IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10532-K

BERSON MARIUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Appellant' motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-22266-CIV-LENARD
(15-20529-CR-LENARD)
MAGISTRATE JUDGE P.A. WHITE

BERSON MARIUS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* movant, **Benson Marius**, has filed this motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his conviction and sentence for conspiracy to possess with intent to distribute 28 grams or more of crack cocaine and various other narcotics, entered following a guilty plea in **case no. 15-20529-Cr-Lenard.**

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

No order to show cause has been issued because, on the face of the petition, it is evident the movant is entitled to no relief. See Rule 4,[1] Rules Governing Section 2255 Proceedings. Because

[1]Rule 4 of the Rules Governing Section 2255 Petitions, provides, in pertinent part, that "[I]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the

summary dismissal is warranted, the government was not required to file any response. See Broadwater v. United States, 292 F.3d 1302, 1303-04 (11th Cir. 2002) (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).

Before the Court for review are the movant's §2255 motion (Cv-DE#1) with supporting exhibits, the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), along with all pertinent portions of the underlying criminal file, including the negotiated written plea agreement (Cr-DE#230), the stipulated factual proffer (Cr-DE#231), together with the change of plea (Cr-DE#344) and sentencing (Cr-DE#345-347) transcripts.[2]

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant raises the following grounds for relief:

1. He was denied effective assistance of counsel during the change of plea proceedings, when his lawyer failed to object as the district judge engaged in plea negotiations for the government. (Cv-DE#1:4).

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judge must dismiss the petition and direct the clerk to notify the petitioner...."

[2]The court may take judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 795 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999) (citing United States v. Rey, 811 F.2d 1453, 1457 n.5 (11 Cir. 1987) (finding the district court may take judicial notice of the records of inferior courts).

2. He was denied effective assistance of counsel at the change of plea proceeding for failing to request a continuance of the hearing after the government made changes to the factual proffer at that time, which were not stipulated to by the movant; and, instead allowed the government, with the court's assistance, to coerce the movant into changing his plea. (Cv-DE#1:7-8).

3. The movant's constitutional rights were violated when the district court engaged in judicial participation in negotiating the change of plea, in violation of Fed.R.Civ.P. 11(c)(1). (Cv-DE#1:10).

4. He was denied effective assistance of counsel on direct appeal, where his lawyer failed to raise as error on appeal that the court improperly engaged in plea negotiations, thereby coercing the movant into changing his plea. (Cv-DE#1:11).

III. Factual and Procedural Background

A. Facts of the Offense

The stipulated factual proffer reveals[3] that beginning in June 2014, the Federal Bureau of Investigation ("FBI") began an investigation of the movant and his brother, Berwin Marius, together with other coconspirators. (Cr-DE#231:1). The movant and the others were responsible for the distribution of narcotics, including crack cocaine, powder cocaine, Ethylone (known as "Molly"), Alprazolam (known as "Xanax"), heroin, and marijuana in the North Miami area of the Southern District of Florida. (Id.).

[3]Any attempt to raise additional arguments regarding the voluntariness of the plea or the sentence imposed, for the first time, in objections to this Report, should be rejected by the district court. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

Undercover purchases of narcotics and intercepted calls between the movant and his brother directed the sales of narcotics from the residence located at 1160 N.W. 141 Street in Miami, Florida (the "1160 Residence"). On June 17, 2014, a confidential source ("CS") met the movant's brother at 1711 N.W. 141 Street, in Miami, Florida (the "1171 Residence"). There, the CS ordered narcotics from the movant's brother, who then directed the CS to the 1160 Residence. (Id.:1-2). These transactions were audio and video recorded and reveal that narcotic packages for distribution were next to firearms at both the 1160 and 1171 Residences. (Id.:2).

Meanwhile, on July 8th, 2014, law enforcement executed a duly issued state search warrant at the 1160 Residence, but as law enforcement approached, multiple individuals fled the building, running in different directions. (Id.). Two were arrested, but at least one escaped. (Id.). During a search of the residence, law enforcement recovered a 9mm Glock pistol, a .45 caliber Glock pistol, an AK-47 magazine with eight live rounds, a variety of other ammunition, approximately 68.5 grams of marijuana, 48 grams of crack cocaine, 27 grams of powder cocaine, 43 Xanax bars (pills), and a quantity of Pyrrolidinovalerophenone or "Flakka," together with various access devices in the name of two individuals who did not appear to live at the residence, a drawer containing ski masks, zip ties, a crow bar, binoculars, and surveillance equipment surrounded with black electrical tape. (Id.). Law enforcement also seized $119 that was found next to the drugs. (Id.). A green 2000 Honda Odyssey was observed parked in the 1160 Residence, which was registered to the movant's mother. (Id.). The movant's driver's license was recovered from inside the vehicle. (Id.).

Next, on August 28, 2014, a second CS ("CS2") was recorded

purchasing 25 individually sealed plastic baggies containing powder cocaine, 7 plastic baggies containing crack cocaine, and 4 additional pieces of crack cocaine, for a total, negotiated price of $450, from the 1160 Residence. (Id.:3). Later that same day, CS2 again returned to the 1160 Residence, purchasing an additional $150 worth of crack cocaine from the movant. (Id.). Between September and March 2015, law enforcement made additional controlled narcotics purchases from the movant, totaling 66.5 grams of powder cocaine, 1.8 grams of cocaine, and 12.2 grams of crack cocaine. (Id.:3-4). During March 2015, the movant would receive several calls and text messages giving him status updates of the amount of drugs remaining at the 1160 Residence. (Id.:4).

Again, in April 2015, law enforcement executed another search warrant at the 1160 Residence. (Id.:4). At the time of its execution, law enforcement discovered the 1160 Residence was unoccupied, and found no narcotics or firearms in the residence. (Id.). However, law enforcement did recover a composition book and a green folder that were left on a coffee table in the living room, organized in ledger format, detailing the amount and types of narcotics sold beginning February 2014 through April 2015, and divided the information into multiple daily shifts. (Id.). The documentation contained in the ledger is consistent with street level sales, as confirmed during the intercepted calls. (Id.:5). The ledgers revealed that the movant was delivering narcotics and picking up money on a daily basis. (Id.). An analysis of the ledgers revealed that, during the period February 2015 and April 2015, at least $25,990 worth of narcotics were delivered to the 1160 Residence, and approximately $25,656 was retrieved by the movant and his brother. (Id.).

After execution of the warrant in April 2015, but before law

enforcement departed the 1160 Residence, the movant received a call from his brother, at which time he informed the movant that a search warrant had been executed at the 1160 Residence, and that the individual working there had taken the drugs and guns and fled out the back of the 1160 Residence, and was hiding out at a coconspirator's home. (Id.). Shortly thereafter, the movant spoke with to another coconspirator who explained that he too had fled with drugs and guns when he saw law enforcement approaching. (Id.).

In the early morning hours of April 2015, a drive-by shooting occurred at the 1160 Residence. (Id.). Intercepted calls revealed that the movant's brother had some advance notice of the attack and intended to have coconspirators, Leudy Kemp and Christopher Smith-Taylor, armed with firearms, including a Mini-14 rifle, so that they could defend the 1160 Residence. (Id.). Smith-Taylor, however, left before the drive-by occurred. (Id.). Later, during another intercepted call, the movant's brother reprimanded Smith-Taylor, insisting that the firearm was "there to serve and protect," and that he should have left it in the 1160 Residence if he was going home. (Id.).

Following the drive-by shooting, the movant and his coconspirators relocated their primary narcotics distribution to a residence located at 810 N.W. 145 Street in Miami, Florida (the "810 Residence"). (Id.:6). During an intercepted call, the movant's brother suspected the drive-by was done in an effort to interfere with the movant and his brother's narcotic trafficking business. (Id.).

Approximately a month later, in May 2015, a third CS ("CS3") purchased two small baggies of cocaine from the movant at the 810 Residence. (Id.). In May 2015, CS2 also made two purchases from the

movant, outside the movant's residence, totaling 57 grams of cocaine. (Id.). That same month, law enforcement executed five search warrants, including one at movant's residence, where they discovered a 7.62 caliber AK-style assault rifle, a scale, and small quantities of cocaine in a bedroom, together with items appearing to belong to the movant. (Id.). In other bedrooms of the movant's residence, law enforcement discovered various calibers of ammunition. (Id.).

