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IN THE  
SUPREME COURT OF THE UNITED STATES

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DAVID PEARSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the court of appeals, in rejecting petitioner's claim that his sentencing counsel provided ineffective assistance by failing to challenge his armed career criminal sentence, erroneously dispense with the requisite categorical analysis of predicate prior convictions, where petitioner's sentence enhancement was premised on the government's shorthand descriptions of prior drug-offense conduct, with no reference to a corresponding statute or sentencing document, and where the underlying state-law drug statute the court of appeals assumed was applicable does not match the requisite categorical analogue under 18 U.S.C. § 924(e)(2)(A)?
2. Did the court of appeals erroneously conclude that petitioner's guilty plea entered pursuant to a plea agreement waived any claim by petitioner as to ineffective assistance of counsel in failing to file a meritorious, case-dispositive motion to suppress evidence?
3. Did the court of appeals err in denying a certificate of appealability on a 28 U.S.C. § 2255 claim, premised on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), that counsel failed to meet a duty to properly advise petitioner regarding his direct appeal rights, where counsel affirmatively misadvised petitioner that if he appealed the government could retaliate and seek to increase his sentence?

## **INTERESTED PARTIES**

The are no parties interested in the proceeding other than those named in the caption of the appellate decision.

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
INTERESTED PARTIES .....	ii
TABLE OF AUTHORITIES .....	v
PETITION .....	1
OPINION .....	1
STATEMENT OF JURISDICTION .....	1
STATUTORY AND OTHER PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING THE WRIT .....	8
I.    The Court should review the decision below to insure that courts rigorously apply a categorical analysis of prior drug convictions used to increase the statutory maximum or impose a mandatory minimum sentence .....	8
II.   The Court should grant the petition to clarify the analysis required of post-conviction courts considering claims of pre-plea ineffectiveness of counsel in failing to present case-dispositive motions .....	14
III.  The Court should grant review to clarify that the right to counsel is violated where ineffective assistance of counsel—in petitioner’s case, affirmative misadvice by counsel concerning threats of retaliation by the government—causes a defendant to fail to timely request the filing of a notice of appeal .....	17
CONCLUSION .....	21
APPENDIX	
Decision of the Court of Appeals for the Eleventh Circuit denying motion for certificate of appealability, <i>David Pearson v. United States</i> , No. 18-10497, 762 F. App’x 786 (Mar. 28, 2019) .....	App. 1

Decision of the Court of Appeals for the Eleventh Circuit denying motion for reconsideration, <i>David Pearson v. United States</i> , No. 18-10497 (July 19, 2019) .....	App. 4
Decision of the United States District Court, S.D. Fla., denying motion to vacate sentence under 18 U.S.C. § 2255, <i>David Pearson v. United States</i> , No. 15-cv-62725-WJZ (Feb. 1, 2018) .....	App. 6
Magistrate Judge's Report recommending denial of motion to vacate sentence under 18 U.S.C. § 2255, <i>David Pearson v. United States</i> , No. 15-cv-62725-WJZ (May 24, 2017) .....	App. 8
Judgment of Conviction, United States District Court, S.D. Fla., <i>United States v. David Pearson</i> , No. 14-cr-60099-WJZ (Jan. 9, 2015) .....	App. 33

## TABLE OF AUTHORITIES

### CASES:

<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978) .....	21
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017) .....	8
<i>Descamps v. United States</i> , 570 U.S. 254 (2013) .....	9
<i>Fox v. United States</i> , No. 17-5352, 2017 WL 4404676	
(6th Cir. July 27, 2017) .....	16
<i>Garza v. Idaho</i> , 139 S.Ct. 738 (2019) .....	21
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985) .....	15
<i>Johnson v. United States</i> , 559 U.S. 133 (2010) .....	9
<i>Lee v. United States</i> , 137 S.Ct. 1958 (2017) .....	16
<i>Mathis v. United States</i> , 136 S.Ct. 2243 (2016) .....	11
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013) .....	9
<i>Premo v. Moore</i> , 562 U.S. 115 (2011) .....	14
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000) .....	i, 17, 18, 19
<i>Rojas-Medina v. United States</i> , 924 F.3d 9 (1st Cir. 2019) .....	21
<i>Schneider v. United States</i> , 864 F.3d 518 (7th Cir. 2017) .....	16
<i>Shepard v. United States</i> , 544 U.S. 13 (2005) .....	11
<i>Shular v. United States</i> , No. 18-6662, 139 S.Ct. 2773 (June 29, 2019) .....	9, 14
<i>Spaho v. United States Att'y Gen.</i> , 837 F.3d 1172 (11th Cir. 2016) .....	12
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	15
<i>Thompson v. United States</i> , 872 F.3d 560 (8th Cir. 2017) .....	16
<i>United States v. Buchanan</i> , 698 F. App'x 149 (4th Cir. 2017) .....	16

<i>United States v. Franklin</i> , 904 F.3d 793 (9th Cir 2019), <i>cert. dismissed</i> , 139 S.Ct. 2690 (June 4, 2019) .....	9, 13
<i>United States v. Smith</i> , 775 F.3d 1262 (11th Cir. 2014) .....	10, 13
<i>United States v. Wilson</i> , 754 F. App'x 930 (11th Cir. 2019), <i>cert. filed</i> , No. 18-8447 (Mar. 8, 2019) .....	13, 14
<b>STATUTORY AND OTHER AUTHORITY:</b>	
U.S. Const. amend. V .....	1, 18, 19, 21
U.S. Const. amend. VI .....	2
18 U.S.C. § 922(g) .....	3
18 U.S.C. § 924(e) .....	3, 4, 5, 9, 10, 13, 20
18 U.S.C. § 924(e)(2)(A) .....	2, 3, 5
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 2253(c) .....	2
28 U.S.C. § 2255 .....	i, 5, 8, 10, 11, 16, 21
Sup. Ct. R. 13.1 .....	1
Sup. Ct. R. Part III .....	1
Fla. Stat. § 775.082(3)(d) .....	10
Fla. Stat. § 893.03(2)(a)(4) .....	10
Fla. Stat. § 893.13(1)(a) .....	10
<i>Lee v. United States, The Unusual Circumstances Test for Strickland Relief</i> , 34 Touro L. Rev. 823 (2018) .....	16

# **PETITION FOR WRIT OF CERTIORARI**

David Pearson respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 18-10497 in that court on March 28, 2019, *Pearson v. United States*.

## **OPINION BELOW**

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1), along with a copy of the order of the Eleventh Circuit denying the motion for reconsideration (App. 4).

## **STATEMENT OF JURISDICTION**

Jurisdiction of this Court is invoked under 28 U.S.C. § 1255 and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on March 28, 2019, and reconsideration was denied on July 19, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1.

## **STATUTORY AND OTHER PROVISIONS INVOLVED**

Petitioner intends to rely upon the following constitutional and statutory provisions:

### **U.S. Const. amend. V (Due Process Clause):**

No person shall ... be deprived of life, liberty, or property, without due process of law . . . .

**U.S. Const. amend. VI (Right to Counsel):**

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

**18 U.S.C. § 924(e)(2)(A):**

(2) As used in this subsection—

(A) the term “serious drug offense” means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

**28 U.S.C. § 2253(c):**

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

### **STATEMENT OF THE CASE**

Petitioner was indicted on a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). The charges stemmed from a vehicle stop of petitioner in Hollywood, Florida on April 25, 2014. A gun was found during a warrantless search of petitioner's car.

Pursuant to a written plea agreement and factual proffer, petitioner pled guilty to the firearm charge. The plea agreement set forth maximum and minimum penalties, including that petitioner faced a mandatory minimum sentence of 15 years and a maximum sentence of life imprisonment (the penalties applicable under the Armed Career Criminal Act, 18 U.S.C. § 924(e)). The factual proffer accompanying the plea agreement listed four prior felony convictions, providing case numbers and shorthand references, but did not state whether they qualified as serious drug offense predicates under § 924(e)(2)(A). At the plea colloquy, the district court advised petitioner that it had not yet determined whether he was "an armed career offender," and the issue remained open for sentencing.

Thereafter, petitioner filed a *pro se* submission advising the court that he wished to withdraw his guilty plea given his counsel's failure to move to suppress the gun seized in the search of his car. Petitioner's counsel moved to withdraw in light of conflicts with petitioner. In an *ex parte* hearing before a magistrate judge, petitioner contended that counsel failed to properly investigate the stop and search of his vehicle by law enforcement and should have sought to suppress the gun that was seized on the grounds that probable cause was lacking and that the police had lied about the circumstances of the search and seizure. At the conclusion of the hearing, petitioner indicated he was willing to proceed with counsel and his plea, and counsel withdrew his motion to withdraw.

