No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

FRANCO NICHOLAS PADGETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Franco Nicholas Padgett, pursuant to 18 U.S.C. § 3006A and Rule 39 of the Supreme Court of the United States, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Undersigned counsel was appointed by the United States Court of Appeals for the Eleventh Circuit, pursuant to the Criminal Justice Act of 1964, as amended, to represent the petitioner.

Dated: March 23, 2020

Respectfully submitted,

/s/ Elaine Mittleman
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Counsel of Record for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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FRANCO NICHOLAS PADGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether the concurrent sentence doctrine applies to challenges to federal sentences when there is no challenge to a conviction.

Whether the concurrent sentence doctrine applies to federal postconviction motions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Franco Nicholas Padgett respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, App., *infra*, 1a-10a, is not reported.

The district court's judgment was filed on March 24, 2017, in the United States District Court, Northern District of Florida (Tallahassee). App., *infra*, 11a.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2019. The time to file a petition was extended to March 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The decision below involved the concurrent sentence doctrine in the context of a 2255 motion.

1. Petitioner is a federal prisoner on supervised release following a 92-month sentence for conspiracy to steal controlled substances from a pharmacy (Count 1), and aiding and abetting possession with intent to distribute controlled substances, in connection with a burglary of a pharmacy (Count 2). App., 2a.

2. In 2014, petitioner filed an amended 2255 motion to vacate his sentence. App., 2a.

3. Petitioner argued that, without jury findings as to the controlled substances in Count 2, the court could not have sentenced him above the statutory maximum. Petitioner claimed that his appellate counsel was ineffective for failing to raise this claim on appeal. App., 3a.

4. The magistrate judge issued a report and recommendation recommending that the district court deny petitioner's 2255 motion. The magistrate judge concluded that, had appellate counsel raised this issue on direct appeal, petitioner arguably would have been entitled to resentencing on Count 2. App., 3a-5a.

5. The magistrate judge concluded that petitioner was not entitled

to relief because of the uncertainty about the concurrent sentence doctrine. Petitioner had concurrent sentences on each count. A reduction in his sentence on Count 2 would have had no effect on the length of his sentence absent any guideline recalculation. App., 5a.

6. The district court adopted the recommendations in the magistrate's report and denied petitioner's 2255 motion. App., 6a., 11a.

7. The Eleventh Circuit granted a certificate of appealability on the issue of whether the district court erred in applying the concurrent sentence doctrine to deny petitioner's 2255 motion. The Eleventh Circuit affirmed the district court. App., 2a.

8. The Eleventh Circuit explained that the concurrent sentence doctrine provides that, where a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid, an appellate court need not consider the validity of the convictions on the other counts. App., 7a.

9. The Eleventh Circuit further stated that it had recognized its discretion to decline to review not only convictions with concurrent sentences, but also sentencing errors under the doctrine. App., 7a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address the concurrent sentence doctrine. The concurrent sentence doctrine was relied upon in this case to permit the courts to avoid addressing petitioner's challenge to his sentence.

I. There is a conflict among the courts of appeals about the concurrent sentence doctrine

A. Background of the concurrent sentence doctrine

The concurrent sentence doctrine was addressed by this Court in *Benton v. Maryland*, 395 U.S. 784, 786-87 (1969). This Court heard oral argument on questions about double jeopardy. Then this Court realized that the existence of a concurrent sentence on the burglary count might prevent the Court from reaching the double jeopardy issue. This Court scheduled the case for reargument, which was limited to the question as to whether the concurrent sentence doctrine had continuing validity.

Justice Marshall explained that "[t]he 'concurrent sentence doctrine' took root in this country quite early, although its earliest manifestations occurred in slightly different contexts." *Id.* at 788. In *Locke v. United States*, 7 Cranch 339 (1813), Chief Justice John Marshall did not consider Locke's challenges to all 11 counts. He declared, "The Court however, is of opinion, that the 4th count is good, and this renders it unnecessary to decide

on the other." *Id*. at 344.

Justice Marshall noted that "[t]he concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions." Further, "[o]ne can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." *Id*. at 789. The holding in *Benton* about the concurrent sentence doctrine was that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." *Id*. at 791.

In *Ray v. United States*, 481 U.S. 736 (1987) (per curiam), this Court granted certiorari to review the role of the concurrent sentence doctrine in the federal courts. *Id*. at 737. However, this Court concluded that the sentences were not concurrent because there was a special assessment for each of the three convictions. The matter was remanded to consider petitioner's challenge to the second possession conviction. *Id*. Thus, it appears that this Court did not have the opportunity to review the role of the concurrent sentence doctrine in federal courts.

In a recent Eighth Circuit opinion, Judge Morris Sheppard Arnold in dissent described the complications relating to the concurrent sentence doctrine. *Oslund v. United States*, 944 F.3d 743, 748 (8th Cir. 2019) (Arnold,

J., dissenting). Judge Arnold noted that, during the late twentieth century, the concurrent-sentence doctrine fell out of favor. The court "essentially restricted the doctrine to a point that it rarely had any application." He explained that the Supreme Court decision in *Ray* "had the practical effect of eliminating the doctrine from challenges to concurrent convictions." Other courts refused outright to apply the doctrine under any circumstance. *United States v. DeBright*, 730 F.3d 1255, 1256 (9th Cir. 1984) (en banc). *Oslund*, 944 F.3d at 748.

The Second Circuit noted that "*Ray* is understood to have 'abolished the [concurrent sentence] doctrine for direct review of federal convictions.' 7 Wayne R. LaFave et al., Crim. Proc. 27.5(b) (4th ed.)." *Dhinsa v. Krueger*, 917 F.3d 70, 76 n. 4 (2d Cir. 2019).

A 1988 law review article asked whether the concurrent sentence doctrine may have died after *Ray*. Anne S. Emanuel, *The Concurrent Sentence Doctrine Dies a Quiet Death—Or Are the Reports Greatly Exaggerated?*, 16 FLA. ST. U. L. REV. 269 (1988). The doctrine concerned a defendant's challenge to any convictions on additional counts which had concurrent sentences with an affirmed conviction. The author described the doctrine as a "judicially created rule of federal criminal procedure." Further, the author asserted that the doctrine "arose when the United States Supreme

Court made a curious leap of logic from a questionable, if well-established rule, to a tenuously related doctrine founded on a troublesome assumption." *Id*. at 269-70 (footnotes omitted).

B. Present status of the concurrent sentence doctrine

The status of the concurrent sentence doctrine changed after this Court's decision in *Ray*. The lower courts have commented on the effect of the *Ray* holding on the concurrent sentence doctrine. The Tenth Circuit explained, in *United States v. Harris*, 695 F.3d 1125, 1139 (10th Cir. 2012), that "*Ray* effectively abolished the concurrent-sentence doctrine" in cases challenging multiple federal convictions, because each conviction has a special assessment.

The Fourth Circuit recently discussed the concurrent sentence doctrine in *United States v. Charles*, 932 F.3d 153 (4th Cir. 2019). The "concurrent sentence doctrine" was described as "authoriz[ing] a court to leave the validity of one concurrent sentence unreviewed when another is valid and carries the same or greater duration of punishment so long as there is *no substantial possibility* that the unreviewed sentence will adversely affect the defendant …" *Id*. at 155 (emphasis in original).

The court explained that the issue presented turned on the proper understanding of the concurrent sentence doctrine and whether the doctrine

allowed the court to leave unreviewed the challenge to the firearm sentence. *Id*. at 158.

The First Circuit mentioned the doctrine in a footnote in a recent opinion. In *United States v. Takesian*, 945 F.3d 553, 563-65, n. 10 (1st Cir. 2019), the court addressed a challenge to a jury instruction on an obstruction count. The footnote at note 10 was described as a "side note." The appellant had argued that the concurrent sentence doctrine did not apply and the government did not challenge that argument. The footnote concluded: "And so we say no more about the concurrent-sentence doctrine."

C. The concurrent sentence doctrine now is used in the review of sentences, not convictions

The concurrent sentence doctrine has new vitality after *Ray*. It now is being relied upon in the review of sentences, not convictions. Even though it is still called the "concurrent sentence doctrine," the doctrine is now something entirely different than the previous doctrine (with the same name) that concerned challenges to federal convictions.

The Fourth Circuit, in *United States v. Charles*, 932 F.3d 153 (4th Cir. 2019), pointed out that the concurrent sentence doctrine cannot be used to avoid reviewing the validity of one of a defendant's *convictions*. However, the doctrine can be used as a species of harmless-error review to challenge a

sentence where there is a valid sentence of equal or greater duration that runs concurrently. *Id*. at 160 (emphasis in original).

The Eleventh Circuit in *United States v. Bradley*, 644 F.3d 1213, 1293 (11th Cir. 2011), cited *United States v. Fuentes-Jimenez*, 750 F.2d 1495, 1497 (11th Cir. 1985), for the definition of the concurrent sentence doctrine. "The concurrent sentence doctrine provides that, if a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid, an appellate court need not consider the validity of the convictions on the other counts." Only when the defendant would suffer "adverse collateral consequences from the unreviewed conviction" does the doctrine not apply.

In *Bradley*, Bradley III challenged his sentences on Counts 3 and 54. [There is also an appellant named Bradley, Jr.] Applying the concurrent sentence doctrine, the Eleventh Circuit declined to review this matter. The court upheld Bradley III's sentence in its entirety. *Id*. at 1293-94.

It should be noted that the *Bradley* court used a definition of the concurrent sentence doctrine that concerned review of the validity of convictions. Even though the doctrine applied to the review of the validity of convictions, the *Bradley* court used the doctrine to decline to review Bradley III's challenge to his sentences on Counts 3 and 54.

The Eighth Circuit recently explained that the concurrent sentence doctrine "allows courts to decline to review the validity of a concurrent sentence when a ruling in the defendant's favor 'would not reduce the time he is required to serve' or otherwise 'prejudice him in any way.'" *Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019) (quoting *United States v. Olunloyo*, 10 F.3d 578, 581 (10th Cir. 1993)).

The *Eason* court noted that "[e]arly cases considering the doctrine involved challenges to one or more concurrent *convictions*, for example, for violation of the Double Jeopardy Clause, and courts struggled to define the minimal level of prejudice that would preclude application of the concurrent sentence doctrine. See *Benton v. Maryland*, 395 U.S. 784, 787-93, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969))." *Eason*, 912 F.3d at 1123 (emphasis in original).

The *Eason* court pointed out that the early cases involved challenges to convictions. However, the court then found that the concurrent sentence doctrine applies to a 28 U.S.C. 2255 motion that challenges only the validity of a concurrent sentence. The doctrine applies unless a ruling in the defendant's favor would reduce the time he is required to serve or otherwise prejudice him in any way. *Id*. The *Eason* Eighth Circuit court relied upon the holding of the Eleventh Circuit in *United States v. Bradley*, 644 F.3d at

1293-94.

The Tenth Circuit noted in *United States v. Harris*, 695 F.3d at 1139, that the holding in *Ray* did not eliminate the applicability of the doctrine where a defendant challenges the sentence and not the conviction. In *Harris*, 695 F.3d at 1140, the 10th Circuit declined to address a challenge to the RICO sentence. The court explained that the defendant would still have to serve his wire fraud sentence, so he would suffer no prejudice.

D. The doctrine is now used in motions to vacate sentences

The revised "concurrent sentence doctrine" is now used in the context of postconviction motions to vacate sentences. This Court's decision in *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015), held that the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), was unconstitutionally vague. This Court's decision has resulted in many cases challenging ACCA-related sentences. As a result, there have been questions about the application of the concurrent sentence doctrine when challenging sentences after *Johnson*.

A Washington district court noted in a 2016 opinion that "[o]nly the 11th Circuit has extended the doctrine to the post-*Johnson* 2255 context." *United States v. Beckham*, 202 F.Supp.3d 1197, 1202 (E.D. Wa. 2016). The district court in *Beckham* rejected the application of the concurrent sentence

doctrine on the facts of that case. The court held that, given the imposition of an unlawful sentence, the options open to the court are to resentence or correct the sentence. The court ordered resentencing on both offenses, because the sentencing scheme had been disrupted by the unlawful ACCA-enhanced sentence. *Id*. at 1203.

In *In re Williams*, 826 F.3d 1351, 1357 (11th Cir. 2016), the Eleventh Circuit denied the application for a successive 2255, explaining that Williams had not demonstrated that he would benefit from *Johnson* on his ACCA-enhanced firearm sentence for Count 3. He received a concurrent mandatory life sentence on Count 1 that was unrelated to his ACCA status and unaffected by *Johnson*. The court cited the concurrent sentence doctrine and the decision in *Bradley*, which was a direct appeal and which predated *Johnson*. *Id*. at 1356.

The Eleventh Circuit again considered the concurrent sentence doctrine in *In re Davis*, 829 F.3d 1297, 1299 (11th Cir. 2016). The court cited the recent *Williams* decision and the concurrent sentence doctrine, noting that a *Johnson* application can be denied.

The court explained that "*Williams* does not apply here." The judge's sentencing decision was informed by Davis's ACCA designation and Davis may have suffered adverse collateral consequences if his ACCA sentence

was unlawful. The court granted the application for permission to file a successive 2255 motion. *Id*. at 1299-1300.

In dissent, Judge Julie Carnes discussed *Williams* and explained that, even if Davis's ACCA sentence were reduced, he would still be serving the same 327 months. *Id*. at 1300.

The dissent by Judge Carnes is a stark example of the potential failing of the concurrent sentence doctrine when it is used to deny a 2255 motion. Judge Carnes wrote that "Davis is serving a concurrent 327-month sentence for which *Johnson* offers him no relief and that is unaffected by any error in the ACCA-designation, meaning that even if his ACCA sentence is reduced, Davis will still be serving the same 327 months." *Id*. at 1300 (footnote omitted).

A review of the docket in the Davis case [App., 12a-16a] shows that an order granting the 2255 motion on remand was signed by Chief Judge Moore on September 5, 2018. Davis was resentenced on November 27, 2018. Davis was resentenced on Counts 1 and 2 to concurrent 150-month sentences. The previous sentence had been concurrent 327-month sentences. The 60-month consecutive sentence on Count 3 was unchanged. Thus, the sentence Davis had initially received for Counts 1 and 2 was reduced at resentencing by 177 months, which is 14.75 years. The concurrent sentence

doctrine should not be used to prevent reconsideration of sentences in the context of a 2255 motion.

The Eighth Circuit has recently addressed the revised "concurrent sentence doctrine" in reviewing motions to vacate sentences after *Johnson*. In *Eason*, 912 F.3d at 1123, the Eighth Circuit referred to the Eleventh Circuit's holding in *Bradley*. The court held that speculation about adverse collateral consequences should not preclude courts from applying this useful rule. Thus, the court agreed with the district court's decision to deny successive 2255 relief based on the discretionary concurrent sentence doctrine. *Eason*, 912 F.3d at 1124.

The Eighth Circuit has addressed this issue in other recent cases, citing *Eason*. In *Smith v. United States*, 930 F.3d 978, 980 (8th Cir. 2019), the court affirmed the district court's reliance on the concurrent sentence doctrine to deny sentencing relief.

Judge Kelly dissented, writing that "the court leaves in place a sentence that all agree is unlawful." The statutory maximum for the ACCA count is 120 months' imprisonment, but Smith received a sentence of 220 months. Judge Kelly noted that the court relied on the concurrent sentence doctrine. In Judge Kelly's view, that doctrine was inapplicable. Further, if the case would be remanded for resentencing, it would be possible for the

district court to sentence Smith to a shorter term of imprisonment. *Smith*, 930 F.3d at 982-83.

Another recent Eighth Circuit case discussed the concurrent sentence doctrine. In *Oslund v. United States*, 944 F.3d 743, 745 (8th Cir. 2019), the court authorized Oslund to challenge his ACCA status. The district court denied the successive 2255 motion based on the concurrent sentence doctrine. The Eighth Circuit concluded that the district court did not err in applying the concurrent sentence doctrine. *Id*. at 748.

Judge Morris Sheppard Arnold dissented. He noted that he could not say that the sentence Oslund challenged would not otherwise prejudice him, even if the district court would not reduce his sentence. Judge Arnold explained that he disagreed that the court "should apply what has come to be called the concurrent-sentence doctrine." Judge Arnold would have either reached the merits of the appeal or vacated the sentence. *Id*. at 748.

Judge Arnold further emphasized that, after a 1993 decision, "our court apparently went a quarter of a century before issuing another published opinion discussing this moribund doctrine in any meaningful detail." He noted that the Eighth Circuit had reinvigorated the doctrine under the limited circumstances presented in *Eason* and *Smith*. He then asserted that "I do not believe we should expand the doctrine as the court does here beyond where

we left it decades ago." Judge Arnold concluded by declaring that he saw no reason why the court should not just vacate Oslund's sentence. *Id*. at 749.

The Fourth Circuit has recently affirmed reliance upon the concurrent sentence doctrine in the context of a 2255 motion. In *United States v. Charles*, 932 F.3d 153, 156, 162 (4th Cir. 2019), the court affirmed the district court's application of the concurrent sentence doctrine in declining to review the firearm sentence. The collateral consequences posited by Charles rested on unrealistic speculation. However, the court remanded the case to allow the district court to consider arguments about a sentence reduction in light of the recently-enacted First Step Act.

The court noted that the impact of the First Step Act had not been considered by the district court. If the district court on remand finds that a reduction in the drug-trafficking sentence is warranted under the First Step Act, then the district court could consider the merits of Charles's 2255 motion challenging the firearm sentence. Thus, it appears that, even though the Fourth Circuit affirmed the district court's use of the concurrent sentence doctrine in declining to review the firearm sentence, there is a possibility that the district court will consider the merits of the 2255 motion challenging the firearm sentence. *Id*. at 162.

II. The questions presented are important and warrant review

This Court has previously endeavored to address the concurrent sentence doctrine, both in *Benton* and in *Ray*. However, the doctrine has now been altered into a different shape that concerns challenges to sentences and not to convictions. The doctrine now permits a court to leave the validity of an ACCA sentence unreviewed. Thus, courts can rely upon the concurrent sentence doctrine, as now formulated, to refuse to address potentially unlawful sentences.

The concurrent sentence doctrine as presently used may still have the same name, but it is not the doctrine that was described in *Benton*. Instead of concerning the review of multiple convictions, the doctrine now is used to avoid review of sentencing issues and the length of sentences.

The *Davis* case provides a stark example of why the concurrent sentence doctrine should not be applied to challenges to sentences, including postconviction motions based on *Johnson*. The Eleventh Circuit remanded the case in *Davis*. Davis was subsequently resentenced and his concurrent 327-month sentences were reduced to 150-months. There would have been great unfairness if the concurrent sentence doctrine had been used to prevent the review of Davis's sentences and the subsequent resentencing to a much lower term of imprisonment.

Moreover, the dissent of Judge Julie Carnes is noteworthy. In dissent, Judge Carnes explained that, even if Davis's ACCA sentence would be reduced, he would still be serving the same 327 months. *Davis*, 829 F.3d at 1300. That assumption or conclusion by Judge Carnes that Davis would still be serving the same 327 months was clearly incorrect.

Appellate judges should not speculate whether a resentencing would benefit a defendant. Instead, the matter should be remanded to permit the district court to address challenges to sentences. There is the possibility that, upon resentencing, the defendant will receive a lower sentence. Further, the result of resentencing could include the release of the defendant from imprisonment. There are numerous possibilities of positive consequences for the defendant if the courts address the challenges to sentencing.

Justice Marshall noted that "[t]he concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions." Further, "[o]ne can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." *Benton*, 395 U.S. at 789.

The concurrent sentence doctrine lacks "any satisfactory explanation" for its origin and scope. It is now being used to deny review of challenges to sentences, rather than to convictions. This new version of the concurrent

sentence doctrine has added to the confusion about the doctrine and serves as an impediment to courts' reviews of sentences after *Johnson*. The Court should grant the petition for certiorari and hold that the concurrent sentence doctrine should not be used to limit or restrict the courts' duties to review challenges to sentences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12645
Non-Argument Calendar

D.C. Docket Nos. 4:13-cv-00687-MW-GRJ; 4:10-cr-00046-MW-GRJ-1

FRANCO NICHOLAS PADGETT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(October 24, 2019)

Before WILSON, JILL PRYOR and BLACK, Circuit Judges.

PER CURIAM:

19.

Franco Nicholas Padgett, a federal prisoner currently on supervised release following a 92-month sentence for conspiracy to steal controlled substances from a pharmacy (Count 1), and aiding and abetting possession with intent to distribute controlled substances (Count 2), in connection with a burglary of a pharmacy, appeals through counsel the district court's denial of his 28 U.S.C. § 2255 motion to vacate. We granted a certificate of appealability on the issue of whether the district court erred in applying the concurrent sentences doctrine to deny Padgett's claim that his appellate counsel was ineffective for failing to appeal the trial court's illegal sentence in excess of the statutory maximum on Count 2. After review,[1] we affirm the district court.

