APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 20-2693

Adam E. Billings

Movant – Appellant

v.

United States of America

Respondent – Appellee

Appeal from U.S. District Court for the Western District of Missouri – Springfield

(6:20-cv-03064-MDH)

JUDGMENT

Before LOKEN, ERICKSON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 07, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

ADAM E. BILLINGS,	)
Movant,	)
	) Case No. 20-3064-CV-S-
vs.	) MDH-P
	)
UNITED STATES OF	) (Crim. Case No. 17-03020-
AMERICA,	) 01-CR-S-MDH))
Respondent.	)

ORDERDENYING MOTION TO VACATE SENTENCE (28 U.S.C. § 2255)AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Movant pled guilty to possession with intent to distribute 50 grams or more of methamphetamine, and the Court sentenced him to 292 months' imprisonment. Crim. Doc. 39.[6] Movant appealed, and the Court of Appeals affirmed this Court's judgment, finding no error of judgment "in weighing relevant

6 "Crim. Doc." refers to filings in Movant's Criminal case. "Doc." refers to filings in this § 2255 case.

factors," and concluding that the sentence was reasonable. Crim. Doc. 51-1, p. 2. Movant now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255. For the reasons explained below, the motion is **DENIED**.

Movant claims two grounds for relief. Within the first ground, Movant claims he was denied effective assistance plea counsel because his attorney failed to (a) "enforce plea negotiated terms in regards to Career Offender status," (b) "effectively argue prejudice in drug quantities and purities," and (c) "argue against inapplicable leadership role enhancement." Doc. 1, p. 4. Also within the first ground, Movant claims he was denied effective assistance of appellate counsel because his attorney "doomed the appeal" by filing an Anders brief. *Id.* As his second ground for relief, Movant claims the Government breached the plea agreement by dropping the §851 enhancement, allowing the presentence investigation report to assess the career-offender enhancement, and by illegally searching his residence. *Id.* at 5.

In order to prevail on his ineffective-assistance claims, Movant must show that the performance of counsel was both constitutionally deficient and prejudicial. *Strickland v. Washington*,466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* standard applies to the performance of plea counsel); *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (Strickland standard applies to the performance of appellate counsel). In order to prevail on his Government-misconduct claims, Movant must show both "flagrant misconduct and substantial prejudice." See *United States v. Wadlington*, 233 F.3d 1067, 1073 (8thCir. 2000). As for all claims, Movant bears the burden of proof. *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969).

Regarding aspects of both grounds for relief, Respondent argues:

> Billings seems to believe the statutory §851 enhancement is synonymous to a career offender designation under the Sentencing Guidelines. An §851 enhancement is not the same thing as a Sentencing Guidelines' career offender designation. An §851 enhancement

changes a defendant's statutory range of punishment. In Billings's case, had the Government pursued §851 enhancements at sentencing, Billings would have faced a statutory mandatory-minimum sentence of 20 years' or life imprisonment, depending on whether the Government provided notice of one prior drug felony or two –a fact that Billings acknowledges.

The career offender designation is accounted for within the Sentencing Guidelines. Unlike an §851 enhancement, the Sentencing Guidelines do not fix the permissible range of sentences, but merely guide the exercise of a sentencing court's discretion in choosing an appropriate sentence within the statutory range. During Billings's change-of-plea hearing, he acknowledged that the Sentencing Guidelines were advisory and that he could be sentenced either above or below that range, up to life imprisonment, based on this Court's discretion. Billings also confirmed his ability to read and write, and [he] told this Court that he had read

> the plea agreement and had discussed the terms with counsel.
>
> Billings expressly agreed that he could not withdraw his guilty plea solely because he did not like the sentence length. Billings signed the plea agreement acknowledging that he entered into it freely and voluntarily. Billings confirmed under oath that he signed the agreement without threats or promises outside of the agreement.
>
> Because there was no agreement relating to the PSR's enhancements, Billings has failed to demonstrate ineffective assistance or prosecutorial misconduct in applying the career offender enhancement under the Sentencing Guidelines.

Doc. 5, pp. 7-9 (citations and footnote omitted).

