APPENDIX A:

OPINION, UNITED STATES v JOHNNY CURTIS BEDGOOD, APPEAL NO. 18-14197 (11th Cir March 15, 2019) (PUBLISHED OPINION)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14197-A

JOHNNY CURTIS BEDGOOD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

John Curtis Bedgood, a federal prisoner, moves for a certificate of appealability ("COA") in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate. Mr. Bedgood is serving a 360-month total sentence for: (1) possessing with intent to distribute cocaine and 28 grams or more of crack cocaine, 21 U.S.C. §§ 841(a)(1), (b)(2)(B)(iii), (b)(2)(C), 851 ("Count 1"); (2) possessing a firearm in furtherance of the drug trafficking crime, 18 U.S.C. §§ 924(c)(1)(A)(i), 2 ("Count 2"); and (3) possession a firearm as a convicted felon, 18 U.S.C. §§ 922(g), 924(e) ("Count 3"). His § 2255 motion asserts five claims, and he has an additional supplemental claim, but none meet the standard for granting a COA. To warrant a COA, he must demonstrate that reasonable jurists would debate the district court's denial of the claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

First, Bedgood has not shown prejudice in Claim 1, that counsel was ineffective when advising him on plea options and the effect of a sentencing enhancement for having prior felony drug convictions. The enhancement increased his minimum from 5 years to 10 years on Count 1 only, and his sentence of 25 years on Count 1, after the judge departed by five years from the Guideline range on Count 1, meant that the 21 U.S.C. § 841 enhancement had no impact on his sentence, such that he cannot show prejudice because his sentence would have been the same even without the enhancement. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). He offers only his own conclusory statements to suggest that he may have entered an "open plea," without a plea agreement, or that he might have cooperated with the government for a plea agreement if he understood the § 841 enhancement, and no COA will issue on Claim 1. *See Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) ("Conclusory allegations of ineffective assistance are insufficient." (internal citations omitted)).

Second, he cannot show prejudice in his claim that the drug amount used to calculate his Guideline range was too high, because under either the amount that the presentence investigation report ("PSI") actually attributed to him, or the lesser 28 grams of crack cocaine that the jury found him guilty of in Count 1, his adjusted offense level would still have increased to 37 under U.S.S.G. § 4B1.1 as a career offender. Because the PSI's drug quantity did not impact his adjusted offense level, he cannot show prejudice. *See Strickland*, 466 U.S. at 694. Third, any challenge to use of information from a confidential informant—who entered Mr. Bedgood's residence after his rear door was opened to allow her to enter, where she saw him engaged in drug activity—to obtain a search and arrest warrant would have been without merit, and counsel was not deficient. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").

Fourth, there was no merit to a claim that counsel should have moved to suppress evidence seized pursuant to warrants for "crack," because Florida's drug schedule does not distinguish between cocaine and its derivatives, and "crack" cocaine is a type of cocaine, so counsel was not deficient. *See id.*; Fla. Stat. § 893.03(2)(a)(4). Fifth, in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), we held that Fla. Stat. § 893.13, as amended, satisfied § 841, the career-offender definition, and the armed career-criminal definitions. *See Smith*, 775 F.3d at 1266–68 (citing *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1280 (11th Cir. 2013). Any contrary argument would have been without merit, and thus counsel was not deficient. *See Strickland*, 466 U.S. at 687; *Bolender*, 16 F.3d at 1573.

Finally, his supplemental claim, filed on July 2, 2016, was untimely because it was brought more than one-year after our judgment affirming his convictions and sentence became final when the 90-day window for filing a *writ of certiorari* to the Supreme Court expired on September 22, 2014. *See* 28 U.S.C. § 2255(f); *Clay v. United States*, 537 U.S. 522, 527 (2003). The supplemental claim did not involve any claims or factual allegations from his original § 2255 motion, so it did not relate back and was properly dismissed as time-barred by the district court. *See Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000).

Because reasonable jurists would not find the district court's assessment of his claim debatable or wrong, or that the issue deserves encouragement to proceed further, Mr. Bedgood's motion for a COA is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX B:

ORDER AND OPINION DENYING 28 USC § 2255,RELIEF, UNITED STATES v JOHNNY CURTIS BEDGOOD, CIVIL NO. 4:15-cv-460 (N.D. FLA AUG. 3, 2018).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. CASES NO. 4:12cr71-RH/CAS
4:15cv460-RH/CAS

JOHNNY CURTIS BEDGOOD,

Defendant.

