APPENDIX "1"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15342-J

JONATHAN JAVIER ALEMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jonathan Aleman, a federal prisoner, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, correct, or set aside his sentence. Aleman is serving a sentence of 151 months' imprisonment after he pled guilty to the receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1).

In his § 2255 motion, Aleman argued that (1) the sentencing court erred by denying his motion for a psychiatric examination; (2) his sentencing counsel was ineffective for allowing the court to enhance his sentence for the distribution of pornography, pursuant to U.S.S.G. § 2G2.2(b)(3)(F), when the file-sharing program he used automatically allowed others to download and transfer materials without his knowledge; and (3) his appellate counsel was ineffective for advising him to dismiss the direct appeal of his sentence. Following a response and

reply, the district court denied the § 2255 motion. The district court determined that Aleman's first claim was procedurally defaulted because he did not raise it in his direct appeal, and, additionally, it was frivolous because he received a psychiatric examination, albeit at his own expense, and its conclusions were presented to the sentencing court in the presentence investigation report and at the sentencing hearing. The court also denied his second claim because the plea agreement and then-binding precedent from this Court would allow reasonably competent counsel to decide that it would be futile to object to the enhancement under § 2G2.2(b)(3)(F). Finally, the court denied his third claim because he failed to show that his appellate counsel was deficient, as the claims he wished to present were barred by his sentence-appeal waiver, were without merit, or were more appropriately raised under a § 2255 motion.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court rejects a constitutional claim on procedural grounds, a petitioner must show that jurists of reason would find it debatable whether (1) the district court was correct in its procedural ruling, and (2) the petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the petitioner fails to satisfy either prong of this two-part test, a court should deny a COA. *Id.* Where the district court has denied a § 2255 motion on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

Reasonable jurists would not debate the district court's finding that Aleman's first claim is procedurally barred because he did not raise it on direct appeal. Further, he has not shown (1) cause and prejudice for failing to raise the claim on direct appeal or (2) his actual innocence, such that a fundamental miscarriage of justice would result if his claim was not considered on the

merits. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2001) (holding that a defendant is barred from raising a claim in § 2255 motion that he did not raise on direct appeal unless he can show cause and prejudice or actual innocence). Consequently, no COA is warranted on this claim. Furthermore, the district court correctly denied his second claim that his sentencing counsel was ineffective for not objecting to the § 2G2.2(b)(3)(F) enhancement, as then-binding precedent from this Court stated that the enhancement did not require the defendant to knowingly distribute the pornography. *See* U.S.S.G. § 2G2.2(b)(3)(F) (2015); *United States v. Creel*, 783 F.3d 1357, 1359-60 (11th Cir. 2015) (stating that § 2G2.2(b)(3)(F) had no *mens rea* element), *superseded by amendment to the Sentencing Guidelines* U.S.S.G. § 2G2.2(b)(3)(F) (2016); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (stating that counsel is not ineffective for failing to raise meritless issues). Therefore, no COA shall issue as to this claim. Finally, the district court properly denied his third claim, as his appellate counsel was not ineffective for deciding not to raise meritless claims on appeal related to the denial of his motion for a psychiatric examination, the ineffectiveness of his sentencing counsel, or other claims barred by his sentence-appeal waiver. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (stating appellate counsel cannot be ineffective for failing to raise meritless issues). Thus, no COA is warranted as to this claim.

Accordingly, Aleman's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

APPENDIX "2"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JONATHAN JAVIER ALEMAN,

Petitioner,

v.

Case No: 6:17-cv-1642-Orl-41TBS
(6:15-cr-122-Orl-41TBS)

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE is before the Court on Petitioner Jonathan Javier Aleman's ("Petitioner's") Application for a Writ of Habeas Corpus ("Motion to Vacate," Doc. 1) filed pursuant to 28 U.S.C. § 2255. Respondent filed a Response to the Motion to Vacate ("Response," Doc. 5) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 11).

Petitioner asserts three grounds for relief. For the following reasons, the Motion to Vacate will be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

On May 27, 2015, a federal grand jury returned an indictment charging Petitioner with one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), two counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B), and one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B). (Cr. Doc. 11).[1]

On July 9, 2015, defense counsel Augustus Sol Invictus ("Invictus") moved the Court under 18 U.S.C. §§ 4241 and 4243 for $2500 to pay Psychiatrist Jeffrey Danziger ("Dr. Danziger")

[1] Pleadings in Petitioner's underlying criminal case, 6:15-cr-122-Orl-41TBS, will be cited as (Cr. Doc.).

for an examination to determine whether Petitioner was mentally competent to waive his *Miranda*[2] rights at the time of his arrest. ("Motion for Exam," Cr. Doc. 27). At the July 22, 2015 hearing on the Motion for Exam (Cr. Doc. 102), Invictus said that an examination would "be beneficial to see whether [Petitioner] is competent to enter a plea[.]" (*Id.* at 4). Two days after listening to Invictus' arguments regarding Petitioner's need for a psychiatric expert, United States Magistrate Judge Thomas Smith ("Judge Smith") issued a written order. (Cr. Doc. 37). Judge Smith concluded that the motion should have been filed pursuant to 18 U.S.C. § 3006A(e),[3] and he construed it as such. (*Id.* at 3). Judge Smith further found that Petitioner "has not shown anything beyond a possibility that he would benefit from Dr. Danziger's assistance" and that he had not "displayed any behavior that would suggest a mental impairment." (*Id.* at 5-6). The Court concluded that Petitioner had not "made a reasonable showing of the need to expend CJA funds for the services of a mental health professional," and the Motion for Expert was denied. (*Id.* at 6).

Notwithstanding the denial of his Motion for Expert, Invictus requested that Dr. Danziger perform a psychiatric and psychosexual evaluation of Petitioner, presumably at Petitioner's expense. (Doc. 8 at 2). The examination was performed on October 31, 2015. (*Id.*). Dr. Danziger

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966) (statements made in response to custodial interrogation are admissible at trial only if the defendant was informed of certain rights before questioning and the defendants understood and voluntarily waived the rights).

[3] This provision provides that:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e) (2015).

provided Invictus with a copy of his initial report on November 9, 2015 (Doc. 8), and a follow-up report on November 12, 2015. (Doc. 9).

Thereafter, Petitioner entered into a Plea Agreement (Cr. Doc. 42) with the government to plead guilty to Count Two of the Indictment. (Cr. Doc. 11). Under the Plea Agreement, the remaining counts were dismissed. (*Id.* at ¶ 4). The Court conducted a plea colloquy on November 17, 2015, and Petitioner was adjudicated guilty the same day. (Cr. Doc. 96). After holding a sentencing hearing on February 12, 2016, the Court sentenced Petitioner to 151 months in prison. (Cr. Doc. 97 at 31).

On March 18, 2016, Petitioner filed a pro se "Notice of Appeal for Reduction of Sentence." ("Notice of Appeal," Cr. Doc. 66). On June 1, 2016, Petitioner's court-appointed appellate counsel, H. Kyle Fletcher ("Fletcher") filed a motion in the Eleventh Circuit Court of Appeals to withdraw the Notice of Appeal "so that [Petitioner] can expeditiously go forward with a Rule 2255 post-conviction proceeding." ("Motion to Withdraw Appeal," Doc. 5-1 at ¶ 4). Attached to the Motion to Withdraw Appeal was a notarized handwritten letter from Petitioner giving "permission to withdraw my appeal and close my case with the Eleventh Circuit. I believe this decision is in my best interest and relieve H. Kyle Fletcher of any fault in my decision." (*Id.* at 6). On June 14, 2016, the Eleventh Circuit granted the Motion to Withdraw Appeal and dismissed Petitioner's appeal. (Cr. Doc. 100).