Regarding Movant's assertion that plea counsel was ineffective for not attempting to expunge three California drug convictions, as Respondent correctly notes: "Billings provides nothing more than

speculation that the priors could be expunged," and "[s]peculation is insufficient to show a reasonable probability that the result would have been different[.]" Doc. 5, p. 10 (citation and quotation marks omitted).

Regarding Movant's challenges concerning the quantity and purity of the drugs involved, as Respondent correctly notes, plea counsel argued to the Court that the "drug quantities and respective purity level were speculative[.]" Doc. 5, p. 12 (citations to the record omitted). Although unsuccessful, counsel made the argument. Further, Respondent's argument that no governmental misconduct was involved in determining drug quantity and purity, also is correct, based in part on Movant's post-Miranda interview and laboratory tests. See *id.* at 13.

Regarding Movant's complaint about the two-level leadership adjustment, Movant acknowledged in his § 2255 motion that he "paid [his] neighbor $100 to receive this package [containing methamphetamine] and deliver it," Doc. 1, p. 18, and, as Respondent correctly notes, "a defendant may be subject to the [leadership] enhancement even if he

managed or supervised only one participant, limited to a single transaction." Doc. 5, p. 14 (citations omitted).

For the reasons explained above, Movant has failed to show that he was denied effective assistance of plea counsel or that he was subjected to governmental misconduct. Regarding the performance of appellate counsel, the Court discerns no constitutional violation because the Court of Appeals "independently reviewed the record," and found "no nonfrivolous issues for appeal." Crim. Doc. 51-1, p. 2. Finally, for the reasons set out by Respondent, the Court agrees that, by pleading guilty, Movant waived any Fourth Amendment issue regarding the search of his residence. SeeDoc. 5, pp. 17-18.

The Court finds that an evidentiary hearing is not required to resolve Movant's claims, and, for the reasons set out above, the Court denies Movant relief pursuant to 28 U.S.C. §2255. Further, the Court declines to issue a certificate of appealability. See 28 U.S.C. §2253(c)(2) (certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right"). The

Clerk of the Court shall enter judgment dismissing this case.

So **ORDERED.**

/s/ Douglas Harpool
DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE

28 U.S.C. §2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not

authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by

motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been

discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

21 U.S.C. §841(a)(1) – (b)(1)(A)

a) **Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

b) **Penalties**

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram

or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts,

isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not

to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this

subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

United States of America, Plaintiff-Appellee,

v.

Marcus Broadway, Defendant-Appellant.

No. 19-2979.

United States Court of Appeals, Eighth Circuit.
Submitted: April 15, 2020.
Filed: August 5, 2020.

Appeal from United States District Court for the Western District of Arkansas — Fayetteville

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

[Unpublished]

PER CURIAM.

Marcus Broadway, who received 100 months in prison for distributing methamphetamine, see 21 U.S.C. § 841(a)(1), appeals his sentence on two grounds. The first is that the district court[7] should not have sentenced him as a career

7 The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

offender. See U.S.S.G. § 4B1.1(a). The second is that he did not deserve an enhancement for possessing a dangerous weapon. See id. § 2D1.1(b)(1). Neither argument entitles him to relief.

The first issue turns on whether Broadway's prior convictions of delivery of cocaine and attempted delivery of cocaine qualify as "controlled substance offense[s]" under the Sentencing Guidelines. U.S.S.G. § 4B1.1(a); see Ark. Code Ann. § 5-64-401(a)(1)(A)(i) (Supp. 2005); id. § 5-64-422(a) (Supp. 2011). A "controlled substance offense" includes "distribution," U.S.S.G. § 4B1.2(b), which can be accomplished through "deliver[y]," Ark. Code Ann. § 5-64-101(9); see id. § 5-64-101(6). The commentary extends the reach of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts. U.S.S.G. § 4B1.2, cmt. n.1. Since 1995, we have deferred to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a "plainly erroneous reading" of it. *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc); accord, e.g., *United States v. Garcia*, 946 F.3d 413, 417 (8th

Cir. 2019); *United States v. Reid*, 887 F.3d 434, 437 (8th Cir. 2018); see also *Stinson v. United States*, 508 U.S. 36, 44-45 (1993) (giving deference to the Guidelines commentary under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), because it is analogous to an agency's interpretation of its own regulation).[8] For this reason, both of Broadway's convictions count as "controlled substance offense[s]."

Broadway's challenge to the two-level dangerous-weapon enhancement fares no better.[9] See U.S.S.G. § 2D1.1(b)(1). Broadway was arrested in his girlfriend's apartment, where law enforcement found a gun that he acknowledged possessing. The only dispute is

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8 We are not in a position to overrule Mendoza-Figueroa, as Broadway urges us to do, even if there have been some major developments since 1995. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (emphasizing that *Auer/Seminole Rock* deference is triggered only by "genuine[] ambigu[ity]"); *United States v. Booker*, 543 U.S. 220, 259-61 (2005) (making the Sentencing Guidelines advisory).

9 Due to Broadway's career-offender status, the enhancement did not affect his Guidelines range. See U.S.S.G. § 4B1.1(b)(3). This fact does not make his challenge moot, however, because of the potential impact on his eligibility for early release. 28 C.F.R. § 550.55(b)(5)(ii); see *United States v. Torres*, 409 F.3d 1000, 1002-03 (8th Cir. 2005).

whether the gun was "connected with the offense." Id. § 2D1.1, cmt. n.11(A).

The bar is not high. See *United States v. Anderson*, 618 F.3d 873, 882 (8th Cir. 2010) (describing it as "very low"). Unless it is "clearly improbable that the weapon was connected with the offense," including any relevant conduct, the enhancement applies. U.S.S.G. § 2D1.1, cmt. n.11(A); see *United States v. Ault*, 446 F.3d 821, 824 (8th Cir. 2006). Along with the gun, officers recovered over $2,000 in cash, plastic baggies, and 54.5 grams of marijuana in the apartment. The presence of these items allowed the district court to "infer[] that a gun near the vicinity of drug activity [was] somehow connected to it." *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008). In light of this evidence, the enhancement stands. See *United States v. Torres*, 409 F.3d 1000, 1003 (8th Cir. 2005) (applying clear-error review).

We accordingly affirm the judgment of the district court.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

MARTEZ L. SMITH, Defendant-Appellant.

No. 20-1117.

United States Court of Appeals, Seventh Circuit.

Argued October 28, 2020.

Decided March 3, 2021.

Appeal from the United States District Court for the Central District of Illinois, No. 18-cr-20037 — Michael M. Mihm, Judge.

Before RIPPLE, WOOD, and BRENNAN, Circuit Judges.

BRENNAN, Circuit Judge.

Illinois law enforcement agents received a tip from a confidential source claiming that Martez Smith had been dealing methamphetamine in Mattoon, Illinois. The agents conducted controlled buys between Smith and the source, and in the course of the investigation, requested

a patrol officer stop Smith's vehicle. During that stop, the officer found marijuana, a marijuana grinder, and a firearm in Smith's vehicle. The officer arrested Smith and seized the gun. A federal grand jury indicted Smith on one count of distributing methamphetamine and one count of possessing a firearm as a felon.

Represented by court-appointed counsel, Smith pleaded guilty to both counts. He then sought to retract his guilty plea, alleging ineffective assistance of counsel. The court denied Smith's motion to withdraw his guilty plea, rejected his request for an evidentiary hearing, and sentenced him on the two counts. On appeal, Smith challenges the district court's denial of his ineffective assistance of counsel claim and his career offender sentencing enhancement. We affirm the district court's decision in full.

I

A

In July 2018, Illinois law enforcement agents received a tip from a confidential source, who claimed he had been purchasing

methamphetamine from Martez Smith in the Mattoon, Illinois area for the past two months. Based on this information, the agents arranged a series of controlled buys between Smith and the source.

The first controlled buy occurred on July 9, 2018. After the transaction, the source returned to the agents and gave them approximately 46 grams of "ice" methamphetamine that he had just purchased from Smith. With a failed attempt in the interim, the agents conducted another controlled buy on July 27. As instructed, the source text messaged Smith to purchase three ounces of methamphetamine. Smith replied "yea" and agreed on a time for the transaction. That day, the agents observed Smith driving as if to avoid surveillance while en route to the scheduled transaction and requested a nearby patrol officer to pull him over. The officer identified Smith's vehicle, noticed it had "extremely dark window tinting," and ordered Smith to stop. When he attempted to measure the window tint, the officer realized that the batteries of his tint meter had failed, so he radioed other officers to bring him a new one.

During the approximately ten-minute wait, the officer learned that Smith's driver's license had been suspended. He asked Smith if he had any contraband in the vehicle. Smith said no. The officer then searched the vehicle and found a small amount of marijuana, a marijuana grinder, and a 9mm pistol with a 30-round extended magazine attached.[10] In a later interview, Smith admitted to possessing the firearm but denied selling methamphetamine.

B

In August 2018, a federal grand jury indicted Smith on two counts: (1) distribution of 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) ("Count 1"); and (2) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g) ("Count 2"). Smith pleaded not guilty to both counts.

The district court appointed Attorney Johanes Maliza to represent Smith. With Maliza's representation, Smith changed his plea to guilty in November 2018. During the change-of-plea

10 Whether Smith consented to the vehicle search is disputed, but the answer to that question does not affect our decision.

hearing before the magistrate judge, the parties agreed that, in addition to the felon-in-possession charge, Smith would plead guilty only to the lesser-included offense of distributing controlled substance between 5 and 50 grams because the laboratory results revealed that Smith sold less than 50 grams of methamphetamine.

The ensuing plea colloquy was thorough. Smith testified under oath in response to the court's questions. The magistrate judge asked Smith whether he had sufficient time to review the case with his counsel, whether he was satisfied with his counsel's representation, and whether he discussed the specific charges with his counsel. Smith answered "yes" to all three questions and admitted under oath that he distributed methamphetamine on July 9, 2018, and knowingly possessed a firearm as a felon on July 27, 2018. The court then asked Smith how he wanted to plead, to which Smith answered "guilty" on both counts.

Following his guilty plea but before sentencing, Smith filed two pro se motions seeking to withdraw his pleas based on ineffective

assistance of counsel. Among various claims, Smith alleged that Maliza failed to investigate and to file a motion to suppress the firearm found in his car. Simultaneously, Maliza moved to withdraw as counsel, citing "a direct and irreconcilable conflict of interest" with Smith. The court granted Maliza's motion and appointed new counsel. By counsel, Smith then moved to withdraw his guilty plea and requested that the court hold an evidentiary hearing on Maliza's alleged ineffective assistance. The district court denied both requests and proceeded to sentencing.

The presentence investigation report recommended a career offender enhancement under U.S.S.G. § 4B1.1 for Smith's two prior convictions: a 2009 federal conviction for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and a 2013 Indiana conviction for attempted armed robbery. Smith objected to this enhancement, arguing that his conspiracy conviction does not constitute a predicate "controlled substance offense" as required by the provision. Specifically, he asserted that the plain language

of the Sentencing Guidelines does not include inchoate offenses like § 846 narcotics conspiracy.

Relying on *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), the district court rejected Smith's argument and held that § 846 conspiracy constitutes a predicate "controlled substance offense." It concluded that Smith qualified for the career-offender enhancement under § 4B1.1. The district court sentenced Smith to 214 months' imprisonment on Count 1 and 120 months' imprisonment on Count 2 to be served concurrently. Smith timely appealed to this court.

II

A

Smith first challenges the district court's denial of his motion to withdraw his guilty plea, which we review for an abuse of discretion. *United States v. Barr*, 960 F.3d 906, 917 (7th Cir. 2020).

A defendant may withdraw a guilty plea after the district court accepts the plea, but before it imposes a sentence, by showing "a fair and just

reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B). Ineffective assistance of counsel serves as a "fair and just" reason for withdrawing a plea. See *United States v. Graf*, 827 F.3d 581, 583-84 (7th Cir. 2016); see also *Hurlow v. United States*, 726 F.3d 958, 967 (7th Cir. 2013) (noting that a plea that resulted from ineffective assistance of counsel cannot be knowing and voluntary). To establish ineffective assistance of counsel, a defendant must show that his counsel rendered deficient performance and that the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). In other words, a defendant must show that his counsel rendered objectively unreasonable performance and that, but for counsel's errors, the outcome would have been different. Id. We need not address both deficient performance and prejudice prongs "if the defendant makes an insufficient showing on one." Id. at 697; see Armfield v. Nicklaus, 985 F.3d 536, 548 (7th Cir. 2021) (same).

