IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12131-E

HAL BERNARD BLACK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Hal Bernard Black is a federal prisoner serving a 135-month sentence after pleading guilty to sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. § 1951(a)(1). Black moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in his appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate and Fed. R. Civ. P. 60(b) motion for relief from judgment. He has also filed a "motion for judgment," a "60 B 3 Motion," and a motion for clarification in this Court. In his "motion for judgment," Black requests a final judgment granting his motions on appeal. In his "60 B 3 Motion," Black argues that he is entitled to relief under Rule 60(b)(3) because the government withheld favorable evidence that tended to prove his innocence. Finally, in his motion for clarification, Black requests that this Court clarify whether his conviction is constitutional where his sex-trafficking offense was not a "crime of violence."

APPENDIX M

In the underlying § 2255 motion, Black asserted that his trial counsel was ineffective for (1) advising him to enter a guilty plea, (2) advising him that he would receive a sentence reduction if he testified before the grand jury against his mother, and (3) failing to file his direct appeal. On January 25, 2018, the district court denied Black's § 2255 motion. The district court also denied a COA. Shortly thereafter, Black filed a Rule 60(b)(3) motion, arguing that the government fraudulently failed to obtain a lawful search warrant to search his cell phone. The district court denied Black's Rule 60(b) motion on May 8, 2018. The court did not, thereafter, rule on a COA.

Black appealed. We initially remanded this appeal to the district court for the limited purpose of determining whether Black was entitled to relief under Fed. R. App. P. 4(a)(6), such that his notice of appeal was timely as to the order denying his § 2255 motion. In light of the district court's determination on limited remand that Black was entitled to relief under Rule 4(a)(6), we conclude that Black's notice of appeal is timely as to the January 25, 2018, order denying his § 2255 motion, as well as the May 8, 2018, order denying his Rule 60(b) motion.

In order to obtain a COA, Black must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Black is unable to make that showing regarding his ineffective-assistance claims, as the record shows that the district court conducted a lengthy and thorough plea colloquy during which he testified, under oath, that he pleaded guilty knowingly and voluntarily, he was not promised anything in exchange for his guilty plea, and he was satisfied with his counsel's performance. *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994).

Additionally, Black cannot make the requisite showing as to his Rule 60(b) motion. In his motion, Black merely made a conclusory allegation of fraud committed by the government without

providing any evidence, and he did not allege how the government's alleged fraudulent conduct prevented him from fully presenting his case. *Waddell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300, 1309 (11th Cir. 2003). Thus, reasonable jurists would not debate the district court's denial of Black's Rule 60(b) motion. Accordingly, Black's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

Additionally, Black's "motion for judgment" is DENIED AS MOOT because he already sought such relief through his COA motion. Further, to the extent that Black's "60 B 3 Motion" is an attempt to seek relief under Rule 60(b), it is DENIED because such a motion is not cognizable on appeal. Moreover, Black raises his argument that the government withheld favorable evidence for the first time on appeal, and, as such, his claim is barred. *See Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (holding that arguments raised for the first time on appeal that were not presented in the district court are deemed waived). Finally, Black's motion for clarification is DENIED because he is attempting to raise a substantive challenge to his conviction that he did not first raise in the district court. *Id.*

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 08, 2019

Hal Bernard Black
USP Lompoc - Inmate Legal Mail
3901 KLEIN BLVD
LOMPOC, CA 93436

Appeal Number: 18-12131-E
Case Style: Hal Black v. USA
District Court Docket No: 1:16-cv-00274-MW-GRJ
Secondary Case Number: 1:15-cr-00009-MW-GRJ-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED. NO FURTHER ACTION WILL BE TAKEN ON THIS APPEAL.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

MOT-2 Notice of Court Action

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12131-E

HAL BERNARD BLACK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARCUS and GRANT, Circuit Judges.