II. LEGAL STANDARDS

A. Standard of Review under 28 U.S.C. § 2255

Title 28 U.S.C. § 2255 provides federal prisoners with an avenue for relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the

> maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). If a court finds a claim under § 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* at § 2255(b). To obtain this relief on collateral review, a petitioner must clear a significantly higher hurdle than exists on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Petitioner must show that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To satisfy the prejudice requirement in the context of a guilty plea, Petitioner must show "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." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). These two elements are commonly referred to as *Strickland*'s performance and prejudice prongs. *Reece v. United States*, 119 F.3d 1462, 1464 n.4 (11th Cir. 1997). If a petitioner fails to establish either *Strickland* prong, the Court need not consider the other prong in finding that there was no ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689–90. Thus, a court, when considering an ineffectiveness claim, must judge the reasonableness of counsel's challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690; *see also Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals:

> [The test for ineffective assistance of counsel] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. Strickland encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992) (citation omitted). Under these rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

Petitioner raises three grounds in his § 2255 motion. He asserts that: (1) the Court erred when it failed to provide Petitioner with a psychiatric expert; (2) Invictus was ineffective for failing to object to the two-point sentencing enhancement for distribution of pornography; and (3) Fletcher was ineffective for advising Petitioner to dismiss his direct appeal. (Doc. 1 at 4-6, 13-15). Each ground will be addressed separately.

A. Ground One

Petitioner asserts that the Court erred and "violated due process of law when it failed to provide the defense with a psychiatric expert." (Doc. 1 at 13). He argues that his academic and family background suggest that he suffered from "mental infirmities" that affected his decision making and that "his will and resolve [could] be overridden by virtually any authority figure." (*Id.*). Therefore, the officers who investigated this case were "able to obtain [inculpatory] evidence

and a superficially voluntary confession without even the ritual *Miranda* warning." (*Id.*). Petitioner also argues that this Court "needed to know the extent and true nature of the illness" to comply with the requirements of 18 U.S.C. § 3553(a). (*Id.*).

Respondent argues that Petitioner is not entitled to § 2255 relief because: (1) the Motion for Exam was properly denied; (2) Petitioner defaulted this claim by failing to raise it on direct appeal; and (3) Petitioner actually received the exam sought in his Motion for Exam. (Doc. 5 at 11-15). It is unnecessary to reach the issue of whether the Motion for Exam was properly denied because Petitioner is not entitled to relief on Ground One for the latter two reasons.

First, Ground One is procedurally defaulted. Under the procedural default rule, a petitioner generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else he is barred from presenting that claim in a § 2255 proceeding. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). When a petitioner fails to properly raise his claim on direct appeal, habeas relief is "available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation." *Reed v. Farley*, 512 U.S. 339, 354 (1994) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977) (internal quotation marks omitted)).[4] Petitioner offers no cause for his failure to raise Ground One on direct appeal.[5]

Next, even if Petitioner could demonstrate cause for his failure to raise this claim on direct appeal, Ground One fails on the merits because Petitioner's assertion that he was unable to provide

[4] A second exception exists when a constitutional violation "has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). However, this second, narrow exception can be easily dispensed with in the present case because there is no evidence establishing (and Petitioner does not assert) that he is actually innocent of the crime to which he pleaded guilty. *See Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001) ("This exception is exceedingly narrow in scope as it concerns a petitioner's 'actual' innocence rather than his 'legal' innocence.") (citing *Calderon v. Thompson*, 523 U.S. 583, 559 (1998)).

