall was actually convicted of three counts of cocaine distribution in the 1997 Autauga County case. The second prior drug conviction the district court relied on to enhance Marshall's sentence under the career offender guideline was an April 1999 Autauga County conviction for cocaine distribution.

16-18 at 34. Therefore, Marshall was incarcerated on the 1997 conviction within 15 years of his commencement of his instant offense in 2012. Consequently, that conviction was not "stale" and could be considered for career offender status. *See* U.S.S.G. § 4A1.2(e)(1); U.S.S.G. § 4B1.2 cmt. n.3.

Marshall does not demonstrate deficient performance in Cooper's alleged failure to investigate his 1997 conviction and his resulting sentence,[12] and he fails also to demonstrate any prejudice. Therefore, he may not have relief on this claim of ineffective assistance of counsel.

C. Actual Innocence

Marshall says he is actually innocent of the offenses of which he was convicted. Doc. # 1 at 4; Doc. # 2 at 4–8.

Habeas petitioners asserting actual innocence must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623–24 (1998). The Supreme Court observed in *Schlup*:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at

[12] The record reflects that Cooper objected to consideration of the Marshall's 1997 conviction for career offender status on grounds of staleness. Doc. # 16-17 at 20; Doc. # 16-18 at 32–34. In making this objection, Cooper did not argue, as Marshall does here, that the balance of Marshall's 15-year sentence after the three-year split was not "suspended" for probation. However, as explained above, the terminology applied to the probationary portion of Marshall's split sentence is of no consequence to whether the 1997 conviction could be considered for career offender status.

> trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

513 U.S. at 324.

Here, Marshall points to no new reliable evidence, as required by *Schlup*, to support a claim of actual innocence. Instead, Marshall reargues the trial evidence and claims it was insufficient to sustain his convictions for conspiracy to distribute cocaine and using a cell phone to facilitate the conspiracy. Doc. # 2 at 4–8. Allegations going to the sufficiency of and/or weight afforded the evidence do not constitute "new reliable evidence" regarding a petitioner's actual innocence. *See Rutledge v. Neilsen*, 2012 WL 3778987, at *7 (M.D. Ala. Jul. 30, 2012). Moreover, on direct appeal, Marshall challenged the sufficiency of the evidence to sustain both of his convictions. The Eleventh Circuit rejected his claims and held there was sufficient evidence to support the convictions. *See* 611 F. App'x at 966. "The district court is not required to reconsider claims of error that were raised and disposed of on direct appeal." *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000); *see also United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981). If a claim has previously been raised on direct appeal and decided adversely to a defendant, it cannot be relitigated in a collateral attack under § 2255. *See Nyhuis*, 211 F.3d at 1343. Furthermore, "[a] rejected claim does not merit rehearing on a different, but previously available, legal theory." *Id.*

Marshall is entitled to no relief on his claims of actual innocence. He points to no new reliable evidence to support his claims, and the Eleventh Circuit has already rejected his challenges to the sufficiency of the evidence to sustain the convictions.

D. Career Offender Enhancement and Johnson v. United States

Marshall claims that his guidelines sentence enhancement as a career offender violates the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Doc. # 2 at 53–56.[13]

In *Johnson,* the Supreme Court held that the definition of "violent felony" under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. *See* 135 S. Ct. at 2557–59. In April 2016, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1264–65 (2016).

Here, the district court relied on Marshall's 1997 and 1999 Alabama convictions for unlawful distribution of cocaine in sentencing Marshall as a career offender. Marshall's attempted reliance on *Johnson* to challenge the district court's application of the career offender enhancement in his case is misplaced. *Johnson* does not extend to defendants sentenced under the career offender guideline, and it does not apply to prior drug offenses. *See Beckles v. United States*, 137 S. Ct. 886, 892–96 (2017); *Johnson*, 135 S. Ct. at 2563. Marshall is entitled to no relief on this claim.

[13] Marshall did not list this claim on the § 2255 motion form; he presents it in his supporting Memorandum of Law. Doc. # 2.

E. February 13, 2017 Amendment

On February 13, 2017, Marshall amended his § 2255 motion to add a new claim that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), his Alabama convictions for cocaine distribution should not have been used to classify him as a career offender because the convictions were obtained under a statute, § 13A-12-211, Ala. Code 1975,[14] that defines a controlled substance offense more broadly than the definition of the offense contained in the career offender guideline at U.S.S.G. § 4B1.2(b).[15] Doc. # 24. The Government argues, correctly, that Marshall's new claim is time-barred under the one-year limitation period in 28 U.S.C. § 2255(f).[16] Doc. # 26 at 3–7.

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[14] Section 13A-12-211, Ala. Code 1975, provides, in pertinent part:

> (a) A person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he or she sells, furnishes, gives away, delivers, or distributes a controlled substance enumerated in Schedules I through V.
>
> . . . .
>
> (c) A person commits the crime of unlawful possession with intent to distribute a controlled substance if, except as otherwise authorized by law, he or she knowingly possesses any of the following quantities of a controlled substance:
>
> > (1) More than eight grams, but less than 28 grams, of cocaine or of any mixture containing cocaine.