While executing the search warrant at coconspirator's Thomas' residence, law enforcement seized small amounts of marijuana, a loaded .357 Magnum revolver in plain view, and a loaded .223 caliber Ruger Mini-14 rifle in the bedroom closet of one of the rooms. (Id.). In other areas of that residence, law enforcement seized a loaded .40 caliber Glock pistol, and several hundred rounds of ammunition. (Id.). The Ruger Mini-14 rifle seized from Thomas' residence was the same rifle that was regularly used to "serve and protect" the residences from where narcotics were sold. (Id.:7).

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

Briefly, the movant was charged with and pleaded guilty to conspiracy to possess with intent to distribute 28 grams or more of crack cocaine, and various other narcotics, in violation of 21 U.S.C. §846, §841(b)(1)(B), and §841(b)(1)(C). (Cr-DE#s118,230). Pursuant to the terms of the negotiated written plea agreement, the government agreed to dismiss all remaining counts after sentencing. (Cr-DE#230:1).

Movant acknowledged that the court could depart from the

advisory guideline range computed, and while required to consider that range, it was not bound to impose a sentence within the advisory range, but was permitted to tailor the sentence in light of other statutory concerns. (Id.:1-2). The movant also acknowledged that any estimate of the probable sentence to be imposed, whether from his attorney, the government, or the probation office, was merely a predication, not a promise, and was not binding on the government, the probation office, or the court. (Id.:2,3-4). Movant affirmed that he could not withdraw his plea solely as a result of the sentence imposed. (Id.:2).

Movant understood that as to the offense of conviction, he faced a minimum term of 5 years imprisonment and up to a statutory maximum of 40 years, followed by a mandatory term of at least 4 years supervised release. (Id.). The government agreed to recommend that the movant's base offense level be reduced up to 3 levels based upon movant's timely acceptance of responsibility. (Id.:3). Next, movant affirmed that the court may find that he is a career offender, pursuant to U.S.S.G. §4B1.1, and may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the defense, the government, or jointly by the parties. (Id.:4). Movant also agreed to forfeit the firearms and ammunition seized by the government. (Id.:5).

Finally, movant understood that, 18 U.S.C. §3742 and 28 U.S.C. §1291, provide that he is entitled to pursue a direct appeal. (Id.:5). In exchange for the undertakings of the government, as reflected in the plea agreement, the movant agreed to waive all rights conferred by 3742 and 1291, including the right to appeal the method in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute, or is the result of an upward departure and/or upward variance from the advisory guideline

that the court establishes at sentencing, or finds that the movant is a career offender. (Id.).

On **January 22, 2016**, a change of plea proceeding, pursuant to Fed.R.Cr.P. 11, was conducted by the district court. (Cr-DE#344). After being given the oath, the movant understood that if he answered any questions falsely, he could be prosecuted in a separate action for perjury or for making a false statement. (Id.:2). The movant next provided background information, including the fact that he was also known as "Sasha," and also provided his age and education. (Id.:3). Movant denied being currently under the influence of or taking within the last 24-hour period any drug, medication, or alcoholic beverage. (Id.). He also denied recently being under the care of a doctor or psychiatrist, or having been hospitalized for any reason, including the use of narcotics, medicines, drugs, or alcohol. (Id.). Movant also denied that his ability to understand the charges against him, or to communicate and understand explanations and advice provided by counsel, were affected by the movant's use of any drug, medication, or alcoholic beverage. (Id.:4).

Regarding the waiver of his constitutional rights, the movant understood that he had the right to plead not guilty, to be presumed innocent, to have a trial by jury, and that the government carried the burden of proof. (Id.:4). Movant understood that if the government could not prove his guilt beyond a reasonable doubt, then the jury would have to find the movant not guilty. (Id.). Movant further understood that he had the right to see and hear all the evidence against him, including the right to cross-examine government witnesses, to present defense witnesses, and to testify or not on his own behalf at trial. (Id.:4-5). If movant chose not to testify, he understood that the jury could not hold that against

him. (Id.:).

Next, movant affirmed understanding that the Superseding Indictment charged in Count 1 that he and his coconspirators conspired with each other and other persons to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. §841(a)(1), §846. (Id.:6). In particular, movant was charged that the amount of narcotics reasonably attributable to him was 28 grams or more of a mixture containing a detectable amount of crack cocaine, in violation of §846(b)(1)(B)(iii), cocaine, molly, Xanax, marijuana, Flakka, heroin, all in violation of §846(b)(1)(C), (Id.:7-9). Thereafter, the government proffered the facts as set forth in the stipulated factual proffer. (Id.:10-22). Regarding the stipulated facts at page 7 of the factual proffer statement, defense counsel explained, at his client's request, that the movant had been trying to recollect each and every one of his transactions, and the government did bring some evidence which counsel went over with the movant, but if it turns out that the government was mistaken about the May 13 and 15, 2015 transactions, and the movant's involvement therewith, the movant wanted to be able to preserve the ability to return to the court to amend the factual proffer as to those two dates. (Id.:24-25). Thereafter, the court indicated that it was going to defer ruling on the plea agreement, pursuant to Rule 11(c)(1)(A), not because of the issue raised by the movant, but because of the government's decision, as set forth in the plea agreement, to dismiss all other charges. (Id.:26). The court explained that it wanted to review the PSI first, because it seemed that the firearms and role are an issue which the parties wish to litigate at sentencing. (Id.:27).

Thereafter, when asked by the court if movant agreed with all other facts proffered by the government, with the exception of

those surrounding the May 13 and May 15th, 2015 transactions, the movant responded that he did. (Id.:27-28). When asked if it was his signature on the factual proffer, and whether he had read and fully discussed it with counsel prior to signing it, the movant responded in the affirmative. (Id.). With the exception of the May 13 and 15, 2015 transactions, the movant stated he did not have any other deletions or corrections to the government's factual proffer as contained in the written factual proffer. (Id.:28).

When asked how he wished to plead to Count 1 of the Superseding Indictment, movant responded, "Guilty, Your Honor." (Id.:28). Movant affirmed he was pleading guilty because he was, in fact, guilty. (Id.). Movant understood he faced a 5-year minimum term of imprisonment and up to a statutory maximum of 40 years imprisonment, to be followed by a minimum of 4 years and up to a term of life supervised release. (Id.:28-29). He also understood that he was pleading guilty to a felony offense. (Id.:30). Next, movant affirmed that he was born in and a naturalized citizen of the United States. (Id.). As to the waiver of his civil rights, movant understood and acknowledged that by pleading guilty he was waiving the right to hold certain public offices, to serve on a jury, to vote, and to possess a firearm. (Id.).

Regarding the Sentencing Guidelines, movant affirmed having discussed them with counsel and how they might apply to his case. (Id.:31). Movant understood that the Court would not be able to determine movant's advisory guideline range until after the PSI was prepared and the parties given an opportunity to object thereto. (Id.). He was also aware that the court would consider other statutory factors when imposing sentence. (Id.). Movant was aware the sentence imposed may be different than any estimate provided by his attorney. (Id.).

Movant next indicated that his plea was being made freely and voluntarily, and denied being forced, threatened or coerced into changing his plea. (Id.:33,40). Movant also indicated that, other than the representations set forth in the negotiated plea agreement, there were no other promises made to induce him to change his plea. (Id.:33,40). Movant also affirmed being satisfied with his attorney, and having had an adequate time to fully confer with counsel about the charges, the Rule 11 proceedings, and all matters relating to his case. (Id.:33).

After the court summarized into the record the conditions set forth in the written plea agreement, and asked whether those where the terms as he understood them, the movant responded that they were. (Id.:33-40). Movant also understood that once the court accepted his plea, he would be bound by it, and if his sentence were more severe than he expected, he would have no right to withdraw the plea. (Id.:40). In response to the court's inquiry, defense counsel stated that the plea was in the best interest of his client, and that there was sufficient evidence upon which to convict the movant as to the count of conviction. (Id.:41). The court then asked the movant whether he had any questions about the possible consequences arising from his guilty plea, and movant responded that he did not. (Id.).

The court then found that the movant was fully competent and capable of entering an informed plea, in that he was aware of the nature of the charge and consequences of the plea, and that the plea of guilty was knowing and voluntary, supported by an independent basis in fact, containing each of the essential elements of the offense. (Id.:41-42). Although the court accepted the movant's guilty plea, and adjudicated him guilty as to Count 1 of the Superseding Indictment, it indicated that it would reserve

acceptance pursuant to Rule 11(c)(3)(A), deferring its decision until it has reviewed the PSI. (Id.:42).

Defense counsel then stressed to the court that it wanted to ensure that the movant was only pleading guilty as to the facts set forth in the stipulated proffer, with the exception of the May 13 and 15, 2015 transactions, and that his agreement did not include the government's subsequent comments about a firearm and possession of a firearm. (Id.:44). Thereafter, the court indicated that the movant's role was not just limited to the written factual proffer, and that if he wanted to do that, then the court was going to vacate everything and not accept the plea. (Id.). Regarding the issue of whether the movant had to agree to a role increase, the court indicated that it did not, leaving the defense to argue that any such enhancement was not warranted. (Id.). The court made clear that once the PSI were prepared, she would make a determination based upon the facts as detailed in the PSI, the written factual proffer, together with the oral factual proffer during the Rule 11 proceeding. (Id.:45).

A brief discussion was had off the record between the movant and counsel, after which the defense advised the court that he had confirmed with his client that he would accept the other issues the government brought up as long as he is permitted to file objections to any role and firearm enhancement set forth in the PSI. (Id.:46). The court then inquired and movant affirmed that he admitted the facts provided by the government which included the facts provided in response to the court's questions, which were separate and apart from the stipulated facts. (Id.).

Prior to sentencing, a PSI was prepared which determined, after converting the narcotics involved to its marijuana

equivalence, pursuant to U.S.S.G. §2D1.1(a)(5),(c)(6), that it involved at least 700 kilograms, but less than 1,000 kilograms of marijuana, resulting in a base offense level 28. (PSI ¶84). An additional 4-level increase was added to the base offense level because a dangerous weapon was possessed and the movant maintained a residence for purposes of manufacturing or distributing a controlled substance. (PSI ¶¶85-86). The base offense level was then increased an additional 4 levels because of the movant's role as an organizer or leader of a criminal activity involving five or more participants or which was otherwise extensive, resulting in an adjusted offense level 36. (PSI ¶88).

The probation officer, however, also determined that movant qualified for an enhanced sentence as a career offender, because the movant was at least 18 years old at the time of the offense of conviction, the offense of conviction was a felony that is a controlled substance offense, and the movant had at least two prior felony convictions for a crime of violence, to-wit, (1) armed robbery and carjacking in Miami-Dade Case No. F98-26488A, and (2) resisting officer with violence in Broward Case No. 09-1428CF10A. (PSI ¶91). Consequently, under U.S.S.G. §4B1.1, the offense level under U.S.S.G. §2D1.1 was used, as it produced the greater offense level. (PSI ¶91). A 3-level reduction to the base offense level was taken because of movant's timely acceptance of responsibility, resulting in a total adjusted offense level 33. (PSI ¶92-94).

The PSI also indicated movant had a total of 5 criminal history points, resulting in a criminal history category III. (PSI ¶103). Because the movant qualified for an enhanced sentence as a career criminal, pursuant to U.S.S.G. §4B1.1(b), his criminal history category is always a category VI. (Id.). Based on a total offense level 33 and criminal history category VI, the movant faced

an advisory guideline range of 235 to 293 months imprisonment. (PSI ¶137). Statutorily, movant faced a minimum of 5 years and up to 40 years imprisonment for violation of 21 U.S.C. §841(b)(1)(B). (PSI ¶136).

At the beginning of the first of three sentencing hearings, the district court announced that it would accept the plea agreement. (Cr-DE#345:3). Thereafter, defense counsel indicated that movant had filed factual and legal objections to the PSI, including objections to the drug quantity, possession of a dangerous weapon, maintaining drug premises, role and career offender enhancements. (Id.:5). At sentencing, the government called Agent Brendan Collins ("Collins") to testify regarding the movant's role and quantity of drugs. After hearing argument of the parties, the court granted the movant's request for a downward variance, imposing a total term of 200 months imprisonment. (Cr-DE#347:24-41).

Movant prosecuted a direct appeal, challenging the amount of drugs attributable to him and the enhancement to his sentence as a career offender, for possessing a firearm, maintaining a premises to distribute drugs, and for his role as a leader of the conspiracy. United States v. Marius, 678 Fed.Appx. 960, 961-62 (11 Cir. 2017). On **February6, 2017**, the Eleventh Circuit Court of Appeals *per curiam* affirmed the judgment of conviction, in a written, but unpublished opinion. United States v. Marius, supra. Certiorari review was denied on **June 5, 2017**. Marius v. United States, ___ U.S. ___, 137 S.Ct. 2230 (2017).

Consequently, for purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case become final on **June 5, 2017**, when certiorari review was denied by

the Supreme Court. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986). See also Pugh v. Smith, 465 F.3d 1295-1300 (11 Cir. 2006)(discussing Nix v. Sec'y for the Dept. Of Corr., 393 F.3d 1235, (11 Cir. 2004) and Bond v. Moore, 309 F.3d 770 (11 Cir. 2002)).

At the latest, the movant was required to file this motion to vacate within one year from the time the judgment becomes final, or no later than **June 5, 2018**. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means movant's limitations period was due to expire on **June 5, 2018**.[4]

The movant's motion to vacate was filed on **June 4, 2018**, one day shy of expiration of his one-year limitations period, after he signed and then handed his pleadings to prison authorities for mailing in accordance with the mailbox rule. (Cv-DE#1:17). Absent evidence to the contrary, the movant's motion is deemed filed, in accordance with the mailbox rule, on the date evidenced by the U.S. Pre-Paid Postage, and not the date he executed it, if those dates

[4]Under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time ... [the court must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday. Where the dates falls on a weekend, the Undersigned has excluded that day from its computation.

differ.[5] (Cv-DE#1:17).

IV. Standard of Review

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). It is also well-established that a §2255 motion may not be a substitute for a direct appeal. Id. at 1232 (citing United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)). 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 . . . "

[5]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." Frady, 456 U.S. at 152; McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief 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, 365 F.3d at 1232-33 (quoting Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988)(internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or Presentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment). Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933,

167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. United States v. Dean, 635 F.3d 1200, 1209-1210 (11th Cir. 2011)(citing United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005)); see also, United States v. Bostic, 645 Fed.Appx. 947, 948 (11th Cir. 2016)(unpublished).[6] The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. United States v. Talley, supra.

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748

[6]"Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. The Court notes this same rule applies to other Fed. Appx. cases cited herein.

(1970). See also United States v. Ruiz, 536 U.S. 622, 629 (2002); Hill v. Lockhart, 474 U.S. 52, 56 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005)(table); United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, United States v. Patti, 337 F.3d 1317, 1320 (11th Cir. 2003), cert. den'd, 540 U.S. 1149 (2004), attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U.S. 258, 267 (1973); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, United States v. Fairchild, 803 F.2d 1121, 1123 (11th Cir. 1986). To determine that a guilty plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id.; see also, United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005)(*per curiam*); United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005).[7]

[7]In Moriarty, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. Brady v. United States, 397 U.S. 742, 748 (1970). If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause. See Santobello v. New York, 404 U.S. 257 (1971).

B. Ineffective Assistance of Counsel Principles

Even if movant attempts to suggest in objections or otherwise that counsel rendered ineffective assistance, this Court's analysis would begin with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011). See also Premo v. Moore, 562 U.S. 115, 121-22, 131 S.Ct. 733, 739-740 (2011); Padilla v. Kentucky, 559 U.S. 356, 367, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). If the movant cannot

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> plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs). See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Brown v. United States, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." Gordon v. United States, 518 F.3d 1291, 1301 (11th Cir. 2008)(citations omitted); Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000). With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Allen v. Sec'y, Fla. Dep't of Corr's, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369 (quoting Strickland, 466 U.S. at 687).

In the context of a guilty plea, the first prong of Strickland requires petitioner to show that the plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a

different plea. Hill, 474 U.S. at 56-59. If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr's, 480 F.3d 1092, 1100 (11th Cir.), cert. den'd, 552 U.S. 990 (2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir.), reh'g and reh'g en banc den'd by, Holladay v. Haley, 232 F.3d 217 (11th Cir.), cert. den'd, 531 U.S. 1017 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of defense counsel and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); United States v. Medlock, 12 F.3d 185, 187 (11th Cir.), cert. den'd, 513 U.S. 864 (1994); United States v. Niles, 565 Fed.Appx. 828 (11th Cir. May 12, 2014)(unpublished).

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So.2d 782, 785 (Fla. 4 DCA 2007)("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); Iacono v. State, 930 So.2d 829 (Fla. 4 DCA 2006)(holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

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

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991), cert. den'd Tejada v. Singletary, 502 U.S. 1105 (1992); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." Chandler, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Dingle, 480 F.3d at 1099; Williamson v. Moore, 221 F.3d 1177, 1180

(11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099 (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

V. Threshold Issues-Timeliness

As narrated previously, the movant filed this §2255 motion was filed on **June 4, 2018**, one day prior to the expiration of the movant's one-year limitations period. Since this §2255 proceeding was instituted before expiration of the federal one-year limitations period, it is timely for purposes of the AEDPA, and review of the motion is warranted.