I. BACKGROUND

In 2014, Padgett, proceeding *pro se*, filed an amended § 2255 motion to vacate his sentence and supporting memorandum. In his first claim, Padgett argued the trial court violated his right to a jury trial because the jury did not return

[1] In a § 2255 proceeding, we normally review a district court's legal conclusions *de novo* and its factual findings for clear error. *Phillips v. United States*, 849 F.3d 988, 992 (11th Cir. 2017). However, a party who fails to object to a magistrate judge's findings or recommendations waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions, as long as the party was informed of the time period for objecting and the consequences on appeal for failing to object. 11th Cir. R. 3–1; 28 U.S.C. § 636(b)(1). In the absence of a proper objection, we may review an appeal for plain error if necessary in the interests of justice. 11th Cir. R. 3–1. Padgett failed to object to the magistrate judge's application of the concurrent sentences doctrine in the magistrate judge's amended report and recommendation, even though the magistrate judge informed him of the time period for objecting and the consequences on appeal for failing to object. We will review Padgett's claim for plain error only.

a special verdict as to the drug quantity or type for Count 2. Padgett argued that, without findings by the jury as to the quantity or type of controlled substances involved in the possession count, the court could not have sentenced him above the statutory maximum for the least serious drug alleged in the indictment—alprazolam (Xanax), a Schedule IV drug, which carries a 60-month statutory maximum. He asserted his appellate counsel was ineffective for failing to raise this claim on direct appeal.

A magistrate judge issued a report and recommendation (R&R) recommending the district court deny Padgett's § 2255 motion. The magistrate judge construed Padgett's claim as a Sixth Amendment claim that his right to a jury trial was violated because the jury was not given special instructions as to drug quantity or type, and concluded that no finding by the jury as to the drug quantity was necessary. The magistrate judge acknowledged the district court could not have sentenced Padgett to a sentence exceeding the statutory maximum for Xanax. However, the magistrate judge concluded the maximum sentence for that drug was 120 months, which was the enhanced statutory maximum when the defendant has a prior conviction for a felony drug offense because Padgett had a prior felony drug conviction in September 2002. The magistrate judge concluded

that, in light of Padgett's prior felony drug offense, his 110-month sentence[2] for Count 2 was lawful.

Padgett objected, arguing for the first time the district court lacked jurisdiction to exceed the 60-month, statutory maximum sentence for Count 2 in 18 U.S.C. § 841(b)(2) because the Government never filed a notice of enhanced sentence under 21 U.S.C. § 851, based on his prior felony drug conviction. Relying on this Court's decision in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998), he argued he was not required to show cause and prejudice for not raising the issue on direct appeal because jurisdictional claims cannot be waived by procedural default. The district court remanded the case to the magistrate judge for further consideration of Padgett's new claim regarding the lack of a § 851 notice.

In an amended R&R, the magistrate judge again recommended Padgett's claim be denied because he had failed to show prejudice resulting from his appellate counsel's failure to raise the sentencing issue on appeal. The magistrate judge concluded Padgett was correct that the jury had not made any findings as to the type or quantity of the controlled substances he possessed, and Padgett's sentence for Count 2 could not have exceeded the statutory maximum for the controlled substance with the lowest penalty. The magistrate judge further

[2] After filing the instant § 2255 motion, Padgett wrote a letter to the clerk of court requesting a sentence reduction under Amendment 782 to the Sentencing Guidelines. The district court reduced his sentence to 92 months' imprisonment on its own motion.

concluded, had the Government filed a notice of enhancement under § 851, Padgett would have qualified for an enhanced sentence based on his previous charges in 2002, to which he pled *nolo contendere*. Noting the controlling law at the time of appeal required strict compliance with § 851 as a jurisdictional requirement, the magistrate judge concluded appellate counsel had an available challenge on Count 2 as exceeding the court's jurisdiction, and had appellate counsel raised this issue on direct appeal, Padgett arguably would have been entitled to resentencing on Count 2.

Nonetheless, the magistrate judge concluded that Padgett was not entitled to relief because "the concurrent sentence doctrine remove[d] the certainty from this equation." Because Padgett was given concurrent sentences on each count and because he did not challenge his sentence on Count 1, a reduction in his sentence on Count 2 would have had no practical effect on the length of Padgett's total sentence, "absent any guidelines recalculation." Moreover, the magistrate judge noted that, although the failure to file a § 851 notice was previously considered jurisdictional, this Court had since recognized in *United States v. DiFalco*, 837 F.3d 1207, 1216-18 (11th Cir. 2016), that the rule had been undermined to the point of abrogation. Therefore, the magistrate judge concluded, the Government's failure to file a § 851 notice did not affect the district court's jurisdiction, and any

error in his sentence on Count 2 did not prejudice Padgett because of his concurrent sentence on Count 1.

Padgett did not file any objections to the amended R&R. Noting there were no objections to the R&R, the district court adopted the recommendations in the amended R&R and denied Padgett's § 2255 motion.

II. BACKGROUND

Section 2255 allows a federal prisoner to collaterally attack his sentence on the grounds, among others, that the sentence "was imposed in violation of the Constitution or laws of the United States" or "was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). A criminal defendant who fails to object at trial, or to raise an issue on direct appeal, is procedurally barred from raising the claim in a § 2255 motion, absent a showing of cause and prejudice or a fundamental miscarriage of justice. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). However, due process requires that a defendant receive effective assistance of appellate counsel on his direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The Sixth Amendment does not require appellate advocates to raise every non-frivolous issue on appeal if counsel, as a matter of professional judgment, decides not to do so. *Knowles v. Mirzayance*, 556 U.S. 111, 126–27 (2009).

Le a.

To prevail on a claim for ineffective assistance of appellate counsel, a defendant must show that "(1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance, he would have prevailed on appeal." *Shere v. Sec'y Fla. Dep't of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008). The deficient performance prong requires a movant to show that counsel acted unreasonably in light of prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The prejudice prong requires a movant to show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694.