_____/

ORDER DENYING THE § 2255 MOTION

A jury convicted the defendant Johnny Curtis Bedgood. He was sentenced and appealed. The judgment was affirmed. He has moved for relief under 28 U.S.C. § 2255 alleging ineffective assistance of counsel. After the government responded, Mr. Bedgood filed a supplemental motion, asserting a new ineffective-assistance claim. The government moved to strike the supplemental motion as untimely. The motions have been fully briefed. This order denies the § 2255 motions without a hearing. *See* Rules Governing Section 2255 Cases 8(a) and (b).

Background

The indictment charged Mr. Bedgood with possessing with intent to distribute cocaine and 28 grams or more of crack cocaine (count one), possessing a

firearm in furtherance of the drug trafficking crime (count two), and possessing the firearm as a convicted felon (count three). The drugs and firearm had been seized during execution of a search warrant at Mr. Bedgood's residence.

Prior to trial, the government filed a notice under 21 U.S.C. § 851 indicating that Mr. Bedgood was subject to enhanced penalties based on his prior felony drug convictions.

After a two-day trial, the jury found Mr. Bedgood guilty on all three counts. In response to a special interrogatory, the jury found that Mr. Bedgood was responsible for 28 grams or more of crack.

Based on the drug type and amount, Mr. Bedgood's base offense level on counts one and three, before application of chapter four enhancements, was 34. But there were chapter four enhancements. Mr. Bedgood was a career offender under United States Sentencing Guidelines Manual ("Guidelines Manual") § 4B1.1 and an armed career criminal under Guidelines Manual § 4B1.4. Under either of these provisions, because the maximum sentence on count one was life, the base offense level was 37. There were no adjustments to the base offense level.

Mr. Bedgood's criminal history category was VI both because he had 16 criminal history points and because he was a career offender and armed career criminal. With a total offense level of 37 and criminal history category of VI, Mr.

Bedgood's guideline imprisonment range on counts one and three was 360 months to life. The minimum sentence on count one was 10 years, and the minimum on count three was 15 years. Together, the minimum on those counts was 15 years, because the 10 and 15 year minimums could be concurrent.

On count two, the minimum mandatory sentence was 5 years consecutive to any other sentence. This made the guideline range on that count 60 months. The combined minimum on all counts was 20 years. The combined guideline range on all counts was 420 months to life.

Mr. Bedgood was sentenced to 300 months concurrent on counts one and three and 60 months consecutive on count two for a total sentence of 360 months. This was a downward variance, that is, a below-guideline sentence not based on a departure under the Guidelines Manual. The ultimate finding, based on all the circumstances, was this: "The sentence is 'sufficient,' a lesser sentence would not be 'sufficient,' and a greater sentence is not 'necessary' to comply with the statutorily-defined sentencing purposes. 18 U.S.C. § 3553(a)." (Statement of Reasons, ECF No. 47, at 5.)

Mr. Bedgood appealed. An element of his treatment as a career offender and armed career criminal was that he was age 18 or more when he committed the current offenses and that he was age 18 or more or met other criteria for the

relevant prior convictions. Even though Mr. Bedgood was plainly over age 18 at the time of the current and prior convictions, he asserted on appeal that the age determination could properly be made only by a jury, not by the judge. Mr. Bedgood also asserted that his trial attorneys were constitutionally ineffective.

The Eleventh Circuit affirmed, rejecting the age claim and declining to address the ineffective-assistance claim on the merits.

Mr. Bedgood timely filed the current § 2255 motion. He asserts multiple claims of ineffective assistance of counsel. He later filed a supplemental memorandum raising a new ineffective-assistance claim. The government opposes the motion in its entirety and has moved to strike the new claim as untimely.

Governing Standard

A defendant may obtain relief based on ineffective assistance of counsel only on a showing of both deficient performance and prejudice. The Supreme Court has said:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

> breakdown in the adversary process that renders the result unreliable."

Strickland v. Washington, 466 U.S. 668, 687 (1984).

An evidentiary hearing is unnecessary on a § 2255 motion when "the motion and files and records conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *Rosin v. United States*, 786 F.3d 873, 877 (11th Cir. 2015); *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). To be entitled to a hearing, a defendant must allege facts that, if true, would entitle him to relief. *See Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015). A hearing is not required on frivolous claims, conclusory allegations unsupported by specifics, or contentions that are wholly unsupported by the record. *See Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) ("[A] district court need not hold a hearing if the allegations [in a § 2255 motion] are . . . based upon unsupported generalizations") (internal quotation marks omitted); *Peoples v. Campbell*, 377 F.3d 1208, 1237 (11th Cir. 2004). Declarations that contain nothing more than conclusory allegations do not warrant a hearing. *Lynn v. United States*, 365 F.3d 1225, 1239 (11th Cir. 2004). Finally, disputes involving purely legal issues can be resolved without a hearing.

Decision Not to Plead Guilty

Mr. Bedgood first claims that his attorney rendered ineffective assistance that caused him to go to trial rather than plead guilty. The facts, according to Mr. Bedgood, are as follows. From the outset, he wished to plead guilty, due to the overwhelming evidence. He asked his attorney to try to negotiate a plea. The attorney reported that in exchange for any plea agreement, the government would require Mr. Bedgood to cooperate—that is, to provide information to the government to assist in the investigation or prosecution of others. Mr. Bedgood "refused to cooperate" and told his attorney he would "refuse any deal that required cooperation." (ECF No. 72 at 17, ¶ 6.) Mr. Bedgood says the attorney never told him that he could enter an "open plea," that is, plead straight up, without a plea agreement. (*Id.* at 18 ¶ 7.)

Mr. Bedgood says the attorney never told him anything about the possible enhancement of the sentencing range based on his prior felony drug convictions. The background is this. Under 21 U.S.C. § 841(b)(1)(B), the minimum sentence for possessing with intent to distribute 28 grams or more of crack is 5 years, and the maximum is 40 years. But if the defendant has a prior conviction for a felony drug offense, the minimum is 10 years, and the maximum is life. The higher penalties apply only if the government files a notice under 21 U.S.C. § 851 setting

out the prior conviction. Here the government filed a notice that Mr. Bedgood had four qualifying prior felony drug offenses.

Mr. Bedgood's only sworn description of the purported effect of his attorney's failure to advise him about an open plea and § 851 is set out in paragraphs 8 through 10 of Mr. Bedgood's declaration:

> 8. Had I known I could have entered an open plea to the Court prior to the Government filing the §851, I would have.
>
> 9. Further, my counsel never told me anything about the application of the §851 enhancement, or its effects on my sentence and conviction, such as that my statutory maximum had been increased from 40 years to life, or that my ad[v]isory guideline range had increase[d] from level 34 to 37, pursuant to the § 851 e[n]hancement.
>
> 10. Had I known the effects of the §851 enhancement would have on my conviction and sentence[,] I definitely would not have chosen to go to trial, and might have chosen to cooperate with the Government.

ECF No. 72 at 18.

These allegations do not entitle Mr. Bedgood to relief.

First, the record establishes without dispute that entering an "open plea" prior to the filing of a § 851 notice was not an option. The record makes clear that, had Mr. Bedgood chosen to plead straight up, the government would have filed the § 851 notice, if necessary moving to continue the plea proceeding so that the notice

could be filed. This accords with the longstanding practice in this district. The government's practice has long been to file § 851 notices in appropriate cases, even for defendants pleading guilty. A request to delay a proceeding for the filing of a notice has rarely if ever been necessary—filing the notice takes little time—but has never been denied and would not have been denied here.

Second, the sentence as imposed was well above the enhanced minimum and well below the original maximum. The change in the statutory sentencing range caused by the § 851 notice made no difference. And there was no possibility, even looking forward from the time of a possible plea, that the § 851 notice would have any *meaningful* effect on the statutory sentencing range. For count one, the only count that § 851 affected, the sentence was sure to exceed 10 years, so whether the minimum was 5 or 10 years was sure to make no difference. Similarly, the sentence on count one was unlikely to exceed 40 years, the original maximum, and even if a longer sentence was deemed appropriate, the original 40-year maximum on count one would not have stood in the way. This is so because the maximum on counts two and three was life. And so, for example, even without a § 851 notice, a life sentence could have been imposed as a 40-year sentence on count one concurrent with a life sentence on count two or three.

Third, while a guilty plea would have changed the guideline range, the record provides no support for any claim that this possibility would have caused Mr. Bedgood to plead guilty rather than go to trial. A guilty plea probably would have resulted in a three-level decrease for acceptance of responsibility under Guidelines Manual § 3E1.1. The total offense level would have been 34, and with the criminal history category of VI, the guideline range on counts one and three would have been 262 to 327 months. I might still have sentenced Mr. Bedgood to 300 months on those counts, but I probably would have sentenced him to 262 months. I would not have imposed a sentence on those counts lower than 262 months. The sentence on count two still would have been 60 months consecutive.

Mr. Bedgood's declaration does *not* say that the prospect of a three-level reduction for acceptance of responsibility would have led him to plead guilty. Having failed to include any such assertion in the declaration, Mr. Bedgood is not entitled to relief on this basis or even to an evidentiary hearing.

This makes it unnecessary to consider two other points. First, it is implausible that the attorney did not know and advise Mr. Bedgood about the possible three-level reduction for acceptance. And second, it is implausible that, having refused to cooperate and having instead chosen to go to trial knowing the

guideline range would stretch to decades, Mr. Bedgood would have changed his mind if he had known about the three-level reduction.

In fact, Mr. Bedgood faced only three possibilities. First, he could go to trial and hope for an acquittal. Second, he could plead guilty, knowing the guideline range and likely sentence would stretch to decades. And third, he could cooperate with the government, hoping for a substantial-assistance motion and much shorter sentence. Mr. Bedgood flatly ruled out the third possibility—he admits it in his declaration—and chose the first option over the second. In hindsight, the decision looks not so good. But it is the decision Mr. Bedgood made.

Finally, Mr. Bedgood says he "might" have chosen to cooperate had he known the effect of a § 851 notice. But what he "might" have done, in contrast to what he "would" have done, is not a basis for relief. And in any event, it is clear that Mr. Bedgood's statements about the effect of a § 851 notice are based on his misunderstanding of the law and his mistaken belief that he could have avoided the filing of a § 851 notice by pleading guilty.

The bottom line is this. Mr. Bedgood unequivocally refused to cooperate and chose to go to trial. He says he would have pleaded guilty before a § 851 notice was filed had his attorney properly advised him about the effect of a § 851 notice. But there was no possibility—none—that without agreeing to cooperate, Mr.

Bedgood could have entered a guilty plea before a § 851 notice was filed. Mr. Bedgood's contrary assertions are based on a misunderstanding of the law and the plea practices in this district.

Drug Weight

Mr. Bedgood contends that his attorney rendered ineffective assistance by not objecting to the drug weight attributed to him in the presentence report. The drug weight was conservatively calculated based on drugs and a ledger seized during a search of Mr. Bedgood's residence. And as Mr. Bedgood apparently admits, the drug weight did not affect the guideline range, which was based on the career-offender and armed-career-criminal guidelines. Those guidelines would have produced the same result based solely on the drugs seized from the residence, without consideration of the ledger. Indeed, the jury's finding that Mr. Bedgood was responsible for 28 grams of crack or more would have produced the same guideline range.

In sum, Mr. Bedgood has not shown that the attorney could have done anything to change the drug-weight calculation, which was correct, and has not shown that the calculation made any difference.

Motion to Suppress

Mr. Bedgood maintains that his attorney rendered ineffective assistance by failing to move to suppress evidence seized from his residence pursuant to the search warrant. He contends that the warrant was invalid because it was based on information obtained from an allegedly unconstitutional entry onto his property.

To show deficient performance by failing to move to suppress, a defendant must show that a motion to suppress would have had a reasonable probability of success. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Green v. Nelson*, 595 F.3d 1245, 1251-52 (11th Cir. 2010). Mr. Bedgood has not met this requirement.

The background is this. A confidential informant entered Mr. Bedgood's residence with consent on August 1, 2012, and bought crack. The informant recorded Mr. Bedgood involved in cooking crack. Officers used this and other evidence to obtain a search warrant for the residence.

Mr. Bedgood says that prior to entering the residence with consent, the confidential informant entered into the curtilage of the residence *without* consent. Mr. Bedgood says the confidential informant chose not to follow the paved driveway and an adjoining path to the front door of his residence, instead cutting through the backyard and knocking on the back door. There, Mr. Bedgood's live-in

girlfriend allowed the confidential informant to enter. Once inside, the confidential informant wandered into the kitchen from the room where she had been instructed to wait and tried to talk to Mr. Bedgood, who "attempted to shield his activities from" the informant. (ECF No. 72 at 9).

Mr. Bedgood acknowledges that his backyard was fenced only on three sides. The confidential informant did not have to open a gate or pass another barrier to approach his back door. (ECF No. 84 at 26). No evidence was recovered from Mr. Bedgood's yard or anywhere outside the residence.

Regardless of the door through which the confidential informant entered, she was lawfully in the residence with consent when she bought crack and made the recording that was used to obtain a warrant. A motion to suppress would have been denied. Mr. Bedgood's attorney's performance on this issue was not deficient.

Validity of Warrants

Mr. Bedgood asserts that his attorney should have moved to suppress evidence that was obtained pursuant to a defective arrest warrant and search warrant. He claims that the warrants were defective because they did not identify a "legitimate" controlled substance. Mr. Bedgood says that identifying the substance as "crack cocaine" had no legal effect because this is a slang term with no legal force under Florida law.

