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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10965-H

LAZARO CANDELARIA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Lazaro Candelaria, a federal prisoner serving a 160-month sentencing for conspiracy to possess with intent to distribute a controlled substance, moves for a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2255 motion. To merit a COA, Mr. Candelaria must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His § 2255 motion asserts six claims, none of which meets the standard for a grant of a COA.

First, Mr. Candelaria did not show that counsel was ineffective for allegedly promising that he would receive a sentence of 5 years' imprisonment if he pled guilty. Mr. Candelaria's after-the-fact allegations cannot overcome his statements made under oath at his plea hearing—that he was made no promises outside the plea agreement, and was not coerced into entering a

guilty plea—because the testimony he and his family members offered at the evidentiary hearing was not credible. *See United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988).

Second, Mr. Candelaria did not show that counsel was ineffective for failing to challenge his career offender status, because he had at least two qualifying predicate offenses and, thus, cannot show prejudice. First, Mr. Candelaria's Florida strong-arm robbery conviction categorically qualifies as a "crime of violence." *See United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011); *see also United States v. Fritts*, 841 F.3d 937, 943-44 (11th Cir. 2016). Second, his Florida delivery of phencyclidine conviction qualifies as a "controlled substance offense." The record indicates that Mr. Candelaria was convicted of a second-degree felony, in violation of FLA. STAT. § 893.03(2)(b)(23), and, thus, was charged with violating FLA. STAT. § 893.13(1)(a). Section § 893.13(1)(a) does not include purchase as a means of committing the offense, and, thus, falls squarely within the definition of a controlled substance offense. *See* U.S.S.G. § 4B1.2(a); *see also United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014).

Third, Mr. Candelaria did not show that counsel was ineffective for failing to raise Mr. Candelaria's alleged mental incompetency before the district court. Contrary to Mr. Candelaria's assertion, counsel, did, in fact, argue before the district court that Mr. Candelaria's cocaine addiction warranted a downward departure. Additionally, Mr. Candelaria, beyond his own personal statements, provided no evidence of his various alleged mental ailments, and, otherwise, the record contained no evidence that would have led counsel, or the district court, to reasonably believe that he was mentally incompetent. *See Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015).

Fourth, Mr. Candelaria did not show that counsel was ineffective for failing to challenge the assessment of Mr. Candelaria's criminal history points. The district court properly counted

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Mr. Candelaria's prior convictions separately for purposes of calculating his criminal history points, because his robbery arrest occurred in 2000, prior to 2003, when he committed the delivery of phencyclidine offense. *See* U.S.S.G. § 4A1.2(a)(2).

Fifth, Mr. Candelaria did not show that counsel was ineffective for failing to object to his prior convictions as too remote in time to be considered at sentencing. In 2004, upon violating the terms of his probation, Mr. Candelaria received an 18-month incarcerative sentence for his robbery offense, which thusly became the operative sentence for purposes of considering the offense at sentencing. That 18-month sentence ran concurrently with the sentence for his delivery of phencyclidine offense, which served as the basis for revoking his probation. *See* U.S.S.G. § 4A1.2(k)(2). Thus, for both offenses, he received a sentence greater than 1 year and 1 month, triggering the 15-year window. *See id.* § 4A1.2(e). Consequently, both of his prior convictions occurred within 15 years of the October 10, 2014, inception of his involvement in the instant conspiracy. The amount of time he was actually imprisoned was immaterial. *See id.* § 4A1.2, comment (n.2).

Sixth, Mr. Candelaria did not show that counsel was ineffective for failing to challenge the finding in the Presentence Investigation Report ("PSI") that Mr. Candelaria was accountable for at least 500 grams, but less than 2 kilograms, of cocaine. Pursuant to the plea agreement, Mr. Candelaria agreed that the conspiracy involved 500 grams or more of cocaine. Thus, the actual amount that Mr. Candelaria personally handled was immaterial.

Accordingly, Mr. Candelaria's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-cv-20629-GAYLES/REID
Case No. 15-cr-20165-GAYLES/REID

LAZARO CANDELARIA,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

_____/

ORDER AFFIRMING AND ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White's Report and Recommendation ("Report") [ECF No. 49]. On June 20, 2018, Petitioner Lazaro Candelaria filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [ECF No. 1]. On February 22, 2017, Petitioner filed the operative, Amended Motion to Vacate, Set Aside, or Correct Sentence. [ECF No. 10]. The case was referred to Judge White for a Report and Recommendation [ECF No. 3]. Judge White's Report recommended that the Motion be denied, no certificate of appealability be issued, final judgment be entered, and the case be closed. [ECF No. 49]. Petitioner filed his objections, through counsel, on November 14, 2018. [ECF No. 54]. This Order follows.

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint*

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Underwriters, L.L.C., 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

The Court, having reviewed the record for clear error, agrees with Judge White's well-reasoned analysis and findings that Petitioner's claims for ineffective assistance of counsel lack merit.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

(1) Judge White's Report and Recommendation [ECF No. 49] is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference;

(2) Petitioner's objections are overruled;

(3) Petitioner's Motion [ECF No. 10] is **DENIED**;

(4) No certificate of appealability shall be issued;

(5) This action shall be **CLOSED** and all pending motions are **DENIED** ***as moot***.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of February, 2019.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20629-Civ-GAYLES
(15-20165-Cr-GAYLES)
MAGISTRATE JUDGE P.A. WHITE

LAZARO CANDELARIA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. INTRODUCTION

Movant has filed a *pro se* motion to vacate under 28 U.S.C. § 2255. The motion attacks the constitutionality of his conviction and sentence for conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846. Judgment for this offense was entered following a guilty plea in case no. **15-20165-Cr-Gayles**.

This case 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 Proceedings for the United States District Courts ("Rules Governing § 2255 Proceedings").

The court has reviewed the entire record.[1] Of note, the

[1] Courts may consider "the record of prior proceedings" to rule on a § 2255 motion. See Rule 4(b), Rules Governing Section 2255 Proceedings; see also 28 U.S.C. § 2255(b) (courts must review "the files and records of the case").

court has reviewed: (1) movant's operative § 2255 motion and its supporting memorandum (Cv-DE##10-11); (2) the government's response (Cv-DE#12); (3) movant's reply (Cv-DE##15-16); (4) movant's supplement (Cv-DE#17-1); (5) the government's second response (Cv-DE#38); and (6) movant's second reply (Cv-DE#43). Furthermore, the court has appointed counsel and held an evidentiary hearing. See Cv-DE#39. As discussed below, the motion should be **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Federal District Court Case

On March 17, 2015, a federal grand jury indicted movant and twelve codefendants. Movant was charged with a single count of conspiracy to possess with intent to distribute 500 grams or more of cocaine, Molly, ethylone, and marijuana, in violation of 21 U.S.C. § 846. Cr-DE#3.

On September 9, 2015, movant signed a plea agreement in which he agreed to plead guilty to one count of conspiracy to possess with intent to distribute a controlled substance. Cr-DE#265.

Paragraph two of the agreement provides:

> [Movant] is aware that the sentence will be imposed by the court after considering the . . . Guidelines . . . . [Movant] acknowledges and understands that the court will compute an advisory sentence under the . . . Guidelines and that the applicable guidelines will be determined by the court relying in part on the results

> of a Pre-Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. [Movant] is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the . . . Guidelines. [Movant] is further aware and understands that the court is required to consider the advisory guideline range determined under the . . . Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the . . . Guidelines' advisory sentence. Knowing these facts, [movant] understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the [offense to which movant was pleading guilty] and that [movant] may not withdraw the plea solely as a result of the sentence imposed.

Id. at 1-2.[2]

Pertinently, paragraph three of the agreement provides:

> [Movant] also understands and acknowledges that, as to [the offense to which he was pleading guilty], the court may impose a statutory maximum term of up to forty . . . years' imprisonment and a statutory minimum

[2] Unless otherwise noted, all page citations for docket entries refer to the page stamp number located at the top, right-hand corner of the page.

mandatory sentence of five . . . years' imprisonment.

Id. at 2.

Paragraph 10 of the agreement provides:

> [Movant] is aware that the sentence has not yet been determined by the court. [Movant] also is aware that any estimate of the probable sentencing range or sentence that [movant] may receive, whether that estimate comes from [movant's] attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the court. [Movant] understands further that any recommendation that the government makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. [Movant] understands and acknowledges . . . that [he] may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by [movant], the government, or a recommendation made jointly by both [movant] and the government.

Id. at 5.

Paragraph 11 of the agreement provides: "This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings." Id.

On September 9, 2015, the district court conducted a change-of-plea hearing. Cr-DE#535. Brian Dobbins represented the United States. Id. at 2. Roderick Vereen represented movant. Id. At the outset, movant took an oath. Id.

