IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11345-J

SAUL ELIAS CAMILO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Saul Elias Camilo is a federal prisoner serving a 120-month sentence after pleading guilty to possession of a stolen firearm. Camilo filed a direct appeal contesting his sentence, and this Court affirmed. Camilo timely filed a 28 U.S.C. § 2255 motion to vacate his sentence, requesting an evidentiary hearing and arguing that both his trial and appellate counsel were ineffective for failing to raise the issue that the government breached the plea agreement by failing to recommend an offense level reduction for acceptance of responsibility under the Sentencing Guidelines. The district court denied Camilo's § 2255 motion on the merits without conducting an evidentiary hearing. Camilo now seeks a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP") in this Court.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by

demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Reasonable jurists would not debate the district court's denial of Camilo's § 2255 motion because the record shows that the government did recommend a reduction in Camilo's sentencing guideline range for acceptance of responsibility, but recommended a non-guideline sentence in accordance with the plea agreement. Therefore, the government did not breach the plea agreement, and Camilo cannot make the requisite showing of deficient performance or prejudice regarding either his trial or appellate counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that, to make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense). Further, because his claims were refuted by the record, Camilo was not entitled to an evidentiary hearing. *See Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (holding that an evidentiary hearing is not required if the movant's allegations are "affirmatively contradicted by the record"). Accordingly, Camilo's motion for a COA is DENIED. His motion for leave to proceed on appeal IFP is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.:17-CV-23802-MIDDLEBROOKS/WHITE

SAUL ELIAS CAMILO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABIILTY

THIS CAUSE comes before the Court upon Petitioner's Notice of Appeal/Request for Certificate of Appealability, filed on April 2, 2018. (DE 10). On February 28, 2018, the Court denied Movant's Motion to Vacate pursuant to 28 U.S.C. § 2255. (DE 8). (DE 31). Petitioner seeks to appeal that Order.

"[W]hen a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition" pursuant to 28 U.S.C. §§ 2254–55, "the right to appeal is governed by the certificate of appealability requirements . . . found at 28 U.S.C. § 2253(c)." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Pursuant to § 2253(c)(2), a district court may only issue a certificate of appealability when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met if the movant can show that reasonable jurists could differ as to the resolution of the case either on the merits or as to any plain procedural bar. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Judge White recommends that a certificate of appealability be denied due to Petitioner's failure to show the denial of a constitutional right. (DE 6 at 9). Having reviewed Petitioner's Motion, I find that reasonable jurists could not differ as to the resolution of Petitioner's Motion to Vacate (DE 1), and therefore a certificate of appealability should not issue.

Applications to appeal *in forma pauperis* are governed by 28 U.S.C. § 1915 and Federal Rule of Appellate Procedure 24. A court of the United States may authorize a party to proceed *in forma pauperis* upon an affidavit of indigency. 28 U.S.C. § 1915(a); *see* Fed. R. App. P. 24(a)(1). An appeal, however, "may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3); *accord* Fed. R. App. P. 24(a)(3)(A). A party who seeks appellate review of an issue does so in good faith if the issue is not frivolous from an objective standard. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962). An *in forma pauperis* action is frivolous "if it is without arguable merit either in law or fact." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002). Alternatively, where a claim is arguable, but ultimately will be unsuccessful, it should be allowed to proceed. *See Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 515 (11th Cir. 1991).

Assuming Camilo on appeal intends to restate his objections to the Report and Recommendations (DE 7), his objections are clearly refuted by the record and therefore his

appeal would be without arguable merit. (*See* DE 6 at 8). Accordingly, his motion to appeal *in forma pauperis* is denied. It is hereby

ORDERED AND ADJUDGED that:

1. Petitioner's Motion for Certificate of Appealability (DE 10) is **DENIED.**
2. Petitioner's Motion to Appeal *in Forma Pauperis* (DE 13) is **DENIED.**

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 10 day of May 2018.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:17-CV-23802-MIDDLEBROOKS/WHITE

SAUL ELIAS CAMILO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White's Report and Recommendation ("Report"), issued on December 4, 2017. (DE 6). Movant filed Objections to the Report. (DE 7).

Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (DE 1, "Motion"). The Report recommends that the Motion should be denied. In the Motion, Movant argues that his sentence should be vacated because both his trial and appellate court attorneys provided ineffective assistance. (DE 1). Specifically, Movant argues that the Government breached the terms of the plea agreement and that his attorneys provided ineffective assistance by failing to raise this issue at sentencing and on appeal. Magistrate Judge White found that Movant's claim is clearly refuted by the record. (DE 6 at 6).

Upon a careful, *de novo* review of the Report, the Objections, and the record, the Court agrees with the Report's recommendation to deny the Motion. Accordingly, it is hereby

ORDERED AND ADJUDGED that:

(1) The Report (DE 6) is **RATIFIED, AFFIRMED, and ADOPTED**

(2) The Motion (DE 1) is **DENIED.**

(3) All pending motions are **DENIED as MOOT.**

(4) The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 28 day of February, 2018.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23802-CV-MIDDLEBROOKS
(15-20670-CR-MIDDLEBROOKS)
MAGISTRATE JUDGE P. A. WHITE

SAUL ELIAS CAMILO, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his sentence entered after he pled guilty to the charge of possession of a stolen firearm in case no. 15-20670-CR-Middlebrooks.

The Court has reviewed the movant's motion (Cv-DE#1). As discussed herein, review of the motion along with all pertinent portions of the underlying criminal file shows that the movant is not entitled to relief. A judge may dismiss a §2255 motion if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rule 4(b) of the Rules Governing Section 2255 Cases in the United States District Courts. See also 28 U.S.C. §2243.[1] Since

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[1]Section 2243, governing applications for writ of habeas corpus, provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, *unless it appears from the application that the applicant or person is not entitled thereto.*

28 U.S.C. §2243 (emphasis added). Rule 4 of the Rules Governing Section 2255

summary dismissal is warranted and the petitioner is not entitled to post-conviction relief, no order to show cause has been issued in the instant case and the government has therefore not been required to file a response to the petition.

Construing the movant's claims liberally as afforded *pro se* litigants, pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the movant appears to raise the following two claims:

1. Trial counsel was ineffective for failing to object to the government's alleged breach of the plea agreement.

2. Appellate counsel was ineffective for failing to raise on appeal the issue of the government's alleged breach of the plea agreement.

Procedural History

The procedural history of the underlying criminal case reveals that the movant was initially charged by Indictment with possession of a firearm by a convicted felon. (CR-DE# 1). After plea negotiations the movant agreed to plead guilty to a superseding information charging him with possession of a stolen firearm. (CR-

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Cases provides:

> The judge who receives the motion must promptly examine it. *If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party....*

RULES GOVERNING SECTION 2255 CASES, RULE 4(b) (emphasis added). A district court has the power under Rule 4 of the Rules Governing Section 2255 Cases to summarily dismiss a movant's claim for relief so long as there is a sufficient basis in the record for an appellate court to review the district court's decision. Broadwater v. United States, 292 F.3d 1302, 1303-04 (11th Cir. 2002).

DE# 20).

Pursuant to the terms of the agreement, the movant acknowledged that the sentence would be imposed by the court after considering the advisory guideline sentence. The movant also acknowledged and understood that he faced up to a maximum of ten years in prison. Based on his timely acceptance of responsibility The government agreed to recommend up to a three level reduction in the movant's base offense level. The movant further acknowledged that the court may depart from the applicable advisory guideline range and impose a sentence that is either more or less severe than the guideline sentence. The movant agreed that the court was required to consider the advisory guideline sentence, but was not bound to impose such a sentence. Rather, the court was permitted to tailor the ultimate sentence in light of other statutory concerns, and that the court could ultimately impose a more severe or less severe sentence than the advisory guideline sentence. Despite the terms concerning the guidelines calculation, the parties agreed to jointly recommend that the movant be sentenced to ten years, the statutory maximum. (CR-DE# 20, p. 4). On November 10, 2015, the movant's plea was accepted after a change of plea hearing. (CR-DE# 50)

Prior to sentencing, a PSI was prepared which reveals as follows. The PSI set the movant's initial base offense level at 20. (PSI ¶13). The probation officer increased that offense level by two because the firearm was stolen. (PSI ¶¶14). **Three levels were then deducted based on the movant's timely acceptance of responsibility, resulting in a total adjusted offense level 29.** (PSI ¶¶20-22).

The probation officer next determined that the movant had 11

criminal history points, resulting in a criminal history category V. (PSI ¶39). A total adjusted base offense level 19 and a criminal history category V, resulted in an advisory guideline range of 57 to 71 months in prison. (PSI ¶86). Statutorily, the movant faced a term of imprisonment from zero to ten years. (PSI ¶85). The PSI reflected that although the guidelines range was 57 to 71 months, the parties had agreed that the movant would be sentenced to 10 years imprisonment. (PSI ¶95).

On January 19, 2016, the movant appeared for sentencing. (CV-DE# 53). The court acknowledged that the plea agreement had allowed the movant to avoid the imposition of a mandatory minimum sentence of 15 years under the original charge of possession of a firearm by a convicted felon. (CR-DE# 53, p. 3). The movant's counsel expressed the movant's concern about the ten year sentence, but explained that the parties had negotiated the plea and agreed to a 10 year sentence after it was determined that the movant faced a 15 year minimum mandatory sentence under the original indictment. (CR-DE# 53, p. 4). After considering the statement of the parties, the PSI, containing the advisory guidelines, and the statutory factors, the court sentenced the movant to a total of 120 months in prison pursuant to the parties agreement. (CR-DE# 53, p. 6). In imposing sentence the trial judge noted, "That's a lengthy sentence, but the plea agreement resulted in the defendant avoiding a charge that would have carried a 15 year minimum mandatory sentence." (CR-DE# 53, p. 6).