VI. Discussion

It is worth noting at the outset that the movant raises four interrelated grounds for relief. As will be discussed in detail below, the recurring theme in all of his claims arise from the complaint that counsel failed to object or seek a continuance of the Rule 11 proceedings when the government attempted to include additional facts not part of the stipulated factual proffer. Specifically, in **claim 1**, movant asserts that was denied effective assistance of counsel during the change of plea proceedings, when his lawyer failed to object as the district judge engaged in plea negotiations for the government. (Cv-DE#1:4). In **claim 2**, movant

asserts that he was denied effective assistance of counsel at the change of plea proceeding for failing to request a continuance of the hearing after the government made changes to the factual proffer at that time, which were not stipulated to by the movant; and, instead allowed the government, with the court's assistance, to coerce the movant into changing his plea. (Cv-DE#1:7-8). In **claim 3**, movant asserts that his constitutional rights were violated when the district court engaged in judicial participation in negotiating the change of plea, in violation of Fed.R.Civ.P. 11(c)(1). (Cv-DE#1:10). In his final ground for relief, **claim 4**, the movant claims that he was denied effective assistance of counsel on direct appeal, where his lawyer failed to raise as error on appeal that the court improperly engaged in plea negotiations, thereby coercing the movant into changing his plea. (Cv-DE#1:11).

The purpose of a §2255 motion is "to safeguard a person's freedom from detention in violation of constitutional guarantees," but "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea." See Winthrop-Redin v. United States, 767 F.3d 1210, 1216 (11 Cir. 2014)(quoting Blackledge v. Allison, 431 U.S. 63, 71, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). The Supreme Court has thus instructed that "'the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. at 73-74, 80 n.19, 97 S.Ct. at 1621-1622, 1630 n.19 (explaining that if the record reflects the procedures of plea negotiation and includes a verbatim transcript of the plea colloquy, a petitioner challenging his plea will be entitled to an evidentiary hearing "only in the most extraordinary circumstances").

It is also well settled that a knowing and voluntary guilty plea waives all non-jurisdictional errors, including non-jurisdictional defects and defenses. United States v. Brown, 752 F.3d 1344, 1347 (11 Cir. 2014). It also bears mentioning that "[A]s a matter of public policy, no court should tolerate claims of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant appears to suggest here generally, that "my lawyer told me to lie" or that he was otherwise threatened, coerced, or unlawfully induced by counsel, the government, or the court into doing so. See Gaddis v. United States, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished).

"[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." See Irick v. United States, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). Given the thorough Rule 11 colloquy that was conducted by the court, as narrated previously in this Report, there is nothing of record to suggest that the movant's plea was anything other than knowing and voluntary. Movant's sentence was more than generous, lawful, and reasonable in light of the oral, not written plea negotiated with the government.

The law is now well settled that a criminal defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. Lee v. United States,[8] ___ U.S.

[8]In Lee, the Supreme Court concluded that the movant's claim he would not have accepted a plea offer was backed by substantial and uncontroverted evidence, showing that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Lee, supra at 1969. That case, however, is factually distinguishable because there the movant had no strong connections to any other country, and the consequences of proceeding to trial were not markedly harsher than pleading. Id. at 1968-69. Here, however, the movant had ties to

___, 137 S.Ct. 1958, 1964, 198 L.Ed.2d 476 (2017); see also, Padilla v. Kentucky, 559 U.S. 356, 357, 130 S.Ct. 1473, 1480-81, 176 L.Ed.2d 284 (2010); Lloyd v. McNeil, 2009 WL 2424576 (S.D. Fla. 2009) (defendant has the right to competent advice regarding the choice to accept a plea or go to trial).

As narrated previously in this Report, in response to the court's inquiry during the change of plea proceeding, the movant first affirmed, under oath, that he was pleading guilty as to Count 1 of the Superseding Indictment, with the understanding that he faced a possible enhancement as a career offender. He also confirmed understanding the nature of the charge, and agreed with the stipulated factual proffer he executed, except as to the May 13 and 15, 2015 drug transactions. Careful review of the change of plea transcript confirms that counsel took brief breaks to confer with the movant when the issue arose therein regarding the enhancements to movant's sentence based on his role and possession of firearm enhancements. His representations here, which contradict and/or are irreconcilable with the stipulated facts adduced at the change of plea proceeding, borders on the perjurious, are disingenuous, incredible, and rejected by this court.

First, contrary to the movant's suggestion, the court did not engage plea negotiations as suggested by the movant, much less coerce, intimidate, or involve itself in the nature or terms of the agreement. To the contrary, the movant had stipulated to the facts as set forth in the agreement, and then during the Rule 11 change of plea proceedings, retracted from the factual stipulations previously executed, objecting to the inclusion of the May 13 and 15, 2015 transactions. In addition, after hearing the government's

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Cuba, but more importantly, had he gone to trial and was found guilty, he would have faced a significantly harsher sentence than that which was imposed.

representations regarding the movant's role, possession of a firearm, and drug quantity, movant reserved the right to contest and/or otherwise object to these findings if they were, in fact, included in the PSI.

Review of the change of plea transcript also reveals that there were brief breaks taken during which counsel conferred with the movant and then the movant addressed and responded to the court's inquiries, under oath, ensuring the court that the entry of his plea was knowing and voluntary, and not, as suggested herein, the product of undue influence, coercion, or judicial manipulation. In fact, during several instances in the proceedings the court indicated it was inclined not to accept the movant's plea, at which point a brief recess was had so that the movant could confer with counsel, after which the movant continued responding to the court's questions, never once indicating that he wished to withdraw his plea or that his plea was anything other than knowing and voluntarily entered, after full consultation with counsel.

Moreover, movant was aware that he would be unable to withdraw his plea as a result of the sentence imposed, and that any estimate regarding that sentence was a predication and not a promise, nor was it binding upon the court. Herein, even with the enhancements, the court granted movant's request for a downward variance, imposing a significantly lower sentence than that called for under the guidelines.

Movant's representations here that he would not have entered into the plea but for counsel's purported deficiencies is, at best, disingenuous, and thus rejected by the court. Further, it is actually directly contradicted his representations during the Rule 11 proceeding. Contrary to his allegations here, movant was

afforded an opportunity to withdraw his plea and proceed to trial during the change of plea proceeding. Instead, he chose to continue with the plea. His after-the-fact assertions here, that he would have rejected the plea offer, but for counsel's deficiencies, is refuted by the record.

Had movant proceeded to trial and been found guilty, he faced a much more severe sentence than that which was negotiated by counsel and effectively argued during the sentencing proceedings which resulted in the downward variance. Also, had he proceeded to trial, he may not have been eligible for the 3-level reduction to the base offense level based on movant's timely acceptance of responsibility. It also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the movant. Because of the plea negotiated by defense counsel, movant received a sentence that was well below the 40-year statutory maximum he faced had he proceeded to trial and been convicted as charged. Under the totality of the circumstances present here, movant has not demonstrated either deficient performance or prejudice arising from counsel's failure to pursue any of the arguments raised herein either during the change of plea proceeding, after the Rule 11 proceeding, or on direct appeal. See Strickland v. Washington, 466 U.S. 668 (1984).

To the contrary, when faced here with such self-serving allegations, in which the movant "has every incentive to embellish," the plea transcript is dispositive on the movant's claims. Movant has not demonstrated here that the plea was anything other than knowing and voluntarily entered. His arguments raised herein are either contradicted by his representations and admissions at the Rule 11 change of plea proceedings, or waived as a result of the knowing and voluntary entry of his guilty plea. As

a result, he cannot satisfy Strickland's deficiency or prejudice prongs arising from counsel's purported representation either during the Rule 11 proceeding, or for failing to raise the issues on direct appeal. Consequently, relief on any of the grounds presented is not warranted.

Given the foregoing, the court finds that the entry of the movant's plea was knowing and voluntary and should not be upset here. See Dodd v. United States, 709 Fed.Appx. 593 (11 Cir. Sept. 25, 2017). Like the defendant in Dodd, even if we credit the movant's allegations here that defense counsel was not expressly clear in his advice regarding the charge and the nature of the plea agreement, the movant cannot demonstrate prejudice under Strickland. Dodd v. United States, supra. Also, any purported deficiency by counsel was cured by the thorough change of plea proceedings, and movant's representations made therein, under oath. No showing has been made here that the court engaged in plea negotiations, much less that counsel had a duty to object as suggested. Again, movant has not satisfied movant's Strickland standard.