BY THE COURT:

Hal Bernard Black has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's January 16, 2019, order denying his motion for a certificate of appealability, denying his motion for IFP status as moot, denying his "motion for judgment" as moot, denying his "60 B 3" motion, and denying his motion for clarification in his appeal of the district court's denial of his Fed. R. Civ. P. 60(b) motion for relief from the judgment denying his 28 U.S.C. § 2255 motion to vacate. Because Black has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

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

UNITED STATES OF AMERICA

vs. Case Nos.: 1:15cr09/MW/GRJ
1:16cv274/MW/GRJ

HAL BERNARD BLACK

REPORT AND RECOMMENDATION

This matter is before the Court upon Petitioner's "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a person in Federal Custody" (ECF No. 204) and the Government's Response thereto (ECF No. 220). The case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2; *see also* 28 U.S.C. § 636(b) and FED. R. CIV. P. 72(b). After a review of the record and the arguments presented, the Court concludes that Petitioner has not raised any issue requiring an evidentiary hearing and that the § 2255 motion should be denied. *See* Rules 8(a) and (b) Governing Section 2255 Cases.

APPENDIX K

I. BACKGROUND

On May 26, 2015, a grand jury returned a four-count indictment charging Petitioner and two co-defendants for crimes based on their participation in a scheme to make money using a minor female to perform sex acts. (ECF No. 1.) Petitioner was charged with: (1) Sex Trafficking of a Minor, in violation of Title 18, United States Code, Sections 1591(a)(1) and (b)(2) (Count One); (2) Financially Benefiting from Sex Trafficking of a Minor, in violation of Title 18, United States Code, Sections 1591(a)(2) and (b)(1) (Count Two); (3) Sex Trafficking of a Minor, in violation of Title 18, United States Code, Sections 1591(a)(1) and (b)(2) (Count Three); and (4) Financially Benefiting from Sex Trafficking of a Minor, in violation of Title 18, United States Code, Sections 1591(a)(2) and (b)(1). *Id.*

On June 9, 2015, Petitioner appeared before the Court and was arraigned on the charges. (ECF No. 8.) The Court appointed attorney David A. Wilson to represent Petitioner. (ECF No. 12.) On November 4, 2015, Petitioner entered into a plea agreement which provided that, if Petitioner agreed to plead guilty to Count One, the Government would move to dismiss Counts Two through Four. (ECF No. 80.) That day, Petitioner

II. ANALYSIS

A. General Legal Standard

Collateral review is not a substitute for direct appeal, and therefore the grounds for collateral attack on final judgments pursuant to Section 2255 are extremely limited. A prisoner is entitled to relief under Section 2255 if the court imposed a sentence that: (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. § 2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . . ."

The law is well established that a district court need not reconsider issues raised in a Section 2255 motion which have been resolved on direct appeal. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014); *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012); *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000); *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under Section 2255. *Nyhuis*, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. *Sanders v. United States*, 373 U.S. 1, 16 (1963) ("identical grounds may often be proved by different factual allegations . . . or supported by different legal arguments . . . or couched in different language . . . or vary in immaterial respects").

Because a motion to vacate under Section 2255 is not a substitute for direct appeal, issues which could have been raised on direct appeal are generally not actionable in a Section 2255 motion and will be considered procedurally barred. *Lynn*, 365 F.3d at 1234–35; *Bousley v. United States*, 523 U.S. 614, 621 (1998); *McKay v. United States*, 657 F.3d 1190, 1195

(11th Cir. 2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." *Lynn*, 365 F.3d at 1232 n.14 (quoting *Mills*, 36 F.3d at 1055). Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider the ground in a Section 2255 motion unless the defendant establishes (1) cause for not raising the ground on direct appeal, and (2) actual prejudice resulting from the alleged error, that is, alternatively, that he is "actually innocent." *Lynn*, 365 F.3d at 1234; *Bousley*, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a defendant must show that "some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [defendant's] own conduct." *Lynn*, 365 F.3d at 1235. A meritorious claim of ineffective assistance of counsel can constitute cause. *See Nyhuis*, 211 F.3d at 1344.

Ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a § 2255 motion regardless of whether they could have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503 (2003); *see also United States v. Franklin*, 694

F.3d 1, 8 (11th Cir. 2012); *United States v. Campo*, 840 F.3d 1249, 1257 n.5 (11th Cir. 2016). In order to prevail on a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Darden v. United States*, 708 F.3d 1225, 1228 (11th Cir. 2013). In applying *Strickland*, a court may dispose of an ineffective assistance claim if a defendant fails to carry his burden on either of the two prongs. *Strickland*, 466 U.S. at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("[T]he court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