[5] Because Petitioner actually received the psychiatric examination he sought, it is axiomatic that he cannot demonstrate actual prejudice from the procedural default of this claim. *See* discussion *infra*.

the Court with comprehensive psychiatric evidence at sentencing is false. After the Court denied Petitioner's Motion for Exam, Invictus retained Dr. Danziger to conduct a thorough psychiatric and psychosexual evaluation of Petitioner (Doc. 8; Doc. 9). In other words, Petitioner received the examination he sought in his Motion for Exam. Dr. Danziger gathered information from Petitioner's family members, his school records, and a personal interview. (Doc. 8 at 2-9). He also conducted psychological testing. (*Id.*at 7-8). Dr. Danziger initially diagnosed Petitioner with "Pedophilic Disorder, nonexclusive type, sexually attracted to both genders" and "Social Anxiety Disorder vs Autism Spectrum Disorder." (*Id.* at 9). Dr. Danziger found Petitioner competent to proceed to sentencing in Federal Court. (*Id.*). He also concluded that Petitioner did not represent a heightened risk of harm or danger to the community while at liberty. (*Id.* at 10). After speaking with Petitioner's mother, Dr. Danziger opined that Petitioner "would meet the criteria for an Autism Spectrum Disorder as defined in the DSM-5." (Doc. 9 at 3).

The report was included as a part of Petitioner's Presentence Investigation Report. (Cr. Doc. 48 at 16-28). Invictus also utilized Dr. Danziger's report at the sentencing hearing to support his argument for a reduced sentence:

> [A]s you will see in Dr. Danziger's report, as you have heard from Ms. Cruz, who spoke earlier, there has always been a question as to Mr. Aleman's competence and his intellectual ability.
>
> And, in fact, defense moved to have the government pay for a psychiatric evaluation in this case because I had serious concerns about his competence to proceed at trial and then competence also to enter into a plea because he is demonstrably slow at things. We've experienced several delays in this case because of his intellectual abilities, and I think the government has seen that as well.
>
> It turns out, according to Dr. Danziger, that this is because Mr. Aleman is on the autism spectrum. And as you will see in the report, there have been studies done showing that the autism spectrum disorders actually affect someone's ability to understand right from wrong. That is not to deny his culpability in this case.

(Cr. Doc. 97 at 18). The Court reviewed the materials provided for his consideration at sentencing (including Dr. Danziger's report), concluded that nothing contained therein excused Petitioner's behavior, and sentenced him to 151 months in prison, which was the low end of the Sentencing Guidelines range. (*Id.* at 29-30, 31).

Because Petitioner received the exam he sought in his Motion for Exam—albeit not at public expense—any argument that Petitioner is entitled to § 2255 relief as a result of Judge Smith's denial of his Motion for Exam is frivolous. In addition to being procedurally barred, Ground One is denied on the merits.

B. Ground Two

Petitioner alleges that Invictus was constitutionally ineffective because he allowed the Court to apply a sentencing enhancement for the distribution of child pornography. (Doc. 1 at 14). Specifically, Petitioner's base offense level was increased by two levels under United States Sentencing Guideline ("U.S.S.G.") § 2G2.2(b)(3)(F). (Cr. Doc. 48 at ¶ 28). Petitioner urges that he did not realize that keeping the pornographic images he downloaded in a shared folder made the images "readily available to others to download without his permission, knowledge, or his consent." (*Id.*). In response, the Government argues that an enhancement under U.S.S.G. § 2G2.2(b)(3)(F) is properly scored when "a defendant [merely] posts child pornography to a publicly accessible website or makes it accessible to others by storing it in a shared computer folder connected to a file-sharing network." (Doc. 5 at 16) (citing *United States v. Grzybowicz*, 747 F.3d 1296, 1307 (2014)). In his reply, Petitioner directs the Court's attention to *United States v. Carroll*, 886 F.3d 1347 (11th Cir. 2018) to support his argument that "distribution requires some knowing, purposeful action, the mere use of peer-to-peer software is not enough." (Doc. 11 at 3).[6]

[6] *Carroll* considered peer-to-peer file distribution under 18 U.S.C. § 2552(a)(2) and did not extend its holding to U.S.S.G. § 2G2.2(b)(3)(F). *See Carroll*, 886 F.3d at 1354 n.3 (noting that § 2552(a)(2) and § 2G2.2(B)(3)(f) are similar, but "the two do not completely overlap").