§ 13A-12-211, Ala. Code 1975

[15] Section 4B1.2(b) of the career offender guideline defines a "controlled substance offense," in pertinent part, as a felony offense "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

[16] The timeliness of a § 2255 motion is governed by 28 U.S.C. § 2255(f), which provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

As a general rule a § 2255 motion, and all claims for relief under § 2255, must be filed within a year of the date on which the petitioner's judgment of conviction becomes final. *See* 28 U.S.C. § 2255(f)(1).[17] For someone who files a petition for writ certiorari with the United States Supreme Court, a judgment of conviction becomes final when the Supreme Court denies the petition for writ of certiorari. *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir. 2002). Marshall's conviction became final, therefore, on November 2, 2015, the date on which the Supreme Court denied his petition for writ of certiorari. *See* Doc. # 16-25. Therefore, any motion or claim by Marshall seeking relief under § 2255 must have been filed by November 2, 2016. Marshall filed the amendment to his § 2255 motion raising his claim under *Mathis* on February 13, 2017—well after expiration of the limitation period in § 2255(f)(1).

The Federal Rules of Civil Procedure provide for the relation back of amendments filed after the running of a period of limitation in certain circumstances. Rule 15(c) of the

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> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

[17] Marshall sets forth no facts or argument to establish that he may use 28 U.S.C. § 2255(f)(2), (3), or (4) as a triggering event for limitations purposes for the claim in his amendment. *See* 28 U.S.C. § 2255(f)(2)–(4).

Federal Rules of Civil Procedure provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *See* Fed.R.Civ.P. 15(c)(2). "'Relation back' causes an otherwise untimely claim to be considered timely by treating it as if it had been filed when the timely claims were filed." *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000). However, "Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts." *Pruitt v. United States*, 274 F.3d 1315, 1317 (11th Cir. 2001). This is so the government has sufficient notice of the facts and claims giving rise to the proposed amendment. *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002) (quoting *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000)). An untimely amendment to a § 2255 motion does not relate back to the date of the original motion where it "seek[s] to add a new claim or to insert a new theory into the case." *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (emphasis omitted). It is not sufficient for an untimely amendment merely to assert the same general type of legal claim as in the original § 2255 motion. *See United States v. Craycraft*, 167 F.3d 451, 456–57 (8th Cir. 1999) (holding that an untimely claim of ineffective assistance of counsel for not filing an appeal did not relate back to timely ineffective assistance claims for not pursuing a downward departure, not raising an objection at trial, and not challenging a prior conviction).

Here, Marshall's new claim, based on his contention that his Alabama cocaine distribution convictions were obtained under a statute that defines a controlled substance

offense more broadly than the definition of the offense contained in the career offender guideline at U.S.S.G. § 4B1.2(b), bears no legal or factual relationship to any of his earlier claims and seeks to insert a new theory of relief into the case. Therefore, the claim does not relate back under Rule 15(c) to claims in the original and timely § 2255 motion. Because this new claim does not relate back, it is time-barred from review under § 2255's one-year limitation period. *See Farris v. United States*, 333 F.3d 1211, 1215–16 (11th Cir. 2003); *Pruitt*, 274 F.3d at 1319.

Even if Marshall's amended claim were timely (and it is not), it would not entitle him to relief, because it lacks merit. In *United States v. Landaverde-Cruz*, 629 F. App'x 854 (11th Cir. 2015), the Eleventh Circuit held that any conviction under § 13A-12-211, Ala. Code 1975, necessarily infers an intent to distribute a controlled substance. *See* 629 F. App'x at 856. Thus, a conviction under § 13A-12-211, Ala. Code 1975, categorically qualifies as a conviction for a controlled substance offense under the career offender guideline at U.S.S.G. § 4B1.2(b). The Eleventh Circuit and district courts within the Eleventh Circuit have elsewhere held that unlawful distribution of a controlled substance under Alabama law is a serious drug offense. *See United States v. Smiley*, 263 F. App'x 765, 769 (11th Cir. 2008) ("Smiley had been convicted of three counts of unlawful distribution of a controlled substance under Ala. Code § 13A-12-211, a Class B felony punishable by not more than twenty years. Thus, Smiley's prior convictions meet the definition of a serious drug offense.") (internal citations omitted); *United States v. Beasley*, 447 F. App'x 32, 36–37 (11th Cir. 2011) (finding conviction for unlawful distribution of a controlled substance under Alabama law was a serious drug offense); *Thomas v. United*

States, 2016 WL 4920046, *5 (N.D. Ala. Sep. 15, 2016) (finding conviction for unlawful distribution under Alabama law was a serious drug offense under the ACCA definition); *Mims v. United States*, 2017 WL 2378085, at *7 (N.D. Ala. June 1, 2017) (denying relief where petitioner asserted claim under *Mathis*, holding that Alabama convictions for unlawful distribution of a controlled substance in violation of § 13A-12-211 are categorically serious drug offenses for purposes of the ACCA). Marshall's amended claim entitles him to no relief.

III. CONCLUSION

For the reasons set out above, it is the RECOMMENDATION of the Magistrate Judge that the 28 U.S.C. § 2255 motion filed by Marshall be DENIED and this case DISMISSED with prejudice.

It is further

ORDERED that the parties shall file any objections to this Recommendation or before June 4, 2018. A party must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made; frivolous, conclusive, or general objections will not be considered. Failure to file written objections to the Magistrate Judge's findings and recommendations under the provisions of 28 U.S.C. § 636(b)(1) will bar a party from a *de novo* determination by the District Court of legal and factual issues covered in the Recommendation and waives the right of the party to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); 11th Cir. R. 3-

1. *See Stein v. Lanning Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

Done this 21st day of May, 2018.

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE