APPENDIX "A"

Eleventh Circuit Denial of Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10252-K

TRACY ANTHONY SCOTT,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Tracy Anthony Scott has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 21, 2019, order denying a certificate of appealability and leave to proceed *in forma pauperis* on appeal of the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Upon review, Scott's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX "B"

Eleventh Circuit Order Denying COA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10252-K

TRACY ANTHONY SCOTT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Tracy Anthony Scott is a federal prisoner serving a 140-month total sentence after pleading guilty to possession with intent to distribute a detectable amount of cocaine near a school, in violation of 21 U.S.C. § 860(a), and being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) and (e)(1). Scott now seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in his appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate, in which he raised two claims for relief.

In order 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). To merit a COA, a movant 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. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

In Claim 1, Scott argued that his trial counsel was ineffective for failing to object to the district court's finding that Scott qualified for an enhanced sentence as a career offender based on two prior state-court controlled-substance convictions, especially in light of the fact that Scott was unrepresented by counsel during one of those state-court proceedings. Reasonable jurists would not debate the district court's denial of this claim. The record reflected that Scott's trial counsel, with respect to his instant conviction, challenged his designation as a career offender. Moreover, the state-court record reflected that Scott was represented by counsel in both of his state-court proceedings. Finally, under this Court's precedent, Scott's state-court convictions under Fla. Stat. Ann. § 893.13(1) qualified as predicate offenses for purposes of the career-offender enhancement. *See United States v. Pridgeon*, 853 F.3d 1192, 1200 (11th Cir.), *cert. denied*, 138 S. Ct. 215 (2017) (reaffirming that convictions under § 893.13 qualify as predicate offenses for purposes of the career-offender enhancement) (citing *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014)). No COA is merited for the denial of this claim.

In Claim 2, Scott argued that his appellate counsel was ineffective for failing to file a petition for a writ of *certiorari* with the U.S. Supreme Court following the conclusion of Scott's direct appeal. Reasonable jurists would not debate the district court's denial of this claim because Scott failed to show that the outcome of his proceedings would have been different had his counsel filed a petition for a writ of *certiorari* in the U.S. Supreme Court following the denial of his direct appeal. The lack of prejudice is underscored by the U.S. Supreme Court's decision, around the same time, not to review *Pridgeon*, a case in which this Court reaffirmed that a conviction under § 893.13 could be relied upon for purposes of the career-offender enhancement. *Pridgeon*, 853 F.3d at 1200, *cert. denied*, 138 S. Ct. 215 (2017). No COA is merited for the denial of this claim.

Accordingly, Scott's motion for a COA is DENIED and his motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-22353-Civ-COOKE/REID
(16-20157-Cr-COOKE)

TRACY ANTHONY SCOTT,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT

THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to 28 U.S.C. §636(b)(1)(B), Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts, and Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters (ECF No. 2). On June 20, 2018, Judge White issued a Report of Magistrate Judge (ECF No. 4) recommending that (1) Movant's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1) be denied, and (2) no certificate of appealability issue. Movant filed his Objections on August 24, 2018 (ECF Nos. 7, 8).

I have considered Judge White's Report, examined the relevant legal authorities, and conducted a *de novo* review of the record. I find Judge White's Report clear, cogent, and compelling. It is therefore **ORDERED and ADJUDGED** that Judge White's Report of Magistrate Judge (ECF No. 4) is **AFFIRMED and ADOPTED**. Accordingly, the Motion to Vacate Sentence (ECF No. 1) is **DENIED**. The Clerk is directed to **CLOSE** this case.

It is **FURTHER ORDERED and ADJUDGED** that Movant has not demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *accord Lott v. Attorney Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010) (explaining that a "petitioner need not show he will ultimately succeed on appeal" in order to warrant a certificate of appealability). Accordingly, this Court **DENIES** a Certificate of Appealability in this case.

DONE and ORDERED in chambers, at Miami, Florida, this 3rd day of January 2019.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Lisette Marie Reid, U.S. Magistrate Judge
Tracy Anthony Scott, pro se
Counsel of record

APPENDIX "D"

Magistrate's R&R

TRACY ANTHONY SCOTT, Movant, vs. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2018 U.S. Dist. LEXIS 104091
CASE NO. 18-22353-CIV-COOKE, (16-20157-CR-COOKE)
June 20, 2018, Decided
June 20, 2018, Entered on Docket

Counsel Tracy Anthony Scott, Plaintiff, Pro se, Coleman, FL.
For United States of America, Defendant: Noticing 2255 US Attorney, LEAD ATTORNEY.

Judges: PATRICK A. WHITE, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: PATRICK A. WHITE

Opinion

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* movant, **Tracy Anthony Scott**, has filed this motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences **for** possessing a controlled substance near a school and **for** felon in possession of a firearm, entered following a guilty plea in **case no. 16-20157-Cr-Cooke**.

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

No order to show cause has been issued because, on the face of the petition, it is evident the movant is entitled to no relief. See Rule 4,1 Rules Governing Section 2255 Proceedings. Because summary dismissal is warranted, the government was not required to file any response. See Broadwater v. United States, 292 F.3d 1302, 1303-04 (11th Cir. 2002) (a district court has the power under Rule 4 of the Rules Governing Section 2255 Cases to summarily dismiss a movant's claim **for** relief so long as there is a sufficient basis in the record **for** an appellate court to review the district court's decision).

Before the Court **for** review are the movant's §2255 motion (Cv-DE#1), the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), along with all pertinent portions of the underlying criminal file, including the change of plea (Cr-DE#69) and sentencing (Cr-DE#70) transcripts.2

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), the movant raises the following two inter-related

grounds **for** relief:

1. He was denied effective assistance of counsel, where his lawyer failed to object to the court's finding that the movant qualified **for** an enhanced sentence as a career offender which was predicated on unreliable information. (Cv-DE#1:5,14).

2. He was denied effective assistance of counsel, where his appellate counsel failed to file a petition **for** certiorari review with the U.S. Supreme Court following conclusion of the movant's direct appeal. (Cv-DE#1:6,17).

III. Factual and Procedural Background

A. Facts of the Offense

The stipulated facts adduced at the change of plea hearing Reveals3 that on April 22, 2016, a detective, acting in an undercover capacity ("UC"), placed a controlled telephone call to an individual who the UC knew sold drugs. (Cr-DE#69:9). The UC, accompanied by another law enforcement undercover officer ("UC2"), agreed to meet the individual, but at that meeting, the individual informed him that he was "dry," meaning he had no drugs to sell, but offered to allow the UC to follow him to where they could get some drugs. (Id.).

The individual got in his car, and the UC, accompanied by UC2, followed in another vehicle, until they arrived at the movant's home in Miami Gardens, Florida. (Id.). The movant's home is located directly across the street from Crestview Elementary School, and well within 1,000 feet of the school's property, located at 2201 N.W. 187 Street in Miami Gardens, Florida. (Id.). After arriving at the movant's home, the UC handed the individual $60, and waited as the individual approached the movant's front porch. (Id.). After a quick call, the movant opened the front door, at which time the individual handed the movant the $60, and the movant in turn gave the individual three clear red baggies. (Id.:10). These clear red baggies were then handed to the UC, who left the area. (Id.). After arriving at a secure location, the UC and UC2 conducted a field test of the contents of the three red baggies, which tested positive **for** the presence of cocaine. (Id.).

On March 2, 2016, while executing a search warrant at the movant's home, investigators found the movant's loaded black and silver Taurus PT709 9mm pistol, serial no. TDM16802, in the movant's dresser drawer. (Id.). The movant agreed that he possessed the Taurus pistol and nine rounds of ammunition, in and affecting interstate and foreign commerce, because the pistol was made in Brazil and the ammunition was made outside the State of Florida. (Id.:10-11).

Movant also agreed that, prior to March 2, 2016, the movant had been convicted of a felony, that was a crime punishable by a term exceeding one year imprisonment, and that his right to possess a firearm or ammunition had not been restored. (Id.:11). The government also noted and movant agreed that Count 1 carried a statutory minimum mandatory term of one year imprisonment, and Count 2 carried a statutory minimum mandatory of 15 years imprisonment. (Id.:12).

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

Briefly, the movant was charged with and pleaded guilty to possession with intent to distribute a detectable amount of cocaine near a school, in violation of 21 U.S.C. §860(a) (Count 1), and felon in possession of a firearm and ammunition, in and affecting interstate and foreign commerce, in violation of 18 U.S.C. §922(g)(1) and §922(e)(1). (Cr-DE#s8, 45, 69). The movant pleaded guilty as charged, without the benefit of a formal, written plea agreement. (Cr-DE#69). A change of plea proceeding, pursuant to Fed.R.Cr.P. 11, was conducted by the district court on July 25, 2018. (Cr-DE#69). At the time, defendant counsel confirmed that the movant was pleading guilty as charged, but intended to challenge his designation as an armed career criminal at sentencing. (Id.:3).

After the movant was given the oath, he understood that if he answered any questions falsely, he could be prosecuted in a separate action **for** perjury or **for** making a false statement. (Id.:4). He then provided his age and background information, including the fact that he was a U.S. citizen. (Id.). Movant denied having been treated **for** any mental illness, drug or alcohol addition, or addition to any narcotics. (Id.). He also denied taking any medications prescribed by a physician. (Id.). He also denied consuming any alcohol or taking any drugs prior to the change of plea proceeding. (Id.).

Movant then affirmed having reviewed the Indictment and fully discussed the charges contained therein with counsel, including the possible defenses, if he had decided to proceed to trial. (Id.:5). Movant also affirmed that he was satisfied with counsel's representation, and that there was nothing he was not satisfied with. (Id.). After conferring with counsel, movant affirmed that he was pleading guilty because he believed it was in his best interest to do so. (Id.).

Movant acknowledged that he was pleading guilty to Count 1, charging him with a violation of 21 U.S.C. §860(a), which carried a maximum penalty of 40 years imprisonment, and guilty to Count 2, a violation of 18 U.S.C. §922(g)(1) and §924(e)(1), that carried a maximum term of up to life imprisonment. (Id.:5-6). Movant confirmed he had spoken with counsel regarding the federal sentencing guidelines and how they might apply in his case. (Id.:6). He understood that the advisory guidelines would assist the court in determining the sentence to be imposed. (Id.). Movant acknowledged that any estimate provided to him was just that, an estimate, and that the court would be unable to determine the movant's sentence exposure until after it has reviewed the PSI. (Id.). Movant acknowledged that if his plea were accepted, he would be unable to withdraw it because he did not later like the sentence that the court imposed. (Id.).

Movant denied being threatened or forced to plead guilty. (Id.:7). He denied being told that something "bad" would happen to him if he did not plead guilty. (Id.). Movant further affirmed that he was pleading guilty to felony offenses. (Id.). As a result, he would be losing valuable civil rights, including the right to vote, hold public office, serve on a jury, and possess any kind of firearm. (Id.:8). Movant further acknowledged and understood that by pleading guilty, he was also giving up certain constitutional rights, including his right to plead not guilty, to proceed to a trial by jury, to be presumed innocence, to require the government to prove the movant's guilt beyond a reasonable doubt, to have movant's attorney cross-examine government witnesses, to call his own defense witnesses at trial, to be presumed innocent, to testify or not at trial, and if he chose not to testify, that the jury would not be able to hold that against him. (Id.:8-9).

The government proffered and the movant agreed with the facts as previously narrated in this report, to support the offenses of conviction. (Id.:9-12). When asked how he wished to plead to the charge in Counts 1 and 2 of the Indictment, movant responded, "Guilty." (Id.:12). The court then found the movant fully competent and capable of entering into an informed plea, that the movant was aware of the nature of the charges and the consequences of the plea, that his plea of guilty was knowing and voluntary, supported by an independent basis in fact, containing each of the essential elements of the offenses. (Id.:12). As a result, the court accepted the movant's plea and adjudicated him guilty as charged in Counts 1 and 2 of the Indictment. (Id.).

Prior to sentencing, a PSI was prepared which grouped Counts 1 and 2 together, because one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to the other count. (PSI ¶21). As a result, the PSI determined that Count 2, a violation of §922(g)(1), produced the highest offense level, and was thus used to set the initial base offense level, pursuant to U.S.S.G. §2K2.1. (PSI ¶¶21-22). In relevant part, the PSI noted that the movant committed the §922(g)(1) violation after two prior felony convictions of either a crime of violence or controlled substance offense, relying upon Case Nos. F94-27553 and F12-6361, which

resulted in an initial base offense level 24, pursuant to U.S.S.G. §2K2.1(a)(2). (PSI ¶21). An additional 6-level enhancement to the base offense level was given based on the fact that the firearm was stolen, and because the movant possessed or transferred the firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, resulting in a total adjusted offense level 30. (PSI ¶¶23-28). However, the movant was considered a **career offender** because he was at least 18 years old at the time of the instant offenses, one of the offenses of conviction involves a controlled substance offense, and the movant had at least two prior felony convictions that are controlled substance offenses, to-wit, **Case Nos. F94-27553 and F12-6361**, resulting in an adjusted offense level 34, pursuant to U.S.S.G. §4B1.1(b)(2). (PSI ¶29) (emphasis added). A 2-level reduction to the base offense level was given based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 32. (PSI ¶¶30-31).

Next, the PSI revealed that the movant had a total of 5 criminal history points, resulting in a criminal history category III. (PSI ¶60). However, according to U.S.S.G. §4B1.1(a), because the movant qualified **for** an enhanced sentence as a career offender, his criminal history category under U.S.S.G. §4B1.1(b) is always a category VI. (PSI ¶60).

Based on a total offense level 32 and a criminal history category VI, the movant faced an advisory guideline range of 210 to 262 months imprisonment. (PSI ¶107). Statutorily, as to Count 1, a violation of 21 U.S.C. §841(b)(1)(C) and §860(a), the movant faced a term of 1 to 40 years imprisonment; and, as to Count 2, the movant faced a term of zero to 10 years imprisonment **for** violation of 18 U.S.C. §924(a)(2). (PSI ¶106).

Movant appeared **for** sentencing on **October 28, 2016**. (Cr-DE#70). At the commencement of the hearing, in response to the court's inquiry, defense counsel advised the court that movant's first objection related to the issue of acceptance of responsibility and the fact that the government was unwilling to agree to the third-point off the movant's base offense level. (Id.:3). The court understood the dilemma, but indicated that only the government could recommend the third point reduction **for** acceptance of responsibility. (Id.:4). In response, the government explained that it was not suffering from a "bruised ego," as alleged by defense counsel. (Id.:12-13). To the contrary, the government explained that they had to prepare **for** trial, prepare witnesses, its exhibit list, and then on the Friday before the Monday that trial was to commence, the movant entered an open plea to the court. (Id.:12-13). As a result, the government was unwilling to offer the additional reduction **for** acceptance of responsibility. (Id.:13). Thereafter, the court heard argument regarding whether the career offender enhancement was lawful. (Id.:14-20). After hearing from the parties, the court found in relevant part, as follows:

> **For** the record, given the present case law in the Eleventh Circuit, as well as the unpublished opinion, I believe Smith controls. I believe this issue of the **mens rea** element has been, at least in this circuit, put to rest. There may be at some point in time where the Eleventh Circuit will disagree, they will have another panel opinion, or, hopefully, more appropriately an *en banc* published opinion that will be able to give the District Court even more guidance. But I believe that the computation as contained in the Presentence Report is correct.(Id.:20).

Movant's counsel next asked **for** a downward variance, pursuant to §3553(a)(6). (Id.:21-22). After hearing further argument from the parties, review of the PSI, as well as, the guidelines and statutory factors in §3553(a), the court ruled that it was imposing a sentence outside the advisory guideline range. (Id.:32). In so finding, the court stated:

> I do not dispute the severity of this Defendant's crime or his continuing involvement in the drug trade based upon my review of the Presentence Report. But I do think that given the nature of

the sentence and the fact that the Defendant asked **for** more time in order to determine what he wanted to do given the disagreement about whether or not the career offender application was appropriate, I am a little disturbed about the Government's parsimonious use of the acceptance of responsibility point.

I think Defendant should be able to effectively discuss the potential plea with their attorneys, evaluate the evidence against them without fear that they will be punished **for** not accepting the responsibility.

Yes, I understand the Government was prepared to go to trial, but I also think that with - to coin a phrase from the vernacular, what comes with great power is great responsibility. And it is a responsibility **for** the Government to recognize that involved with indicting someone is a little element of justice, so I will be sentencing the Defendant outside the advisory guideline range based upon the 3553 factors.

It is the finding of this court the Defendant is hereby committed to the Bureau of Prisons on Count 1 as to 140 months and Count 2 120 months to run consecutive - to run concurrently, excuse me.

He is placed on supervised release **for** six years as to Count 1, three years as to Count 2. All the other terms and conditions of supervised release remain in effect and the special conditions as outlined in part G and pay the special assessment of $200....(DE#70:32-33).

Movant prosecuted a direct appeal, challenging the lawfulness of his career offender enhancement, claiming one of the two predicate offenses **for** "controlled substance offenses," does not qualify, because after 2002, Florida convictions **for** violation of Fla.Stat. §**893.13**(1) allow **for** a conviction regardless of whether the defendant knew the substance he possessed was an illicit controlled substance. United States v. Scott, 703 Fed.Appx. 924 (11 Cir. 2017)(unpublished); (Cr-DE#73). On **August 11, 2017**, the Eleventh Circuit *per curiam* affirmed the convictions and sentences, in a written, but unpublished opinion, finding that the district court had properly deemed the movant a career offender, because the movant's prior challenged conviction, a violation of Fla.Stat. §**893.13**, remains a controlled substance offense under the sentencing guidelines. United States v. Scott, 703 Fed.Appx. at 926.

No petition **for** certiorari review appears to have been filed, and the time **for** doing so is due to expire on **December 9, 2017**, when the 90-day period **for** seeking certiorari review expired following the conclusion of the movant's direct appeal. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1986). See also Pugh v. Smith, 465 F.3d at 1295-1300 (11 Cir. 2006)(discussing Nix v. Sec'y **for** the Dept. Of Corr., 393 F.3d 1235 (11 Cir. 2004) and Bond v. Moore, 309 F.3d 770 (11 Cir. 2002)).

At the latest, the movant was required to file this motion to vacate within one year from the time the judgment becomes final, or no later than **December 9, 2018**. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1986); see also, Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11 Cir. 2007)(this Court has suggested th that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means movant's limitations period is due to expire on **December 9, 2018**.4

The movant's motion to vacate was filed on **June 4, 2018**, approximately six months after his conviction became final, when he signed and then handed the pleading to prison authorities **for**

mailing in accordance with the mailbox rule. (Cv-DE#1:21). Absent evidence to the contrary, the movant's motion is deemed filed, in accordance with the mailbox rule, on the date evidence by the U.S. Postal Service stamp showing its receipt on **June 4, 2018**, and not the date movant handed it to prison officials **for** mailing, if those dates differ.5 (Cv-DE#1:21).