The 2015 Sentencing Guidelines Manual ("2015 Guidelines") was used to determine Petitioner's offense level. (Cr. Doc. 48 at ¶ 25). The 2015 Guidelines provided for a two-level increase in an offense level if the defendant's child pornography offense involved distribution. U.S.S.G. § 2G2.2(b)(3)(F) (2015). The 2015 Guidelines application notes defined "distribution" as:

> any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

U.S.S.G. § 2G2.2 (2015), comment n.1.[7]

The plea agreement, which Petitioner signed, states that Agent Matthew Fowler, utilizing a peer-to-peer file sharing program, was able to download images of child pornography from Petitioner's IP address. (Cr. Doc. 42 at 15). Petitioner does not dispute that he obtained these images or that he placed them in a shared folder. Rather, he asserts that he did not know that he automatically made the images available for others to download when he did so. (Doc. 1 at 14). Even if true, such an assertion does not entitle Petitioner to § 2255 relief. There is no *mens rea* requirement—expressed or implied—in the 2015 Guidelines' version of § 2G2.2(b)(3)(F). *See United States v. Creel*, 783 F.3d 1357, 1360 (11th Cir. 2015), *overruled by* 2016 amendment to § 2G2.2(b)(3)(F). To the contrary, under the 2015 Guidelines, the Eleventh Circuit repeatedly held that a defendant who makes child pornography files accessible to other users of a peer-to-peer file

[7] On April 28, 2016—after Petitioner's sentence was imposed—the United States Sentencing Commission proposed an amendment to § 2G2.2(b)(3)(F) to add a requirement that the defendant knowingly engaged in distribution. Effective November 1, 2016, the Sentencing Commission revised Section 2G2.2(b)(3)(F) to provide for a two-level increase "[i]f the defendant knowingly engaged in distribution." In an unpublished opinion, the Eleventh Circuit concluded that the amendment is not a substantive amendment that would apply retroactively. *United States v. Garcia*, 654 F. App'x 972, 974 n. 2 (11th Cir. 2016).

sharing program has distributed child pornography under the Guidelines. *See United States v. Spriggs*, 666 F.3d 1284, 1287 (11th Cir. 2012) (distribution element of U.S.S.G. § 2G2.2(b) satisfied because "[a]llowing files to be accessed on the Internet by placing them in a file-sharing folder is akin to posting material on a website for public viewing."); *Carroll*, 886 F.3d at 1354 n. 3 ("[P]rior to a 2016 amendment, [§ 2G2.2(b)(3)(F)] did not have a mens rea requirement."); *United States v. Sanchez*, 655 F. App'x 806, 807 (11th Cir. 2016) (recognizing that the § 2G2.2(b)(3)(F) enhancement "applies to all defendants who have distributed child pornography, regardless of whether they knew they were doing so."); *Garcia*, 654 F. App'x at 974 ("[N]o panel of this Court may require the Government to prove or the district court to find that child pornography was *knowingly* distributed before applying the two-point sentencing enhancement in U. S. S. G. § 2G2.2(b)(3)(F).") (emphasis in original).

Under the facts alleged in the plea agreement and the above-cited Eleventh Circuit precedent, reasonable competent counsel could have concluded that it was futile to object to the two-level enhancement under U.S.S.G. § 2G2.2(b)(3)(F). Invictus had no obligation to advance an argument reasonably believed to have no legal merit. *Diaz-Boyzo v. United States*, 294 F. App'x 558, 560 (11th Cir. 2008) (counsel not ineffective for failing to pursue a non-meritorious issue). Ground Two fails to satisfy *Strickland*'s performance prong, and the claim is denied.