In the guilty plea context, we apply the modified Strickland analysis articulated in *Hill v. Lockhart*, 474 U.S. 52 (1985). See *Gish v. Hepp*, 955 F.3d 597, 605 (7th Cir. 2020). Under *Hill*,

the deficient performance prong remains largely unchanged. A defendant must show that his counsel rendered objectively unreasonable performance and "performed seriously below professional standards." *United States v. Williams*, 698 F.3d 374, 386 (7th Cir. 2012). On the prejudice prong, a defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill*, 474 U.S. at 59). The prejudice inquiry into counsel's failure to investigate "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59 (adding that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial").

A guilty plea, however, "should not lightly be withdrawn." *United States v. Brown*, 973 F.3d 667, 715 (7th Cir. 2020). Courts must "not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 137 S.

Ct. at 1967. We instead "look to contemporaneous evidence to substantiate a defendant's expressed preferences" and only allow a withdrawal if we are convinced that the defendant would have pleaded differently. Id.

Smith alleges three deficiencies in Maliza's performance: (1) failure to investigate and file a motion to suppress the firearm found in the car; (2) pressure to hastily plead guilty; and (3) general unfamiliarity with the facts of the case. The district court denied these claims as either lacking merit or otherwise undermined by the record. We agree and analyze each of Smith's arguments in turn.

Motion to Suppress.

When the alleged deficiency is based on counsel's failure to move to suppress evidence, a defendant must "prove the motion was meritorious." *Long v. United States*, 847 F.3d 916, 920 (7th Cir. 2017) (internal quotation marks omitted). But here any alleged deficiency by Maliza matters only if Smith could show that suppressing the firearm evidence likely would

have changed the outcome of the trial. *Hill*, 474 U.S. at 59.

Smith claims that a motion to suppress would have succeeded because the patrol officer did not have consent or a warrant to search his vehicle. Warrantless searches are per se unreasonable under the Fourth Amendment, unless an exception applies. *United States v. Kizart*, 967 F.3d 693, 695 (7th Cir. 2020) (citing *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). The record suggests that the automobile exception applies here. Under the automobile exception, an officer may search a vehicle without a warrant if there is probable cause. *Kizart*, 967 F.3d at 695; see *United States v. Sands*, 815 F.3d 1057, 1061-62 (7th Cir. 2015) ("A warrantless arrest is constitutionally permissible if supported by probable cause...."). Probable cause exists "if, given the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Eymann*, 962 F.3d 273, 286 (7th Cir. 2020) (internal quotation marks omitted).

The patrol officer here had probable cause to stop Smith and search his vehicle. Law

enforcement agents had already conducted a controlled buy, and they had scheduled another on the day of the arrest. The agents even had text message evidence detailing the transaction planned for later that day. Smith was also driving suspiciously moments before the officer stopped him and had illegally tinted windows on his car. And although the officer may not have known all the facts supporting probable cause, he was acting at the direction of the agents who did. See *United States v. Khan*, 937 F.3d 1042, 1052 (7th Cir. 2019) (noting that the collective knowledge doctrine "permits a stop at the direction of, or based on information relayed from, another law enforcement agency"); see also *United States v. Nicksion*, 628 F.3d 368, 376-77 (7th Cir. 2010) (finding that the collective knowledge of law enforcement provided ample probable cause for officers to stop and arrest the defendant and search his vehicle). The totality of the circumstances leading up to the stop demonstrates a fair probability that Smith's vehicle contained contraband. The officer therefore had probable cause to stop Smith and to search his vehicle. Without more, Smith cannot establish that he

would have succeeded on his motion to suppress the firearm evidence.

Time Pressure.

Smith also contends that Maliza rendered ineffective assistance by pressuring him to take the guilty plea. He alleges Maliza did so in part by telling him that the government would file a superseding indictment with an additional charge if Smith did not plead guilty before the grand jury reconvened. The district court dismissed Smith's claims as conclusory or otherwise undermined by the record noting that "that there was no pressure for the defendant to plead immediately."