Further, he has not demonstrated that appellate counsel was ineffective, much less that he suffered prejudice as a result of counsel's failure to challenge on appeal the voluntariness of his plea, for the reasons expressed herein. Appellate counsel has no duty to raise non-meritorious issues on direct appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). On this record, movant has not demonstrated either deficient performance or prejudice under Strickland arising from counsel's failure to pursue the meritless arguments raised herein. The movant's plea was knowing and voluntary and any argument to the contrary would have failed.

Accordingly, since movant's plea was voluntarily entered with full knowledge of the possible consequences resulting therefrom, the movant is not entitled to relief herein. See United States v. Wilson, 245 Fed. Appx. 10 (11th Cir. 2007) (even if counsel was deficient in advising defendant of possible sentencing implications of guilty plea, defendant could not establish prejudice where the district court cured any error by explaining the consequences in detail before accepting the plea); see also United States v. Perez, 2010 WL 4643033 (D.Neb. Nov. 9, 2010) (even if Padilla applies, the court is not convinced the defendant could establish prejudice where two prior charges would likely be reinstated and defendant could well be subject to deportation without the federal conviction at issue); Amreya v. United States, 2010 WL 4629996 (N.D. Tex. Nov. 8, 2010) (movant failed to show prejudice where the trial court advised him of the possibility of deportation as the result of his plea and he testified he understood that consequence); Brown, 2010 WL 5313546 (same).

It also bears mentioning that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant suggests here generally, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so. See Gaddis v. United States, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished). His allegations here are clearly refuted by his sworn declarations at the Rule 11 proceeding. "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." See Irick v. United States, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). Consequently, the movant is entitled to no relief on any of the arguments presented because his plea was

knowing and voluntary, and his sentence was lawful and reasonable in light of the negotiated plea and the sentence exposure he faced if convicted at trial.

It will be recalled, that 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).

Finally, it should further be noted that this court has considered all of the movant's arguments raised in his §2255 motion with supporting memorandum and affidavits. (Cv-DE#1). See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his arguments, movant has failed to demonstrate he is entitled to vacatur of his conviction and sentence. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein, the claim was considered and found to be devoid of merit, warranting no discussion herein. To the extent he attempts to raise new arguments for the first time in his

objections, those claims should be barred.

On this record, the movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brady v. United States, 397 U.S. 742, 748 (1970).[9] See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984). He also cannot show that the total sentence imposed was either unreasonable or that there was error in the sentencing proceeding. Thus, he has not demonstrated either deficient performance or prejudice arising from counsel's failure to pursue any of the claims raised herein. See Strickland v. Washington, 466 U.S. 668 (1984). Relief is therefore not warranted.

VII. Evidentiary Hearing

Movant is also not entitled to an evidentiary hearing on the claims raised in this proceeding. Movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. See Schriro v. Landrigan, 550 U.S. 465, 473-75, 127 S.Ct. 1933, 1939-40, 127 S.Ct. 1933 (2007)(holding that if record refutes the factual allegations in

[9]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S. 504, 508 (1984).

the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Townsend v. Sain, 372 U.S. 293, 307 (1963); 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)(holding that §2255 does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel, and stating: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record.").

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show 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. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Recommendations

Based on the foregoing, it is recommended that the motion to vacate be DENIED on the merits; that no certificate of appealability issue; and, that this case be 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 12th day of June, 2018.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-22266-CIV-LENARD/WHITE
(Criminal Case No. 15-20529-Cr-Lenard)

BERSON MARIUS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING AND SUPPLEMENTING REPORT OF THE MAGISTRATE JUDGE (D.E. 3), DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE (D.E. 1), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick A. White issued June 12, 2018, ("Report," D.E. 3), recommending that the Court deny Movant Berson Marius's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, ("Motion," D.E. 1). Movant filed Objections to Judge White's Report on July 5, 2018. ("Objections," D.E. 6.) Upon review of the Report, Objections, and the record, the Court finds as follows.

I. Background

According to the stipulated written Factual Proffer, as early as June 2014, Movant and several co-conspirators were under FBI investigation for distributing crack cocaine, powder cocaine, marijuana, and other narcotics in North Miami, Florida. (Cr-D.E. 231 at 1.) The Factual Proffer describes controlled narcotics purchases by confidential sources

from Movant on August 14, 2014, August 28, 2014, September 23, 2014, September 29, 2014 (twice), December 4, 2014, December 11, 2014, March 2, 2015, March 24, 2015, May 11, 2015, May 13, 2015, and May 15, 2015. (Id. at 3-6.) At least some of these purchases were made from a "trap house" located at 1160 NW 141 Street in Miami, Florida, which was apparently controlled by Movant and his brother ("1160 Trap House"). (Id. at 1-3.)

Some of these purchases were audio and/or video recorded. (Id. at 3.) For example, during the August 14, 2014 purchase, a confidential source purchasing crack cocaine from Movant audio and video recorded Movant sitting at a desk bagging what appears to be crack cocaine. (Id. at 3.)

The Factual Proffer also details the contents of intercepted telephone calls and text messages in which Movant discusses drugs and guns. (Id. at 4- 6.)

On July 8, 2014, law enforcement executed a search warrant on the 1160 Trap House during which they seized a 9mm Glock pistol, a .45 caliber Glock pistol; an AK-47 magazine with eight live rounds (plus a variety of other ammunition), approximately 68.5 grams of marijuana, 46 grams of crack cocaine, 27 grams of powder cocaine, 43 Xanax bars (pills), and a quantity of Pyrrolidinovalerophenone (commonly known as "flakka"). (Id. at 2.) In the driveway was a van owned by Movant's mother in which Movant's driver's license was discovered. (Id.)

On April 9, 2015, law enforcement executed another search warrant at the 1160 Trap House during which they seized a notebook organized in the form of a ledger detailing the amount and types of narcotics sold during the period of February 14, 2015

through April 9, 2015. (Id. at 4.) Each daily shift reflects two dollar amounts annotated with either "G," representing "Gotti," which is Movant's brother's nickname, or "S," representing "Sasha" or "Sha," which is Movant's nickname. (Id.) The documentation in the seized ledgers is consistent with street-level sales described in phone calls intercepted by law enforcement. (Id. at 5.) The seized ledgers reflect that Movant was delivering narcotics and picking up money nearly every day. (Id.) Law enforcement reviewed the ledgers and determined that at least $25,990 worth of narcotics was delivered, and approximately $25,656 was retrieved by Movant and his brother during the relevant period. (Id.)

On May 19, 2015, law enforcement executed five search warrants, including one at Movant's home. (Id. at 6.) At Movant's residence, law enforcement discovered a 7.62 caliber AK-style assault rifle in a bedroom, together with items appearing to belong to Movant. (Id.) In the same room, law enforcement discovered a scale and small quantities of cocaine. (Id.) They also discovered ammunition of various calibers in other rooms of Movant's residence. (Id.)

The signed Factual Proffer states that Movant conspired to sell narcotics, including cocaine base, powder cocaine, Ethylone, Alprazolam, heroin, and marijuana with his brother and other named and unnamed co-conspirators. (Id. at 7.)

In July 2015, Movant and nine co-conspirators were charged by Indictment for various drug and firearm offenses. (Cr-D.E. 53.) On September 25, 2015, the Grand Jury issued a Superseding Indictment charging Movant with the following crimes:

- Count 1: conspiracy to possess with intent to distribute 28 grams or more of crack cocaine and other narcotics in violation of 21 U.S.C. §§ 841(b)(1)(B)(iii), 841(b)(1)(C), and 846;
- Count 4: possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii);
- Counts 7 & 8: possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C);
- Counts 5 & 13: possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1); and
- Counts 6 and 14: possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).

(Cr-D.E. 118.)

On January 22, 2016, Movant and the Government entered into a Plea Agreement by which Movant agreed to plead guilty to Count 1 in exchange for the Government seeking dismissal of the remaining counts after sentencing. (Cr-D.E. 230 at 1.)

The same day, Movant signed the Factual Proffer, acknowledging that if the case went to trial the Government would have proven the facts stated therein beyond a reasonable doubt. (Cr-D.E. 231.)