C. Ground Three

Petitioner asserts that Fletcher was ineffective for advising him to dismiss his direct appeal. (Doc. 1 at 15). Petitioner originally filed a *pro se* Notice of Appeal on March 18, 2016, stating that he wished to appeal this Court's "sentencing decision . . . because of the lack of representation and evidence[.]" (Cr. Doc. 66). Fletcher was appointed as appellate counsel on April 26, 2016. (Cr. Doc. 83). On June 1, 2016, Fletcher filed the Motion to Withdraw Appeal, asserting that there were no viable issues for an appeal. (Doc. 5-1). *See* discussion *supra* Section I. Petitioner now alleges that Fletcher failed to inform him that, by dismissing the appeal, "he could never challenge the

sentencing errors." (*Id.*). In addition, Petitioner argues that "without a direct appeal, [Fletcher] ensured that most – if not all – retroactively-applicable Supreme Court decisions did not apply to him." (*Id.*). Petitioner claims that, had he filed an appeal, he would have "emphasiz[ed] this court's failure to order a full-scale psychological evaluation." (*Id.*).

In response to Ground Three, Respondent argues that Petitioner cannot demonstrate deficient performance or prejudice because Petitioner chose to abandon his direct appeal. (Doc. 5). Respondent attaches to the Response a copy of the Motion to Withdraw Appeal Petitioner filed in the Eleventh Circuit. (Doc. 5-1). In the Motion to Withdraw Appeal, Fletcher stated that he examined the record on appeal and "cannot in good faith make any argument on appeal." (*Id.* at 2). Fletcher said that he spoke with Petitioner and informed him that he expected to file an *Anders*[8] brief "based upon a lack of a viable issue for an appeal." (*Id.*). Also attached to the Response is Petitioner's sworn statement that he gave Fletcher permission to withdraw the appeal because he believed that it was in his best interest to do so. (*Id.* at 6). Petitioner "relieve[d] H. Kyle Fletcher of any fault in my decision." (*Id.*).

Based upon Petitioner's current assertion that he wanted to challenge both his sentence and Judge Smith's denial of his Motion for Exam, the Court construes Ground Three as a claim that Fletcher failed to raise viable issues on appeal. The proper standard for evaluating a claim that appellate counsel was ineffective for failing to raise issues on direct appeal is the standard enunciated in *Strickland*. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Specifically, Petitioner must demonstrate that appellate counsel was objectively unreasonable for failing to find arguable issues to appeal. (*Id.*). If the petitioner can make such a showing, "he must show a reasonable

[8] *Anders v. California*, 386 U.S. 738 (1967) (an appointed attorney must advocate his client's cause vigorously and may not withdraw from a frivolous appeal). An *Anders* brief is filed by a criminal defendant's court-appointed defense attorney who wants to withdraw from the case on appeal because he believes that the appeal is frivolous.

probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." (*Id.*) (citing *Strickland*, 466 U.S. at 694). Petitioner satisfies neither of these conditions.

To the extent Counsel made a reasonable strategic decision to advise Petitioner to withdraw his appeal, the decision is virtually unassailable. *See Strickland*, 466 U.S. at 690 ("Strategic choices made after a thorough investigation of law and facts . . . are virtually unchallengeable."). In the Motion to Withdraw Appeal (Doc. 5-1), Fletcher said that he examined the record and determined that Petitioner could raise no meritorious arguments. (*Id.* at 2). This determination was reasonable. First, Petitioner specifically waived his right to appeal his sentence on any ground except: "(a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution." (Cr. Doc. 42 at 13) (alteration in original); *see also* Cr. Doc. 96 at 7. None of the exceptions apply in this case. Next, to the extent Petitioner wanted to appeal "this court's failure to order a full-scale psychological evaluation," (Doc. 1 at 15), reasonable competent counsel could have concluded that any appeal on this issue would have been frivolous because Petitioner actually received the psychological evaluation he sought. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) ("Appellate counsel is not ineffective for failing to raise claims 'reasonably considered to be without merit.'") (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984)); *see also* discussion *supra* Ground One. Finally, Petitioner's Notice of Appeal appears to be directed solely towards claims of ineffective assistance of counsel at sentencing. (Cr. Doc. 66). Generally, claims of ineffective assistance of counsel cannot be raised on direct appeal and are properly raised in a § 2255 motion. *See United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002). ("We will not generally consider claims of ineffective assistance of

counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record.").