IV. Standard of Review

Because collateral review is not a substitute **for** direct appeal, the grounds **for** collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11 Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved **for** th transgressions of constitutional rights and **for** that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). It is also well-established that a §2255 motion may not be a substitute **for** a direct appeal. Id. at 1232 (citing United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . . "

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." Frady, 456 U.S. at 152; McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved **for** transgressions of constitutional rights and **for** that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Lynn, 365 F.3d at 1232-33 (quoting Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988)(internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or Presentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment). Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. United States v. Dean, 635 F.3d 1200, 1209-1210 (11th

Cir. 2011)(citing United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005)); see also, United States v. Bostic, 645 Fed.Appx. 947, 948 (11th Cir. 2016)(unpublished).6 The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. United States v. Talley, supra.

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). See also United States v. Ruiz, 536 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002); Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005)(table); United States v. Mosley, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, United States v. Patti, 337 F.3d 1317, 1320 (11th Cir. 2003), cert. den'd, 540 U.S. 1149, 124 S. Ct. 1146, 157 L. Ed. 2d 1042 (2004), attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, United States v. Fairchild, 803 F.2d 1121, 1123 (11 Cir. 1986). To determine that a guilty th plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id.; see also, United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005)(*per curiam*); United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005).7

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause. See Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

B. Ineffective Assistance of Counsel Principles

Even if movant attempts to suggest in objections or otherwise that counsel rendered ineffective assistance, this Court's analysis would begin with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel **for** his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770, 788, 178 L.

Ed. 2d 624 (2011). See also Premo v. Moore, 562 U.S. 115, 121-22, 131 S.Ct. 733, 739-740, 178 L. Ed. 2d 649 (2011); Padilla v. Kentucky, 559 U.S. 356, 367, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs). See also Butcher v. United States, 368 F.3d 1290, 1293, 95 Fed. Appx. 1290 (11th Cir. 2004); Brown v. United States, 720 F.3d 1316 (11th Cir. 2013).

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

In the context of a guilty plea, the first prong of Strickland requires petitioner to show that the plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but **for** counsel's errors, he/she would have entered a different plea. Hill, 474 U.S. at 56-59. If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Dingle v. Sec'y **for** Dep't of Corr's, 480 F.3d 1092, 1100 (11th Cir.), cert. den'd, 552 U.S. 990, 128 S. Ct. 530, 169 L. Ed. 2d 339 (2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir.), reh'g and reh'g en banc den'd by, Holladay v. Haley, 232 F.3d 217 (11th Cir.), cert. den'd, 531 U.S. 1017, 121 S. Ct. 578, 148 L. Ed. 2d 495 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of defense counsel and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); United States v. Medlock, 12 F.3d 185, 187 (11th Cir.), cert. den'd, 513 U.S. 864, 115 S. Ct. 180, 130 L. Ed. 2d 115 (1994); United States v. Niles, 565 Fed.Appx. 828 (11th Cir. May 12, 2014)(unpublished).

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

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but **for** counsel's errors, the result of the proceeding would have been

less harsh due to a reduction in the defendant's offense level. Glover v. United States, 531 U.S. 198, 203-04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." Id. at 203.

Furthermore, a §2255 movant must provide factual support **for** his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991), cert. den'd Tejada v. Singletary, 502 U.S. 1105, 112 S. Ct. 1199, 117 L. Ed. 2d 439 (1992); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." Chandler, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Dingle, 480 F.3d at 1099; Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099 (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

V. Threshold Issues-Timeliness

As narrated previously, the movant filed this §2255 motion was filed on **June 4, 2018**, approximately six months after his conviction became final. Since this §2255 proceeding was instituted before expiration of the federal one-year limitations period, it is timely **for** purposes of the AEDPA, and review of the motion is warranted.

VI. Discussion

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

It is also well settled that a knowing and voluntary guilty plea waives all non-jurisdictional errors, including non-jurisdictional defects and defenses. United States v. Brown, 752 F.3d 1344, 1347 (11 Cir. 2014). It also bears mentioning that "[A]s a matter of public policy, no court should tolerate claims of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the

Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant appears to suggest here generally, that "my lawyer told me to lie" or that he was otherwise threatened, coerced, or unlawfully induced by counsel, the government, or the court into doing so. See Gaddis v. United States, 2009 U.S. Dist. LEXIS 126108, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished).

"[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." See Irick v. United States, 2009 U.S. Dist. LEXIS 85094, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). Given the thorough Rule 11 colloquy that was conducted by the court, as narrated previously in this Report, there is nothing of record to suggest that the movant's plea was anything other than knowing and voluntary. Further, movant's sentence was more than generous, lawful, and reasonable in light of the movant's career offender enhancement and the fact that he was facing a significantly higher term of imprisonment, but the court, in its discretion entered a significant downward variance, imposing a total sentence of two concurrent terms of 140 months imprisonment, to be followed by a total of 3 years supervised release. (Cr-DE#55,70).

The law is now well settled that a criminal defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. Lee v. United States,8 __ U.S. __, 137 S.Ct. 1958, 1964, 198 L.Ed.2d 476 (2017); see also, Padilla v. Kentucky, 559 U.S. 356, 357, 130 S.Ct. 1473, 1480-81, 176 L.Ed.2d 284 (2010); Lloyd v. McNeil, 2009 U.S. Dist. LEXIS 68606, 2009 WL 2424576 (S.D. Fla. 2009) (defendant has the right to competent advice regarding the choice to accept a plea or go to trial).

As narrated previously in this Report, in response to the court's inquiry during the change of plea proceeding, the movant first affirmed, under oath, that he was entering an open plea to the Indictment, with the understanding that he faced a possible enhancement as an armed career criminal. He also confirmed understanding the nature of the charge, and agreed with the facts proffered by the government at the Rule 11 proceeding. His representations here, which contradict and/or are irreconcilable with the stipulated facts adduced at the change of plea proceeding, borders on the perjurious, are disingenuous, incredible, and rejected by this court.

Turning to the claims raised in this federal proceeding, movant argues in **claim 1**, that his counsel was "unfamiliar with sentencing laws," because counsel should have objected to the predicate offenses used to support the career offender enhancement, on the basis that one the offenses was as a result of "a 2002 revocation of parole," in which the movant did not have "the assistance of counsel or written notice." (Id.:14). Movant suggests that this prior conviction, which he does not identify by case number or otherwise, was improperly used since he did not have an attorney to represent him in those proceedings.

This claim is not only patently frivolous, but borders on the perjurious. The movant does not identify which prior conviction he claims was uncounseled. Regardless, the two prior convictions relied upon in the PSI to support the career offender enhancement reveals that the movant did, in fact, have counsel appointed to represent him. In Miami-Dade County, Circuit Court, **Case No. 13-2012-CF-6361**, the movant was represented by Alexander Michael, Esquire; and, in Miami-Dade County, Circuit Court, **Case No. F94-027553**, the movant was represented by Theodore Mastos. Copies of the relevant state court dockets and pleadings are being filed and made part of this record by separate court order. Given movant's conclusory allegations here, which are directly contradicted by the record, the movant has not demonstrated either deficient performance or prejudice arising from counsel's failure to pursue this precise argument at sentencing or on appeal. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Relief must therefore be denied.

Under Florida law, it is unlawful to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. §893.13(1)(a). For offenses under Fla.Stat. §893.13, committed after 2002, "knowledge of the illicit nature of a controlled substance is not an element of [the] offense." See Fla.Stat. §893.101(2). Therefore, a defendant may be convicted under §893.13(1)(a) even if he was unaware the substance he possessed was a controlled substance. See Id.

Moreover, the Eleventh Circuit has made clear that convictions under Fla. Stat. §893.13(1) qualify as "serious drug offenses," for purposes of the ACCA, and the "controlled substance offenses," for purposes of the career-offender guidelines, despite the lack of a mens rea element in §893.13, because neither the ACCA definition of "serious drug offense" nor the Guidelines definition of a "controlled substance offense" includes a mens rea element regarding the illicit nature of the controlled substance. United States v. Smith, 775 F.3d 1262, 1267-68 (11 Cir. 2014).

Thus, movant's suggestion that his prior convictions are no longer qualifying predicate offenses because he did not have counsel appointed in one of the cases, or otherwise is meritless. Further, as was previously stated, the movant agreed he had been previously convicted of numerous qualifying predicates, as set forth in the facts adduced at the change of plea proceeding. His allegations to the contrary here are disingenuous and border on the perjurious. In fact, the prior convictions utilized in the PSI categorically support his enhanced sentence. Careful review of the state court judgments in each of the foregoing cases, confirms this fact.9 As discussed above, the movant's prior drug convictions categorically count as serious drug offenses under the Guidelines. His arguments to the contrary are foreclosed by the Eleventh Circuit's decision in United States v. Smith, 775 F.3d 1262, 1264-68 (11 Cir. 2014)(finding Fla.Stat. §893.13(1) is a serious drug offense); see also, United States v. Cobb, 842 F.3d 1213, 1223 (11 Cir. 2016)(Rejecting argument that conviction for possession with intent to sell or deliver under Fla.Stat. §893.13(1) does not qualify as a serious drug offense as being foreclosed by United States v. Smith, supra). Thus, as applied here, movant's arguments to the contrary are devoid of merit.

Consequently, the movant cannot establish deficient performance or prejudice arising from counsel's failure to pursue these nonmeritorious arguments either at sentencing or on direct appeal. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Relief must therefore be denied.

In related **claim 2**, the movant claims he was denied effective assistance of counsel, where his appellate counsel failed to file a petition for certiorari review with the U.S. Supreme Court following conclusion of the movant's direct appeal. (Cv-DE#1:6,17).

Appellate counsel was not ineffective for failing to pursue discretionary review. A defendant is entitled to effective assistance of counsel on the first appeal of his conviction where such an appeal is a matter of right. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L. Ed. 2d 821 (1985). The movant, however, does not have a constitutional right to counsel in pursuing discretionary review of a conviction. See Wainwright v. Torna, 455 U.S. 586, 587, 102 S.Ct. 1300, 71 L. Ed. 2d 475 (1982) (holding that defendant in state criminal case did not have a constitutional right to counsel in pursuing discretionary review in the state supreme court); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L. Ed. 2d 341 (1974) (holding that there is no constitutional right to counsel in pursuing a writ of certiorari in the United States Supreme Court); Cray v. United States, 16-16988-F, 2017 U.S. App. LEXIS 27326, 2017 WL 5515840, at *2-3 (11th Cir. Apr. 12, 2017)(rejecting §2255 claim of ineffective assistance of counsel, finding there is no constitutional right to counsel in pursuing discretionary review); United States v. Fernandez, 397 Fed.Appx. 433, 436 (10th Cir. 2010) (rejecting §2255 claim of ineffective assistance of counsel based on failure to petition Supreme

Court **for** writ of certiorari). Consequently, the movant is not entitled to relief on his claim that counsel was ineffective **for** failing to seek discretionary review with the United States Supreme Court following movant's conclusion on direct appeal.

Movant purportedly relies upon a letter sent by counsel, in which he agreed to file such a petition, but missed the deadline **for** doing so. (Cv-DE#1:17). Movant concedes he did not attach the letter because it contains other "confidential communications that are not directly relevant to this ground." (Id.). On this record, however, the claim is merely speculative, at best. Movant could have redacted what he perceives to be the "confidential" information contained in the letter, and attached it as an exhibit to his motion, along with an affidavit from counsel certifying that he did, in fact, author such a letter. Even so, as noted previously, movant has no constitutional right to counsel in pursuing discretionary review. Therefore, he cannot demonstrate that he is entitled to relief on this claim.

Movant is reminded that the law is well settled that it is his burden to provide a claim in a §2255 motion. See Beeman v. United States, 871 F.3d 1215, 1222 (11 Cir. 2017) (citing Rivers v. United States, 777 F.3d 1306, 1316 (11 Cir. 2015); LeCroy v. United States, 739 F.3d 1297, 1321 (11 Cir. 2014); Barnes v. United States, 579 F.2d 364, 366 (5 Cir. 1978)("Under Section 2255, [the movant] had the burden of showing that he was entitled to relief."); Coon v. United States, 441 F.2d 279, 280 (5 Cir. 1971)("A movant in a collateral attack upon a judgment has the burden to allege and prove facts which would entitle him to relief.")). In so ruling, the Eleventh Circuit commented that "[O]ne of the principal functions of [the] AEDPA was to ensure a greater degree of finality **for** convictions." Beeman v. United States, 871 F.3d at 1223 (citations omitted). The court recognized that "[P]utting the burden of proof and persuasion on the Government in a §2255 proceeding to show the absence of a constitutional violation or that an error had no effect on the judgment would undermine the presumption of finality that attaches at the end of the direct appeal process," and "would go a long way toward creating a presumption of non-finality and undermine the important interests that finality protects." Beeman v. United States, 871 F.3d at 1223.

The Eleventh Circuit further made clear in Beeman that:

> [A] Johnson claim and a Descamps claim make two very different assertions. A Johnson claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a Descamps claim asserts that the defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause.See Beeman v. United States, 871 F.3d at 1220. In Beeman, the movant's arguments "focused" or raised a Descamps10 claim, maintaining that his Georgia conviction **for** aggravated assault could no longer qualify as an aggravated felony under the element clause. Id. However, the movant also raised, what "sounds like a Johnson claim," arguing that the sentencing court erred in relying on the residual clause to determine that his aggravated assault conviction in Georgia qualified as a crime of violence under the ACCA. Id. The defendant supported his argument, stating that aggravated assault in Georgia had "historically qualified as an ACCA predicate under that statute's residual clause." Id. The movant has not demonstrated here that he is entitled to relief on any of the claims presented.

It is also worth mentioning that the lawfulness of his career offender enhancement was raised and rejected on direct appeal, albeit, on a different legal basis. See United States v. Scott, 703 Fed.Appx. 924 (11 Cir. 2017)(unpublished); (Cr-DE#73). Movant has not alleged a change of circumstance sufficient to warrant relitigation of the substantive issue underlying this ineffective claim. See Hobson v. United States, 825 F.2d 364, 366 (11th Cir. 1987)(claim raised and considered on direct appeal precludes further review of the claim in a §2255 motion), vacated on other grounds, 492 U.S. 913, 109 S. Ct. 3233, 106 L. Ed. 2d 581 (1989); United States v. Nyhuis, 211 F.3d 1340,

1343 (11th Cir. 2000); Webb v. United States, 510 F.2d 1097 (5th Cir. 1975); Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992), overruled on other grounds by Castellanos v. United States, 26 F.3d 717 (7 Cir. 1994); Graziano v. United States, 83 F.3d 587 (2d Cir. 1996)(Collateral attack on a final judgment in a criminal case is generally available under §2255 only **for** a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.). Therefore, the claims are procedurally barred from review here. He has not demonstrated a change of circumstance sufficient to warrant relitigation of the claim in this §2255 proceeding.

Moreover, to the extent the challenges here are based on a different legal argument, and he attempts to fault counsel **for** failing to pursue the issues at sentencing or on appeal, such argument should be summarily rejected as the movant cannot satisfy either the deficiency or prejudice prong of Strickland. Movant cannot demonstrate that, but **for** counsel's failure to pursue this precise issues further, either prior to sentencing or on appeal, the result would have been different. **For** the reasons that follow, no prejudice, under Strickland, has been shown arising from counsel's failure to pursue this nonmeritorious issue, as suggested here.

Given the Eleventh Circuit's explicit findings in affirming the judgment and resulting sentences, together with the facts narrated previously in this Report, the movant here has not demonstrated a change in circumstance sufficient to warrant reconsideration of the claim either substantively, much less by way of an ineffective assistance of counsel claim arising from counsel's failure to pursue a further challenge to the career offender enhancement, as alleged. Relief must therefore be denied.

When faced here with such self-serving allegations, in which the movant "has every incentive to embellish," the plea transcript is dispositive on the movant's claims. Movant has not demonstrated here that the plea was anything other than knowing and voluntarily entered, and the resultant sentences lawful. His arguments raised herein are either contradicted by his representations and admissions at the Rule 11 change of plea proceedings, or waived as a result of the knowing and voluntary entry of his guilty plea. Moreover, he has not demonstrated here that the career offender enhancement was unlawful. It should be recalled that the movant received a substantial downward variance in sentence from the career offender designation. Under the totality of the circumstances present here, movant cannot satisfy Strickland's deficiency or prejudice prongs arising from counsel's purported representation either during the Rule 11 proceeding, or **for** failing to raise the issues regarding his career offender enhancement at sentencing or on direct appeal. Consequently, relief on any of the grounds presented is not warranted.

Given the foregoing, the court finds that the entry of the movant's plea was knowing and voluntary and should not be upset here. See Dodd v. United States, 709 Fed.Appx. 593 (11 Cir. Sept. 25, 2017). Like the defendant in Dodd, even if we credit the movant's allegations here that defense counsel was not expressly clear in his advice regarding the charge and the nature of the plea agreement, the movant cannot demonstrate prejudice under Strickland. Dodd v. United States, supra. Also, any purported deficiency by counsel was cured by the thorough change of plea proceedings, and movant's representations made therein, under oath. Again, movant has not satisfied movant's Strickland standard.

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

arguments raised herein.

It also bears mentioning that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant suggests here generally, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so. See Gaddis v. United States, 2009 U.S. Dist. LEXIS 126108, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished). His allegations here are clearly refuted by his sworn declarations at the Rule 11 proceeding. "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." See Irick v. United States, 2009 U.S. Dist. LEXIS 85094, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). Consequently, the movant is entitled to no relief on any of the arguments presented because his plea was knowing and voluntary, and his sentence was lawful and reasonable in light of the plea and the sentence exposure he faced if convicted at trial.

It will be recalled, that when viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner due process of law. The petitioner therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9 Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (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, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

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

On this record, the movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).11 See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984). He also cannot show that the total sentence imposed was either unreasonable or that there was error in the sentencing proceeding. Thus, he has not demonstrated either deficient performance or prejudice arising from counsel's failure to pursue any of the claims raised herein. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Relief is therefore not warranted.

VII. Evidentiary Hearing

Movant is also not entitled to an evidentiary hearing on the claims raised in this proceeding. Movant has the burden of establishing the need **for** an evidentiary hearing, and he would only be entitled to a

hearing if his allegations, if proved, would establish his right to collateral relief. See Schriro v. Landrigan, 550 U.S. 465, 473-75, 127 S.Ct. 1933, 167 L. Ed. 2d 836, 1939-40, 127 S.Ct. 1933 (2007)(holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), *citing*, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979)(holding that §2255 does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel, and stating: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record.").

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition **for** writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481, 173 L. Ed. 2d 347 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Recommendations

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

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 20th day of June, 2018.

/s/ Patrick A. White

UNITED STATES MAGISTRATE JU