The judgment of conviction was entered on the docket by the Clerk on January 20, 2016. (Cr-DE# 31). The movant appealed. (CR-DE3 35). On April 19, 2017, the Eleventh Circuit affirmed the petitioner's conviction and sentence. (CR-DE# 58).This motion to vacate was timely filed thereafter on October 12, 2017, less than

one year from the time the movant's conviction became final. (CV-DE#1).

Discussion of Claims

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

Here, the movant argues that both trial counsel and appellate counsel were ineffective for failing to argue that the government breached the plea agreement. In order to prevail on a claim of ineffective assistance of counsel, the movant must establish: (1) deficient performance - that his counsel's representation fell below an objective standard of reasonableness; and (2) prejudice - but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)(*en banc*). The

standard is the same for claims of ineffective assistance on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11 Cir. 1995).

In the case of ineffective assistance during the punishment phase, prejudice is established if "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993); United States v. Bartholomew, 974 F.2d 39, 42 (5th Cir. 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The court need not address both prongs of the Strickland standard if the complainant has made an insufficient showing on one. Id. at 697. However, a movant must establish that the sentence was increased due to counsel's deficient performance. Glover v. United States, 531 U.S. 198, 203-204 (2001).

In the context of a case in which guilty pleas or the equivalent were entered, application of the second prong of the two-prong Strickland standard requires a showing that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Construing the arguments raised by the movant in this §2255 motion with supporting affidavit (Cv-DE#1), the movant appears to argue that, but for counsel's misadvice regarding his exposure at sentencing, he would not have pled guilty, and instead would have proceeded to trial. However, as will be demonstrated *infra*, that claim is clearly refuted by the record.

Moreover, review of counsel's conduct is to be highly deferential. Spaziano v. Singletary, 36 F.3d 1028, 1039 (11 Cir. 1994), and second-guessing of an attorney's performance is not permitted. White v. Singletary, 972 F.2d 1218, 1220 ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11 Cir. 1992). Because a "wide range" of performance is constitutionally acceptable, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." Rogers v. Zant, 13 F.2d 384, 386 (11 Cir. 1994).

Finally, although the sentencing process may be reviewed by the district court on a §2255 motion, the severity of a sentence within statutory limits may not be reviewed because it raises no constitutional or statutory question. Kett v. United States, 722 F.2d 687, 690 (11th Cir. 1984); see also, Nelson v. United States, 709 F.2d 39, 40 (11th Cir. 1983) (citing, United States v. Diaz, 662 F.2d 713, 719 (11th Cir. 1981); United States v. Becker, 569 F.2d 951, 965 (5th Cir.), cert. denied, 439 U.S. 865 (1978), United States v. White, 524 F.2d 1249, 1254 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976).); See also Williams v. Alabama, 403 F.2d 1019, 1020 (5th Cir. 1968) (§2254 habeas case) (sentence within statutory limit is generally not subject to constitutional attack); Castle v. United States, 399 F.2d 642, 652 (5th Cir.1968) (§2255 case) (sentence within statutory limit is not reviewable on appeal and does not amount to a constitutional violation). These former Fifth Circuit decisions are controlling authority in this circuit. Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

In both of the movant's claims he asserts that counsel should have argued that the government breached the plea agreement by not recommending a three level reduction in his offense level for acceptance of responsibility as was promised. He contends that if either trial or appellate counsel had raised this issue his sentence would have been reduced. He also argues that appellate counsel should have appealed the sentence that was an upward departure from the sentencing guidelines.

The movant's claim is based upon the faulty premise that the government did not recommend a three level reduction in his adjusted offense level. Review of the PSI shows that, as agreed, the three level reduction was included in the calculation of the movant's total offense level. (PSI ¶ 20-21). There simply was no breach of the plea agreement by the government. The movant received exactly the sentence set forth in the plea agreement. The court had found that the movant entered that plea agreement knowingly and voluntarily and that he understood the terms of the agreement. In short there was no breach of the agreement and neither trial counsel, nor appellate counsel were ineffective for failing to raise this non-meritorious issue. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001); United States v. Sanders, 165 F.3d 248, 253 (3rd Cir. 1999). Since neither trial counsel nor appellate counsel were ineffective, the motion should be denied.

Finally, the movant's request for an evidentiary hearing on his claims of ineffective assistance of counsel should be denied. A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979). As previously discussed in this

Report, the claims raised are unsupported by the record or without merit. Consequently, no evidentiary hearing is required.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Rules Governing Section 2255 Cases.

The petitioner in this case fails to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (explaining the meaning of this term) (citation omitted). Therefore, it is recommended that the Court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such argument to the attention of the district judge in the objections permitted to this report and recommendation.

Conclusion

It is therefore recommended that this motion to vacate sentence be denied and the case closed.

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

Signed this 4th day of December, 2017.

UNITED STATES MAGISTRATE JUDGE

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