Because the grounds Petitioner wished to raise on direct appeal were either barred by his appeal waiver in the plea agreement, without merit, or more appropriately raised in a 28 U.S.C. § 2255 motion, Petitioner has not demonstrated that Fletcher's performance was constitutionally deficient. Likewise, Petitioner has not demonstrated a reasonable probability that he would have prevailed on his appeal, and he cannot demonstrate *Strickland* prejudice. *Smith*, 528 U.S. at 285-86.[9] Ground Three is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit. Because the claims raised in the Motion to Vacate are either procedurally barred, contrary to law, or affirmatively contradicted by the record, an evidentiary hearing is not required. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989) ("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.") (quoting *Guerra v. United States*, 588 F.2d 519, 520-21 (5th Cir. 1979)).

IV. CERTIFICATE OF APPEALABILITY

[9] Petitioner disagrees that he has to demonstrate prejudice under *Smith* and argues instead that the test for prejudice in this case is whether his decision to withdraw his appeal was informed. (Doc. 11 at 3). He asserts that Fletcher failed to explain that dismissing his direct appeal meant he could not challenge sentencing errors and that by dismissing his appeal "retroactively-applicable Supreme Court decisions [would] not apply to him." (Doc. 1 at 15; Doc. 11 at 3). This argument is unavailing. Fletcher stated in the Motion to Withdraw Appeal that he explained the lack of viable appellate issues to Petitioner, and Petitioner submitted a sworn statement attesting that he believed the withdrawal to be in his best interests. (Doc. 5-1 at 6). As noted, Petitioner waived his right to appeal most sentencing errors, and any argument that a future Supreme Court case might apply to his unidentified claims and might be held to be retroactive is too speculative to warrant a finding of prejudice. *See United States v. Lawson*, 947 F.2d 849, 843 (7th Cir. 1991) ("Conclusory allegations of ineffective assistance are insufficient."); *Fuqua v. Sec'y, Dep't of Corr.*, 409 F. App'x 243, 246 (11th Cir. 2010) (recognizing that "[f]ederal habeas relief cannot follow [mere] speculation" of prejudice).

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180 (2009). "A [certificate of appealability] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 474 (2000)) or, that "the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal citation omitted). Petitioner has not made the requisite showing in these circumstances.

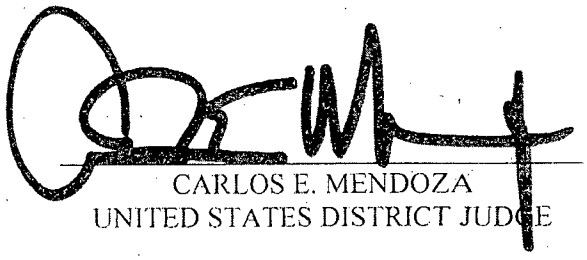
Because Petitioner is not entitled to a certificate of appealability, he is not entitled to proceed *in forma pauperis* on appeal.

V. CONCLUSION

It is therefore **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED**, and this case is **DISMISSED** with prejudice.
2. The Clerk of Court shall enter judgment accordingly and is directed to close this case.
3. Petitioner is **DENIED** a certificate of appealability.
4. The Clerk of Court is directed to file a copy of this Order in Criminal Case No. 6:15-cr-122-Orl-41TBS and to terminate the Motion to Vacate (Cr. Doc. 101) pending in that case.

DONE and **ORDERED** in Orlando, Florida on October 26, 2018.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party
OrlP-4

APPENDIX "3"

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 20, 2019

Mr. Jonathan Javier Aleman
Prisoner ID #62396-018
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

Re: Jonathan Javier Aleman
v. United States
Application No. 18A1335

Dear Mr. Aleman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on June 20, 2019, extended the time to and including August 17, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Susan Frimpong
Case Analyst