Regarding his competency, movant stated that: (1) he had a year of college; (2) he was not currently under the influence of any alcohol, narcotics, or medication; and (3) he had never been diagnosed with a mental illness. Id. at 3.

Regarding the plea agreement, the court asked movant if he signed it, and he stated that he had. Id. Further, he stated that he had read and understood everything in the agreement. Id. at 4.

Then, the district court asked if he had had enough time to speak to his attorney about everything contained in it. Id. Thereupon, Vereen asked for a minute to speak with movant off the record. Id. Thereafter, Vereen stated that they were ready to proceed, and movant stated that he did not need any more time to speak with Vereen. Id.

The court continued discussing the plea agreement. Id. The court stated that, as set forth in paragraph three of the agreement, the statutory maximum term of imprisonment for the offense in question was 40 years. Id. at 4-5. Movant stated that he understood. Id. at 5. Likewise, movant stated that he understood that the offense had a mandatory minimum sentence of five years. Id. Movant added that he did not have any questions about the plea agreement. Id. at 6.

Regarding the voluntariness of his plea, movant stated that no one had promised him anything other than what was set forth in

the plea agreement to get him to plead guilty. Id. Further, he stated that no one had threatened or forced him to plead guilty. Id.

Regarding the guidelines, movant stated that he had discussed with Vereen how they might apply to his case. Id. at 8. Further, movant stated that he understood that Vereen could only give him Vereen's best assessment of what his actual guidelines would be. Id. at 8-9. Likewise, movant acknowledged that the court could not make a final decision regarding the applicable guidelines until considering his PSI and any objections made thereto. Id. Furthermore, movant stated that he understood that his guilty plea would still bind him if his sentence was more or less severe than he expected it to be. Id. at 9.

The court then asked movant about his interactions with Vereen. Movant stated that he had had enough time to discuss the case and his guilty plea with Vereen. Id. Further, movant stated that he had discussed with Vereen all possible defenses that he might have in the case. Id. Additionally, he stated that he had not had any difficulty communicating with Vereen. Thereupon, the following exchange took place:

> THE COURT: Has your attorney done everything that you've asked him to do?
>
> THE DEFENDANT: So far.
>
> THE COURT: All right. Well, is there something else you want him to do? If not, this is the time to tell me.
>
> THE DEFENDANT: Well, we'll see in the future, at

sentencing.

THE COURT: Well--

THE DEFENDANT: Everything is cool, yes, sir.

THE COURT: Okay. Are you fully satisfied with your attorney's representation?

THE DEFENDANT: Yes, sir.

Id. at 9-10.

After discussing the factual proffer, the district court asked movant how he was pleading to the charged offense. Id. at 11. He said guilty. Further, he said that he was pleading guilty because he was, in fact, guilty. Id. The court found, *inter alia*, that his guilty plea was "knowingly and voluntarily entered" and accepted it. Id.

B. The PSI

The PSI calculated movant's base offense level as 24. PSI ¶ 125. This calculation was based on a finding that movant was "responsible for 500 grams but less than two kilograms of cocaine[.]" Id. (citing USSG § 2D1.1(a)(5), (c)(8)). Furthermore, the PSI found that, under USSG § 4B1.1(a), movant was a "career offender because he was at least 18 years old at the time of the instant offense, the instant offense of conviction is a felony that is a controlled substance offense, and the defendant ha[d] at least two prior felony convictions of either a crime of violence or a controlled substance offense." PSI ¶ 131. According

to the PSI, these offenses are: (1) strongarm robbery; (2) delivery of phencyclidine and possession/purchase/sell/deliver/manufacture cannabis[3]; and (3) trafficking in cocaine, possession of MDMA, possession of cannabis, and possession of a firearm by a felon.[4] PSI ¶¶ 140-42. Further, the PSI found that, "[s]ince the statutory maximum penalty for the instant offense is 40 years, the offense level is 34, § 4B1.1(b)(2)." Id.

However, the PSI recommended a three-point reduction in the offense level for acceptance of responsibility. PSI ¶ 132-33. Therefore, movant's total offense level was 31. PSI ¶ 134. Furthermore, based on its determination that movant was a career offender, the PSI assigned a criminal history category of VI under USSG § 4B1.1(b). PSI ¶ 144. "Based upon a total offense level of 31 and a criminal history category of VI, the guideline imprisonment range [was] 188 to 235 months." PSI ¶ 171.

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[3] The PSI lists "delivery of phencyclidine" and "possession/purchase/sell/deliver/manufacture cannabis" as separate offenses. PSI ¶ 141. However, in computing movant's criminal history, the PSI assigned criminal history points only one time for both offenses. PSI ¶ 141. Furthermore, in arguing that the district court properly calculated movant's criminal history, the government has relied on only the conviction for delivery of phencyclidine. Therefore, in considering whether the district court properly calculated movant's criminal history (including designating him as a career offender), the undersigned considers only the conviction for delivery of phencyclidine and disregards the other conviction listed in paragraph 141 of the PSI.

[4] Similar to the previous footnote, the PSI lists "trafficking in cocaine, possession of MDMA, possession of cannabis, and possession of a firearm by a felon" as separate offenses. PSI ¶ 142. However, to support his argument that the district court improperly computed his criminal history, movant contends only that the district court erred in relying on his conviction for trafficking in cocaine in designating him as a career offender. Likewise, the government contends that the district court properly relied on the conviction for trafficking in cocaine in designating movant as a career offender. Therefore, in considering whether the district court properly calculated movant's criminal history (including his designation as a career offender), the undersigned considers only the conviction for trafficking in cocaine and disregards the other convictions listed in paragraph 142 of the PSI.

C. Post-Plea Motions' Practice

On November 2, 2015, movant, though Vereen, filed objections to the PSI. Cr-DE#340. Movant argued: (1) certain facts that the government alleged in the PSI were inaccurate; (2) the probation officer erred by not classifying him as a minor participant based on the size and nature of the conspiracy; (3) a sentence within the guidelines' range of 188 to 235 months would be unreasonable in light of the factors under 18 U.S.C. § 3553; and (4) defendant qualified for a two-level reduction under USSG § 5K2.13 for diminished capacity based on cocaine addiction. See generally id.

On November 4, 2015, movant, through Vereen, filed a motion for a downward departure. Cr-DE#357. The arguments made therein largely duplicated the arguments made in the objections to the PSI. Compare id., with Cr-DE#340.

In both the objections and the motion for a downward departure, Vereen acknowledged that the mandatory minimum sentence for the offense in question was five years. Cr-DE#340 at 5; Cr-DE#357 at 2.

D. The Sentencing Hearing

On December 16, 2015, the district court held a sentencing hearing. Cr-DE#525. There, Vereen reasserted the arguments that he made in his objection to the PSI and motion for downward departure. Id. at 2-12. The district court sustained, in part, Vereen's objections to certain paragraphs in the PSI. Id. at 22. These objections generally pertained to the quantity of the drugs mentioned in those paragraphs and whether the drugs were actually

delivered. Id. However, the district court found that these errors did not factor into the calculation of the guidelines. Id. at 22-23. The district court reasoned that, because movant pleaded guilty to conspiracy, it was immaterial as to whether movant had "received or handled those particular quantities of drugs." Id. at 23. Notably, in the factual proffer, movant admitted that the conspiracy involved more than 500 grams of cocaine. Id. at 16, 23; see also Cr-DE#266 at 13.

Further, the district court rejected the argument that movant had a minor or minimal role in the conspiracy. Id. at 23-24. Additionally, the district court found that movant failed to meet his burden of showing "reduced capacity based on his voluntary use of drugs." Id. at 24.

The district court then asked the parties what an appropriate sentence would be. Id. at 25. The government argued for a sentence of 188 months, which was at the very low end of the guideline range of 188 to 235 months. Id. at 25. The government acknowledged that it was arguing for a higher sentence for movant than for some of his codefendants even though the latter "were held responsible for more drugs." Id. at 29. However, the government reasoned that movant was not similarly situated to these codefendants because he was a career offender. Id. For his part, Vereen asked the court to sentence movant to the 60-month statutory minimum. Id. at 32, 34.

The district court acknowledged that movant's conduct was "arguably [less] culpable" than that of some of his codefendants. Id. at 35. However, the district court noted that he had a much greater guideline range due to his "significant criminal history." Id. Ultimately, the court granted a downward variance

of 28 months, sentencing movant to 160 months in prison. Id. at 36.

E. Direct Criminal Appeal

Movant, through Vereen, filed a notice of appeal on December 23, 2016. Cr-DE#466. On appeal, Vereen argued that: (1) the district court erred by denying movant's request for a two-level reduction under USSG § 3B1.2(b) based on his allegedly minor role in the offense; (2) movant's sentence was procedurally unreasonable because the district court denied a minor role reduction; and (3) movant's sentence was substantively unreasonable in light of the lower sentences imposed on his codefendants, who had larger roles in the conspiracy. See generally Cr-DE#545 at 4-6.

The Eleventh Circuit held that the first two arguments failed because: (1) movant was sentenced as a career offender and did not challenge that conclusion; and (2) minor role adjustments are not available to defendants sentenced as career offenders under § 4B1.1. Id. at 4. The Eleventh Circuit rejected the third argument because, as a career offender, movant was not similarly situated to the other defendants. Id. at 6. The court added that the district court appropriately considered the § 3553(a) factors. Id.

F. The Instant Case

1. Movant's Claims

On February 17, 2017, movant filed a motion to vacate under 28 U.S.C. § 2255. Cv-DE#1. He filed an amended motion to vacate

on February 22, 2017. Cv-DE#10. The amended motion is the operative motion to vacate. Contemporaneously, he filed a supporting memorandum. Cv-DE#11. On July 10, 2017, movant filed a supplement to his supporting memorandum. Cv-DE#17-1. The court refers to the supporting memorandum and the supplement as the "supporting memorandum" because the supplement adds nothing in substance to the supporting memorandum.

In his supporting memorandum, movant raises nine "arguments." However, he sometimes raises more than one claim under a given argument. Likewise, he raises certain claims under more than one "argument." Due to this disjointedness, the undersigned redesignates his claims as follows:

- Claim 1: Movant involuntarily pleaded guilty because Vereen allegedly ineffectively promised him that movant would receive a specific sentence of five years' imprisonment if movant pleaded guilty. Cv-DE#11 at 16-19, 32; Cv-DE#15 at 9-11; Cv-DE#17-1 at 1-4.

- Claim 2: Vereen ineffectively failed to challenge the district court's classification of movant as a career offender under USSG § 4B1.1. He generally reasons that his predicate convictions do not qualify as "crimes of violence" or "controlled substance offenses" under the categorical approach enunciated in Taylor v. United States, 495 U.S. 575 (1990), and its progeny. Cv-DE#11 at 8-14, 20; Cv-DE#15 at 2-8, 11-17; Cv-DE#16 at 1-5.

- Claim 3: Movant alleges that he suffers from mental health and drug abuse problems and that Vereen ineffectively failed to bring these problems to the court's attention. Further, he conclusorily asserts that the district court should have given

him a mental health evaluation. Cv-DE#11 at 23-24.

- Claim 4: Vereen ineffectively failed to object to the calculation of movant's criminal history points. In support, movant notes that he received two criminal history points for his robbery conviction and two criminal history points for his conviction for delivery of phencyclidine. PSI ¶¶ 140-41. He contends that this computation was erroneous because the convictions for these two offenses were "consolidated for sentencing and cannot be separated once they are consolidated." Cv-DE#11 at 28.

- Claim 5: Movant contends that the aforementioned two convictions were too remote in time to count as prior convictions under the guidelines. Thus, he suggests, Vereen ineffectively failed to raise this objection. See id. at 30.

- Claim 6: Movant contends that Vereen ineffectively failed to challenge the finding in the PSI that he was "accountable for at least 500 grams but less than two kilograms of cocaine." PSI ¶ 59. Movant conclusorily contends that "he was only responsible for 84 grams at most." Id. at 31.

2. Evidentiary Hearing

On February 7, 2018, the undersigned set the case in for an evidentiary hearing on claim 1, i.e., whether Vereen provided ineffective assistance by promising movant that he would receive a 5-year sentence if he pleaded guilty.

The hearing took place on May 24, 2018. Alvin Entin represented movant. AUSA Dobbins represented the government.

Movant presented the following witnesses: (1) his sister, Ana Calderon; (2) his mother, Rafaela Cruz Leon; and (3) himself. AUSA Dobbins presented only Vereen.

Calderon testified first. Pertinently, she testified that, after the detention hearing, Vereen "apologized to [her] and [her] family, stating that [Vereen] thought that [movant] was only going to get five years[] [in prison]." Cv-DE#39 at 8; see also id. at 11, 20. But the detention hearing was held on June 2, 2015, Cr-DE#314, which came over six months before movant was sentenced to 160 months in prison, Cr-DE#446. The notion that Vereen would have made such a statement is so far-fetched and nonsensical that, in and of itself, it destroyed Calderon's testimony.

Other considerations show that Calderon's testimony was incredible. One, her statement that Vereen apologized after the detention hearing because movant received more than five years in prison is inconsistent with an affidavit she submitted to support movant's § 2255 motion. See Cv-DE#10-1 at 28. Two, Calderon's unusually nervous demeanor, coupled with the vagueness of her testimony, also damaged her credibility. In short, Calderon was not a credible witness.

Movant's mother, Cruz Leon, testified next. Cruz Leon was not a credible witness. Notably, Cruz Leon testified that Vereen met with her before movant pleaded guilty and told her that the "max [movant] could get was 60 months to five years[.]" Cv-DE#39 at 25. Cruz Leon looked very evasive when she made this statement. The notion that Vereen, and experienced criminal defense attorney, would have told Cruz Leon that the maximum sentence that movant faced was a range of "60 months to five

years" is, put mildly, implausible. The implausibility of this statement, coupled with Cruz Leon's evasive demeanor, damaged her credibility.

Another consideration shows that Cruz Leon's testimony was incredible. As with Calderon, Cruz Leon submitted an affidavit to support movant's § 2255 motion. Cv-DE#10-1 at 27. The affidavit is typewritten with the exception of Cruz Leon's signature and the date on which she signed it. In the affidavit, Cruz Leon conclusorily states that Vereen promised her that the prosecution would not consider movant a career offender and the district judge would give him "5 years maximum" because (1) "everyone in the indictment was responsible for a lot more drugs than [movant]" and (2) Vereen "knew the judge[.]" Id.

Inconsistently with the affidavit, Cruz Leon initially testified that she did not remember Vereen talking to her about whether movant was responsible for "less or more[]" drugs than his codefendants. Cv-DE#39 at 32. Only when AUSA Dobbins confronted her with this inconsistency did she vaguely testify that Vereen "talked to [her] about something like that[.]" Id. AUSA Dobbins then asked her if she wrote the affidavit. Id. at 32-33. Thereupon, Cruz Leon grew noticeably unsettled. She said that she did not type it up. Id. at 33. AUSA Dobbins then asked her who did. Id. Continuing to falter, she stated that she and her daughter (Calderon) "wrote it[]" at an unidentified attorney's office. Id. When Dobbins asked her if she and Calderon were dictating for a secretary, she evaded the question, repeatedly stating "We were there." Id. at 33-34. Based on her unsettled demeanor and evasive testimony, the undersigned finds Cruz Leon's account of the preparation of the affidavit to be incredible.

In sum, Cruz Leon was not a credible witness.

Next, movant testified. Movant was not a credible witness.

Movant's testimony elicited on direct examination largely repeated the assertions made in his supporting memorandum. Pertinently, he testified that:

- Vereen met with him before the change-of-plea hearing and told him that he was not going to be a career offender and that he "had an agreement for 60 months[.]" Id. at 40.

- Vereen did see him again until the change-of-plea hearing. There, for the first time, Vereen presented him with the factual proffer and plea agreement and told him that he had to "sign [them] in order to receive the 60 months." Id. at 41-42. Likewise, he testified that Vereen told him that he had to agree with the questions the district judge asked him at the change-of-plea hearing "to receive the 60 months[.]" Id. at 43. Movant acknowledged that the district judge asked him if he had been promised anything. Id. at 44. However, movant insisted that Vereen told him that he had to agree with "everything [the judge] said[] . . . to receive the 60 months." Id. To support this assertion, he testified that he stopped the plea colloquy at one point to confer with Vereen. Id. at 44-45. Movant added that, at this moment, Vereen assured him that, if he just played along, he would receive a 60-month sentence. Id.

AUSA Dobbins cross-examined movant. Dobbins pointed out that several of the statements movant made in his supporting memorandum and at the hearing contradicted statements he made during the plea colloquy. Of note:

- Movant testified that he did not read the plea agreement before signing it. Id. at 57-58. Yet movant conceded that he stated otherwise during the plea colloquy. Id. at 61.

- Movant testified that he did not read the factual proffer before signing it. Id. at 71. Yet movant conceded that he stated otherwise during the plea colloquy. Id.

- In light of his testimony that Vereen promised him a 60-month sentence and told him to play along during the plea colloquy, movant conceded that he lied to the district judge when he said that: (a) no one promised him anything to get him to plead guilty; and (b) he had had enough time to discuss the case with Vereen. Id. at 67, 69.

- Movant noted that he said during the plea colloquy that he was pleading guilty because he was in fact guilty of conspiring to possess more than 500 grams of cocaine and other controlled substances. Id. at 73. However, he conceded that this statement was untrue and contended that he was responsible for a significantly lower amount. Id.

These contradictions damaged movant's credibility. In short, he conceded at the evidentiary hearing that he was not fully truthful with the district court during his plea colloquy. This shows that he is willing to misrepresent the truth under oath when he believes it is in his interest to do so.

However, the undersigned also bases his finding that movant's testimony was incredible on additional considerations. One, Movant's testimony at the hearing was vague and largely parroted contentions made in his supporting memorandum. This

observation left the undersigned with the impression that his testimony was manufactured.

Two, movant was very combative during the hearing. At the outset, the undersigned overheard him having a animated discussion with Mr. Entin. Then, during his sister's (Calderon's) testimony, he reacted angrily when she gave the nonsensical testimony that Vereen apologized to her after the detention hearing because he thought movant was only going to receive five years in prison. Indeed, the undersigned overheard him mutter that he did not want to go through with the hearing.

Three, movant was combative at other times during the hearing. At one point, during cross-examination, movant himself objected to a question AUSA Dobbins asked him. Cv-DE#39 at 79. At another point, movant started making a statement when there was no question pending. Id. at 83. Similarly, movant explicitly asked the undersigned if he could make a statement. Id. at 84. Subsequently, movant apologized to the undersigned "if [he] went off in any way[,]" id. at 85, essentially acknowledging his combativeness.

Four, during Mr. Entin's closing argument, movant raised his hand and waived it in an apparent request for permission to speak. Movant did not lower his hand even though the undersigned continued to question Mr. Entin and ignored him. Eventually, a U.S. Marshall had to walk over to movant and tell him to lower his hand.[5]

[5] Some of these remarks and behaviors are not reflected in the official transcript of the evidentiary hearing. However, the undersigned was in the courtroom and heard and observed them.

In sum, movant was not a credible witness. In particular, the undersigned finds incredible his testimony that:

- Vereen promised him that he would receive a 60-month sentence if he pleaded guilty.

- Vereen told him that he knew the district judge, implying that Vereen had an agreement with the district judge for the imposition of specific sentence.

- Vereen promised him that the district court would not designate him as a career offender if he pleaded guilty.

- Vereen told him that he had to agree to everything during the change-of-plea hearing to get the 60-month sentence.

- When the district judge asked movant if Vereen had done everything he had told him to do, movant's initial response that he would "see at sentencing" evidences that Vereen promised him a 60-month sentence.

- When Vereen and movant conferred during the plea colloquy, Vereen then assured him that he would get the 60-month sentence if he continued to play along.[6]

[6] Vereen testified for the government. Pertinently, he testified that he did not promise movant or his family a specific sentence in this case and does not, as a matter of practice, promise his clients specific sentences. Cv-DE#39 at 95, 108, 114. He also testified that he did not promise movant that the district court would not classify him as a career offender if he pleaded guilty. See id. at 104, 119, 122-24. In fact, he testified that he raised with movant the possibility that the district court could classify him as such. Id. at 122-24. The undersigned finds this testimony credible based on its coherent content and Vereen's steady demeanor.

3. Post-Evidentiary Proceedings

On June 8, 2018, the undersigned ordered the government to file a second response. Cv-DE#37. The undersigned generally reasoned that the government had failed to meaningfully respond to some of movant's claims. On July 9, 2018, the government filed its second response. Cv-DE#38. Movant, through Entin, filed his second reply on August 8, 2018. Cv-DE#43.

III. ANALYSIS

A. Ineffective Assistance of Counsel Principles

To establish a claim of ineffective assistance of counsel, movant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

To prove deficiency, he must show that his attorney's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. Id. at 688. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To prove prejudice, movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

B. Claim 1

Movant contends that he involuntarily pleaded guilty because Vereen allegedly ineffectively promised him that movant would receive a specific sentence of five years' imprisonment if movant pleaded guilty. This claim lacks merit.

"[T]he two-part *Strickland* . . . test applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). When evaluating a claim that ineffective assistance led to the improvident acceptance of a guilty plea, the defendant must show "that there is a reasonable probability that, but for counsel's errors,[the defendant] would not have pleaded guilty and would have insisted on going to trial." Lafler v. Cooper, 566 U.S. 156, 163 (2012) (alteration in original) (citing Hill, 474 U.S. at 58).

When evaluating post-guilty plea claims of ineffective assistance, defendants are usually bound by statements made under oath during a plea colloquy. "[T]he representations of the defendant, his lawyer, and the prosecutor at such a 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. 63, 73-74 (1977). "Solemn declarations in open court carry a strong presumption of verity." Id. at 74; see also 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." (citation omitted)).

Here, movant has not shown that Vereen deficiently advised him that he would receive a 5-year sentence if he pleaded guilty.

The undersigned held an evidentiary hearing and found the testimony of movant and his witnesses on this score to be incredible.

Furthermore, the record contradicts the assertion that Vereen promised movant a specific sentence and that the district court would not classify him as a career offender. As set forth above, supra Part II(A), the plea agreement stated that: (1) the guidelines would not be calculated until after the entry of the guilty plea; (2) the guidelines were advisory and the district court could impose any sentence up to the 40-year statutory maximum; and (3) any prediction that Vereen made regarding the sentence was not a promise and not binding on the court.

Likewise, movant acknowledged during the plea colloquy that: (1) he read and understood the plea agreement; (2) no one promised him anything other than what was in the plea agreement to get him to plead guilty; (3) his guilty plea would still bind him if his sentence was more or less severe than he expected it to be; (4) Vereen could give him only his best estimate as to what the guidelines would be; and (5) he was fully satisfied with Vereen's representation. Moreover, the court found his plea to be knowing and voluntary. Movant has utterly failed to overcome his heavy burden of showing that these statements were false. Consequently, he has failed to show that Vereen was deficient.

Nor can movant show prejudice. That is, even had Vereen promised him a 5-year sentence and that he would not be designated as a career offender, movant cannot show that he would not have pleaded guilty and would have insisted on going to trial. Again, the plea agreement stated that: (1) the district court could impose up to the maximum sentence; and (2) any

prediction by Vereen regarding a sentence did not bind the district court. Likewise, movant stated during his plea colloquy that: (1) no one threatened or forced him to plead guilty; and (2) his guilty plea would still bind him if his sentence was more severe than expected. And, to reiterate, the district court found that his plea was knowing and voluntary. On this record, even had Vereen performed deficiently, movant would not be able to show prejudice.

In sum, claim 1 lacks merit.

C. Claim 3

Movant contends "that he is a drug abuser, . . . not a drug dealer." Cv-DE#11 at 23. Further, he contends that "[his] record[] [verifies] that he suffers from a mental illness of diminished capacity, and that he suffers mentally from various other mental disorders, such as depression, withdrawals, [and] personality disorders from the abuse of drugs." Id. He adds that he has "schizophrenia and at times hallucinates" based on his drug abuse and a prior accident. Id. Yet he contends that Vereen failed to bring to the district court's attention that he was "mentally incapacitated," "mentally incompetent," and "mentally delusional." Id.

Movant contends that this alleged failure prejudiced him. Movant suggests that, had Vereen done so, movant would have received a mental evaluation and placement in a hospital instead of imprisonment. Id. at 24. The undersigned also liberally reads movant's supporting memorandum to allege that the district court erred in not *sua sponte* conducting a mental health evaluation. All of these contentions lack merit.

Contrary to movant's contention, Vereen did argue before sentencing that movant deserved a downward departure under USSG § 5K2.13 due to cocaine addiction. Cr-DE#340 at 6-7; Cr-DE#357 at 3-4. Vereen made the same argument during sentencing. Cr-DE#525 at 8-10. The district court rejected this argument, finding an insufficient "basis to grant a reduction based upon reduced capacity based on [movant's] voluntary use of drugs." Id. at 24. The district court reasoned: "Considering 5K2.13 and what [movant] is required to show [], . . . I don't think [movant] has met that burden." Id.

Under USSG § 5H1.4, "[d]rug . . . dependence . . . ordinarily is not a reason for a downward departure." Consonantly, under USSG § 5K2.13, "the court may not depart below the applicable guideline range if [] the significantly reduced mental capacity was caused by the voluntary use of drugs."

Here, movant has not shown that his alleged cocaine addiction warranted a downward departure. For starters, he has not adequately shown that he had such an addiction. The only evidence in the record of his alleged addiction are: (1) a statement on March 18, 2015 to a health care provider that he used 2 to 4 grams of cocaine a day until his arrest; (2) his statement to the preparer of the PSI that he used 3 to 4 grams of cocaine a day until his arrest. Cr-DE#340 at 9; PSI ¶ 158. Movant's unadorned statements that he had such an addiction, absent more, are insufficient to meet the burden of proof under § 2255. See Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017) (citing cases) (noting that movants bear the burden of proof under § 2255).

In any event, Vereen effectively conceded at sentencing that movant's alleged drug use was voluntary. See Cr-DE#525 at 9. And the district court correctly held that voluntary drug use is not a basis for a downward departure under § 5K2.13. Thus, movant's contention that his drug use warranted a downward departure is meritless. Vereen's raising of this meritless claim was not deficient. See Freeman v. Att'y Gen., 536 F.3d 1225, 1233 (11th Cir. 2008) (citation omitted) ("A lawyer cannot be deficient for failing to raise a meritless claim[.]").

Nor did Vereen deficiently fail to argue that movant's alleged mental health problems warranted a downward departure. Notably, during the plea colloquy, movant stated that he had never "suffered from or . . . been diagnosed with a mental illness." Cr-DE#535 at 3. Movant has not overcome his heavy burden of showing that this statement was false.

The only contrary evidence is: (1) an isolated statement in the PSI that FDC medical staff reported that movant had "a history [of] temporary or acute[] anxiety diagnosis[]"; and (2) movant's statement to the preparer of the PSI that "he was diagnosed with schizophrenia at the age of 17 and [] was seen by a psychologist and a psychiatrist who prescribed him medication[]"; and (3) his girlfriend's statement to the preparer of the PSI that movant had "depression issues" but never sought treatment. PSI ¶ 157.

Yet the PSI states that movant did "not recall the medication [or] the names of the providers [who allegedly diagnosed him with schizophrenia]." Id. Further, the PSI states that movant "never took the medications [or] continued his mental health treatment [for his alleged schizophrenia]." Id. And

movant's brother, whom the preparer of the PSI interviewed, was not sure if he had any mental health issues. Id. Furthermore, while movant alleges in his supporting memorandum that he has a variety of mental health issues, his allegations are unsupported and conclusory.

On this record, movant has not adequately shown that he has any mental health problems. See Beeman, 871 F.3d at 1222; Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1256 (11th Cir. 2012) (movant has burden of proof on ineffectiveness claim). Therefore, the district court most likely would have denied an request for a downward departure on this ground. As a result, Vereen's failure to so argue was not deficient. See Freeman, 536 F.3d at 1233.

Movant's next contention is that he should have received a mental health evaluation under 18 U.S.C. § 4241. Pertinently, this statute provides that the defendant or attorney for the government may "file a motion for a hearing to determine the mental competency of the defendant." Id. § 4241(a). "The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Id.

Here, the record does not reflect that either Vereen or the district judge had reasonable cause to believe that movant was suffering from such a mental disease or defect. Courts usually consider three factors to determine whether such reasonable cause

of incompetency exists: (1) "evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; and (3) prior medical opinion regarding the defendant's competence to stand trial." United States v. Wingo, 789 F.3d 1226, 1236 (11th Cir. 2015) (citation omitted).

Here, regarding factor (1), movant has submitted no evidence that he displayed irrational behavior during the underlying proceedings. Factor (2) strongly weighs against him because he stated during the plea colloquy that he had never suffered from or been diagnosed with a mental illness. Likewise, the district judge found that, "[b]ased on [movant's] responses to [his] questions, [movant] . . . intelligently waived [his] rights; . . . knowingly . . . entered [his] plea; [and understood] the nature of the charges and the consequences of the plea[.]" Cr-DE#535 at 11; see also United States v. Sesma-Bague, 644 F. App'x 970, 971 (11th Cir. 2016) (per curiam). Furthermore, regarding factor (3), "the record is [essentially] bereft of any opinion, medical or lay, questioning [movant's] competence." Sesma-Bague, 644 F. App'x at 971 (citation omitted). The sparse and unsupported statements in the PSI regarding movant's mental health are not sufficiently probative under Wingo. Cf. 789 F.3d at 1237 ("At least three medical doctors expressed serious doubts about [the defendant's] competence." (emphasis added)).[7]

Accordingly, Vereen did not deficiently fail to move for a mental competency hearing under § 4241. Likewise, the district

[7] Two other considerations indicate that movant was competent to assist in his defense and plead guilty. First, the undersigned observed movant carefully at the evidentiary hearing. While he was combative, he did not display signs of incompetency. Second, until the appointment of counsel, he represented himself in his habeas action. Based partly on movant's legal arguments, the undersigned deemed it proper to schedule an evidentiary hearing on one of his claims.

court's failure to *sua sponte* order such a hearing under said statute was not improper.

For the same reasons, the district court did not err in failing to *sua sponte* conduct a hearing under Pate v. Robinson, 383 U.S. 375, 385 (1966). "Due process requires that a defendant be given a [*sua sponte*] hearing on competency when the evidence raises a 'bona fide doubt' as to his competency to stand trial." McNair v. Dugger, 866 F.2d 399, 401 (11th Cir. 1989) (per curiam) (quoting Pate, 383 U.S. at 385). And, ordinarily, Pate's "bona fide doubt" test is coextensive with § 4241's "reasonable cause" test. See Wingo, 789 F.3d at 1236 (citation omitted); compare Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir. 1990) (setting forth same Pate's "bona fide doubt" test), with Wingo, 789 F.3d at 1236 (using same "bona fide doubt" test to define § 4241's "reasonable cause" requirement). Thus, the district court's failure to conduct a *sua sponte* Pate hearing was not erroneous.

In sum, claim 3 lacks merit.

D. Claim 5

1. Background

Movant's fifth claim is that the following two convictions were too remote in time to count as prior convictions under the guidelines: (1) delivery of phencyclidine; and (2) strongarm robbery. Cv-DE#11 at 30. That is, movant contends that, due to the age of these convictions, the district court improperly relied on them when computing movant's criminal history.

The record reflects, Cv-DE#48-2,[8] and the parties concede, that movant was sentenced on March 22, 2004 for delivery of phencyclidine. Furthermore, the record reflects that movant was sentenced to eighteen months in prison on this conviction. Id. It is not fully clear, however, how much time movant spent in prison for this conviction. On the one hand, said judicial records state that movant received 196 days' credit for time served. Id. However, the PSI states that movant's 18-month sentence was "reduced to 196 days." PSI ¶ 141.

The record also reflects, Cv-DE#38-2 at 10-12, and the parties concede, that movant was sentenced to three years' probation for strongarm robbery on September 28, 2000. Furthermore, the PSI states, PSI ¶ 140, and the parties concede, that movant's probation was revoked on June 14, 2004. Judicial records show that movant was sentenced to 18 months' imprisonment on this offense. Cv-DE#38-2 at 13.[9]

Movant contends that the robbery conviction was consolidated with the delivery of phencyclidine conviction. Cv-DE#43 at 3. The government appears to agree with this contention. See Cv-DE#38 at 13-14. Furthermore, movant contends that his 18-month "prison term was reduced to 196 days[']jail time[]" on August 3, 2004. Cv-DE#43 at 4 (citing PSI ¶ 140).

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[8] The court judicially notices these judicial records. See Fed. R. Evid. 201(b)-(c); McBride v. Sharpe, 25 F.3d 962, 970 (11th Cir. 1994) (en banc) (federal habeas court may *sua sponte* consider state court records when the petitioner was a party to the proceedings and there is no indication that the state records are "inaccurate, incomplete, or misleading").

[9] Cv-DE#38-2 at 10-13 are state-court judgments pertaining to movant's robbery conviction. Cv-DE#48-1 is the Miami-Dade County docket sheet pertaining to said conviction. The court judicially notices these records as well. Supra n.8.

2. Timeliness of Delivery of Phencyclidine Conviction

The guidelines set forth various definitions and instructions for computing criminal history. Regarding the applicable time period, "[a]ny prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted." USSG § 4A1.2(e)(1).[10] The commentary to § 4A1.2 makes clear that "criminal history points are based on the sentence pronounced, not the length of time actually served." USSG § 4A1.2 cmt., n.2; see also United States v. Glover, 154 F.3d 1291, 1295 (11th Cir. 1998). Courts normally consider "the sentencing documents in the record[]" to determine "a defendant's total sentence of imprisonment for purposes of the Guidelines." See Glover, 154 F.3d at 1295.

Here, such records show that movant was sentenced to eighteen months in prison for delivery of phencyclidine. Thus, he has a prior sentence of imprisonment exceeding one year and one month that was imposed on March 22, 2004.

Movant appears to contend that this conviction was for only 196 days. This fact, he concludes, makes § 4A1.2(e)(2)'s ten-year period apply rather than §4A1.2(e)(1)'s fifteen-year period. However, as noted, courts must consider the sentencing documents in the record to determine the length of the conviction. Furthermore, as noted, the above-referenced state judicial records show that this conviction was for eighteen months, not

[10] The undersigned analyzes the 2016 guidelines because they were in effect when movant was sentenced. Dorsey v. United States, 567 U.S. 260, 275 (2012).

196 days.

Movant appears to counter that: (1) the PSI states that movant was sentenced to only 196 days; and (2) the court must rely on the information in the PSI to determine the length of the sentence.

Again, however, courts must rely on sentencing documents in the record to make this determination. While state docket sheets are not judgments *per se*, "uncertified docket sheets downloaded from a court's website [are] sufficient to prove that the defendant [has] a prior . . . conviction [for the purposes of computing his criminal history]." See United States v. Northcutt, 554 F. App's 875, 879 (11th Cir. 2014) (per curiam) (citation omitted). In short, a docket sheet from the clerk of the court of the county in which the defendant was convicted is a more reliable source of information regarding that conviction than a PSI. Cf. Northcutt, 554 F. App'x at 879; Glover, 154 F.3d at 1295.[11]

Moreover, the PSI does not even state unequivocally that movant was sentenced to 196 days for delivery of phencyclidine. Rather, it states: "18 months state prison, reduced to 196 days credit time served[.]" PSI ¶ 141. Thus, the PSI lends support to the undersigned's finding that movant was sentenced to eighteen months' imprisonment for delivery of phencyclidine.

Accordingly, the only remaining issue is whether this

[11] Notably, the government submitted the actual state-court judgments for this offense. They show that movant was sentenced to 18 months in prison. Cv-DE#47-1 at 13, 16. But the undersigned need not consider these documents to dispose of this claim; the above-referenced docket sheet suffices. That said, the undersigned would properly rely on these state-court judgments. See supra nn.8-9; infra n.19.

sentence "was imposed within fifteen years of the defendant's commencement of the instant offense." USSG § 4A1.2(e)(1). Here, the PSI reflects that movant joined the conspiracy on October 10, 2014. PSI ¶ 42; see also USSG § 1B1.3 cmt., n.3(B). Therefore, because movant's March 22, 2004 conviction for delivery of phencyclidine was imposed within fifteen years of October 10, 2014, the district court would have overruled any objection on this basis. Consequently, Vereen did not deficiently fail to challenge the timeliness, or not, of this conviction.

3. Timeliness of Robbery Conviction

A state-court judgment shows that, on September 28, 2000, movant was sentenced to three years of probation for this offense. Cv-DE#38-2 at 10-12. Thus, movant contends that this conviction is not one "exceeding one year and one month" under § 4A1.2(e)(1). Therefore, he continues, § 4A1.2(e)(2)'s ten-year window applies. He further argues that, because September 28, 2000 comes more than ten years before the October 10, 2014 commencement of the instant offense, § 4A1.2(e)(2) does not apply. Consequently, he concludes, this prior offense is not counted because it is "not within the [10- and 15-year] time periods [discussed] above." USSG § 4A1.2(e)(3).

This argument lacks merit. A subsequent state-court judgment shows that, on June 24, 2004, movant's probation was revoked and he was sentenced to eighteen months in prison. Cv-DE#38-2 at 13. "Revocation of probation[] . . . may affect the time period under [§ 4A1.2(e)]." USSG § 4A1.2(k)(2). In such a case, "[f]or the purposes of determining the applicable time period, use . . . : [] in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from

incarceration on such sentence . . . [.]" USSG § 4A1.2(k)(2)(A); see also United States v. Knight, 562 F.3d 1314, 1329 (11th Cir. 2009).

Here, movant does not dispute that the judgment revoking his probation and imposing a sentence involved an adult term of imprisonment. Furthermore, as discussed, he was sentenced to eighteen months in prison, which surpasses imprisonment totaling more than one year and one month. True, movant appears to contend that he was sentenced to only 196 days for his revocation of probation. However, both the judgment revoking his probation, Cv-DE#38-2 at 13, and the docket sheet for his robbery offense, show that he was sentenced to eighteen months in prison. And, to reiterate, "criminal history points are based on the sentence pronounced, not the length of time actually served." USSG § 4A1.2 cmt., n.2. Thus, the issue is whether movant was released from incarceration within fifteen years of his commencement of the instant offense.

He was. Movant commenced the instant offense on October 10, 2014. Furthermore, the PSI states, and neither party has disputed, that he was released from custody for this offense on December 20, 2004. PSI ¶ 140. Likewise, records from the Florida Department of Corrections ("FDOC") state that movant was released from custody on December 21, 2004. Cv-DE#48-3.[12] Thus, the record compels the conclusion that movant commenced the instant offense approximately ten years after his release from custody on this offense, falling comfortably within the applicable 15-year

[12] The court takes judicial notice of these FDOC records. See Fed. R. Evid. 201(b)-(c); Dimanche v. Brown, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015) (taking judicial notice of public reports prepared by the FDOC); McBride, 25 F.3d at 970.

window.[13] [14]

For these reasons, the district court would have overruled any objection to the timeliness, or not, of movant's delivery of phencyclidine and robbery convictions. Vereen did not deficiently fail to raise this meritless objection.

E. Claim 4

Movant contends that the district court erroneously assessed two criminal history points each for his robbery and delivery of phencyclidine convictions. This is because, he continues, the state court consolidated these offenses for sentencing. As noted, the government does not appear to challenge this contention. See Cv-DE#38 at 13-14. Movant concludes that Vereen ineffectively failed to raise this allegedly meritorious claim.

This claim lacks merit. Under the guidelines' definitions and instructions for computing criminal history,

> If the defendant has multiple prior sentences , [courts must] determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated

[13] Assuming *arguendo* that it were improper to rely on the PSI and FDOC records to determine movant's release date for this offense, the record would still show that movant commenced the instant offense within fifteen years of his release from incarceration. Again, movant was resentenced on June 24, 2004. Necessarily, his release date would be no earlier than this date. This date is easily within fifteen years of the October 10, 2014 commencement date.

[14] Movant does not contend that his conviction for cocaine trafficking was too old to receive criminal history points.

> by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense).

USSG § 4A1.2(a)(2).

Here, movant was arrested for robbery on March 25, 2000. Cv-DE#48-1; PSI ¶ 140.[15] He was arrested for delivery on phencyclidine in September 2003. Cv-DE#48-2; PSI ¶ 141. Thus, he was arrested for robbery prior to committing the offense of delivery of phencyclidine. Thus, under the plain language of § 4A1.2(a)(2), these offenses are counted separately. See also United States v. Wright, 862 F.3d 1265, 1281 (2017). Due to this intervening arrest, these offenses would be counted separately irrespective of whether the state court consolidated them, aggregated them, ordered them to run concurrently, and/or imposed them on the same day. See Wright, 862 F.3d at 1281; United States v. Delaney, 639 F. App'x 592, 597 (11th Cir. 2016) (per curiam); United States v. Muoio, 592 F. App'x 762, 766 (11th Cir. 2014) (per curiam); Lee, 391 F. App'x at 835.

In short, the district court properly counted movant's robbery and delivery of phencyclidine convictions separately despite their apparent consolidation. Vereen did not deficiently fail to raise this meritless objection.

F. Claim 6

Movant contends that Vereen ineffectively failed to challenge the finding in the PSI that he was "accountable for at

[15] Courts may consider the PSI when making this determination. See United States v. Lee, 391 F. App'x 831, 835 (11th Cir. 2010) (per curiam).

least 500 grams but less than two kilograms of cocaine." PSI ¶ 59. Movant conclusorily contends that "he was only responsible for 84 grams at most." Cv-DE#11 at 31.

This claim is frivolous. The factual proffer states that "the conspiracy between [movant] and his co-defendants involved 500 or more grams of cocaine." Cr-DE#266 at 13. Movant stated during his plea colloquy that the factual proffer was true. Cr-DE#535 at 10-11. Likewise, count 1 of the indictment states that movant conspired to possess with intent to distribute "five hundred . . . grams or more of . . . cocaine," Cr-DE#3 at 3, and movant pleaded guilty to this offense, Cr-DE#535 at 11. Movant has not overcome his heavy burden of showing that these statements were false. Moreover, in arguing, albeit unsuccessfully, for a downward departure at sentencing, Vereen raised the amount of drugs that movant actually handled. In short, movant cannot show deficiency or prejudice on this claim.

G. Claim 2

1. Introduction

Movant contends that the district court improperly classified him as a career offender under the guidelines. In support, he contends that none of the following convictions is a qualifying predicate offense: (1) strongarm robbery; (2) delivery of phencyclidine; and (3) cocaine trafficking. Because these offenses allegedly did not qualify under the guidelines' career offender provision, movant contends that Vereen ineffectively failed to challenge his career offender classification.

This argument fails. As discussed below, robbery is a qualifying "crime of violence," and delivery of phencyclidine is a qualifying "controlled substance offense." Furthermore, the guidelines' career offender provision requires only two qualifying offenses. Therefore, even if Vereen deficiently failed to argue that the cocaine trafficking conviction was not a qualifying controlled substance offense, the district court still would have properly classified movant as a career offender. Consequently, movant cannot show prejudice on his Strickland claim.

2. Applicable Guideline Provisions

In relevant part, a defendant is a career offender if (1) his prior conviction "is a felony that is either a crime of violence or a controlled substance offense[]"; and (2) he has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1(a).

Pertinently, the term "crime of violence" means:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another[.] . . .

USSG § 4B1.2(a)(1).

As relevant here, "[t]he term 'controlled substance offense' means an offense under . . . state law, punishable by

imprisonment for a term exceeding one year, that prohibits the . . . distribution[] or dispensing of a controlled substance . . . .

USSG § 4B1.2(b).[16]

3. Discussion

a. Strongarm Robbery

Movant contends that his robbery conviction is not a crime of violence under the guidelines. Eleventh Circuit precedent forecloses this contention. See generally United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011).

In Lockley, the defendant contended that the district court erred in enhancing his sentence under USSG § 4B1.1(a). To support this contention, he maintained that "his prior conviction for attempted robbery in violation of Fla. Stat. []§ 812.13(1) . . . was not a 'crime of violence' under § 4B1.2." Id. at 1240. The court disagreed. Pertinently, it held that the "bare elements of § 812.13(1) . . . satisfy the elements . . . clause[] of U.S.S.G. § 4B1.2(a)." Id. at 1245. It reasoned:

> [R]obbery under [§ 812.13(1)] . . . requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm. All but the latter option specifically require

[16] Here, it is undisputed that movant's strongarm robbery and delivery of phencyclidine convictions are punishable by imprisonment for a term exceeding one year.

> the use or threatened use of physical force against the person of another. And, once again, we find it inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force. Section 812.13(1) accordingly has, as an element, the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

Id.

Subsequent Eleventh Circuit decisions have recognized that "*Lockley* remain[s] binding precedent." United States v. Lee, 886 F.3d 1161, 1165 (11th Cir. 2018) (per curiam); see also United States v. Seabrooks, 839 F.3d 1326, 1340 (11th Cir. 2016) ("In *Lockley*, this Court held that a Florida robbery conviction under § 812.13(1), even without a firearm, qualifies as a 'crime of violence' under the elements clause in the career offender guideline in U.S.S.G. § 4B1.2(a)[.]" (emphasis added)); United States v. Fritts, 841 F.3d 937, 940 (11th Cir. 2016) (same).

Accordingly, the district court would have overruled any objection to the classification of this offense as a crime of violence under the guidelines. Vereen's failure to so argue was not deficient.

b. Delivery of Phencyclidine

Pertinently, "a person [who] . . . sell[s], manufacture[s], or deliver[s], or possess[es] with intent to sell, manufacture, or deliver, a controlled substance named or described in [Fla. Stat. § 893.03(2)(b)] commits a felony of the second degree[.] .

. ." Fla. Stat. Ann. § 893.13(1)(a). In September 2003 (i.e., the date of the offense), as well as now, Florida law classified phencyclidine as a controlled substance. Fla. Stat. § 893.03(2)(b)(23).

Movant contends that the record is not clear on whether he was convicted under Fla. Stat. § 893.13 or Fla. Stat § 893.135. Cv-DE#11 at 10. This alleged uncertainty, he continues, shows that his conviction for delivery of phencyclidine was not a controlled substance offense under the guidelines. See id. In support, he contends § 893.13 and § 893.135 prohibit the "delivery" of controlled substances. Id. However, he contends that § 893.135 "prohibits the act of purchase which is not included in the definition of . . . 893.13." Id. Therefore, he suggests that he could have been convicted of the act of "purchasing" phencyclidine. See id. This possibility is "dispositive," he further suggests, because the guideline's definition for "controlled substance offense" does not include the "purchase" of a controlled substance.

This argument lacks merit. In contrast to § 893.13(1)(a), § 893.135 "criminalizes trafficking in certain drugs[.]" Franklin v. State, 887 So. 2d 1063, 1067 (Fla. 2004) (emphasis added). Section 893.135(1)(d) pertains to "trafficking in phencyclidine[.]" State v. Dominguez, 509 So. 2d 917, 919 (Fla. 1987). Pertinently, § 893.135 provides:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine, . . . commits a felony of the first degree, which felony shall be known

as "trafficking in phencyclidine[.]" . . .

Fla. Stat. Ann. § 893.135(d)(1) (emphasis added).

Here, a state docket sheet specifies that movant was charged with the second-degree felony of "delivery of phencyclidine" in violation of § 893.02(2)(b)(23). Cv-DE#48-2. Thus, because he was not charged with a first-degree felony, the record does not reflect that he was charged under § 893.135(d)(1). Rather, because § 893.13(1)(a) provides that delivering a "controlled substance" listed in § 893.02(2)(b)(23) is a second-degree felony, and because the docket sheet charged movant with the second-degree felony of delivery of phencyclidine in violation of § 893.02(2)(b)(23), every indication is that movant was charged with and pleaded guilty to delivery of phencyclidine in violation of §§ 893.13(1)(a) and 893.02(2)(b)(23).[17]

Because the record so reflects, the remaining issue is whether this conviction qualifies as a "controlled substance offense" under § 4B1.2(b). It does.

The Eleventh Circuit has held that "[s]ection 893.13(1) of the Florida Statutes is . . . a 'controlled substance offense[]' U.S.S.G. § 4B1.2(b)." United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014). Furthermore, the Eleventh Circuit has held that "a conviction for delivery of cocaine clearly is an offense under state law that prohibits the distribution or dispensing of a controlled substance[.]" United States v. Hicks, 174 F. App'x 505, 506 (11th Cir. 2006) (per curiam) (citing United States v.

[17] It is proper to use the "uncertified docket sheet[] downloaded from [the state] court's website . . . to prove that [movant] [has] a prior . . . conviction [for the purposes of computing his criminal history]." See Northcutt, 554 F. App'x at 879; see also supra nn.8-9; infra Part III(H)(3).

Govan, 293 F.3d 1248, 1250 (11th Cir. 2002)). If a conviction for delivery of cocaine satisfies § 4B1.2(b), it follows that a conviction for delivery of phencyclidine does. Both convictions involve a "delivery" and, like cocaine, phencyclidine is a controlled substance under federal law (as well as Florida law). Compare 21 U.S.C. § 812(a), with 21 C.F.R. § 1308.12(e)(4).

True, § 4B1.2(b) pertinently defines "controlled substance" as an offense prohibiting the "manufacture, import, export, distribution, or dispensing of a controlled substance." That is, § 4B1.2(b) does not explicitly provide that the term "controlled substance offense" prohibiting the "delivery" of a controlled substance. But the "fact that [§ 4B1.2(b)] does not specifically use the term[] . . . 'deliver' is irrelevant because distribution [a term it uses] of a controlled substance encompasses, as a matter of definition, any method of transferring a controlled substance, including . . . delivery." United States v. Johnson, 515 F. App'x 844, 847 (11th Cir. 2013) (per curiam). Under Florida law, "'[d]eliver' or 'delivery' means the . . . transfer from one person to another of a controlled substance[.]" Fla. Stat. § 893.02(6). Thus, "[a]ny conduct meeting the state's definition of 'delivery' comes within § 4B1.2(b) because 'transfer' is just another word for distribute or dispense." United States. v. Redden, 875 F.3d 374, 375 (7th Cir. 2017).

In sum, movant has not shown that Vereen deficiently failed to argue that his delivery of phencyclidine conviction is a controlled substance offense. The district court would have rejected this argument.

As noted, only two qualifying crimes of violence and/or controlled substance offenses are required to support a career

offender designation. USSG § 4B1.1(a). Here, as discussed above, movant has two such prior convictions. Therefore, assuming *arguendo* that his trafficking in cocaine conviction is not a controlled substance offense and that Vereen deficiently failed to so argue, the district court still properly designated him as a career offender. Consequently, he cannot show prejudice on his claim that Vereen ineffectively failed to challenge his career offender designation.

H. Movant's Objections to the Government's Supplemental Documents

A short primer on the categorical and modified categorical approaches is necessary to understand this objection.

1. Legal Background

The Armed Career Criminal Act ("ACCA") "increases the sentences of certain federal defendants who have three prior convictions 'for a violent felony,' including 'burglary, arson, or extortion.'" Descamps v. United States, 570 U.S. 254, 257 (2013). "To determine whether a past conviction is for one of those crimes, courts use what has become known as the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime--i.e., the offense as commonly understood." Id. "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." Id.

The Supreme Court has "approved a variant of this method--labeled . . . the 'modified categorical approach'--when a prior conviction is for violating a so-called 'divisible statute.'" Id.

A divisible statute "sets out one or more elements of the offense in the alternative--for example, stating that burglary involves entry into a building or an automobile." Id. "If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." Id. "The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." Id.

When applying the modified categorical approach, the court usually may consider only a charging document, judgment of conviction, plea agreement, transcript of a plea colloquy, or some comparable judicial record, that the government submits. See Shepard v. United States, 544 U.S. 13, 26 (2005); United States v. Braun, 801 F.3d 1301, 1305 (11th Cir. 2015). These documents are commonly called Shepard documents because the Supreme Court approved them in said decision.

2. Discussion

As discussed, after the evidentiary hearing, the undersigned ordered the government to file a second response. The government did so and submitted documents to support its second response. In this report, the undersigned cited only: (1) a state judgment sentencing movant to probation on his robbery conviction; and (2) a state judgment sentencing him to prison for violating his probation on said conviction. Cv-DE#38-2 at 10-13.

Subsequently, the undersigned ordered the government to "supplement the record with any charging document, judgment, plea agreement or colloquy, and/or some comparable judicial record evidencing movant's [] conviction for delivery of phencyclidine[,]" as well as "the docket sheet for the state's [] prosecution of movant for delivery of phencyclidine." Cv-DE#44. The undersigned did so because the government included with his second response some of this information for movant's robbery and cocaine trafficking convictions, but not for his delivery of phencyclidine conviction.

On the day the government's response to this order was due, movant filed an objection to the undersigned's order. Cv-DE#46. Movant contended that "the Government should not be allowed to produce any other [Shepard] documents as all such documents were to be produced only at the initial sentencing hearing." Id. at 1. Thus, because the government did not introduce them at movant's sentencing hearing, movant concludes that the undersigned cannot consider them in this § 2255 proceeding. Id.

The court need not rule on this objection. The undersigned did not cite or use any of the documents that movant submitted in response to the order to supplement the record. Doing so was not necessary to resolve the claims in movant's § 2255 motion.

True, the undersigned cited two state court judgments pertaining to movant's robbery conviction. However, the undersigned did so only in considering whether Vereen ineffectively failed to challenge the district court's computation of his criminal history score. The undersigned did not cite or use these judgments in considering whether movant's robbery conviction was a "crime of violence" under the

guideline's career offender provision. As discussed, the Eleventh Circuit has already held that Florida robbery is categorically a crime of violence under § 4B1.2(a)'s elements clause. The undersigned did not apply the modified categorical approach and did not have to.[18]

3. Final Consideration

Liberally construed, one could read movant's objection to the government's supplemental documents as an objection to any use of state docket sheets in considering whether the district court properly classified movant as a career offender. However, the undersigned did not use a docket sheet in determining that movant's robbery conviction was a crime of violence under the guidelines.

True, the undersigned used a docket sheet to determine that movant's delivery of phencyclidine conviction was a controlled substance offense under the guidelines. However, the undersigned did so only to determine under what statute movant was convicted (i.e., Fla. Stat. § 893.13 or Fla. Stat. § 893.135). That is, the undersigned considered the docket sheet only to "determine [the fact of] a prior conviction[.]" Cf. Mathis v. United States, 136

[18] It is unclear whether movant's counsel is even objecting to the documents that the government submitted with its second response, which included the two state judgments at issue. Cv-DE#46 at 4. Again, the court need not rule on this objection. However, if movant objects to the court's consideration of these judgments on the ground that they are Shepard documents and the government did not present them at sentencing, movant forfeited the objection. This is because, in his second reply, movant did not object to the government's submission of these judgments with its second response. Cf. United States v. Olano, 507 U.S. 725, 731 (1993) (stating that a right "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right" (citation omitted)). However, movant did not forfeit any objection to the supplemental documents that the government submitted (of which the undersigned has used none), see Cv-DE#47, because he timely objected to their submission.

S. Ct. 2243, 2248 (2016). The undersigned did not consider " the particular facts of the [delivery of phencyclidine] prosecution." Cf. id. Thus, in determining that said conviction was a controlled substance offense, the undersigned did no more than to "look at the elements of the convicted offense . . . in determining [that movant's] prior conviction [for delivery of phencyclidine] is a controlled substance offense under § 4B1.2[b]." See United States v. Lipsey, 40 F.3d 1200, 1201 (11th Cir. 1994).[19]

It also bears mentioning that movant has raised an ineffectiveness claim. The essence of this claim is twofold: (1) the law clearly shows that his delivery of phencyclidine conviction is not a crime of violence under the guidelines; and (2) Vereen failed to investigate this issue factually or legally. See Hinton v. Alabama, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." (citations omitted)). Thus, it behooves the court to consider what a reasonable factual and legal investigation by Vereen would have uncovered. The docket sheet would have been one

[19] Because the undersigned used the docket sheet only to determine the fact of movant's conviction for delivery of phencyclidine, the undersigned likewise could have considered some of the supplemental documents that the government submitted. The indictment and judgment conclusively show that movant was charged with and pleaded guilty to delivery of phencyclidine in violation of Fla. Stat. § 893.13(1)(a). Cv-DE#47-1 at 4, 11. Yet, in rejecting the contention that movant's delivery of phencyclidine conviction was not a crime of violence under the guidelines, the undersigned has already so found. Supra Part III(G)(3)(b). Thus, consideration of the indictment and judgment is not essential to the analysis. All the same, it would have been proper for the undersigned to consider these documents. Again, the undersigned would be using them only to determine the fact of a prior conviction (i.e., under what statute movant was convicted). The undersigned would not be using them to look outside of the elements of the convicted offense. As indicated above, supra Part III(G)(3)(b), the undersigned did not need to in view of the applicable authorities.

appropriate source of information in this regard. And it is appropriate for the court to consider whether the docket sheet, together with the undisputed facts in the record and basic legal research, would have given Vereen a reasonable basis to conclude that the claim was meritless. It would have.

In sum, the undersigned properly considered the docket sheet in concluding that movant's delivery of phencyclidine conviction is a controlled substance offense under the guidelines and that, therefore, Vereen did not deficiently fail to raise this claim.

IV. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Id. "If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Id. "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." Rule 11(b), Rules Governing § 2255 Proceedings.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a movant's constitutional claims on the merits, "a petitioner must show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve

encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows . . . 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." Slack, 529 U.S. at 484.

Here, in view of the entire record, the court denies a certificate of appealability. If movant disagrees, he may so argue in any objections filed with the district court.

V. RECOMMENDATIONS

Based on the foregoing, it is recommended that movant's amended motion (Cv-DE#10) be **DENIED**; that no certificate of appealability issue; that final judgment be entered; 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. Failure to file timely objections shall bar plaintiff from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 148-53 (1985); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 14th day of September, 2018.

UNITED STATES MAGISTRATE JUDGE

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App'x C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10965-H

LAZARO CANDELARIA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Lazaro Candelaria has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's August 22, 2019, order denying him a certificate of appealability from the district court's order denying his 28 U.S.C. § 2255 motion. Upon review, Candelaria's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appx "B"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 22, 2019

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 19-10965-H
Case Style: Lazaro Candelaria v. USA
District Court Docket No: 1:17-cv-20629-DPG
Secondary Case Number: 1:15-cr-20165-DPG-6

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

 APPX "C"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 27, 2019

Alvin E. Entin
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Appeal Number: 19-10965-H
Case Style: Lazaro Candelaria v. USA
District Court Docket No: 1:17-cv-20629-DPG
Secondary Case Number: 1:15-cr-20165-DPG-6

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

19-10965

Appx "C"

Lazaro Candelaria
#05983-104
FCI Coleman Medium - Inmate Legal Mail
PO BOX 1032
COLEMAN, FL 33521-1032

Additional material from this filing is available in the Clerk's Office.