In determining whether counsel's conduct was deficient, this court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; *see also Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Reviewing courts are to examine counsel's performance in a highly

deferential manner and "must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Hammond v. Hall*, 586 F.3d 1289, 1324 (11th Cir. 2009) (quoting *Strickland*, 466 U.S. at 689); *see also Chandler v. United States*, 218 F.3d 1305, 1315–16 (11th Cir. 2000) (discussing presumption of reasonableness of counsel's conduct); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (emphasizing that petitioner was "not entitled to error-free representation"). Counsel's performance must be evaluated with a high degree of deference and without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler*, 218 F.3d at 1315. "[T]he fact that a particular defense ultimately proved to be unsuccessful [does not] demonstrate ineffectiveness." *Chandler*, 218 F.3d at 1314. When reviewing the performance of an experienced trial counsel, the presumption that counsel's conduct was reasonable is even stronger, because "[e]xperience is due some respect." *Chandler*, 218 F.3d

at 1316 n.18.

With regard to the prejudice requirement, a defendant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*, 466 U.S. at 693). For a court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (quoting *Strickland*, 466 U.S. at 687).

To establish ineffective assistance, Defendant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir. 1987). Bare, conclusory

allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012); *Garcia v. United States*, 456 F. App'x 804, 807 (11th Cir. 2012) (*citing Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir. 1993)); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (*citing Blackledge v. Allison*, 431 U.S. 63, 74 (1977)).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Chandler*, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (quoting *Adams*

v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather whether counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Regardless of how the standard is framed, under the prevailing case law it is abundantly clear that a moving defendant has a high hurdle to overcome to establish a violation of his constitutional rights based on his attorney's performance. A defendant's belief that a certain course of action that counsel failed to take might have helped his case does not direct a finding that counsel was *constitutionally ineffective* under the standards set forth above.

An evidentiary hearing is unnecessary when "the motion and files and records conclusively show that the prisoner is entitled to no relief." *See* 28 U.S.C. § 2255(b); *Rosin*, 786 F.3d at 877; *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). Not every claim of ineffective assistance of counsel warrants an evidentiary hearing. *Gordon*, 518 F.3d at 1301 (citing *Vick v. United States*, 730 F.2d 707, 708 (11th Cir. 1984)). To be entitled to a hearing, a defendant must allege facts that, if true, would prove

he is entitled 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) (explaining that "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). Even affidavits that amount to nothing more than conclusory allegations do not warrant a hearing. *Lynn*, 365 F.3d at 1239. Finally, disputes involving purely legal issues can be resolved by the court without a hearing.

B. Petitioner's Ground One

In his sole ground for relief, Petitioner alleges his attorney, David Wilson, rendered ineffective assistance of counsel. Specifically, Petitioner alleges Mr. Wilson advised Petitioner to admit to the FBI that he was guilty of the charges against him. Petitioner further alleges Mr. Wilson advised him that if he testified before the grand jury against his mother, a co-defendant in the case, he would receive the ten-year statutory mandatcry

minimum sentence and would receive a downward departure therefrom. Petitioner asserts he told Mr. Wilson he was not guilty of the charges, but Mr. Wilson "kept telling him" to talk to the FBI.

Petitioner further asserts Mr. Wilson did not file his direct appeal and has ignored all of Petitioner's attempts at communication. Petitioner alleges that, if not for counsel's unsound advice, Petitioner would have insisted on going to trial on the charges, and the case would have reached a different outcome.

Petitioner's assertion that he is not guilty and that Mr. Wilson instructed him to plead guilty to the charges and testify against his mother in exchange for a reduced sentence is controverted by the record. A review of the plea colloquy reveals Petitioner testified as follows at his guilty plea hearing:

> The Court: Very good. Now, Mr. Black, you appeared to have followed what I've told you so far and paid attention so I'm now going to ask you directly, how do you plead to the charge in count one of the indictment, guilty or not guilty?
>
> Petitioner: Guilty.
>
> The Court: And are you pleading guilty because you indeed are guilty of that charge?

Petitioner: Yeah, I guess so.

The Court: Well, this is not the time to guess.

Petitioner: Yes, sir.

The Court: Are you pleading guilty because you indeed committed the charge in count one of the indictment?

Petitioner: Yes, sir, I have committed the crime like that, yes, sir.

The Court: And you admit you committed the acts set forth in the charge in count one of the indictment?

Petitioner: Yes, sir.

. . .

The Court: . . . . Now, Mr. Black, your decision to plead guilty here this afternoon is it being made freely and voluntarily?