Also on January 22, 2016, Movant appeared before the Court for a Change of Plea hearing. (See Tr. of Change of Plea Hr'g, D.E. 344.) The Court conducted a thorough plea colloquy during which the Government read the Factual Proffer into the record. (Id. at 10-22.) During the Government's recitation, the Court questioned the Government

regarding statements made therein. (See id. at 14:17 – 15:25; 16:19; 16:25 – 17:12; 18:4-17; 20:10-24; 21:9.) For example:

> MS. GALVIN [Prosecutor]: . . . During several calls and text messages in March 2015, Defendant received updates on the status of the crack cocaine, powder cocaine, ethylone, alprazolam and marijuana remaining at the 1160 trap house from the individuals selling narcotics at the 1160 trap house.
>
> THE COURT: What does that mean?
>
> MS. GALVIN: The individuals who were selling narcotics at the trap would call and provide updates to Defendant regarding how many drugs had been sold so far that day, how many drugs were left. So they're reordering their supply of narcotics.
>
> THE COURT: And they were selling all of those drugs at the 1160 trap house?
>
> MS. GALVIN: That's correct.
>
> So, for example, on March 21st, 2015, Co-Defendant Dequentin Thomas sold cocaine to a female customer for $12 after Defendant told Thomas that was the price she should pay.
>
> . . .
>
> THE COURT: And what were the updates?
>
> MS GALVIN: The updates would be, for example, that they had a particular quantity of crack cocaine left, for example, or they had a particular number of bars of Xanax left. They would say they had, you know, five pills left or that they were out of crack cocaine and they needed more.
>
> THE COURT: And so Defendant initiated these calls or the persons at the trap house were calling him?
>
> MS. GALVIN: It happened both ways. Sometimes the Defendant would call to get an update and sometimes, particularly if they were out of narcotics, the individuals who were working there would call Defendant to inform him of the status.

(Id. at 14:12 – 15:25.)

THE COURT: So the Defendant was the supplier of drugs?

MS. GALVIN: That's correct. He was – he and his brother were supplying the narcotics.

(Id. at 16:19-21.)

THE COURT: So on the ledger for the shift, whoever was working at the trap house, would put down the amount of money that they gave to either the Defendant or his brother?

MS. GALVIN: That's correct.

(Id. at 17:4-7.)

THE COURT: Did this Defendant have individual ownership over amounts of drugs?

MS. GALVIN: It was in some ways individual and in some ways collective. Gotti would often drop off powder cocaine. This Defendant would often drop off crack cocaine. But the profits appeared to be shared. So there was quite a bit of crossover.

(Id. at 20:18-24.)

THE COURT: And all the direct sales from the Defendant were powder cocaine; were they not?

MS GALVIN: Except for one, I believe, that was crack.

(Id. at 21:9-11.) When the Government concluded its recitation of the Factual Proffer, the Court continued to ask questions:

THE COURT: So other than supplying various different drugs and other than having people report to him, what amounts of drugs were at the trap house or houses?

And other than the distribution of money to the Defendants as noted in the ledgers, what encompassed the Defendant's role?

Was he a supplier of drugs? Did he supervise the people in the trap houses? Did he supply the guns? What did he do?

MS. GALVIN: I think this is something that the parties will be arguing to the Court at sentencing regarding his role and what enhancement should apply.

But from the Government's view, the Defendant was supplying narcotics to the individuals who were actually selling them. He himself was, of course, selling narcotics.

He also would direct individuals to pay the people who were working at the trap. He would authorize payment to the workers at the trap. He would again sort of take stock of what drugs were there and what drugs were needed. He assisted in finding a new trap house when they had to move after the drive-by shooting. Also, he was sort of responsible to make sure that electricity got turned on at the new trap house.

He also was going to provide a vehicle during the period of retaliation where this group was going to plan and retaliate against the other group that had executed the drive-by shooting. His participation was going to be providing a car.

Regarding the guns –

THE COURT: For the retaliation?

MS. GALVIN: Yes. Regarding the guns, it is clear that he had a firearm that was used in the conspiracy in his bedroom. There was a recorded call in advance of us executing the search warrant in which he explained to Gotti that he had moved a firearm "over here," meaning his home.

So that sort of encompasses in broad strokes his participation in the conspiracy.

(Id. at 22:13 – 23:25.) The Court then asked whether Movant understood the charge against him, and Movant said "Yes, your Honor." (Id. at 24:6-7.)

The Court then permitted Defense Counsel to respond to the Prosecutor's remarks. (Id. at 24:8.) Defense counsel made clear that Defendant was accepting responsibility "for those things that are contained in the plea agreement and the factual proffer and resolve his case and save the time and money to the Government and this Court." (Id. at 24:18-21.) However, as to the other matters not contained in the written Factual Proffer, including issues involving Movant's role and the firearms, he stated that "these additional issues are things that we anticipate litigating as part of the sentencing process." (Id. at 24:22-24.)

Additionally, Defense Counsel indicated that although Movant signed the Factual Proffer and was prepared to go forward with the change of plea, he was not entirely sure that the narcotics sales to the confidential source on May 13, 2015 and May 15, 2015 actually occurred, and he wanted to reserve the right to amend the Factual Proffer if further review of the evidence showed those two transactions did not occur. (Id. at 25:7 – 26:7.)[1]

[1] MR. FEIGENBAUM: . . . On Page 6 of the factual proffer, your Honor, which Ms. Galvin just read into the record, Paragraph 2, the second and third sentences describing events on May 13, 2015, and May 15, 2015, regarding purchases by CS-2 of quantities of powder cocaine, please understand, your Honor, that there was a lengthy period that this conspiracy is described in the superseding indictment.

My client has tried his best to recall his involvement in each and every transaction, which he admits to those in the factual proffer, of course. He signed it.

Ms. Galvin further was kind enough to bring us some evidence which we looked at today regarding the May 13, 2015, and May 15, 2015, transactions.

The Court then stated that pursuant to Rule 11(c)(3)(A) it was not going to accept the Plea Agreement at that time but would reserve on whether to accept the Plea Agreement. (Id. at 26:8-10.)

> THE COURT: . . . I'm going to defer a decision on the plea agreement until I have reviewed the presentence report, as this is a plea agreement that comes under Rule 11(c)(1)(A).
>
> And then I would follow the procedures if, in fact, I reject it under (c)(5)(A), (B) and (C).
>
> MR. FEIGENBAUM: Your Honor, may I have – inquire about one thing?
>
> Does your Honor's decision have anything to do with the two dates in the factual proffer that we wanted to just be sure about before --
>
> THE COURT: No.
>
> MR. FEIGENBAUM: Okay. So it's not related to that?
>
> THE COURT: No. It relates to the Government seeking to dismiss the other counts of the indictment.
>
> MR. FEIGENBAUM: I understand.

> My client is okay with going forward with the entire factual proffer, which he signed.
>
> If for some reason it turns out the Government was mistaken just about those two dates as to his involvement, what Ms. Galvin and I would like the Court to understand is, if we need to come back just on those two dates on those things to amend the factual proffer, that would be the only thing. But we're still willing to go forward with it at this point.
>
> The Government seems to have the evidence. They have a spreadsheet, which was provided before. But there's an audio and video recording that we just want to be doubly sure about. But we would ask the Court that this not hold up this proceeding.

(Id. at 25:7 – 26:7.)

> THE COURT: I want to see what the PSR says and what the issues are. It seems that firearms and role is an issue, as I understand it, that the parties wish to litigate at the time of sentencing. But I want to see the PSR and then make a determination whether I'll accept the plea agreement.

(Id. at 26:11-27:6.) The Court then asked Movant whether he admitted "the facts as stated by the Prosecutor"—with the exception of the May 13, 2015 and May 15, 2015 controlled purchases—and Movant stated "Yes, your Honor." (Id. at 27:7-13.) Movant then pled guilty to Count 1. (Id. at 28:14.)

The Court then went on to colloquy Movant regarding the Plea Agreement. (Id. at 33:17 – 40:22.) The Court accepted the guilty plea but reserved on whether to accept or reject the Plea Agreement until after it reviewed the presentence investigation report. (Id. at 42:4-10.)

Defense Counsel then asked to clarify that when Movant stated that he agreed with the facts as stated by the prosecutor, it did not include the Government's "supplemental oral proffer about what it believed were the issues to be litigated. I just want to make sure that Mr. Marius was not agreeing to those issues which the Government says are open for litigating." (Id. at 43:9-15.)

> THE COURT: Well, that was part of the factual proffer.
>
> MR. FEIGENBAUM: Well, she represented –
>
> THE COURT: There were a couple of issues that Ms. Galvin said that it was -- the parties had not agreed on role and possession of a firearm.
>
> But the facts are the facts, and she detailed facts in response to my questions, which the Defendant then agreed those were appropriate facts.

MR. FEIGENBAUM: I think what he -- this is why I'm bringing it up now. It's very important. He's agreeing to everything that was in the written factual proffer, which we went over very carefully. So....

THE COURT: It's not just limited to the written factual proffer. If you want to do that, I'm going to vacate everything and I'm not accepting the plea. I asked questions. He answered questions about facts.