The concurrent sentences doctrine provides that, where a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid, an appellate court need not consider the validity of the convictions on the other counts. *In re Davis*, 829 F.3d 1297, 1299 (11th Cir. 2016). We have recognized our discretion to decline to review not only convictions with concurrent sentences, but also sentencing errors under the doctrine. *See United States v. Bradley*, 644 F.3d 1213, 1293-94 (11th Cir. 2011) (declining to review challenges on direct appeal to the district court's sentencing guidelines range calculations with regard to two counts, as each of those sentences was to run concurrently with a longer sentence on another count, which this Court had already upheld); *United States v. Campa*, 529 F.3d 980, 1018 (11th Cir. 2008) (holding an error in

calculating the defendant's sentence as to one count was harmless where a longer, concurrent sentence stood as to another count); *United States v. Jones*, 28 F.3d 1574, 1582 (11th Cir. 1994), *vacated*, 516 U.S. 1022 (1995), *opinion reinstated in part*, 74 F.3d 275 (11th Cir. 1996) (exercising our discretion not to apply the concurrent sentences doctrine). The doctrine is not a jurisdictional bar to consideration of challenges to multiple convictions, but merely a rule of judicial convenience where its use is appropriate. *Benton v. Maryland*, 395 U.S. 784, 787–91 (1969). The doctrine does not apply where the defendant would suffer "adverse collateral consequences from the unreviewed conviction." *In re Williams*, 826 F.3d 1351, 1356 (11th Cir. 2016) (quotations omitted).

Padgett has failed to show the district court plainly erred by denying his § 2255 motion. *See United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006) (explaining the plain error standard requires the defendant to show (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings). Padgett's argument the concurrent sentences doctrine applies only to convictions, and not to sentences, is defeated by the prior panel precedent rule, as this Court has explicitly noted its discretion to apply the doctrine to sentencing errors and has applied the doctrine to sentencing errors. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (stating under the prior panel precedent rule, "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 by [us] sitting *en banc*"); *Bradley*, 644 F.3d at 1293-94; *Campa*, 529 F.3d at 1018; *Jones*, 28 F.3d at 1582.

Next, the district court did not commit plain error in determining Padgett was not prejudiced by his counsel's failure to challenge his illegal sentence on direct appeal. Padgett has not pointed to any case involving two interdependent, concurrent sentences where this Court or the Supreme Court has held on collateral review the concurrent sentences doctrine cannot be invoked to show a defendant was not prejudiced by his counsel's failure to challenge an illegal sentence on one count. *See United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) (stating an error is not plain unless the explicit language of a statute or rule specifically resolves the issue, or there is precedent from this court or the Supreme Court directly resolving it). Also, because the concurrent sentences doctrine is discretionary, no precedent from this Court directly indicates whether or not the appeals court would have applied the concurrent sentences doctrine to deny him relief on appeal. *See id; United States v. Sosa*, 782 F.3d 630, 637 (11th Cir. 2015) (stating for an error to be plain, it must be clear or obvious, rather than subject to reasonable dispute). Therefore, the district court's conclusion Padgett was not

prejudiced by his appellate counsel's failure to appeal his sentence on Count 2 was not plain error.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

VS CASE NO. 4:10cr46-MW/GRJ-1

FRANCO NICHOLAS PADGETT,

JUDGMENT

The Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, ECF No. 145, is DENIED. A certificate of appealability is DENIED.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

March 24, 2017
DATE

s/ Victoria Milton
Deputy Clerk: Victoria Milton

11 9.

2255,CLOSED

U.S. District Court
Southern District of Florida (Miami)
CRIMINAL DOCKET FOR CASE #: 1:00-cr-01060-KMM All Defendants

Case title: USA v. Davis

Date Filed: 11/30/2000
Date Terminated: 08/22/2001

Assigned to: Judge K. Michael Moore

Appeals court case number: 01-14942-C

Defendant (1)

Antrone Davis
DOB: 9/20/74 PRISONER: 66687-004
TERMINATED: 08/22/2001

represented by **Antrone Davis**
66687-004
Berlin
Federal Correctional Institution
Inmate/Parcels
P.O. Box 9000
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PRO SE

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ATTORNEY TO BE NOTICED
Designation: Retained

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Designation: Public Defender Appointment

12-9.

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Public Defender Appointment

Pending Counts	**Disposition**
18:922G.F UNLAWFUL TRANSPORT OF FIREARMS (1s)	RE-SENTENCED: Imprisonment for 150 Months (concurrent with Count Two); PRIOR SENTENCE: Imprisonment for a term of 327 months.
21:841A=ND.F POSSESS WITH INTENT TO DISTRIBUTE CRACK COCAINE (2s)	RE-SENTENCED: Imprisonment for 150 Months (concurrent with Count One); PRIOR SENTENCE: Imprisonment for a term of 327 months.
18:924C.F VIOLENT CRIME/DRUGS/MACHINE GUN during and in relation to possession of cocaine base (3s)	RE-SENTENCED: Imprisonment for 60 Months (consecutive to Counts One and Two); PRIOR SENTENCE: Imprisonment for a term of 60 months to run consecutive to counts 1 and 2.

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
18:924A.F PENALTIES FOR FIREARMS (1)	dismissed.
21:841A=ND.F NARCOTICS - SELL/DISTRIBUTE/DISPENSE (2)	dismissed.
18:924A.F PENALTIES FOR FIREARMS (3)	dismissed.
18:922G.F UNLAWFUL TRANSPORT OF FIREARMS (4s-5s)	acquitted.

13a.