Petitioner: Yes, sir.

The Court: Has anyone threatened you, forced you, coerced you or intimidated you in any way regarding your decision to plead guilty?

Petitioner: No, sir.

The Court: Other than what the government has agreed to do in the written plea agreement and supplement to plea agreement, are you relying on any other agreement or is there any other promise or any other understanding you have with anyone else which is causing you to plead guilty here this afternoon other than what's in the plea agreement?

Petitioner: No, sir, I just want to do my time and come home.

contrary.[1]

Further, Petitioner's assertion that Mr. Wilson did not file his direct appeal and has ignored all of Petitioner's attempts at communication finds no support in the record. Petitioner does not claim he instructed Mr. Wilson to file an appeal on his behalf, nor does he demonstrate that he, at any time, expressed a desire to appeal his conviction. Further, Petitioner provides no details as to when he attempted to communicate with Mr. Wilson or the substance of what he attempted to communicate.

On the contrary, Petitioner's representations to the Court at his guilty plea and sentencing hearings demonstrate Petitioner was satisfied with Mr. Wilson's performance:

> The Court: Now, Mr. Black, you've been represented throughout this case by Mr. Wilson. Are you satisfied with your lawyer and the way your lawyer has represented you so far?
>
> Mr. Black: Yes, sir.
>
> The Court: And have you had enough time to discuss your case

[1] Petitioner's declarations in open court in the trial of his co-defendant and mother Tawanda Lakaye Burnett, submitted as Exhibit 1 to the Government's Response in ECF No. 220, also contradict Petitioner's assertion that Mr. Wilson advised him to plead guilty despite protesting his innocence. In *United States v. Tawanda Lakaye Burnett*, Case No. 1:15cr09, Petitioner testified that he spoke with Mr. Wilson and "[A]ll I know is he told me I should plead guilty if I knew I was involved in the human trafficking of E.B. and I told him, yeah, I agree I was, so he said then the right thing to do is plead guilty and ask for cooperation in order for a 5K1—."

fully with your lawyer and tell your lawyer everything you know about your case?

Mr. Black: Yes, sir.

The Court: Mr. Black, we're here for sentencing today. As you heard announced, I'm Judge Walker. Let me start by asking you, have you had the opportunity to review the presentence investigation report prepared by probation in your case?

Mr. Black: Yes, sir.

The Court: Have you gone over it with your lawyer?

Mr. Black: Yes, sir.

The Court: Has he answered all your questions?

Mr. Black: Yes, sir.

The Court: Are you well pleased with his representation?

Mr. Black: Yes, sir.

(ECF No. 218 at 42; ECF No. 221 at 2, 3.) The record further reveals Petitioner was advised on the record of his right to appeal his sentence:

The Court: All right, Mr. Black, you're advised you have the right to appeal this sentence. If you are unable to afford the cost of an appeal, you may apply for leave to appeal *in forma pauperis*. Any appeal must be filed within fourteen days. Upon request, the clerk will immediately file a notice of appeal on your behalf. Do you understand, sir?

Mr. Black: Yes, sir.

(ECF No. 221 at 74-75.) Petitioner did not file a notice of appeal and has failed to provide any facts to support a claim that he expressed to his counsel the desire to appeal his conviction and sentence. Petitioner's general allegations that Mr. Wilson failed to file an appeal, without greater specificity, cannot establish ineffective assistance of counsel. *See Wilson*, 962 F.2d at 998 (conclusory allegations of ineffective assistance of counsel are insufficient to state a claim); *see also Lockhart*, 474 U.S. 52 (conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue). Petitioner fails to establish counsel's performance was deficient and that he was prejudiced thereby. As such, Petitioner has not carried his burden of demonstrating that counsel was constitutionally ineffective under *Strickland.*

C. Evidentiary Hearing

To warrant an evidentiary hearing, a defendant must allege facts that, if true, would prove he is entitled to relief. Petitioner has failed to do so here. Accordingly, his request for an evidentiary hearing is denied.

III. CONCLUSION

For all of the foregoing reasons, the Court concludes that Petitioner has not shown that he is entitled to Section 2255 relief. Nor has he shown that an evidentiary hearing is warranted. Therefore, Petitioner's motion should be denied.