The presentence investigation report (PSI) stated that petitioner was an armed career criminal subject to an enhanced sentence of 15 years to life imprisonment under § 924(e). The PSI described, as predicate prior convictions in support of the armed career criminal enhancement, "sale or delivery of cocaine"; "possession of cocaine with intent to deliver or sell"; and "possession of Oxycodone with intent to deliver or sell." The PSI listed these prior convictions as "Dkt. Nos. 99-16829CF10A, 10-03881CF10A, and 10-12868CF10A." App. 11. The criminal history section of the PSI added another case, Dkt. No. 99-1717CF10A, identified as "delivery of cocaine." *Id.* The § 924(e) enhancement raised petitioner's statutory maximum sentence from 10 years imprisonment to life imprisonment and caused him to be subject to a 15-year mandatory minimum. No objections to the PSI were submitted by petitioner's counsel.

The information before the sentencing court as to the prior predicate offenses consisted of case numbers, police report excerpts, and a shorthand reference to four prior drug-related offenses as set forth in the factual proffer. Although the PSI indicated that petitioner was an armed career criminal on the basis of the four prior cases listed in the factual proffer, neither the PSI nor the factual proffer specified that these prior offenses qualified as serious drug offenses within the meaning of § 924(e). The government did not submit judgments or charging documents as to any of the prior convictions; nor were the underlying state drug statutes identified. Further, at sentencing, the district court made no findings that petitioner's prior offenses qualified as serious drug offenses under § 924(e)(2)(A).

The court imposed a 180-month sentence, representing the 15-year mandatory term, and adopted the factual findings and guideline computations set forth in the PSI. The court also advised petitioner of his right to appeal and appointed his existing counsel to represent him for the purpose of an appeal. No appeal notice was filed by petitioner's counsel.

Petitioner filed a timely *pro se* motion to vacate sentence under 28 U.S.C. § 2255. The motion claimed counsel was ineffective in failing to file a notice of appeal, failing to move to suppress evidence obtained through an illegal warrantless seizure, and failing to challenge the enhancement of his sentence based on prior offenses used to designate him as an armed career criminal. An evidentiary hearing was granted by

the magistrate judge solely to address the claim that counsel failed to file a notice of appeal.

At the hearing on the failure to file a notice of appeal, petitioner testified that when he pled guilty, it was not determined whether he qualified as an armed career criminal; that when he met with counsel a week before his sentencing, he told counsel that he believed he did not qualify as an armed career criminal and wanted to object to such a designation; and that counsel advised him he would look into the matter and would object to his being sentenced as an armed career criminal. During that meeting, they also spoke of a possible appeal of the armed career criminal issue, but counsel indicated such a challenge would probably result in the government's retaliating by seeking additional charges. Counsel did not discuss with petitioner any legal issues that could be appealed or otherwise advise him of the pros and cons of appealing. Petitioner testified that he asked counsel to object during the sentencing hearing, but counsel admonished him to stay silent; after sentence was imposed, petitioner told his wife, father and daughter that he was upset with counsel's failure to object at sentencing and with the outcome of his sentence. Petitioner's wife went to the federal courthouse to check the docket sheet in order to see if a notice of appeal had been filed, and found that it had not.

Petitioner's father's affidavit (admitted at the evidentiary hearing, without opposition) related that petitioner had advised him before sentencing that he wished to challenge his designation as an armed career criminal and that his attorney was going to seek a lesser sentence. Petitioner's father further averred that petitioner told

him, in a conversation two weeks after sentencing, that he was extremely upset that his attorney had not objected to his armed career criminal designation.

Petitioner's attorney, testifying for the government, disputed that petitioner had conveyed any desire to appeal. Counsel acknowledged that after the sentencing, he never met with petitioner and had no communication with him as to anything relating to petitioner's appeal rights.

The magistrate judge issued a report and recommendation that recommended denying the motion. The magistrate's report concluded counsel was not ineffective in failing to file a direct appeal or in violating a duty to consult with petitioner about an appeal. The magistrate's report also concluded that counsel was not ineffective in failing to challenge petitioner's enhancement as an armed career criminal, and found that his sentence was not unlawful. App. 22–23.

Petitioner filed written objections to the magistrate's report. The district court issued an order that overruled his objections, adopted the magistrate's report, and denied the motion to vacate as well as a certificate of appealability. App. 8.

Petitioner filed a notice of appeal and a motion for certificate of appealability in the Eleventh Circuit. The Eleventh Circuit denied the motion, concluding that reasonable jurists would not debate that petitioner's claims of attorney ineffectiveness in failing to challenge the stop of his vehicle and to move to suppress the firearm found in the ensuing vehicle search were procedurally barred because, in the Eleventh Circuit's view, his guilty plea waived any right he had to representation on the Fourth Amendment violations. App. 4–5. The Eleventh Circuit also rejected petitioner's

claims that his counsel was deficient in failing to challenge his armed career criminal enhancement and in failing to file a direct appeal.

Petitioner moved for reconsideration of the Eleventh Circuit's denial of a certificate of appealability, which the Eleventh Circuit denied. The Eleventh Circuit clarified its decision as to petitioner's claim of attorney ineffectiveness in failing to file a motion to suppress: the court of appeals concluded that, even assuming this claim was not waived, petitioner failed to prove that, but for his counsel's ineffectiveness, he would not have entered a guilty plea.

## **REASONS FOR GRANTING THE PETITION**

### **I. The Court should review the decision below to insure the rigorous application of a categorical analysis of prior drug convictions used to increase the statutory maximum or impose a mandatory minimum sentence.**

The Eleventh Circuit failed to employ a categorical analysis of the offense conduct covered by the statute of conviction and erroneously assumed facts concerning the content of judgments of conviction that were never presented or proffered by the government.<sup>1</sup>

This Court has recently granted certiorari in a case that presents the question whether the determination of a "serious drug offense" under the Armed Career

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<sup>1</sup> The court of appeals also erred under *Buck v. Davis*, 137 S.Ct. 759, 774 (2017), in that the court failed to direct its analysis to the gatekeeping function of reviewing the motion to find whether petitioner has made "a preliminary showing that his claim was debatable." Instead, the Eleventh Circuit sought to distinguish other precedent and broke new decisional ground by assuming the outcome of a contested sentencing hearing that was never held as well as disregarding the absence of any evidentiary hearing on this § 2255 claim in the district court.

Criminal Act requires the same categorical approach used in the determination of a “violent felony” under the Act. *Shular v. United States*, No. 18–6662, 139 S.Ct. 2773 (June 29, 2019). Further, in *United States v. Franklin*, 904 F.3d 793, 799–802 (9th Cir. 2019), the court of appeals held that a state-law drug offense must categorically match the elements of a generic analogue to constitute a “serious drug offense” under 18 U.S.C. § 924(e), *cert. dismissed*, 139 S.Ct. 2690 (June 4, 2019).

A state offense is a “categorical” match only if it includes all the elements of the federally defined offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If the state statute criminalizes any conduct that falls beyond the federal definition, then the statute is “overbroad” and not a categorical match. Courts analyzing a prior conviction “must presume that the conviction ‘rested upon nothing more than the least of the acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (brackets omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). That is because the categorical approach looks to “what the state conviction necessarily involved, not the facts underlying the case.” *Id.*

The court of appeals concluded that a certificate of appealability should not issue as to petitioner’s claim that his prior convictions did not qualify him as an armed career criminal and that his attorney was ineffective in failing to challenge his armed career criminal enhancement on the basis of those prior convictions, pursuant to its finding that petitioner had two prior Florida convictions for delivering cocaine and a third conviction for possession with intent to sell cocaine. App. 2 (citing Fla. Stat. §§

893.13(1)(a), 893.03(2)(a)(4), and 775.082(3)(d) as to delivery of cocaine, and *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), as to possession with intent to sell cocaine). The court of appeals' determination was improper on multiple grounds.

The court of appeals based its ruling on a record that lacks any documentary showing of petitioner's prior convictions. No documentation of the convictions was ever offered at sentencing or in the § 2255 proceeding. Contrary to the court of appeals, and based on the absence of an evidentiary hearing, reasonable jurists could disagree as to whether the prior convictions were for the Florida statutory offenses identified by the court of appeals in its order denying a certificate of appealability and whether each means of commission of those offenses meets the statutory test for the equivalent of a federal drug crime.

The information in the factual proffer gives neither a statute number nor a specific description of the statutory offense. It simply provides a generic title of an offense. One of the prior offenses is even described as "possession/sale/deliver," which could mean any one of those three offenses—including simple possession, which would not qualify as a serious drug offense. The PSI failed to provide the statutes of conviction, the government did not submit judgments or charging documents, and the district court made no findings at sentencing that petitioner's prior offenses qualified as "serious drug offenses" within the meaning of 18 U.S.C. § 924(e). The sentencing court instead relied exclusively on police report excerpts contained in petitioner's PSI that were plainly inadequate to establish that his prior state crimes qualified as serious drug offenses. The use of copied information from police reports in the PSI is

not permitted in order to determine whether an offense is a “serious drug offense.” *See Shepard v. United States*, 544 U.S. 13, 16, 26 (2005) (when determining whether a broader state conviction for an offense meets the ACCA definition of a generic predicate offense, courts may not look to police reports; police reports and complaints may not be considered in determining whether a prior offense qualifies as a predicate for purposes of ACCA sentencing).