Ms. Galvin indicated there were some issues as far as possession, whether he should receive an increase for possession of a firearm or whether he should have a role increase.

MR. FEIGENBAUM: Just to understand the Court, then, you would want the Government – I'm sorry – you would want Mr. Marius to agree to a role increase –

THE COURT: No. You can argue for him that he's not entitled to it. But I asked questions about what his – what he did and Ms. Galvin answered that he supplied drugs.

I asked her about what did it mean that people reported to him and requested or he reported -- strike that -- that he inquired of them of quantities and she responded to that.

Those were facts. As I understand it, the Defendant accepted those facts.

MR. FEIGENBAUM: I believe you're correct, your Honor. If I could just have one second. And my understanding then would be that we could still –

THE COURT: You can still make your argument. But the facts -- I would make a determination whether or not the facts support or do not support any factors that the probation officer includes in the presentence report or any request by the Government or a request by you.

I then make a determination based upon the facts as they are detailed in the presentence investigation report, the facts as they're detailed in the factual proffer and the factual proffer that's submitted to me in open court.

MR. FEIGENBAUM: Yes.

And I believe your Honor did say we'll have the right to object to any of those factors once the advisory PSI is issued.

THE COURT: Of course. But I'm not going to say to you that I'm not going to consider the facts that the Government -- the additional facts based upon the Court's inquiry that the Defendant agreed to.

If he's not going to agree to them, as the Government has indicated, then I'm going to vacate the plea and he can go to trial.

(Discussion had off the record between the Defendant and his counsel.)

MR. FEIGENBAUM: Judge, I've confirmed with my client. As long as we're able to file objections to the role the way it's portrayed in the PSI and any firearms enhancements – as long as we're allowed to still have that opportunity to object, my client will accept the other issues that the prosecutor brought up and that your Honor asked him if he was willing to agree to what he heard in court today.

THE COURT: So I want to make sure it's clear that, when I asked Mr. Marius, "Do you admit or not admit the facts as stated by the prosecutor?", that that included the facts that she provided to the Court based on my questions and her answers to those questions as to the facts, separate and apart from the factual proffer.

Do you understand that, Mr. Marius?

THE DEFENDANT: Yes. I understand, your Honor.

THE COURT: And do you admit or not admit those facts?

THE DEFENDANT: Yes, your Honor.

THE COURT: Yes, you admit them or no, you do not?

THE DEFENDANT: Yes. Yes. I admit them, your Honor.

THE COURT: Now, that doesn't preclude you from arguing that if, in fact, the probation officer recommends an increase for role in the offense or, let's say, the Government objects if there's no role in the offense, you can either object to what's in the report or oppose the Government's request. And I'll make that determination at the time of sentencing.

> Likewise, as far as the firearm enhancement, if the report has a firearm enhancement and you don't think there should be a firearm enhancement, Mr. Feigenbaum, you can object to it.
>
> If it doesn't have a firearm enhancement and the Government files an objection and you wish the probation officer to be upheld in their recommendation, you can argue against that.
>
> But I'm going to rely on the facts as they were detailed to me in open court, the facts contained – the unobjected-to facts contained in the PSR, any presentation of evidence that's made to me at the time of the sentencing hearing, which I will find by a preponderance of the evidence, and any statements made by the Defendant.
>
> MR. FEIGENBAUM: You have fully clarified that for me, your Honor, and I thank you.
>
> THE COURT: And that's in addition to whether I accept or don't accept the plea agreement.
>
> THE DEFENDANT: Yes, your Honor.

(Id. at 43: 22 - 47:21.)

The Probation Office prepared a Presentence Investigation Report ("PSR") which calculated a total offense level of 33, based on a base-offense level of 28 (because the offense involved the equivalent of at least 700 kilograms but less than 1,000 kilograms of marijuana), a two level increase for possessing a dangerous weapon, a two level increase for maintaining a premises for the purpose of manufacturing or distributing a controlled substance, a four-level increase for Movant's role as an organizer or leader, and a three level decrease for accepting responsibility. (Cr-D.E. 331 ¶¶ 85-86, 88, 90, 92-94.) The PSR also indicated that Movant qualified as a career offender, (id. ¶ 91), which requires a criminal history category of VI, (id. ¶ 103). Based on a total offense level of 33 and a

criminal history category VI, Movant faced an advisory Guidelines range of 235 to 293 months' imprisonment. (Id. ¶ 137.)

The Court conducted a three-day sentencing hearing on April 20, 21, and 29, 2016. (See Tr. of Sentencing Hr'g, Cr-D.E. 345, 346, 347.) On Day 1, the Court announced that it would accept the Plea Agreement. (Cr-D.E. 345 at 3:22.) Thereafter, the Court heard Defense Counsel's objections to the PSR and received evidence from the Government. (Cr-D.E. 345, 346.) Ultimately, the Court adopted the factual findings and Guideline applications contained in the advisory PSR. (Cr-D.E. 347:18:4-7.) After hearing arguments from the Parties, and considering the relevant sentencing factors, the Court granted a downward variance and sentenced Movant to 200 months' imprisonment. (Id. at 36:16 – 37:10.)

Movant prosecuted a direct appeal, challenging the amount of drugs attributed to him and the enhancements to his sentence for possessing a firearm, for maintaining a premises to distribute drugs, and for his role as a leader of the conspiracy. See United States v. Marius, 678 F. App'x 960 (11th Cir. 2017). On February 6, 2017, the Eleventh Circuit Court of Appeals issued an opinion affirming the Court's judgment. Id. The U.S. Supreme Court subsequently denied Movant's petition for writ of certiorari. 137 S. Ct. 2230.

On June 4, 2018, Movant timely filed the instant Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (D.E. 1.) Therein he raises four related claims:

1. He was denied effective assistance of counsel during the change of plea proceedings when Defense Counsel failed to object when the judge engaged in "plea negotiations" for the Government.

2. He was denied effective assistance of counsel during the change of plea proceedings when Defense Counsel failed to request a continuance of the hearing after the Government made changes to the Factual Proffer on the record in open court.

3. He was denied due process when the judge "engaged in judicial participation" in negotiating the change of plea in violation of Federal Rule of Criminal Procedure 11(c)(1).

4. He was denied the effective assistance of appellate counsel when his appellate lawyer failed to raise as an error on appeal that the Court improperly engaged in plea negotiations, thereby coercing Movant into changing his plea.

(Id. at 4-11.)

Judge White determined that, on the face of the Motion, Movant is not entitled to relief. (Report at 1.) As a general matter, Judge White found that "[g]iven the thorough Rule 11 colloquy that was conducted by the court, . . . there is nothing of record to suggest that the movant's plea was anything other than knowing and voluntary." (Id. at 27.) Judge White further found that the Court did not engage in plea negotiations, that counsel took appropriate measures during the change of plea proceedings to discuss with Movant the issues that arose during those proceedings, and that Movant clearly indicated to the Court that he accepted the Government's oral representations and continued to wish to plead guilty. (Id. at 28-29.) Thus, Judge White found that Movant had not established a claim for ineffective assistance of counsel during the plea proceedings, or the denial of due process. (Id. at 29-30.) Judge White further found that Movant failed to

demonstrate that appellate counsel was ineffective or that he suffered prejudice as a result of the alleged failure to challenge on appeal the voluntariness of his plea. (Id. at 31.)

Movant objects to Judge White's Report in its entirety. (D.E. 6 at 1.) He also filed an "affidavit" which is not notarized, that explains his version of events that occurred during the change of plea proceedings. (D.E. 7.)

II. Legal Standards

Upon receipt of the Magistrate Judge's Report and Petitioner's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). Those portions of a magistrate judge's report and recommendation to which no objection has been made are reviewed for clear error. See Lombardo v. United States, 222 F. Supp. 2d 1367, 1369 (S.D. Fla. 2002); see also Macort. v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that [i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the

recommendation.") (internal quotation marks and citations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Insofar as Petitioner's claims involve allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

III. Discussion

The Objections state that "because Movant's claims are interrelated, this objection includes all claims mentioned . . . ." (Obj. at 12.) However, Movant only specifically objects to Judge White's findings as to Ground One and Three. (See id. at 7-12.) Movant does not specifically object to Judge White's finding as to Ground Two that Defense Counsel was not ineffective for failing to request a continuance during the

change of plea hearing. Nor does Movant specifically object to Judge White's finding as to Ground Four that appellate counsel was not ineffective for failing to raise these issues on direct appeal. (See id.) The Court concludes that Judge White's finding as to Grounds Two and Four are not clearly erroneous and denies the Motion as to those Grounds.