CERTIFICATE OF APPEALABILITY

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

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also 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." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Based on the foregoing, it is respectfully **RECOMMENDED** that:

1. The "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a person in Federal Custody" (ECF No. 204) should be **DENIED**.
2. A certificate of appealability should be **DENIED**.

IN CHAMBERS at Gainesville, Florida, this 20th day of December, 2017.

/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy

thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

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

UNITED STATES OF AMERICA,

v. **Case No. 1:15cr9-MW/GRJ**

HAL BERNARD BLACK,

Defendant/Petitioner,

_____/

ORDER ACCEPTING AND ADOPTING REPORT AND RECOMMENDATION

This Court has considered, without hearing, the Magistrate Judge's Report and Recommendation. ECF No. 241 Upon consideration, no objections having been filed by the parties,

IT IS ORDERED:

The report and recommendation is **accepted and adopted** as this Court's opinion. The Clerk shall enter judgment stating, "Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, ECF No. 204, is **DENIED**. A Certificate of Appealability is **DENIED**." The Clerk shall close the file.

SO ORDERED on January 25, 2018.

s/Mark E. Walker
United States District Judge

Appendix N

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

UNITED STATES OF AMERICA.

v. **CASE NO: 1:15cr9-MW/GRJ**

HAL BERNARD BLACK,

Defendant.

/

ORDER

This case is on remand from the Eleventh Circuit for the limited purpose of determining whether Defendant timely appealed this Court's denial of his § 2255 motion. ECF No. 277. On January 25, 2018, this Court denied Defendant's § 2255 motion. ECF Nos. 243 & 244. Defendant appealed this denial on May 17, 2018—more than 60 days after January 25. ECF No. 253. The delay in his appeal may have been caused by him not timely receiving this Court's denial. *See* ECF No. 277, at 3 ("[I]t appears from [Black's] response that he may not have received timely notice of the judgment . . .").

During a hearing on September 14, 2018, where this Court had the opportunity to question Defendant under oath, this Court finds that Defendant has satisfied the requirements to reopen the time to file an appeal under Federal Rule of Appellate Procedure 4(a)(6); namely, this Court finds (1) Mr. Black did not receive notice of entry of the order within 21 days of entry, (2) his motion was filed within 14 days

APPENDIX L

after he received notice of the entry, and (3) no party would be prejudiced by reopening the time to appeal. This Court also finds that Defendant has still not received a copy of the report and recommendation or this Court's order adopting same and thus directs the Clerk to mail Defendant a copy of these documents.

This hearing only occurred after exhaustive efforts on the part of this Court to locate Defendant and get him on the phone. *See* ECF No. 281 (noting some of the difficulties in setting up telephonic hearing). This Court attempted to set the matter for hearing the same week it received the remand and regrets in took thirty days to comply with the Circuit's order.

Finally, this Court notes that the Government conducted its own thorough review of Defendant's incarceration and concluded the report and recommendation as well as this Court's orders were mailed to the wrong address. The Government agreed that Defendant should be afforded relief. Accordingly,

IT IS ORDERED:

1. This Court finds that Defendant has satisfied the requirements to reopen the time to file an appeal under Federal Rule of Appellate Procedure 4(a)(6) and thus the time to file an appeal is reopened for a period of 14 days after the date of this order. Of course, Defendant has already filed a notice of appeal, ECF No. ECF No. 253.

2. The Clerk is directed to send the Report and Recommendation, ECF No. 241, this Court's Order Adopting the Report and Recommendation, ECF No. 243, and the docket sheet to Defendant at the address identified during the telephonic conference.
3. The Clerk shall take all necessary steps to forward this Order to the Eleventh Circuit to supplement their record for further proceedings.

SO ORDERED on September 14, 2018.

s/Mark E. Walker
Chief United States District Judge

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

UNITED STATES OF AMERICA.

v. **CASE NO: 1:15cr9-MW/GRJ**

HAL BERNARD BLACK,

Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

This Court has considered, without hearing, Defendant's motion to proceed *in forma pauperis*. ECF No. 264. The motion is **DENIED**. This Court previously denied Defendant a certificate of appealability in its Order Accepting and Adopting the Magistrate Judge's Report and Recommendation. ECF No. 243.

SO ORDERED on July 9, 2018.

s/Mark E. Walker
United States District Judge

APPENDIX B

Additional material from this filing is available in the Clerk's Office.