At the evidentiary hearing on petitioner’s § 2255 claim of ineffective assistance of counsel in failing to file a notice of appeal, the government admitted that it had not produced any documentation of petitioner’s prior convictions at sentencing, nor did the government seek to remedy that at the evidentiary hearing. Petitioner never stipulated that any of his priors were “serious drug offenses.” He simply stipulated that he had prior convictions under those case numbers. Furthermore, in the plea colloquy the district court acknowledged that the issue of whether petitioner qualified under § 924(e)(2)(A) was undetermined and that petitioner would have an opportunity to further discuss this with his attorney after reviewing the PSI. The record shows that, rather than agreeing that his prior offenses were serious drug offenses, petitioner explicitly did not stipulate this point and was greatly interested in this issue at the time of the plea and beyond. The record, therefore, remains devoid of this essential documentation. Given the absence of record development, reasonable jurists could dispute whether a remand for evidentiary proceedings is appropriate.

The court of appeals determination fails to comport with *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016), which provides that a prior conviction will qualify

as a predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense. Neither of these definitions includes attempted sale or “possession with intent to sell.” There is a Florida statute, however, that does include an attempt to sell, although that statute was not referenced in the relevant documents presented at sentencing or in the PSI. The Florida statute proscribing the sale, delivery, or possession with intent to sell or deliver a controlled substance provides as follows: “[A] person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.” Fla. Stat. § 893.13(1)(a). Notably, the Eleventh Circuit itself has concluded that “[s]ome of the alternative elements set forth in § 893.13(1)(a) involve ‘illicit trafficking’ [for purposes of the aggravated felony definition of immigration law] and some do not.” *Spaho v. United States Att’y Gen.*, 837 F.3d 1172, 1178 (11th Cir. 2016). The result of counsel’s failure to object was a sentence far beyond the statutory maximum that otherwise would have applied to the indicted offense. Having failed to submit requisite documentation, the government did not meet its evidentiary burden of demonstrating whether petitioner qualified for a sentencing enhancement as an armed career criminal.

Petitioner disputed not only that his offenses qualify as serious drug offenses but that the district court had proper information to make such a determination. Based on the disqualification of prior convictions under Fla. Stat. § 893.13, even assuming that those are petitioner’s prior convictions, the court of appeals rejection of a certificate of appealability as to petitioner’s claim of ineffective assistance of counsel

in failing to object to the enhancement and the way in which the enhancement was established at sentencing was improper and merits certiorari relief.

In *United States v. Wilson*, 754 F. App'x 930 (11th Cir. 2019), *cert. filed*, No. 18-8447 (Mar. 8, 2019), the Eleventh Circuit concluded that a prior Florida conviction for delivery of cocaine, in violation of Fla. Stat. § 893.13(1)(a), was a “serious drug offense” under § 924(e), pursuant to *United States v. Smith*, 775 F.3d 1262, 1267–68 (11th Cir. 2014). The *Wilson* certiorari petition challenges the ruling in *Smith*—which the court of appeals relied on in its ruling denying a certificate of appealability to petitioner—and presents the question whether a state drug offense must categorically match a generic analogue’s elements to qualify as a serious drug offense under § 924(e). The Solicitor General’s brief states that “the question presented *has divided the courts of appeals...*” *Wilson* BIO at 2 & n. 1 (May 9, 2019)(emphasis added).

The Eleventh Circuit, in denying petitioner’s motion for a certificate of appealability, found that petitioner’s prior state convictions were serious drug offenses under § 924(e) in light of *Smith*, 775 F.3d at 1268—the holding of which is contrary to the Ninth Circuit’s decision in *Franklin*—and that petitioner’s attorney was thus not ineffective in failing to challenge use of such convictions as enhancement predicates. App. 2–3. The issue on which petitioner sought a COA mirrors the certiorari issues presented in *Franklin* and *Wilson*, and in other pending certiorari petitions cited by the Solicitor General. *See Wilson* BIO at 2 n. 1. At a minimum, that appellate courts are divided on this issue suggests that reasonable jurists may—and indeed do—differ regarding the issue presented by petitioner. *See Wilson* BIO. In the alternative,

petitioner requests that this Court consider the instant certiorari petition in conjunction with *Shular* and *Wilson*.

**II. The Court should grant the petition to clarify the analysis required of post-conviction courts considering claims of pre-plea ineffectiveness of counsel in failing to present case-dispositive motions.**

In *Premo v. Moore*, 562 U.S. 115 (2011), the Court addressed whether, under clearly established law, the failure to file a meritorious motion to suppress a confession constituted ineffective assistance of counsel. The Court concluded that even a meritorious motion may have less value than a plea bargain, particularly where the motion is not case-dispositive and the plea bargain is highly advantageous. In *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017), the Court noted the importance of these factors, citing *Premo* for the proposition that “when the defendant’s decision about going to trial turns on his prospects of success and those are affected by the attorney’s error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession,” greater weight should be given to the outcome-determinative aspect of the ineffectiveness. In view of the Court’s decisions in *Premo* and *Lee*, the analysis employed by the Eleventh Circuit to deny a certificate of appealability to petitioner warrants review. The Eleventh Circuit abandoned all reference to whether, but for counsel’s failure to file the motion to suppress, the defendant would have been acquitted or his charges dismissed. And the court of appeals merely assumed that a plea bargain with nominally beneficial

provisions was so beneficial as to outweigh the defendant's preference for winning the case outright. App. 5 & n. 2.

Any value of a plea bargain should be carefully balanced against the ineffective decision by counsel to fail to file a meritorious motion to suppress that would have been case-dispositive. *See Premo*, 562 U.S. at 126 ("It is not clear how the successful exclusion of the confession would have affected counsel's strategic calculus."); existence of two eyewitnesses against defendant meant suppression his confession would have only a speculative impact on the outcome); *id.* at 124 (counsel's "explanation—that suppression would have been futile—confirms that his representation was adequate under *Strickland* [v. *Washington*, 466 U.S. 668 (1984)], or at least that it would have been reasonable for the state court to reach that conclusion").

The Eleventh Circuit's *per se* rule that barred any appellate consideration of petitioner's case cannot be reconciled with this Court's recognition of the importance of the alternative course of events had the ineffective assistance not occurred.

The court of appeals concluded that no reasonable jurist would debate that petitioner's claims of ineffective assistance of counsel in failing to challenge the illegal stop of his vehicle and in failing to move to suppress the firearm found inside the vehicle were procedurally barred. In making this determination, the court of appeals failed to evaluate the pertinent question of cause and prejudice to excuse procedural default. Under *Lee*, 137 S.Ct. at 1965, an ineffective assistance claim is not barred by a guilty plea where counsel's pre-plea failures caused the entry of the plea. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Under *Lee*, petitioner's claim—that his attorney's ineffective assistance in failing to move to suppress, depriving petitioner of his only meaningful defense to the charges, led him to enter a guilty plea rather than proceed to trial—is fully cognizable under 28 U.S.C. § 2255.

The principle established in *Lee*, that erroneous advice by counsel prior to the defendant's entry of a plea is a basis for voiding the plea because pursuing a trial would be rational, has been recognized in multiple cases outside the immigration context. *See Lee v. United States, The Unusual Circumstances Test for Strickland Relief*, 34 Touro L. Rev. 823, 854 n. 225 & cases cited therein (2018) (“Cases not involving immigration are not discussed in this Note, but suffice to say petitioners have relied on *Lee*’s principle that erroneous advice by counsel prior to entering a plea is a ground for voiding the plea because pursuing a trial would be rational. ... *Fox v. United States*, No. 17-5352, 2017 WL 4404676, at \*1 (6th Cir. July 27, 2017) (same); *Thompson v. United States*, 872 F.3d 560, 563 (8th Cir. 2017) (same); ... *United States v. Buchanan*, 698 F. App’x 149, 150 (4th Cir. 2017) (holding that the district court erred in failing to allow withdrawal of plea); *Schneider v. United States*, 864 F.3d 518, 519 (7th Cir. 2017) (“[T]rial lawyer was ineffective for advising him that he met the statutory elements of the offense of sexual abuse of a minor and for not explaining that his prior conduct could be considered during sentencing.’)”).

Petitioner refrained from withdrawing his guilty plea solely because his counsel refused to file a motion to suppress. After pleading guilty, petitioner filed a *pro se* submission advising the court he wished to withdraw the plea given counsel’s failure

to move to suppress the gun seized in the search of his car. Petitioner’s counsel, firmly opposing petitioner’s belief in a suppression motion, moved to withdraw in light of conflicts in the representation. In an *ex parte* hearing before a magistrate judge, petitioner contended that counsel failed to properly investigate law enforcement’s stop and search of his vehicle and should have sought to suppress the gun that was seized on the grounds probable cause was lacking and the police had lied about the circumstances of the search and seizure.

Petitioner would not have pled guilty if counsel had filed the motion to suppress. Application of a procedural default bar is particularly inapt because counsel’s ineffectiveness excuses procedural default and because petitioner clearly raised and preserved an ineffectiveness claim. The Court should review and reject the Eleventh Circuit’s *per se* rule that by accepting a plea bargain petitioner waived violations of his right to effective pre-plea representation.

**III. The Court should grant review to clarify that the right to counsel is violated where ineffective assistance of counsel—in petitioner’s case, affirmative misadvice by counsel concerning threats of retaliation by the government—causes a defendant to fail to timely request the filing of a notice of appeal.**

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that counsel must, in some circumstances, consult with the defendant concerning the right to appeal. “We employ the term ‘consult’ to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.” *Id.* at 478. Although the Court did not impose a

*perse* requirement of consultation regarding the right to appeal, *see id.* at 480, implicit in the counsel's professional obligations when consulting with a defendant regarding advantages and disadvantages of an appeal is an obligation not to affirmatively mislead the defendant. In petitioner's case, counsel affirmatively discouraged the filing of a notice of appeal by misadvising petitioner that the government would retaliate against him by filing additional charges if petitioner appealed, because the government would treat the filing of a notice of appeal as a breach of the plea agreement. Counsel's advice was factually wrong (in that there was no such threat), contradicted express or implied terms of the plea agreement, and in any event was unfounded because any such retaliatory action by the government would likely have constituted a due process violation. And counsel's affirmative misadvice concerning the exercise of the right to appeal, whether or not counsel was obligated to consult under *Flores-Ortega*, compelled relief for petitioner.

The court of appeals denied petitioner a certificate of appealability on his claim that counsel ineffectively consulted with him regarding his appellate rights after the imposition of a 15-year sentence as an armed career criminal, resulting in the failure to file a timely notice of appeal. The court of appeals based its determination on counsel's testimony that he did not believe there was a viable issue for appeal and that petitioner did not advise him that he was displeased with the sentence and did not directly request that counsel file an appeal. The court of appeals found that these circumstances vitiated counsel's duty even to consult with petitioner, pursuant to *Flores-Ortega*, about the filing of an appeal where the sentence that was imposed was

pursuant to a joint recommendation of the parties. App. 3. The court of appeals' analysis contravenes *Flores-Ortega*, however, given petitioner's claim that his counsel conveyed fundamentally erroneous advice, consisting of counsel's inaccurate assertion to petitioner that were petitioner to appeal, the government would retaliate, where in fact there was no such threat of retaliation by the government, and even if there were, it would have violated the Fifth Amendment's due process clause.

Counsel acknowledged that after sentencing, he never met with petitioner and did not write to him about or discuss with him by phone or through an intermediary anything relating to petitioner's appeal rights. Even when a defendant has not made a specific request of his attorney to file an appeal, the attorney is obligated to consult regarding an appeal when either (1) any rational defendant would want to appeal, or (2) this particular client reasonably demonstrated an interest in appealing. *See Roe v. Flores-Ortega*, 528 U.S. at 480. The consultation regarding an appeal must include discussion regarding the advantages and disadvantages of appealing and a reasonable effort to determine the client's wishes regarding whether or not to appeal. *Id.* at 478. Failure to meet this duty to consult results in ineffective assistance. *Id.*

The district court accepted counsel's evidentiary hearing testimony that he warned petitioner that by objecting at sentencing and by appealing from the sentence he would risk retaliation by the government and the filing of new, more serious charges. App. 12. The district court acknowledged, and relied on, counsel's testimony that he warned petitioner that if the defense failed to recommend the imposition of an armed career criminal sentence, petitioner would violate the plea agreement and would

cause the government to be freed from its plea-agreement promise to recommend only the minimum sentence under the statute. App. 24. This advice was so far off the mark as to be egregiously wrong: the government’s plea agreement promise to recommend the minimum statutory sentence under 18 U.S.C. § 924(e) was not tethered to a sentencing recommendation or lack of a sentencing objection by petitioner. The district court cited the repeated (false) statements of advice that counsel gave petitioner to the effect that petitioner had obligated himself to stipulate to an armed career criminal sentence in his plea agreement and in his plea hearing. App. 21–23 (court detailing attorney’s advice to petitioner that plea agreement required “joint sentencing recommendation” for 15-year sentence as armed career criminal). Counsel, according to the district court, explained to petitioner that if he appealed the sentencing enhancement, petitioner would be committing a grave error and would violate his plea agreement. App. 23 (court finding that attorney advised petitioner that if he challenged the sentencing enhancement “he may be facing life in prison”). Petitioner had every right to challenge the sentence enhancement on appeal without any risk of adverse consequence. The government’s obligation to recommend a 15-year minimum sentence would not have been affected by appeal. Counsel’s false advice to petitioner that he would be violating the plea agreement, and that the government would then be free to recommend a higher sentence and file additional charges, is entirely unfounded.

If the government had sought to retaliate against petitioner after sentencing based on his assertion of rights preserved under the plea agreement, such retaliation

would not have been protected as an exercise of plea-bargaining give-and-take. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . .”). The imagined threats of retaliation that counsel presented to petitioner to foreclose his right to exercise sentencing and appellate rights were not part of the plea bargain, and counsel’s misreading of the plea agreement and plea colloquy in providing such false advice required corrective advice regarding the right to appeal. *See Rojas-Medina v. United States*, 924 F.3d 9 (1st Cir. 2019) (counsel’s failure to consult deprived defendant of appeal). Even an appeal waiver—of which there was none in this case—would not undermine petitioner’s claim. *See Garza v. Idaho*, 139 S.Ct. 738, 749 (2019) (appeal waiver does not preclude a § 2255 challenge premised on counsel’s ineffectiveness in failing to appeal). The court should review the decision below to clarify the issue of ineffective appeal consultation by counsel.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.  
Counsel for Petitioner

Miami, Florida  
October 2019

## APPENDIX

## APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit denying motion for certificate of appealability, <i>David Pearson v. United States</i> , No. 18-10497, 762 F. App'x 786 (Mar. 28, 2019) .....	App. 1
Decision of the Court of Appeals for the Eleventh Circuit denying motion for reconsideration, <i>David Pearson v. United States</i> , No. 18-10497 (July 19, 2019) .....	App. 4
Decision of the United States District Court, S.D. Fla., denying motion to vacate sentence under 18 U.S.C. § 2255, <i>David Pearson v. United States</i> , No. 15-cv-62725-WJZ (Feb. 1, 2018) .....	App. 6
Magistrate Judge's Report recommending denial of motion to vacate sentence under 18 U.S.C. § 2255, <i>David Pearson v. United States</i> , No. 15-cv-62725-WJZ (May 24, 2017) .....	App. 8
Judgment of Conviction, United States District Court, S.D. Fla., <i>United States v. David Pearson</i> , No. 14-cr-60099-WJZ (Jan. 9, 2015) .....	App. 33

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-10497-C

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DAVID PEARSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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ORDER:

David Pearson is a federal prisoner serving a 180-month sentence after pleading guilty to being a felon in possession of a firearm. He was sentenced as an armed career criminal, based on four prior Florida convictions: (1) sale or delivery of cocaine at or near a place of worship; (2) delivery of cocaine; (3) possession of cocaine with intent to deliver or sell; and (4) possession of oxycodone with intent to deliver or sell. He filed the instant 28 U.S.C. § 2255 motion, which the district court denied. He now seeks a certificate of appealability (“COA”) from this Court.

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court denies a motion to vacate on procedural grounds, the COA applicant must show that reasonable jurists would find debatable (1) whether the district court was correct in its procedural ruling, and (2) whether the § 2255

motion to vacate stated “a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel’s performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687.

A knowing and voluntary guilty plea “waives all nonjurisdictional defects in the proceedings.” *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). Thus, claims of ineffective assistance of counsel that do not implicate the validity of the plea are waived by a guilty plea, and a defendant who enters a guilty plea can attack only “the voluntary and knowing nature of the plea.” *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992).

In Pearson’s first two claims, he argued that his counsel failed to contest the traffic stop that led to the discovery of his firearm and failed to file a motion to suppress that firearm. Reasonable jurists would not debate that these two claims were procedurally barred. Pearson did not challenge the voluntariness or knowing nature of his plea, and thus, because his claims did not implicate the validity of the plea, his arguments were waived. *See Patti*, 337 F.3d at 1320; *Wilson*, 962 F.2d at 997.

Pearson argued, in his third claim, that his prior convictions did not qualify him as an armed career criminal. Pearson had two prior Florida convictions for delivering cocaine, which, as second-degree felonies, qualified as Armed Career Criminal Act (“ACCA”) predicates. *See* 18 U.S.C. § 924(e)(2)(A)(ii); Fla. Stat. Ann. §§ 893.13(1)(a), 893.03(2)(a)(4), and 775.082(3)(d). His conviction for possession with the intent to sell cocaine qualified as a third ACCA predicate,

qualifying him for the ACCA 15-year mandatory-minimum sentence. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). Accordingly, his counsel was not deficient for failing to challenge Pearson's ACCA enhancement. *See Strickland*, 466 U.S. at 687.

Finally, Pearson argued, in his fourth claim, that his counsel failed to file a direct appeal after being directed to do so. Counsel "is not under a *per se* constitutional obligation to consult with his or her client about an appeal." *Otero v. United States*, 499 F.3d 1267, 1270 (11th Cir. 2007); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 478-79 (2000) (rejecting a bright-line rule that, in every case, as a constitutional matter, counsel has a duty to consult with the defendant about an appeal). Here, the magistrate judge found, after an evidentiary hearing, that Pearson did not directly ask his attorney to file an appeal on his behalf, and his attorney testified that he would have filed one if Pearson had asked. When the sentencing court accepted the jointly-recommended sentence from the parties, Pearson's attorney had no reason to believe that anything worth appealing had occurred, and he testified that Pearson gave no indication that he was unhappy with the sentence. Accordingly, Pearson's attorney was not ineffective for failing to file a direct appeal. *Roe*, 528 U.S. at 480.

Because Pearson has not shown that reasonable jurists would find debatable the denial of his § 2255 motion, for the reasons stated above, his motion for a COA is DENIED.

/s/ Kevin C. Newsom  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-10497-C

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DAVID PEARSON ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

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

---

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

David Pearson has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 28, 2019, order denying a certificate of appealability, following the denial of his 28 U.S.C. § 2255 motion. Pearson argues, among other things, that this Court erroneously determined that his claim regarding counsel's failure to file a motion to suppress was waived by his guilty plea. He argues that his counsel's failure to file a motion to suppress rendered his plea involuntary, and, when a prisoner claims that the ineffective assistance of his counsel renders his plea involuntary, that claim cannot be waived by the plea itself.

Even assuming, *arguendo*, that Pearson's claim was not waived, he failed to demonstrate

prejudice. The two-part *Strickland*<sup>1</sup> test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). The prejudice prong “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process,” meaning a “defendant 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.”

*Id.* at 59.

Here, Pearson entered his plea, knowing that he was forgoing a motion to suppress, with the tacit agreement that, in exchange for agreeing to the 15-year sentence, the government would refrain from charging him with much more serious drug and sex trafficking crimes that could have resulted in a life sentence. Thus, he made no showing that he would not have entered the plea but for counsel’s failure to pursue a motion to suppress, and, in fact, he expressly entered the plea with full knowledge that the motion would not be filed.<sup>2</sup> *See id.* at 58-59. The remainder of Pearson’s motion reiterates arguments that this Court already considered and rejected. Accordingly, Pearson’s motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>2</sup> Pearson relies on *Arvelo v. Sec’y, Florida Dep’t of Corr.*, 788 F.3d 1345, 1348 (11th Cir. 2015) to argue that, “where a [defendant] faults his lawyer for failing to pursue a motion to suppress prior to entering a plea, both the deficient performance and prejudice prongs of *Strickland* turn on the viability of the motion to suppress.” However, in *Arvelo*, “[t]he State made no bargain with Mr. Arvelo in exchange for his plea. And there [was] no evidence that the state court imposed a lesser sentence because of the plea.” *Id.* at 1349 n.3.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62725-CIV-ZLOCH  
14-60009-CR-ZLOCH

DAVID PEARSON,

Movant,

vs.

**O R D E R**

UNITED STATES OF AMERICA,

Respondent.

/

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 34) filed herein by United States Magistrate Judge Patrick A. White and upon Movant David Pearson's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** as follows:

1. The Movant's Objections To The Magistrate's Report And Recommendation (DE 37) be and the same are hereby **OVERRULED**;
2. The Report Of Magistrate Judge (DE 34) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted, and ratified by the Court;
3. Movant David Pearson's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) be and the same is hereby **DENIED**; and

4. Final Judgment will be entered by separate Order.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 1st day of February, 2018.

  
\_\_\_\_\_  
WILLIAM J. ZLOCH  
Sr. United States District Judge

Copies furnished:

The Honorable Patrick A. White  
United States Magistrate Judge

All Counsel of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62725-CV-ZLOCH  
(14-60009-CR-ZLOCH)  
MAGISTRATE JUDGE P. A. WHITE

DAVID PEARSON,

Movant,

v.

REPORT  
OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.

---

I. Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his sentence entered after he pled guilty to possession of a firearm by a convicted felon in case number 14-60009-CR-ZLOCH.

The movant has raised a total of six claims. The movant initially raised the following issues:

1. Counsel was ineffective for failing to contest the traffic stop.
2. Counsel was ineffective for failing to suppress the gun that was discovered after the traffic stop.
3. Counsel was ineffective for failing to challenge his prior convictions that were used to qualify him as an armed career criminal.
4. Counsel was ineffective for failing to file a direct appeal after being requested to do so.

The movant filed two supplements to his initial motion in which he raised the following claims:

5. Counsel was ineffective for failing to object to the 2K2.1 enhancement.

6. It was constitutional error to use his Florida drug convictions as predicates to qualify him as an armed career criminal.

(CV-DE# 1). After review of the motion it was determined that an evidentiary hearing would be required to address the movant's third claim. (CV-DE# 12). Brittney Horstman was appointed as counsel.

## II. Procedural History

On May 8, 2014, the movant was charged by indictment with possession of a firearm by a convicted felon. (CR-DE# 8). His first appointed counsel filed a motion to withdraw because the movant insisted that he file a motion for a probable cause hearing and a motion to suppress. (CR-DE# 26). Counsel refused to file these motions because they were "without merit and frivolous." Counsel was permitted to withdraw and new counsel, Gregory Morse, was appointed. (CR-DE# 27, 28).

The movant entered a written plea agreement on October 6, 2014. (CR-DE# 34). In the plea agreement the movant acknowledged that the court was required to impose a minimum term of 15 years imprisonment. In a factual proffer executed the same day the movant agreed that he had been convicted of four drug felonies in state court. (CR-DE# 34-1).

A change of plea hearing was held on October 6, 2014. (CV-DE# 7-1). Prior to conducting the plea colloquy the court explained to the movant that if he did not understand anything he should ask for an explanation. He was also advised that if he wished to speak privately with his attorney he should feel free to ask. The movant was sworn. The court explained that the purpose of the hearing was for him to enter a plea of guilty. He was advised that it was strictly his decision to enter the plea. The movant acknowledged

reviewing the indictment and discussing the case with counsel. The movant was asked if he was satisfied with counsel's representation and responded "Absolutely, sir."

After the court reviewed the indictment, the movant acknowledged that he understood the charge. He had reviewed the factual proffer and agreed that everything contained in it was truthful and accurate. The movant acknowledged that he had reviewed the plea agreement with counsel prior to signing it and had no further questions about the plea agreement.

The court explained the rights the movant was giving up in electing to enter a plea of guilty. It was explained that by entering a guilty plea all that would remain would be sentencing. Before accepting the plea the court explained the potential sentencing outcomes. The movant understood that the court must impose a minimum sentence of 15 years up to life imprisonment.

The issue of the armed career criminal enhancement and the movant's criminal history was raised during the change of plea hearing. Counsel and the movant were given a moment to discuss the issue. He understood that the sentencing enhancements applied if he was an armed career criminal. The court explained that the movant had a right to appeal.

The court found the movant was alert and intelligent and understood the nature of the charges and the possible penalties. The movant was found to understand his rights and the consequences of pleading guilty. The court found there was a factual basis for the plea and that the plea was entered knowingly and voluntarily.

Prior to sentencing, a Presentence Investigation Report ("PSI") was prepared. The base offense level was set at 24 pursuant to U.S.S.G. § 2K2.1(a)(2) because the movant had two prior felony convictions of either a crime of violence or a controlled substance offense. (PSI ¶13). However, because the movant also qualified as an armed career criminal and was subject to an enhanced sentence, the offense level was set at 33. (PSI ¶19). As agreed in the plea agreement, the movant received a three level reduction for acceptance of responsibility. (PSI ¶¶20-21). His total offense level was 30. (PSI ¶22).

The movant's had 18 criminal history points. (PSI ¶¶23-45). The movant's criminal history included, *inter alia*, convictions for sale or delivery of cocaine (Case no. 99-16829CF10B), delivery of cocaine (case no. 99-17171CF10A), possession of cocaine with intent to deliver or sell (case no. 08-CF-1178), possession of cocaine with intent to deliver or sell (case no. 03881CF10A), and possession of oxycodone with intent to deliver or sell (case no. 10-12868CF10A). Since at least four of these convictions were serious drug offenses, the movant qualified as an armed career criminal. The movant's criminal history was VI based on either his 18 criminal history points or his status as an armed career criminal. (PSI ¶45-46).

On December 11, 2014 counsel filed a motion to withdraw. (CR-DE# 41). Counsel advised that the movant wished to withdraw his plea because counsel had not filed a motion for a probable cause hearing or a motion to suppress. Since the request to withdraw the plea was based on counsel's alleged failure to properly advise the movant, counsel pointed out that he had a conflict with the movant.

On December 15, 2014 the movant filed a pro se letter with the

court seeking to withdraw his plea. (CR-DE#45). He claimed that his plea was involuntary and lacking in a factual basis. He contended that if either of his attorneys had investigated the case they would have discovered a lack of probable cause for his arrest and would have pursued a motion to dismiss, a probable cause hearing or a motion to suppress. Attached to the letter was a copy of a series of e-mails with counsel in which the movant asked counsel to file a motion to withdraw his plea. Counsel responded that he would do so and would also be filing a motion to withdraw as counsel. Counsel also advised the movant of the risks of withdrawing the plea including the fact that the government could charge him with more serious crimes.