However, the Court agrees that all of the claims are interrelated, and for that reason the Court's de novo review and discussion of Grounds One and Three applies equally to Grounds Two and Four.

With respect to Ground One, Movant argues that counsel was ineffective for failing to object during the Prosecutor's recitation of the written Factual Proffer when the Court elicited additional facts not contained in the written Factual Proffer. (Obj. at 8-9.) "Clearly the judge participated in the oral factual proffer change, and counsel just stood there without saying a word, allowing his client to participate in a change of plea without his advise [sic]." (Id. at 8.) He argues that the Court's inquiries about the Factual Proffer constitute judicial participation in plea discussions in violation of Rule 11(c)(1). (Id. at 8-9.) In Ground Three, Movant argues that this judicial "participation" violated his right to due process. (Mot. at 11.)

Movant's argument that the Court participated in plea negotiations in violation of Rule 11(c)(1) borders on frivolity. Rule 11(c)(1) provides, in relevant part: "An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions." Fed. R. Crim. P. 11(c)(1). Here, the Parties negotiated and signed the Plea

Agreement before the change of plea hearing began on January 22, 2016. (See Tr. of Change of Plea Hr'g, D.E. 344 at 33:17.) Because the Court did not participate in those discussions, it did not violate Rule 11(c)(1).

Because the Court did not engage in plea negotiations, counsel cannot be deemed ineffective for failing to object "when the judge engaged in the plea negotiations for the Government[,]" as asserted in Ground One of the Motion, (D.E. 1 at 5), or request a continuance, as asserted in Ground Two, (id. at 8-9). The Court's research has revealed no prior cases finding that a court erred by eliciting additional facts during a factual proffer, or finding ineffective assistance of counsel for failing to object when a Court elicited additional facts during a factual proffer. Regardless, Defense Counsel adequately raised concerns regarding the supplemental oral proffer, advising the Court that the Parties intended to litigate the factual basis for any enhancements at the sentencing hearing, and reserving Movant's right to contest or object to these findings if they were, in fact, included in the PSR. (Tr. of Change of Plea Hr'g at 24:13-16; 43:9 – 45:18.) Consequently, counsel did not render ineffective assistance at the change of plea hearing.

Even if counsel could be deemed ineffective for failing to object to the Court's line of questioning, Movant has wholly failed to persuade the Court that he suffered prejudice—i.e., that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a

defendant's expressed preferences." Lee v. United States, __ U.S. __, 137 S. Ct. 1958, 1967 (2017).

Here, the Court finds that there is not a reasonable probability that but for counsel's alleged errors, Movant would not have pled guilty and would have insisted on going to trial. The Superseding Indictment charged Movant with eight crimes: (1) conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 846, 841(b)(1)(B)(iii), and 841(b)(1)(C), (Count 1); (2) possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii) (Count 4); (3) possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), (Counts 7 and 8); (4) possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1), (Counts 5 and 13); and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i), (Counts 6 and 14). The firearm offenses charged in Counts 6 and 14 carried maximum penalties of life imprisonment. See 18 U.S.C. § 924(c)(1)(A)(i). Pursuant to the Plea Agreement, Movant was required to plead guilty to Count 1 only and, in exchange, the Government agreed to seek dismissal of the remaining counts. (Cr-D.E. 230 ¶¶ 1-2.) The Plea Agreement was so tremendously favorable to Movant that the Court deferred ruling on whether to even accept it. (See Tr. of Change of Plea Hr'g at 26:11 – 27:6.)

Furthermore, there was overwhelming evidence supporting all of the crimes charged against Movant in the Superseding Indictment. Briefly, pursuant to the facts contained in the Factual Proffer—all of which Movant admits are correct and would have

been proven at trial beyond a reasonable doubt, (Cr-D.E. 344 at 10:6-8; 27:7-16; 47:17-21)—the FBI conducted a lengthy investigation into Movant's drug distribution network. (See D.E. 231 at 1-7.) During the investigation, the FBI conducted several controlled purchases of narcotics by confidential sources from Movant (some of which were audio- and/or videotaped), intercepted and recorded telephone conversations in which Movant discusses drug transactions, intercepted text messages in which Movant discusses the status of drugs, and executed at least six search warrants on various houses Movant used during the conspiracy, including one at Movant's residence. (Id.) Law enforcement seized a wealth of evidence pursuant to these search warrants, including drugs, guns, and a ledger detailing street-level sales of narcotics showing that Movant collected the proceeds of the sales. (Id.) Given the overwhelming amount of evidence implicating Movant in all of the crimes charged against him in the Superseding Indictment, rejecting the Plea Agreement would not have been rational under the circumstances. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (holding that to obtain habeas relief for ineffective assistance of counsel during plea proceedings a prisoner "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"). Therefore, the Court finds that under the facts and circumstances of this case, there is not a reasonable probability that but for counsel's alleged errors, Movant would not have pled guilty and would have insisted on going to trial.

Finally, any alleged deficiency by counsel was cured by the Court through the lengthy plea colloquy, and Movant's representations therein, under oath. (Id. at 2:19 – 41:20.) After all of the facts supporting the charge—oral and written—had been recited,

the Court asked Movant whether he understood the charge against him. (Id. at 24:6.) Movant stated "Yes, your Honor." (Id. at 24:7.) When the Court asked Movant if "what the prosecutor stated [is] correct, other than the purchase of cocaine on May 13 and 15, 2015[,]" Movant stated "Yes, your Honor." (Id. at 27:14-16.) When the Court asked Movant whether he had "any deletions or corrections to what was stated in open court or what's contained in the written factual proffer, other than the two dates and purchases brought up by your lawyer[,]" Movant answered "No, your Honor." (Id. at 28:7-11 (emphasis added).) Movant then pled guilty and stated that he was pleading guilty because he is guilty. (Id. at 28:15-17.) He further stated that he understood the consequences of his plea and the potential sentences. (Id. at 28:18 – 32:25.) He further affirmed that his plea of guilty was being made freely and voluntarily, and that nobody had forced, threatened, or coerced him to plead guilty. (Id. at 33:1-6.) Therefore, the Court found Movant's plea to be a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. (Id. at 42:1-3.)

Later, after Defense Counsel sought clarification, the Court clearly explained to Movant that when the Court asked whether Movant admitted the facts as stated by the prosecutor, it "included the facts that she provided to the Court based on my questions and her answers to those questions as to the facts, separate and apart from the factual proffer." (Id. at 46:10-15.) Movant affirmed that he understood. (Id. at 46:17.) The Court asked Movant again:

THE COURT: And do you admit or not admit those facts?

THE DEFENDANT: Yes, your Honor.

THE COURT: Yes, you admit them or no, you do not?

THE DEFENDANT: Yes. Yes. I admit them, your Honor.

(Id. at 46:18-21.)

"There is a strong presumption that the statements made during the colloquy are true." United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994) (citing United States v. Gonzalez-Mercado, 808 F.2d 796, 800 n.8 (11th Cir. 1987)). The Court's thorough colloquy ensured that the entry of Movant's guilty plea was knowing and voluntary, and not, as Movant argues in his 2255 Motion, the product of undue influence, coercion, or judicial manipulation. As such, the Court finds that any alleged deficiency in Defense Counsel's performance was cured by the Court's exhaustive plea colloquy. See United States v. Wilson, 145 F. App'x 10, 11-12 (11th Cir. 2007) (finding that any alleged deficiencies in counsel's failure to advise the defendant were cured by the court's plea colloquy).

Finally, because Defense Counsel was not ineffective, and because the Court did not violate Movant's right to Due Process, appellate counsel cannot be deemed ineffective for failing to raise these meritless issues on appeal. Pinkney v. Sec'y, Dep't of Corrs., 876 F.3d 1290, 1297 (11th Cir. 2017) (citing Freeman v. Att'y Gen., 536 F.3d 1225, 1233 (11th Cir. 2008); Diaz v. Sec'y for the Dep't of Corrs., 402 F.3d 1136, 1142 (11th Cir. 2005); Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001); Lindsey v. Smith, 820 F.2d 1137, 1152 (11th Cir. 2017).

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge (D.E. 3) is **ADOPTED** as supplemented herein;
2. Movant Berson Marius's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1) is **DENIED**;
3. A Certificate of Appealability **SHALL NOT ISSUE**;
4. All pending motions are **DENIED AS MOOT**; and
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 28th day of December, 2018.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-22266-CIV-LENARD/WHITE
(Criminal Case No. 15-20529-Cr-Lenard)

BERSON MARIUS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Berson Marius's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** is hereby entered in favor of Respondent United States of America; and

2. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida this 28th day of December, 2018.

Joan A. Lenard
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE