APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12195-A

JOHNNY L. DAWSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Johnny Dawson is a federal prisoner serving a 15-year sentence after he pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He was sentenced under the Armed Career Criminal Act ("ACCA"), based on his prior Florida convictions, including: (1) two sale of cocaine offenses; (2) possession with intent to sell cocaine; and (3) aggravated assault with a deadly weapon. Dawson appealed, and this Court affirmed, noting that his complaints about his ACCA sentence were meritless because he had three prior convictions that qualified as "serious drug offenses."

Dawson subsequently filed this 28 U.S.C. § 2255 motion, arguing that: (1) trial counsel failed to argue that his prior drug convictions did not qualify as ACCA predicates because the offenses lacked *mens rea* elements; and (2) appellate counsel failed to challenge the use of his aggravated assault conviction as an ACCA predicate. The district court denied Dawson's § 2255

motion, and denied him a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") on appeal, both of which he now seeks in this Court.

To obtain a COA, a § 2255 movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A movant must demonstrate that reasonable jurists would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Under the ACCA, any person who violates § 922(g), and has 3 previous convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). Under Florida law, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Fla. Stat. Ann. § 893.13(1). This Court has determined that a violation of § 893.13(1) involving cocaine is a "serious drug offense." *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014).

Reasonable jurists would not debate the denial of Dawson's claim regarding trial counsel because his prior Florida drug offenses were ACCA predicates, and the argument that counsel supposedly should have made was foreclosed by precedent. *See id.* Additionally, reasonable jurists would not debate the denial of Dawson's claim regarding appellate counsel because Dawson could not show prejudice, as he still would have had three ACCA predicates, even without the aggravated assault conviction. *See* 18 U.S.C. § 924(e)(1); *Strickland*, 466 U.S. at 687, 694.

Accordingly, Dawson's COA motion is DENIED, and his IFP motion is DENIED AS MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

NUNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY L. DAWSON,

Plaintiff,

v. **Case No: 8:19-cv-257-T-33AEP**

Criminal Case No. 8:16-cr-500-T-33AEP

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order entered April 15, 2019, the Plaintiff's motion to vacate, set aside or correct sentence, is hereby denied.

ELIZABETH M. WARREN, CLERK

By: B. Sohn, Deputy Clerk

Date: April 16, 2019

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY L. DAWSON,

v. Case No. 8:16-cr-500-T-33AEP
8:19-cv-257-T-33AEP

UNITED STATES OF AMERICA.

ORDER

This cause is before the Court on pro se Johnny L. Dawson's timely-filed 28 U.S.C. § 2255 motion to vacate, set aside, or correct an illegal sentence. (Doc. cv-1; cr-63). Respondent responded to the motion (Doc. cv-5), and Dawson replied to the response. (Doc. cv-8).

After review, the motion to vacate must be denied.

BACKGROUND

A police officer responded to a call about a man with a gun wrapped in a t-shirt. The man was on a blue bicycle wearing white shorts, a black shirt, and a Chicago Bulls baseball cap. (Doc. cr-34 ¶ 10). When the officer arrived at the address identified in the call, he saw Dawson, who matched the description the caller had provided the police, sitting on a bicycle holding a dirty white t-shirt. (*Id.* ¶ 11). As the officer approached, Dawson moved in the opposite direction, walked toward a tree, and placed the white t-shirt behind his back. (*Id.*). When Dawson moved the t-shirt behind his back, the officer observed the outline of a handgun inside the shirt and ordered Dawson to raise his hands. (*Id.*). Dawson did not immediately comply, but instead, placed the t-shirt onto a chair on the sidewalk and began

to run. (*Id.*). The officer successfully apprehended Dawson and gathered up the t-shirt, which held a Smith and Wesson .380 revolver. (*Id.*). The firearm was loaded with five rounds of ammunition, and its hammer was cocked in the ready-to-fire position. (*Id.*).

Although Dawson initially claimed that he picked up the gun and did not know what to do with it when officers arrived, post-*Miranda* he admitted, among other things, that he knew it was a gun when he picked it up and that he had wrapped it in the t-shirt. (*Id.* at ¶ 12). Dawson also admitted that he cocked the gun's hammer and knew that the gun was loaded. (*Id.*). At the time Dawson handled the firearm, he had at least three prior drug convictions and a conviction for aggravated assault with a deadly weapon.

Dawson was charged with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Doc. cr-1). Dawson pled guilty to that charge pursuant to a written plea agreement. (Docs. cr-22, 23).

During his change-of-plea hearing, Dawson denied ever being treated for any type of mental illness. (Doc. cr-53 at 4). Dawson confirmed that he had reviewed and discussed the plea agreement with counsel. (*Id.* at 5). Dawson understood that if he were found to be an armed career criminal, he faced an enhanced sentence with a mandatory-minimum prison term of 15 years and up to life in prison. If he were not an armed career criminal, he faced a maximum sentence of 10 years incarceration. (*Id.* at 10-11).

Dawson was informed that the sentencing guidelines were advisory and that if he were an armed career criminal, this Court's authority to sentence him to less than 15 years incarceration was severely restricted. (*Id.* at 12-13).

The Court found that Dawson was competent and that his guilty plea was knowing and voluntary. (*Id.* at 18). Dawson did not object to the Report and Recommendation. The

Court accepted his guilty plea and adjudicated him guilty. (Docs. cr-26, 27).

Dawson was an armed career criminal under United States Sentencing Guideline (USSG) § 4B1.4 because he had three prior serious drug offense convictions and a conviction for aggravated assault with a deadly weapon. (Presentence Report [PSR] ¶¶ 30, 35, 41, 44, 46). After a three-level reduction for acceptance of responsibility, Dawson faced a total offense level of 30. (*Id.* at ¶ 32). With a criminal history category of V, Dawson faced a statutory minimum term of 15 years and up to life in prison, and a guideline imprisonment range of 180-188 months. (*Id.* at ¶¶ 106, 107).

At sentencing, defense counsel had no objections to the factual accuracy of the PSR and could not "make in good faith any objections to the guidelines." (Doc. cr-41 at 4-5). The Government, acknowledging that much of Dawson's criminal history was older, noted his offenses had "escalated over time in their nature," and requested a guideline sentence with no objection to the mandatory-minimum sentence. (*Id.* at 5-9). Defense counsel argued that over the last seven or eight years, Dawson had "turned his life around." (*Id.* at 10). Defense counsel recognized that this Court's "hands were tied" and asked for the mandatory-minimum sentence, explaining that Dawson never intended to harm anyone with the firearm; was trying to cooperate with law enforcement; and that the offense did not include violence. (*Id.* at 10-12).

After reviewing the PSR, advisory guidelines, and the sections 3551 and 3553 factors, this Court sentenced Dawson to 180 months incarceration. (*Id.* at 17; Doc. cr-39.) The Court stated that the sentence was "sufficient, but not greater than necessary to comply with the statutory purposes of sentencing." (*Id.* at 19). This Court further explained that it was Dawson's background that "hurt [him] the most[,]" particularly his prior drug convictions

that formed the basis for his armed career criminal designation. (*Id.* at 19-21).

Dawson timely filed a section 2255, alleging his counsel failed to file a notice of appeal. (Docs. cr-43, 44). In the interest of judicial economy, the Court granted Dawson's section 2255 motion, vacated his original judgment, and entered a new judgment allowing him to file a notice of appeal. (Docs. cr-44, 45). Dawson appealed, and defense counsel filed an *Anders*[1] brief after finding no issues of arguable merit. (Docs. cr-49; 60 at 2). Dawson then filed a pro se brief claiming he was inappropriately sentenced to a 15-year prison term under the Armed Career Criminal Act (ACCA); that this Court failed to advise him that he faced that sentence, and that this Court did not ensure his guilty plea was knowing, intelligent, and voluntary in light of his personal and family history of mental and cognitive impairment. (Doc. cr-60 at 2-3).

The Eleventh Circuit Court of Appeals deemed these claims to be meritless. (Doc. cr-60). The appellate court also declined to review Dawson's allegations that defense counsel had misled him during plea negotiations and failed to account for his mental incapacity, construing these claims as allegations of ineffective assistance of counsel that were more properly considered under section 2255. (*Id.* at 4). The appellate court affirmed Dawson's conviction and sentence. (*Id.*); *United States v. Dawson*, 719 F. App'x. 991 (11th Cir. 2018). On October 1, 2018, the United States Supreme Court denied Dawson's petition for certiorari review. (Doc. 62; *Dawson v. United States*, 139 S. Ct. 204 (2018)).

Dawson now contends that his counsel was ineffective for failing to argue that his prior drug convictions did not qualify as ACCA predicates (Ground One); the *Strickland v.*

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[1] *Anders v. California*, 386 U.S. 738 (1967).

Washington, 466 U.S. 668, 687 (1984) presumption of effectiveness should be reconsidered and overruled (Ground Two); appellate counsel was ineffective for failing to challenge his aggravated assault conviction (Ground Three); and counsel misled him during plea negotiations and failed to account for his "mental incapacity" (Ground Four). (*See generally,* Docs. cv-1 and cv-1-1.)

DISCUSSION

Burden of Proof

In general, on collateral review, the defendant bears the burden of proof and persuasion on each and every aspect of his claim, *see In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (collecting cases), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review, *see United States v. Frady*, 456 U.S. 152, 164-66 (1982). Accordingly, if this Court "cannot tell one way or the other" whether the claim is valid, then the defendant has failed to carry his burden. *Moore*, 830 F.3d at 1273; *cf. United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005) (In plain error review, "the burden truly is on the defendant to show that the error actually did make a difference ... Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the plain error test, and the burden is on the defendant."). Dawson cannot meet this burden.

Cognizability

Dawson's claims that counsel was ineffective (Grounds One, Three, and Four) are grounded in the Sixth Amendment and are cognizable under 28 U.S.C. § 2255. *Lynn v. United States*, 365 F.3d 1225, 1234 n.17 (11th Cir. 2004) (Ineffective assistance claims should be decided in section 2255 proceedings.).

Dawson's claim that the *Strickland* standard should be overturned (Ground Two), is not cognizable under section 2255.

Specifically, Section 2255 authorizes an attack on a sentence on four grounds: (1) it was imposed in violation of the Constitution or laws of the United States; (2) it was imposed without jurisdiction; (3) it exceeds the maximum authorized by law; or (4) it is otherwise subject to collateral attack. 28 U.S.C. § 2255. "Section 2255 does not provide a remedy for every alleged error in conviction and sentencing." *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (*en banc*). A motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255, is generally the proper means to challenge the imposition or length of detention. *Lawston v. United States*, 2014 WL 11444107, *2 (S.D. Fla., April 24, 2014). Dawson's claim that *Strickland* should be overturned is not an attack on his sentence; will not be considered by this Court; and, therefore, merits no further discussion.

Prior Resolution

Dawson cannot obtain review of his arguments that counsel was ineffective for failing to argue his prior drug convictions do not qualify as ACCA predicates (Ground One) because that claim -- absent the allegation of ineffective assistance of counsel -- was resolved against him in an earlier proceeding. "Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255." *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) (quoting *United States v. Natelli*, 553 F.2d 5, 7 (2d Cir. 1977)); *see Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir. 1995) (Section 2255 motion is "neither a recapitulation of nor a substitute" for direct appeal; absent changed circumstances of fact or law, court will not reconsider an issue

already decided on direct appeal.).

On direct appeal, Dawson claimed that his three prior drug convictions under Florida Statute § 893.13(1) should not have been used as ACCA predicates. (Doc. cr-60 at 2). In a lengthy argument, Dawson appears to claim that his counsel was ineffective for failing to argue that his prior drug offenses lacked an implied element of a "serious drug offense," namely, "an implied *mens rea* element." (*See generally* Doc. cv-1-1 at 2-30.) Dawson clearly recognizes that this argument is virtually identical to the one that he raised and lost on direct appeal because he repeatedly challenges *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) -- the case upon which the Eleventh Circuit relied to deny him relief on direct appeal -- throughout his argument. Even if this Court were inclined to consider Dawson's claim, he is not entitled to relief.

MERITS

Standard of Review

To succeed on an ineffective assistance of counsel claim, a petitioner must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. at 687. When evaluating performance, this Court must apply a "strong presumption" that counsel has "rendered adequate assistance and [has] made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. "We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested

in whether the adversarial process at trial, in fact, worked adequately." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (*en banc*) (quoting *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir.1992)).

To establish deficient performance, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). A petitioner demonstrates prejudice only when he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If the petitioner fails to establish either of the *Strickland* prongs, his claim fails. *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1319 (11th Cir. 2005).

Ground One

Dawson claims that counsel was ineffective for failing to challenge his prior Florida § 893.13 drug convictions. As discussed above, Dawson raised and lost this claim on direct appeal. Dawson concedes that the Eleventh Circuit's decision in *United States v. Smith* squarely holds that his convictions under § 893.13(1) qualify as serious drug offenses, notwithstanding the lack of an element of *mens rea* with respect to the illicit nature of the controlled substance. (Doc. cv-1-1 at 4-5; *see also, Smith*, 775 F.3d at 1266-68. This Court -- like Dawson's counsel -- is bound by that holding. *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017) ("We are bound to follow *Smith*."); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this court sitting *en banc*"); *see also, Smith*, 775 F.3d at 1266-67

(rejecting argument that court should imply an element of *mens rea* in the federal definitions for "serious drug offense" and "controlled substance offense"; stating "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either [the federal statute or Sentencing Guidelines' respective] definition[s].").

Ground one does not warrant relief.

Ground Three

Dawson contends that appellate counsel "abandoned" him by not arguing that his prior conviction for aggravated assault with a deadly weapon no longer qualified as a "crime of violence" within the meaning of the ACCA. (Doc. cv-1 at 6-7). Ground three is meritless.

An effective appellate attorney is not required to raise every non-frivolous issue. Indeed, it is an effective strategy to "winnow out" weaker arguments even though they may have some merit. *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Moreover, the law recognizes that an attorney does not perform deficiently by failing to assert an argument that binding circuit precedent foreclosed at that time. *See United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001).

The law clearly provides that "a person who violates section 922(g)" and "has three previous convictions by any court ... for a violent felony or a serious drug offense, or both, ... shall be ... imprisoned not less than fifteen years[.]" 18 U.S.C. § 924(e)(1). The Eleventh Circuit has confirmed that Dawson's three prior Florida drug convictions qualify as "serious drug offenses" under the ACCA. (Doc. cr-60 at 2; *see also Smith*, 775 F.3d at 1267-68.

Stated differently, Eleventh Circuit law foreclosed (and still forecloses) Dawson's argument as to why his prior convictions should not be deemed to qualify under the ACCA. Therefore, any challenge to his prior assault conviction would not have changed the

outcome either at sentencing or on direct appeal. Dawson fails to demonstrate either deficient performance or prejudice and, accordingly, is not entitled to relief on ground three.

Ground Four

Dawson alleges that defense counsel misled him during plea negotiations, and failed to account for an unidentified "mental incapacity."[2] (Doc. cv-1 at 8). To support this claim, Dawson provides an affidavit asserting that counsel informed him he would receive a sentence between three and four years. (Doc. cv-1-1 at 35).

When Dawson received the PSR and learned he was an armed career criminal, Dawson claims counsel advised that he would challenge Dawson's prior convictions at sentencing. (*Id.*). Counsel, however, did not challenge or object to the ACCA designation, resulting in Dawson's pleading guilty "without knowing the exact penalty [he] was facing." (*Id.*). His sworn statements made during his change-of-plea hearing, however, contradict his unsupported claims. (*See* Doc. cr-53 at 10-11.) Thus, this claim fails because it does not meet the stringent requirements outlined in *Strickland* and *Hill v. Lockhart*, 474 U.S. 52 (1985).

In *Hill*, the Supreme Court held that "the two part [*Strickland*] test applies to challenges to guilty pleas based on ineffective assistance of counsel," and that "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability

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[2] The Eleventh Circuit rejected Dawson's claim that this Court did not take proper steps to ensure his guilty plea was knowing, intelligent, and voluntary "in light of his personal and family history of mental and cognitive impairment." (Doc. cr-60 at 3). The appellate court noted that during his plea colloquy Dawson stated that he had never been treated for mental illness and, through his PSR, verified that he had no personal or family history of mental or emotional problems. (*Id.*; *see also* Doc. cr-53 at 4).

that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 58-59. Under Federal Rule of Criminal Procedure 11, the Court must inform the defendant of any possible maximum penalty and any mandatory minimum penalty to which he will be subjected to by pleading guilty, and ensure that the defendant understands the sentencing range. Fed. R. Crim. P. 11(b)(1)(H)-(I). Rule 11 also "imposes upon a district court the obligation and responsibility to conduct an inquiry into whether the defendant makes a knowing and voluntary guilty plea." *United States v. Gandy*, 710 F.3d 1234, 1240 (11th Cir. 2013).

During a change-of-plea hearing, the court must address three core concerns: (1) the guilty plea must be free of coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *Gandy*, 710 F.3d at 1240. Failure to address any of those core concerns amounts to plain error. *Id.* A variance from the requirements of Rule 11, however, is harmless error if it does not affect a defendant's substantial rights. *Id.* A defendant who seeks reversal of his conviction after a guilty plea due to Rule 11 error "must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.*

Dawson does not even attempt to carry his burden of establishing that, but for purported errors, he would have proceeded to trial. Nothing in the record indicates that Dawson would not have entered his guilty plea. In fact, the record clearly demonstrates the opposite. The Court addressed each core principal of Rule 11, which Dawson subsequently indicated that he understood. *(See generally* Docs. cr-53, 60.) Dawson voluntarily chose to plead guilty knowing fully the elements of his crimes and the potential penalties and ramifications. (*See generally*, Doc. cr-53). On direct appeal the Eleventh Circuit found that

Dawson's claim -- that he did not plead guilty knowingly, intelligently, and voluntarily because the court did not tell him he could face a 15-year ACCA prison sentence -- was wholly meritless. (Doc. cr-60 at 3 [stating that the magistrate judge at the change-of-plea hearing "affirmatively told Dawson that he might be subject to 'a mandatory minimum term of imprisonment of 15 years'" and "expressly asked Dawson whether he understood the penalties he faced," to which Dawson replied, "Yes, sir"]).

"There is a strong presumption that statements made during the plea colloquy are true," and Dawson "bears a heavy burden to show that his statements under oath were false." *Patel v. United States*, 252 F. App'x. 970, 975 (11th Cir. 2007) (*per curiam*) (citation omitted). Dawson readily admitted at his plea colloquy that he understood the potential penalties he faced. (*See generally* Doc. cr-53.)

A section 2255 motion is not designed to account for buyer's remorse regarding a defendant's decision to plead guilty. *Monsegue v. United States*, 2017 WL 1128455, *4 (S.D. Ga., Mar. 24, 2017) (citations and quotations omitted); *see also Nelson v. United States*, 2015 WL 4756975, *1 (S.D. Ga., Aug. 11, 2015) ("Nelson has wasted this Court's time with a 'buyer's remorse' filing. He chose to plead guilty with full knowledge of the consequences. Now he must live with those consequences.").

Dawson cannot now vacate his voluntary plea simply because he is unhappy with the outcome. Likewise, he cannot vacate his convictions based on ineffective assistance of counsel.

Ground four does not warrant relief.

Nothing in Dawson's reply convinces this Court that he is entitled to relief.

Accordingly, the Court orders:

That Dawson's 28 U.S.C. § 2255 motion to vacate, set aside or correct an illegal sentence (Doc. cv-1; cr-63) is denied. The Clerk is directed to enter judgment for the Government and to close this case.

Dawson is not entitled to a certificate of appealability (COA). He does not have the absolute right to appeal. 28 U.S.C. § 2253(c)(1). A COA must first issue. *Id.* To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2254(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Dawson has not made the requisite showing. Finally, because he is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

ORDERED at Tampa, Florida, on April 15, 2019.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

AUSA
Johnny L. Dawson