We give special weight to a defendant's sworn testimony in a Rule 11 plea colloquy. See *Graf*, 827 F.3d at 584 ("A defendant's motion to withdraw is unlikely to have merit if it seeks to dispute his sworn assurances to the court."). That testimony is presumed true, and the defendant bears a heavy burden to overcome this presumption. See *United States v. Chavers*, 515 F.3d 722, 724 (7th Cir. 2008). Smith expressly acknowledged during his plea colloquy

that he had sufficient time to discuss the case with Maliza. As the district court found, the magistrate judge "was careful to give the defendant several opportunities where he could have said that he was being pressured ... [and] sufficient opportunity to say that he wanted more time." At one point, Maliza even offered to adjourn the hearing to allow time to file corrected information, which cuts against Smith's argument that his counsel had rushed him to plead guilty.

Smith cannot show prejudice. He fails to demonstrate a reasonable probability that, but for Maliza's pressure, he would not have pleaded guilty. The district court was correct to reject this claim.

Counsel's Lack of Familiarity.

Smith next asserts Maliza rendered ineffective assistance because he lacked familiarity with the facts of the case, emphasizing that the public defender was "confused and unfamiliar with the relevant facts." To support this claim, Smith points to a portion of the change-of-plea hearing transcript where Maliza appears to

fumble with his words: "Again, Your Honor, I haven't seen as much. There was some stuff that I did — I don't, I don't think I noticed, but the — certainly, the evidence that pertains to the elements ... the essential elements of the crime, yes." Smith also complains that he "himself had to speak up to correct his attorney's misrepresentations."

Smith's challenge falls short of demonstrating ineffective assistance of counsel. "An ineffective assistance of counsel claim cannot stand on a blank record, peppered with the defendant's own unsupported allegations of misconduct." *United States v. Hodges*, 259 F.3d 655, 660 (7th Cir. 2001). The district court noted that Smith took Maliza's statements "out of context" and read "far too much into them." The hearing transcript shows that Maliza made the spotlighted statement to confirm that the government presented evidence that met the essential elements of the drug and firearm charges while disagreeing with some of the details. Viewing the statement in context, the district court recognized that Maliza actually demonstrated familiarity with the case. There is no support in the record for the assertion that

Maliza made a misrepresentation or that suggests his unfamiliarity with the case. The district court therefore properly exercised its discretion to conclude that Smith's arguments lack record support and that he was not prejudiced.

B

Smith insists that the district court erred by denying his request for an evidentiary hearing to support his motion to withdraw his guilty plea. We review the district court's decision not to hold an evidentiary hearing for abuse of discretion, see *United States v. Jones*, 381 F.3d 615, 618 (7th Cir. 2004), and its "factual findings, including whether the defendant knowingly and voluntarily entered the plea, for clear error." *United States v. Perillo*, 897 F.3d 878, 883 (7th Cir. 2018).

A motion to withdraw a plea does not automatically entitle a defendant to an evidentiary hearing because "[w]hether to hold a hearing on the plea's validity is a matter left to the trial court's sound discretion." *United States v. Collins*, 796 F.3d 829, 834 (7th Cir.

2015). To illustrate, an evidentiary hearing is not required "if the petitioner makes allegations that are vague, conclusory, or palpably incredible, rather than detailed and specific." *Gaylord v. United States*, 829 F.3d 500, 506-07 (7th Cir. 2016) (internal quotation marks omitted). A district court need not hold an evidentiary hearing if the defendant fails to offer substantial evidence "or if the allegations advanced in support of the motion are conclusory or unreliable." *Collins*, 796 F.3d at 834.

The district court did not abuse its discretion by denying Smith's request for an evidentiary hearing. The only argument that it found as "possibly not a conclusory allegation" was the potential success of the motion to suppress. But the district court explained that the government provided "the uncontested proffer" of independent probable cause to stop Smith and search his car. Because Smith's motion to suppress would not have been successful, no evidentiary hearing was necessary.