On December 18, 2014 an *ex parte* hearing was held on the motion to withdraw. (CR-DE# 58). Counsel explained that the government agreed that in return for a guilty plea to a 15 year sentence as a career criminal it would not file very serious charges of sex trafficking and armed drug trafficking. Counsel told the court that he had several meetings with the movant during which it was explained that he did not have to accept the plea. He advised the court that he had investigated the stop and after investigating found that given the government's offer it was not worth the risk to pursue a motion that was not meritorious. Counsel had tried to convince the movant that withdrawing the plea was not in his best interest. He also did not believe that he had legal grounds to withdraw his plea. Counsel reiterated that the movant was adamant that a probable cause hearing be held and a motion to suppress be filed. Counsel advised the court that he had not had an opportunity to review the PSI with the movant. The court provided a copy of the PSI to the movant.

The court addressed the movant, explaining that there was no

basis to withdraw his guilty plea. The court provided the movant a chance to explain his problems with counsel. The movant explained that he believed there was a problem with the probable cause. The court explained that the issue of probable cause was addressed before the grand jury in the issuance of an indictment. The movant then told the court that the initial stop was not supported by probable cause and therefore the gun should have been suppressed. He claimed that officers lied about the stop and the search of his vehicle. The court explained that even assuming the gun was suppressed there were other charges not associated with the gun that the government could have pursued. The court noted that by filing the motion to suppress the movant "would have opened up an enormous and very dangerous can of worms." Despite that risk, the court advised the movant that it was his choice whether to have his attorney pursue that course. The court also pointed out that if the plea were withdrawn and he went to trial, he would likely be facing additional serious charges with a possible life sentence. After hearing from the court, the movant asked for an opportunity to speak with counsel. Thereafter, counsel advised the court that the movant wanted him to remain as counsel and continue with his plea.

On January 9, 2016 the movant appeared for sentencing. (CV-DE# 7-1). At the start of the hearing the District Judge addressed the movant's motion to withdraw his plea to determine if the issue had been resolved. The movant acknowledged that he had withdrawn his request to withdraw his plea. After addressing this issue the court moved on to sentencing.

The movant acknowledged reviewing the PSI. There were no objections to the PSI. The parties agreed that the minimum mandatory sentence of 15 years was the appropriate sentence. The court sentenced the movant to 180 months imprisonment. In doing so

the court adopted the findings of the PSI. There were no objections to the manner by which the sentence was imposed. The movant was again advised of his right to appeal. There was no appeal.

The movant timely filed his motion to vacate on December 22, 2015. An evidentiary hearing was held on May 9, 2017.

### III. Discussion

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

The movant raises claims challenging counsel's effectiveness. In order to prevail on a claim of ineffective assistance of counsel, the movant must establish: (1) deficient performance - that his counsel's representation fell below an objective standard of reasonableness; and (2) prejudice - but for the deficiency in representation, there is a reasonable probability that the result

of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11<sup>th</sup> Cir. 2000) (*en banc*). The standard is the same for claims of ineffective assistance on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11 Cir. 1995).

In the context of a case in which guilty pleas or the equivalent were entered, application of the second prong of the two-prong Strickland standard requires a showing that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

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

Moreover, review of counsel's conduct is to be highly deferential. Spaziano v. Singletary, 36 F.3d 1028, 1039 (11 Cir.

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

#### **A. Counsel's Failure File Direct Appeal**

In his third claim the movant contends that counsel, Gregory Morse, failed to file a direct appeal. In the initial motion he alleged that he directed counsel to file a direct appeal. At the evidentiary hearing counsel suggested that even if the movant did not directly request an appeal, counsel had a duty to consult with him regarding the advantages and disadvantages of issues that could be appealed. Although this is the movant's third claim, it is addressed first because the testimony at the evidentiary hearing has impact upon the movant's other claims of ineffective assistance of counsel.

The law is clear that counsel's failure to file a direct appeal after being requested to do so by his client results in a per se constitutional violation of the movant's Sixth Amendment right to counsel, which entitles the movant to an appellate proceeding. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) ("we have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable"); United States v. Stanton, 2010 WL 3705964 (11<sup>th</sup> Cir. 2010) (quoting Flores-Ortega, supra.). There is a presumption of prejudice "with no further showing from the

defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." Roe v. Flores-Ortega, supra at 484. A defendant need not establish that his direct appeal would have been arguably meritorious; he need only show that his counsel's constitutionally deficient performance deprived him of an appeal he would have otherwise taken--i.e., the defendant expressed to his attorney a desire to appeal. Id.; see also, McElroy v. United States, 2007 WL 4393955, \*1 (11<sup>th</sup> Cir. 2007); Gomez-Diaz v. United States, 433 F.3d 788, 792 (11<sup>th</sup> Cir. 2005).

In the case of an appeal following a guilty plea, however, the defendant is entitled to an out-of-time appeal of sentencing issues only. Flores-Ortega, 528 U.S. at 483. Only sentencing claims may be raised on an out-of-time appeal following a plea because "the few grounds upon which the guilty plea may be challenged are not limited to direct appellate review, but instead are more appropriately raised in §2255 proceedings." Montemino at 417.

In determining if counsel had a duty to consult about an appeal there are several factors to consider. Flores-Ortega at 480. Those factors include whether the conviction followed a guilty plea, whether the movant received the sentence bargained for, whether there was an appeal waiver and whether there are non-frivolous grounds for appeal. Id. As noted by the Supreme Court, a plea of guilty "reduces the scope of potentially appealable issues" and also shows that "the defendant seeks an end to judicial proceedings." Id. "[E]vidence of nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal will often be highly relevant" in determining whether the movant was prejudiced by counsel's failure to consult about an appeal. Id. 484-485.

Testimony at Evidentiary Hearing

The movant testified that he attended the hearing on Mr. Morse's motion to withdraw on December 18, 2014. It was at that hearing that the movant first received a copy of the PSI. He and Mr. Morse reviewed the PSI after the hearing. The PSI indicated that he would be enhanced as an armed career criminal. He had previously discussed the enhancement with when Mr. Morse was initially appointed in his case. In those initial discussions there was still some question as to whether or not he would qualify, however the issue was not resolved prior to the entry of his plea. According to the movant, Mr. Morse was focused on the other potential charges. The movant understood that there were other charges that could have been presented in a superseding indictment.

The movant testified that a week before sentencing he asked Mr. Morse to challenge the armed career criminal enhancement because he did not believe he qualified. According to the movant, Mr. Morse said he would look into it. They discussed the prospect of appealing the issue after sentencing, but Mr. Morse advised him that if he appealed the government would pursue the other charges. The movant claimed Mr. Morse did not address any other advantages or disadvantages of pursuing an appeal. The movant testified that Mr. Morse told him he would object to the armed career criminal enhancement at sentencing.

When the movant arrived for his sentencing hearing he became aware that no objections to the enhancement had been filed. He claimed that Mr. Morse told him that if he raised an issue regarding the enhancement, the government would let the judge know about the other potential charges. According to the movant, when he tried to speak with Mr. Morse about raising the objections he was told to be silent. He testified that Mr. Morse did not provide him

any law on the issue of the armed career criminal enhancement. The movant claimed that after sentencing he "was communicating to [Mr. Morse] that [he] wanted to appeal that issue."

After sentencing the movant attempted to email and call Mr. Morse, but was unable to make contact. He also told family members that he was upset about his sentence and that Mr. Morse had not objected to the enhancement. He told them he was going to appeal his case. He did not realize appeal had not been filed until after the 14 days to file the notice had passed. According to the movant, his wife went to the courthouse to look at the docket. He claimed that he tried to file a notice of appeal on his own but was in the process of being transferred from Miami FDC to Coleman. He then determined he would have to file a section 2255 motion.

On cross examination the movant acknowledged that on two occasions he had sent letters to the judge expressing his dissatisfaction with counsel hoping that the issues would be addressed. The movant testified that he and Mr. Morse had discussed some of the uncertainties in the law regarding the Armed Career Criminal Act ("ACCA") that were currently pending in the courts. He acknowledged that Mr. Morse was focused on the fact that he could be charged with other serious crimes (including sex trafficking) and that it would be in his best interest to resolve the case with a joint recommendation of a 15 year sentence. He maintained, however, that he did not agree that he was an armed career criminal. The movant admitted that he had not raised any objections at the sentencing hearing, but claimed it was because he did not know anything about the law. He never wrote a letter to the judge when he realized no appeal had been filed.

Around the time of his sentencing the movant asked Mr. Morse

to communicate with state authorities about a pending state case. Mr. Morse attempted to do so on behalf of the movant. The movant did not ask any family members to contact Mr. Morse to file an appeal during the 14 day appeal period. The movant received a letter from Mr. Morse about a year after his sentencing. In that letter Mr. Morse advised the movant that he had reviewed case law and the PSI and determined that the recent Johnson case did not apply to him.

The movant had intended to call two witnesses at the hearing, however neither witness appeared. Counsel proffered to the court that the movant's father, Willie James Richardson, had become ill and was unable to travel. By stipulation of the parties the movant's father's affidavit was to be made a part of the record. That affidavit was submitted on May 12, 2017. (CV-DE# 32). In the affidavit Mr. Richardson recounts conversations with the movant. According to the affidavit, the movant expressed his displeasure with both his sentence and counsel's failure to challenge the enhancement. The movant also expressed his desire to appeal the sentence.

The government presented the testimony of Mr. Morse who has practiced as an attorney for 17 years. During his time as an criminal defense attorney has practiced as both an appellate and trial attorney. He testified that if a client asked him to file an appeal he would have no problem filing the notice of appeal.

Mr. Morse came to represent the movant after prior counsel was permitted to withdraw. He kept detailed notes of his meetings with the movant. He first met with the movant on July 22, 2014 when they discussed the case facts and the status of the case. Counsel also spoke to prior counsel on that date.

On August 25, 2014, Mr. Morse hand delivered a letter to the movant detailing the plea agreement. He advised the movant that it was ultimately his decision whether to accept the plea with a joint recommendation of a 15 year sentence. The movant did not tell Mr. Morse to object to the enhanced sentence. To the contrary, Mr. Morse testified that he knew the stakes if the plea was rejected.

He next met with the movant on September 23, 2014. They discussed a Broward County probable cause affidavit as it related to his federal case. On October 6, 2014 he met with the movant to discuss the government's plea offer. They also addressed some issues the movant had raised in a letter. In the letter the movant questioned whether there was a legal stop and whether there were grounds for a motion to suppress. They also discussed the armed career criminal enhancement's effect on the movant's sentence. Mr. Morse explained to the movant that his prior convictions under Florida Statute 893 were qualifying felonies. He also explained that part of the benefit of agreeing that he qualified as an armed career criminal was that the government would not prosecute him for other crimes that could potentially result in a much longer sentence. At no time after the October 6, 2014 meeting did the movant ask counsel to challenge the enhancement.

Mr. Morse next met with the movant on October 28, 2014, after the plea was signed. They discussed sentencing. The movant did not tell Mr. Morse to object to the armed career criminal enhancement as they had already discussed the issue on October 6, 2014 when the plea agreement was signed.

On December 30, 2014, Mr. Morse met with the movant to discuss the upcoming sentencing hearing. Mr. Morse explained what he expected would occur at sentencing and the prospect of an appeal

should the judge not follow the joint sentencing recommendation. Mr. Morse asked the movant if he wanted to object or challenge anything. The movant did not express a desire to object as it was accepted that it was a joint recommendation. Mr. Morse explained under what circumstances an appeal would be appropriate. He explained that they would appeal if the court went above the guideline range or if the court relied on facts outside the PSI. The movant understood that if the sentence stayed within the joint recommendation they would not appeal.

At the sentencing hearing the movant never expressed a desire to object to the armed career criminal enhancement. Mr. Morse never told the movant to be quiet. If the movant had wanted to speak to Mr. Morse he would have asked for a moment to speak with him. The movant gave no indication that he was upset with the 15 year sentence. After sentencing Mr. Morse and the movant talked about his state case. Mr. Morse asked him to try to get the state case resolved. Mr. Morse contacted the public defender and the judge in the state case to inform them of his federal sentence.

Mr. Morse reiterated that the movant had never asked him to file a notice of appeal. He testified that filing the notice was a simple procedure which he would have happily done, whether he agreed with an appeal or not. He never heard from the movant's wife or father. He did not hear from the movant via letter or phone call after sentencing.

On cross examination was asked about legal research he performed regarding the Armed Career Criminal Act ("ACCA"). He conducted research on the issue in August in preparing a scoresheet should the government pursue a superseding indictment with additional charges. Counsel was aware of the state of the law

because he had discussed it with the movant and had been following the developments in the law because he had other clients who were impacted by the ACCA.

Mr. Morse testified that there were challenges that could be raised to the enhancement, especially since the law was in a state of flux. However, the movant had prior state drug convictions with possession and an element of intent to distribute which would qualify as serious drug offenses and the movant wanted to accept the plea. Mr. Morse advised him he could challenge the priors, or file a motion to suppress, but the risk was that if they lost he may be facing life in prison. Mr. Morse had reviewed the movant's priors in discovery and found they were qualifying serious drug offenses notwithstanding the state of the law.

Mr. Morse testified that if after the 14 day period to file the appeal had expired he would have pursued a belated appeal.

#### Merits of Claim

The testimony of Mr. Morse was credible. He testified that he kept contemporaneous notes of his meetings with the movant. His testimony indicated an excellent recollection of his interactions with the movant and their discussions regarding the ACCA and the plea agreement.

Regarding the discussions between Mr. Morse and the movant, there was little dispute up to the point where the movant claims that he asked counsel to challenge the ACCA enhancement. Prior to that time the evidence establishes that the primary concern of the movant was avoiding the filing of a superseding indictment charging him with more serious offenses including sex trafficking and armed drug trafficking. In exchange for his guilty the government chose

not to pursue those additional charges. As part of the plea agreement the movant admitted that he had four convictions for serious drug offenses. There is no dispute over the plea agreement.

The only dispute in the testimony regards what happened leading up to sentencing. The movant contends that he asked Mr. Morse to challenge the ACCA enhancement at sentencing. Mr. Morse testified that there was no discussion of challenging the enhancement after the plea agreement was signed. Mr. Morse testified that he explained the movant's options to him prior to signing the plea agreement. Among those options was a challenge to the ACCA enhancement. According to Mr. Morse's testimony, which the court finds credible, the movant agreed not to challenge the enhancement in order to avoid being charged with more serious offenses in a superseding indictment. This agreement was made only after Mr. Morse explained the risks of challenging the enhancement and making it clear that it was the movant's choice. It is evident that the movant made a choice to avoid the more serious charges. Therefore the court finds that the movant did not ask Mr. Morse to challenge the ACCA enhancement at sentencing or to file an appeal of the sentence. Since there was no direct request for an appeal counsel was not *per se* ineffective.

Mr. Morse was also not ineffective for failing to consult with the movant about an appeal. Mr. Morse explained the options of challenging the ACCA enhancement and the possibility of appealing an adverse ruling. However, Mr. Morse also explained that under the law, as it stood leading up to sentencing, the movant's prior convictions qualified as serious drug offenses supporting the ACCA enhancement. Mr. Morse advised the movant of that by challenging the enhancement he risked the filing of additional serious charges. It is evident that the movant elected to forego any challenge in

order to avoid the potential of a life sentence on these other charges after being advised of the advantages and disadvantages of that decision.

Additionally, Mr. Morse engaged in lengthy discussions about the advantages and disadvantages of pursuing an appeal. Mr. Morse was aware that the state of the law regarding the ACCA was in flux during the period of the plea negotiations leading up to sentencing. He and the movant discussed the uncertainties. After these discussions, the movant decided not to file an appeal. Thus the record refutes the movant's claim that counsel failed to consult with him regarding an appeal. This claim should be denied.

Failure to Challenge Stop and File Motion to Suppress

In his first and second claims, the movant contends that counsel was ineffective for failing to challenge his initial stop and failed to file a motion to suppress the evidence that was found as a result of that stop. These related claims were raised in the movant's pro se motion to withdraw his plea. That motion resulted in Mr. Morse filing a motion to withdraw as counsel. The motion to withdraw was the subject of an ex parte hearing. As recounted above, at the end of the ex parte hearing the movant withdrew his motion to withdraw his plea. The movant has once again attempted to raise this claim of ineffective assistance of counsel in these proceedings. This claim a was not a subject of the evidentiary hearing.

Where a criminal defendant enters a knowing, voluntary, and intelligent plea of guilty to an offense or offenses, he waives, or more accurately, forfeits all non-jurisdictional defects and defenses. See United States v. Broce, 488 U.S. 563 (1989); McMann v. Richardson, 397 U.S. 759 (1970) (voluntary guilty plea waives

all non-jurisdictional defects); United States v. De La Garza, 516 F.3d 1266, 1271 (11<sup>th</sup> Cir. 2008), quoting, Wilson v. United States, 962 F.2d 996 (11<sup>th</sup> Cir. 1992) (claim of ineffective assistance of counsel relating to pre-plea issues waived by voluntary guilty plea); McCoy v. Wainwright, 804 F.2d 1196, 1198 (11<sup>th</sup> Cir. 1986) (voluntary guilty plea waives all non-jurisdictional defects); see also, United States v. Glinsey, 209 F.3d 386, 392 (5<sup>th</sup> Cir. 2000), citing, United States v. Smallwood, 920 F.2d 1231, 1240 (5<sup>th</sup> Cir. 1991); Smith v. United States, 447 F.2d 487, 488 (5<sup>th</sup> Cir. 1971), citing, Hayes v. Smith, 447 F.2d 488 (5<sup>th</sup> Cir. 1971). "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary." United States v. Glinsey, 209 F.3d at 392.

To ensure that a plea is voluntary and knowing, Fed.R.Cr.P. 11(b)(1) states that "the court must address the defendant personally in open court before accepting the plea and inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading." Gordon v. United States, 496 F.3d 1270, 1277 (11<sup>th</sup> Cir. 2007). The rule imposes upon a district court the obligation and responsibility to conduct a searching inquiry into the voluntariness of a defendant's guilty plea. Id. (citations omitted).

Thus, "[a] court accepting a guilty plea must comply with Rule 11 and specifically address three 'core principles,' 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." United States v. Moriarty, 429 F.3d 1012, 1019 (2005). 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 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.

Review of the change of plea proceedings reveals that the court conducted a thorough Rule 11 proceeding. (CV-DE# 7-1). At that time, the movant acknowledged under oath<sup>1</sup> that he was satisfied with counsel's representation, and that he had discussed the indictment, the government's case and the nature of the charges with counsel prior to the change of plea. The court advised, and the movant acknowledged, the potential consequences of entering a guilty plea. The movant also denied being forced, threatened or coerced into pleading guilty. The court further advised the movant of the essential elements of the offense, as well as, potential maximum sentence.

In addition to the change of plea hearing, this issue was thoroughly discussed at an ex parte hearing on counsel's motion to withdraw. The movant sought to remove counsel on the ground that he had not pursued these issues prior to entering the plea. After a

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<sup>1</sup>The law is clear that "solemn declarations in open court carry a strong presumption of verity," forming a "formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); United States v. Rogers, 848 F.2d 166, 168 (11<sup>th</sup> Cir. 1988). The subsequent presentation of conclusory allegations, unsupported by specifics, is subject to summary dismissal, as are contentions which in the face of the record are wholly incredible. Machibroda v. United States, 368 U.S. 487 (1962).

candid discussion about the risks of pursuing these claims, the movant agreed to withdraw his motion.

On the record before this court, it is evident that the movant understood the facts and the elements of the offense upon which the charges rested. Moreover, by way of entering into the negotiated plea agreement, the movant was telling his lawyer not to conduct any further investigation and not present at a trial proceeding any legal defenses that he may be entitled to as it relates to his case or pursue the motion to suppress. It is further clear that the movant knew that he was foregoing a motion to suppress the gun with the full knowledge that he was avoiding a superseding indictment involving additional serious charges. Under these circumstances, no showing has been made that the plea was anything but knowing and voluntary. Therefore, the movant's knowing and voluntary guilty plea waived all non-jurisdictional defects and defenses. Thus, he is not entitled to review of these two claims.

Even if this claim were reviewable, the movant would not be entitled to relief. As has been discussed earlier, the movant was advised of the advantages and disadvantages of pursuing the a motion to suppress attacking the probable cause for the stop. Counsel advised him that the motion was not meritorious and pursuing it risked losing a favorable plea offer that did not include the other serious charges. The movant's plea was entered with a full understanding of counsel's strategic decisions. He has made no showing the he would not have entered the plea but for counsel's failure to pursue a motion to suppress, to the contrary, he expressly entered the plea with full knowledge that the motion would not be filed.

Sentencing Enhancements

In three related claims the movant challenges the use of his prior state convictions to enhance his sentence. He contends that counsel was ineffective for failing to challenge his prior state convictions as predicates for his ACCA enhancement and for failing to object to an increase in his base offense level under U.S.S.G. §2K2.1.<sup>2</sup> The §2K2.1 claim was raised as a supplement to his original motion. He further argues that it was error to use his Florida drug convictions as predicates for his ACCA enhanced sentence. He contends that if the prior convictions had been challenged he would not have been sentenced as either an armed career criminal or a career offender.

None of these claims warrant relief. As was discussed above regarding the movant's claim that counsel failed to file a direct appeal, this claim is refuted by the record. The testimony at the evidentiary hearing established that by entering his guilty plea the movant admitted that he had four prior convictions for serious drug offenses. The plea was made with the knowledge that his priors could be challenged. The movant made a conscious decision to not challenge the priors in exchange for the government foregoing additional serious charges. Furthermore, as discussed, *infra*, the movant's prior Florida convictions qualified as serious drug offenses under the ACCA. The movant has failed to establish either that counsel's performance was deficient or that he was prejudiced. His claim that counsel was ineffective for failing to challenge his prior convictions should be denied.

The court did not err by using the movant's prior Florida drug convictions as predicates for the ACCA enhancement. The movant's

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<sup>2</sup>Because the movant was sentenced as an armed career criminal rather than as a career offender, his challenge to §2K2.1 is moot. His offense level was based upon his status as an armed career criminal pursuant to U.S.S.G. §4B1.4(b) (3).

prior Florida drug convictions all qualify as serious drug offenses under the ACCA. Just prior to the movant's sentencing the Eleventh Circuit issued an opinion finding that a conviction for possession with intent to sell under Florida law was serious drug offense. United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014) ("Section 893.13(1) of the Florida Statutes is both a "serious drug offense," 18 U.S.C. § 924(e)(2)(A), and a "controlled substance offense," U.S.S.G. § 4B1.2(b)."). This decision merely continued the Eleventh Circuit's prior holdings that sale, manufacture, or delivery of cocaine constitutes a serious drug offense for purposes of the ACCA. See United States v. Home, 206 Fed.Appx. 942, 944 n.3 (11<sup>th</sup> Cir. 2006) (sale or delivery of cocaine is a serious drug offense for purposes of enhanced sentence as an armed career criminal); United States v. Johnson, 515 Fed.Appx. 844, 847 (11<sup>th</sup> Cir. 2013) (delivery of a controlled substance qualifies as a serious drug offense under the ACCA). Since the movant's prior convictions qualified as serious drug offenses, the court properly relied on this conviction when enhancing movant's sentence under the ACCA. The movant's claim that the court's use of these convictions violated the constitution should be denied.

#### **VII. Certificate of Appealability**

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of

appealability under 28 U.S.C. §2253 (c).” See Fed.R.App.P. 22 (b) (1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

However, “[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11<sup>th</sup> Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11<sup>th</sup> Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

#### **VIII. Conclusion**

Based on the foregoing, it is recommended that the motion to vacate be denied. It is further recommended that no certificate of appealability issue herein, 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 24<sup>th</sup> day of May, 2017.



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UNITED STATES MAGISTRATE JUDGE

cc: Brittney B. Horstman, Esq.  
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United States District Court  
Southern District of Florida  
FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number - 0:14-60099-CR-ZLOCH-1

DAVID PEARSON

USM Number: 05169-104

Counsel For Defendant: Gregory Morse, Esq.  
Counsel For The United States: Francis Viamontes, Esq., AUSA  
Court Reporter: Tammy Nestor

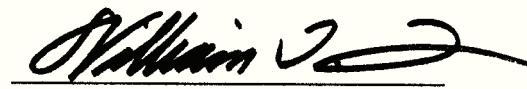
The defendant pleaded guilty to the One Count Indictment.  
The defendant is adjudicated guilty of the following offense:

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. §§ 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	April 25, 2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:  
January 6, 2015



WILLIAM J. ZLOCH  
United States District Judge

January 9, 2015

ALL PENDING MOTIONS ARE HEREBY DENIED AS MOOT.

DEFENDANT: DAVID PEARSON  
CASE NUMBER: 0:14-60099-CR-ZLOCH-1

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months** as to the One Count Indictment.

The defendant is remanded to the custody of the United States Marshal.

The Court recommends a Federal facility in South Florida.  
The Court recommends the 500 Hour Drug Abuse Program.

**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
**UNITED STATES MARSHAL**

By: \_\_\_\_\_  
**Deputy U.S. Marshal**

DEFENDANT: DAVID PEARSON  
CASE NUMBER: 0:14-60099-CR-ZLOCH-1

## **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**. Within 72 hours of release, the defendant shall report in person to the probation office in the district where released.

While on supervised release, the defendant shall not commit any crimes, shall be prohibited from possessing a firearm or other dangerous devices, shall not possess a controlled substance, shall cooperate in the collection of DNA, and shall comply with the standard conditions of supervised release and with the special conditions listed on the attached page.

## **STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer **within seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DAVID PEARSON  
CASE NUMBER: 0:14-60099-CR-ZLOCH-1

### **SPECIAL CONDITIONS OF SUPERVISION**

The defendant shall also comply with the following additional conditions of supervised release:

**Permissible Search** - The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

**Substance Abuse Treatment** - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DAVID PEARSON  
CASE NUMBER: 0:14-60099-CR-ZLOCH-1

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<b><u>Total Assessment</u></b>	<b><u>Total Fine</u></b>	<b><u>Total Restitution</u></b>
\$100.00	\$	\$

\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DAVID PEARSON  
CASE NUMBER: 0:14-60099-CR-ZLOCH-1

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

**The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:**

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
400 NORTH MIAMI AVENUE, ROOM 8N09  
MIAMI, FLORIDA 33128-7716**

**The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.**

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.