06/11/2002		ACKNOWLEDGMENT of receipt by U.S.C.A. of: COR on 6/5/02; U.S.C.A. # 01-14942-C (Former Deputy Clerk) (Entered: 06/13/2002)
02/07/2003	78	MANDATE OF USCA (certified copy) with opinion as to Antrone Davis RE: [62-1] appeal affirming judgment/order of the district court Date Issued: 2/5/03 USCA Appeal #: 01-14942-CC; Copy to Judge. (Former Deputy Clerk) (Entered: 02/10/2003)
02/07/2003		Record on appeal returned from U.S. Court of Appeals: [62-1] appeal by Antrone Davis USCA #: 01-14942-CC (Former Deputy Clerk) (Entered: 02/10/2003)
05/07/2004	79	MOTION by Antrone Davis to vacate under 28 U.S.C. 2255 (Civil Action # 04-cv-21081-Moore) (cj, Deputy Clerk) (Entered: 05/10/2004)
05/07/2004		NOTE: All further docketing is to be done in the civil case. (Civil Case no.: 04-CV-21081-Moore) Criminal cases filed 1996 and prior will be scanned at a later date (cj, Deputy Clerk) (Entered: 05/10/2004)
02/10/2010	84	Motion to Vacate under 28 U.S.C. 2255 by Antrone Davis (civil case number 10cv24675-KMM.) All further docketing related to the motion to vacate is to be done in the civil case. (Attachments: # 1 Memorandum DE 72 in 04cv21081)(lk) Modified file date and civil case number on 3/14/2013 (dm). (Entered: 03/13/2013)
04/07/2010	80	MOTION to waive or expunge fines by Antrone Davis. Responses due by 4/26/2010 (ail) (Entered: 04/08/2010)
04/21/2010	81	RESPONSE to Motion by USA as to Antrone Davis re 80 MOTION to waive or expunge fines Replies due by 5/3/2010. (Damian, Melissa) (Entered: 04/21/2010)
04/29/2010	82	ORDER DENYING 80 Motion to Waive or Expunge Funds as to Antrone Davis (1). Signed by Judge K. Michael Moore on 4/29/2010. (rg1) (Entered: 04/29/2010)
04/09/2012	83	NOTICE of Status Inquiry by Antrone Davis. Copy of docket sheet mailed to filer on 4/10/12 (asl) (Entered: 04/10/2012)
04/21/2015	85	NOTICE of Change of Address (address updated) (ail) (Entered: 04/21/2015)
06/24/2016	86	Motion to Vacate under 28 U.S.C. 2255 by Antrone Davis (civil case number 1:16-cv-22751-KMM.) All further docketing related to the motion to vacate is to be done in the civil case. (rms1) (Entered: 06/28/2016)
06/30/2016	87	ORDER denying 86 Motion to Vacate (2255) as to Antrone Davis (1). See 16-cv-22751 (ECF No. 5). Signed by Chief Judge K. Michael Moore on 6/30/2016. (mgn) (Entered: 06/30/2016)
08/01/2016	88	Clerk's First Notice of Undeliverable Mail as to Antrone Davis re 87 Order on Motion to Vacate (2255). US Mail returned for: **Antrone Davis.** ***The Court has located and updated the address for this party. Document mailed to inmate's new address. After two unsuccessful noticing attempts, notices from the Court will no longer be sent to this party in this case until a correct address is provided.*** **(drz) (Entered: 08/01/2016)**
09/04/2018	89	FINAL Addendum 2 Disclosure of REVISED Presentence Investigation Report of Antrone Davis. This is a limited access document. Report access provided to attorneys Christopher Clark and Sowmya Bharathi, AFPD by USPO (Attachments: # 1 First Addendum, # 2 Second Addendum)(mcl1) (Entered: 09/04/2018)
09/05/2018	90	Notice of Assignment of Assistant Federal Public Defender as to Antrone Davis. Attorney Sowmya Bharathi added.. Attorney Sowmya Bharathi added to party Antrone Davis(pty:dft). (Bharathi, Sowmya) (Entered: 09/05/2018)
09/06/2018	91	ORDER GRANTING U.S.C. 28 § 2255 Motion on Remand as to Antrone Davis. (See

		also 1:16-cv-22751) Signed by Chief Judge K. Michael Moore on 9/5/2018. *See attached document for full details.* (rg1) (Entered: 09/06/2018)
09/06/2018	92	WRIT OF HABEAS CORPUS ad Prosequendum Issued as to Antrone Davis. Signed by Chief Judge K. Michael Moore on 9/6/2018. Re-Sentencing set for 11/27/2018 10:00 AM in Miami Division before Chief Judge K. Michael Moore. (rg1) (Entered: 09/06/2018)
09/06/2018	93	PAPERLESS NOTICE OF SENTENCING HEARING as to Antrone Davis. Sentencing set for 11/27/2018 10:00 AM in Miami Division before Chief Judge K. Michael Moore. (rg1) (Entered: 09/06/2018)
10/11/2018	94	Unopposed MOTION to Continue *Deadline to File PSI Objections and Sentencing Memorandum* by Antrone Davis. Responses due by 10/25/2018 (Attachments: # 1 Text of Proposed Order)(Bharathi, Sowmya) (Entered: 10/11/2018)
10/15/2018	95	PAPERLESS ORDER GRANTING 94 Unopposed Motion to Continue Deadline to file PSI Objections and Sentencing Memo as to Antrone Davis. Upon review of the motion, the record, and just cause having been shown, it is hereby ORDERED AND ADJUDGED the motion is GRANTED. The deadline for filing PSI Objections and a Sentencing Memorandum is hereby extended to 11/1/2018. Signed by Chief Judge K. Michael Moore on 10/15/2018. (rg1) (Entered: 10/15/2018)
10/16/2018		Set/Reset Deadlines/Hearings as per DE 95 as to Antrone Davis: Objections to PSI Report due by 11/1/2018 (lk) (Entered: 10/16/2018)
10/29/2018	96	Second MOTION to Continue *Deadline to File PSI Objections and Sentencing Memo* by Antrone Davis. Responses due by 11/13/2018 (Attachments: # 1 Text of Proposed Order) (Bharathi, Sowmya) (Entered: 10/29/2018)
10/30/2018	97	ORDER GRANTING 96 Motion to Continue Deadline to File PSI Objectins and Setencing Memo as to Antrone Davis (1). Objections to PSI Report due by 11/15/2018 Signed by Chief Judge K. Michael Moore on 10/30/2018. *See attached document for full details.* (rg1) (Entered: 10/30/2018)
11/15/2018	98	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Antrone Davis (Attachments: # 1 Exhibit (1) Case Disposition Record) (Bharathi, Sowmya) (Entered: 11/15/2018)
11/15/2018	99	SENTENCING MEMORANDUM by Antrone Davis (Attachments: # 1 Exhibit (1) Character Reference from BOP Rev. Buenviaje, # 2 Exhibit (2) GED & Other Educational Certificates, # 3 Exhibit (3) Mr. Davis's Letter to the Court, # 4 Exhibit (4) Mr. Odeleye's Letter to the Court, # 5 Exhibit (5) Ms. Hoards Letter to the Court) (Bharathi, Sowmya) (Entered: 11/15/2018)
11/21/2018	100	FINAL Addendum 3 Disclosure of ACCA CASE Presentence Investigation Report of Antrone Davis. This is a limited access document. Report access provided to attorneys Christopher Clark, Sowmya Bharathi by USPO (Attachments: # 1 First Addendum, # 2 Second Addendum, # 3 Third Addendum)(wsz) (Entered: 11/21/2018)
11/26/2018	101	**FIRST** Clerk's Notice of Undeliverable Mail as to Antrone Davis re 97 Order on Motion to Continue,. US Mail returned for: ANTRONE DAVIS. ***Updated address found and document resent to new address.***FDC MIAMI 33 NE 4TH STREETMIAMI, FL 33132 (pgz) (Entered: 11/26/2018)
11/26/2018	102	RESPONSE to 98 Objections to Presentence Investigation Report by USA as to Antrone Davis (Clark, Christopher) (Entered: 11/26/2018)
11/27/2018	103	Minute Entry for proceedings held before Chief Judge K. Michael Moore: Sentencing held on 11/27/2018 as to Antrone Davis. Court Reporter: Glenda Powers, 305-523-5022 /

		Glenda_Powers@flsd.uscourts.gov. (rg1) (Entered: 11/27/2018)
11/27/2018	104	AMENDED JUDGMENT as to Antrone Davis (1), Count(s) 1, 2, 3, dismissed; Count(s) 1s, RE-SENTENCED: Imprisonment for 150 Months (concurrent with Count Two); PRIOR SENTENCE: Imprisonment for a term of 327 months; Count(s) 2s, RE-SENTENCED: Imprisonment for 150 Months (concurrent with Count One); PRIOR SENTENCE: Imprisonment for a term of 327 months; Count(s) 3s, RE-SENTENCED: Imprisonment for 60 Months (consecutive to Counts One and Two); PRIOR SENTENCE: Imprisonment for a term of 60 months to run consecutive to counts 1 and 2.; Count(s) 4s-5s, acquitted. Signed by Chief Judge K. Michael Moore on 11/27/2018. *See attached document for full details.* (rg1) (Entered: 11/27/2018)
01/31/2019	105	Petition and Order for Modification of Conditions with consent - 12B as to Antrone Davis. Signed by Chief Judge K. Michael Moore on 1/30/2019. *See attached document for full details.* (rg1) (Entered: 01/31/2019)
02/15/2019	106	**SECOND** Clerk's Notice of Undeliverable Mail as to Antrone Davis re 105 Petition and Order for Modification of Conditions with/without consent. US Mail returned for: ANTRONE DAVIS. ***The Court has not located an updated address for this party. After two undeliverable notices from the Court, notices will no longer be sent to this party in this case until a correct address is provided.*** Released On: 11/28/2018 (pgz) (Entered: 02/15/2019)
12/13/2019	107	Notice of Criminal Transfer to Northern District of Georgia of a Transfer of Jurisdiction as to Antrone Davis. Transfer of Jurisdiction Order, Judgment, Docket sheet and documents attached. If you require any information from our Financial Section, please call 305-523-5050. If you require certified copies of any documents, please call our Records Section at 305-523-5210. *Attention Receiving Court: If you wish to designate a different email address for future transfers, send your request to TXND at: InterDistrictTransfer_TXND@txnd.uscourts.gov.* (Attachments: # 1 Docket Sheet) (asl) (Entered: 12/13/2019)

PROOF OF SERVICE

I, Elaine Mittleman, a member of the Bar of this Court, hereby certify that a copy of the foregoing Motion for Leave to Proceed *in Forma Pauperis* and Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was sent by United States mail, postage prepaid, on March 23, 2020, to:

Solicitor General of the United States
Room 5616
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

All parties required to be served have been served.

/s/ Elaine Mittleman
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Counsel of Record for Petitioner