Under Florida Statutes § 893.03(2)(a)(4), controlled substances include "cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." The statute does not distinguish between cocaine and its derivatives. "Crack" is cocaine; that this is an informal term for a substance more formally referred to as cocaine base is of no moment. *See Godfrey v. State*, 947 So. 2d 565 (Fla. 1st DCA 2006) (holding that a defendant cannot be charged separately for crack cocaine and powder cocaine discovered in the passenger compartment of the same vehicle); *Romain v. State*, 973 So. 2d 1252 (Fla. 5th DCA 2008) (same).

A motion to suppress on this basis would have been frivolous. Mr. Bedgood's attorney's performance on this issue was not deficient.

Prior Drug Convictions

Mr. Bedgood says his attorney rendered ineffective assistance regarding the four Florida drug convictions that resulted in the increase in his minimum and maximum sentences on count one and in his treatment as a career offender and armed career criminal.

Effective on May 13, 2002, the Florida controlled-substances statute was amended to provide that "knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter." Fla. Stat. § 893.13. Mr.

Bedgood says that, because of this change, convictions under the statute no longer meet the definitions of the convictions that trigger § 841 enhancements or treatment as a career offender or armed career criminal.

Mr. Bedgood is not entitled to relief on this basis.

First, the *conduct* underlying Mr. Bedgood's four prior drug convictions occurred before the statute was amended. (ECF No. 44, PSR ¶¶ 50, 51, 52, 54). Two *convictions* occurred after the change, but the change of course could not apply to conduct that preceded it, and in any event eliminating these two convictions from consideration would have made no difference. The other two convictions, standing alone, would have subjected Mr. Bedgood to all the same treatment.

Second, the Eleventh Circuit has squarely rejected the argument that § 893.13 as amended does not meet the § 841, career-offender, and armed career-criminal definitions. *See United States v. Smith*, 775 F.3d 1262, 1266-1268 (11th Cir. 2014).

Mr. Bedgood's attorney did not render deficient performance by failing to raise this unfounded claim.

Conflict of Interest

In Mr. Bedgood's supplemental memorandum, he contends for the first time that his attorney had a conflict of interest—that while representing Mr. Bedgood in this case, the attorney also represented Mr. Bedgood's girlfriend on related charges in state court. If offered as evidence supporting the ineffective-assistance claims raised in Mr. Bedgood's timely § 2255 motion—evidence explaining the attorney's alleged lack of diligence—the reference to the conflict is unobjectionable but unavailing; regardless of motive, the attorney did not render ineffective assistance that prejudiced Mr. Bedgood.

If offered as a claim for relief, the assertion is untimely. The limitations period for § 2255 claims is one year. The period runs from the latest of four possible triggers. The trigger that applies in this case is the date on which the judgment became final.

The Eleventh Circuit issued its opinion affirming Mr. Bedgood's conviction and sentence on June 23, 2014. The deadline to file a petition for a writ of certiorari was September 22, 2014—the first workday at least 90 days after issuance of the opinion. The last day on which a § 2255 motion could be filed was September 22, 2015.

Mr. Bedgood first raised the conflict-of-interest claim on July 2, 2016. This was too late. *See Davenport v. United States*, 217 F.3d 1341, 1344, 1346 (11th Cir. 2000) (holding that an amendment to a § 2255 motion relates back to the date of the original motion only if the amendment arises from the same set of facts as the original claim, not from separate conduct and occurrences); *Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003).

Certificate of Appealability

A defendant may appeal the denial of a § 2255 motion only if the district court or court of appeals issues a certificate of appealability. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in Slack:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Mr. Bedgood first raised the conflict-of-interest claim on July 2, 2016. This was too late. *See Davenport v. United States*, 217 F.3d 1341, 1344, 1346 (11th Cir. 2000) (holding that an amendment to a § 2255 motion relates back to the date of the original motion only if the amendment arises from the same set of facts as the original claim, not from separate conduct and occurrences); *Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003).

Certificate of Appealability

A defendant may appeal the denial of a § 2255 motion only if the district court or court of appeals issues a certificate of appealability. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in Slack:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

The defendant has not made the required showing. This order thus denies a certificate of appealability.

Conclusion

IT IS ORDERED:

1. The defendant's § 2255 motion, ECF No. 71, is denied.

2. The defendant's supplemental § 2255 motion, ECF No. 84, is denied.

3. The government's motion to strike, ECF No. 86, is denied as moot.

4. The clerk must enter judgment.

5. A certificate of appealability is denied.

SO ORDERED on July 31, 2018.

s/Robert L. Hinkle
United States District Judge