III

Smith next challenges his career offender enhancement. According to Smith, his prior conviction for conspiring to traffic cocaine, in violation of 21 U.S.C. § 846, does not constitute a predicate "controlled substance offense" under U.S.S.G. § 4B1.2. We review the district court's application of the Sentencing Guidelines de novo. *United States v. Lewis*, 842 F.3d 467, 476 (7th Cir. 2016).

We look first to the text of the guidelines provisions that Smith disputes. Under § 4B1.1, a defendant is a career offender if: (1) he was at least 18 years old when he committed the offense; (2) the instant offense is a crime of violence or a controlled substance offense; and (3) he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Section 4B1.2, in relevant part, defines "controlled substance offense" as "an offense under federal or state law ... that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or

dispense." U.S.S.G. § 4B1.2. Application Note 1 to § 4B1.2 defines "controlled substance offense" to include aiding and abetting, conspiring, and attempting to commit such offenses. U.S.S.G. § 4B1.2 cmt. n.1. Smith contends that Application Note 1 is an improper expansion of § 4B1.2.

Courts treat the application notes to the Sentencing Guidelines like an agency's interpretation of its own rules. See *Stinson v. United States*, 508 U.S. 36, 44-45 (1993). In *Stinson*, the Supreme Court held that courts must give application notes "controlling weight." Id. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). A corresponding application note is binding authority "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Id. at 38; see *United States v. Tate*, 822 F.3d 370, 375 (7th Cir. 2016) (same). We apply the application notes as "authoritative glosses on the Guidelines, unless the notes conflict with the text." *United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012), overruled on other grounds by *United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016).

A split of authority exists among many of the circuits as to whether courts are to defer to Application Note 1 when applying § 4B1.2. In United States v. Winstead, the D.C. Circuit recognized a conflict between the text of § 4B1.2 and Application Note 1. 890 F.3d 1082 (D.C. Cir. 2018). It applied the interpretative canon expressio unius est exclusio alterius to note that § 4B1.2 "presents a very detailed `definition' of controlled substance offense that clearly excludes inchoate offenses." Id. at 1091. Given that the text of § 4B1.2 does not expressly include inchoate offenses, the D.C. Circuit concluded that Application Note 1 improperly expands the provision's scope and declined to recognize an attempt crime as a controlled substance offense. Id. at 1091-92.

Similarly, the Sixth Circuit in *United States v. Havis* did not extend the definition of controlled substance offense to include attempt crimes. 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam). It emphasized that the application notes to the Sentencing Guidelines "serve[ ] only to interpret the Guidelines' text, not to replace or modify it." Id. at 386 (emphasis in original). Because

Application Note 1 adds to § 4B1.2's textual definition, rather than interprets it, the Sixth Circuit found the more expansive construction impermissible. Id. at 386-87. Finally, the Third Circuit concluded the same in *United States v. Nasir*, 982 F.3d 144, 159-60 (3d Cir. 2020) (en banc). In addition to the expressio unius argument, that court raised a separation-of-powers concern — namely, that deferring to the application notes circumvents "the checks Congress put on the Sentencing Commission." Id. at 159. The Third Circuit "conclude[d] that inchoate crimes are not included in the definition of `controlled substance offenses' given in section 4B1.2(b)." Id. at 160. Smith relies on these cases to support his position.

Our court's precedent holds otherwise, and we see no reason here to diverge from it. In *United States v. Adams*, we held that the term "controlled substance offense" encompasses inchoate offenses. 934 F.3d at 729-30. There, the defendant challenged the sentencing enhancement under U.S.S.G. § 2K2.1, which raises the base offense level for a felon-in-possession conviction when the defendant also has a prior conviction for a controlled substance

offense. Id. at 727. Section 2K2.1's Application Note 1 references § 4B1.2's Application Note 1 for the definition of "controlled substance offense." U.S.S.G. § 2K2.1 cmt. n.1 (noting that "'[c]ontrolled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2"). We concluded that § 4B1.2's Application Note 1 is authoritative and that "controlled substance offense" includes inchoate offenses. *Adams*, 934 F.3d at 729-30. In reaching this conclusion, we relied on Raupp, which deferred to Application Note 1 when applying § 4B1.2 and found no conflict between them. 677 F.3d at 759. ("There cannot be a conflict because the text of § 4B1.2(a) does not tell us, one way or another, whether inchoate offenses are included or excluded."). Several other circuits agree. See, e.g., *United States v. Lange*, 862 F.3d 1290, 1294-96 (11th Cir. 2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

Smith attempts to distinguish *Adams* from this case but to no avail. He emphasizes that *Adams* dealt with a sentencing enhancement under § 2K2.1, whereas here we address a sentencing enhancement under § 4B1.1. But to distinguish *Adams* would require us to find that there is a conflict between § 4B1.2 and Application Note 1 when interpreting § 4B1.1 but that no such conflict exists when interpreting § 2K2.1. We cannot reconcile Smith's position with our holding in *Adams*.

That brings us to our final issue: does § 4B1.2's Application Note 1 encompass § 846 conspiracy under the categorical approach? The categorical approach asks courts to look to the generic elements of a crime, rather than the facts underlying how the crime was committed, when determining whether a prior conviction is a "controlled substance offense." *United States v. Smith*, 921 F.3d 708, 712 (7th Cir. 2019). A "generic" version of an offense means "the offense as commonly understood." *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). "If the elements of the crime of conviction are the same as, or narrower than, the elements of the generic version of the offense, the crime of

conviction qualifies as a predicate offense." *Smith*, 921 F.3d at 712 (citing *Mathis* 136 S. Ct. at 2247-48).

Smith thinks that under the categorical approach, his § 846 conspiracy conviction does not qualify as a predicate "controlled substance offense." He points to decisions from other circuits that have concluded Application Note 1 does not include § 846 conspiracy. See, e.g., *United States v. McCollum*, 885 F.3d 300, 308-09 (4th Cir. 2018); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016). These decisions found generic conspiracy to require an overt act in furtherance of the conspiracy. Because § 846 lacks an overt-act requirement, Smith asserts, it "criminalizes a broader range of conduct than that covered by generic conspiracy." He adds that a § 846 offense does not fall within the ambit of § 4B1.2's definition of "controlled substance offense."

The Second Circuit recently took a different approach in *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020). The defendant in Tabb argued that Application Note 1 covers only "generic" conspiracy, and by implication, excludes the

broader § 846 narcotics conspiracy. Id. at 88. The Second Circuit disagreed. It first explained that generic conspiracy encompasses § 846 conspiracy because "[t]he essence of a conspiracy is an agreement by two or more persons to commit an unlawful act." Id. Although it recognized that common law often required an overt act as an element of a conspiracy offense, the Second Circuit found the requirement unnecessary given that "Congress has chosen to eliminate this requirement in the case of several federal crimes, most notably narcotics conspiracy." Id. (citing *United States v. Shabani*, 513 U.S. 10, 14-15 (1994)). The court concluded that reading Application Note 1 to cover § 846 narcotics conspiracy would best preserve the internal consistency of the Sentencing Guidelines. Id. (noting that the defendant's reading would "require finding that term `conspiracy' includes Section 846 narcotics conspiracy in some parts of the guidelines, but not others" (citations omitted)). Other circuits have drawn similar conclusions. See, e.g., *United States v. Rivera-Constantino*, 798 F.3d 900, 903-94 (9th Cir. 2015); *United States v. Rodriguez-Escareno*, 700 F.3d 751, 753-54 (5th Cir. 2012).

We agree that Application Note 1 encompasses § 846 conspiracy. First, the plain language of Application Note 1 unambiguously includes conspiracy as a "controlled substance offense." U.S.S.G. § 4B1.2 cmt. n.1. We find no reason to construe the word "conspiring" in Application Note 1 to exclude § 846 conspiracy, especially given that an overt act is not always a required element in the narcotics conspiracy context.

Second, the narrow reading that Smith proposes would lead to conflicting textual and structural consequences. Under his reading, a § 846 conspiracy would constitute a controlled substance offense when interpreting § 2K2.1, as we do in Adams, but not when interpreting § 4B1.1, as we do here. It would also mean that the Sentencing Commission, when it included the term "conspiring" in § 4B1.2's Application Note 1, intended to exclude federal conspiracy from the federal Sentencing Guidelines. See *Tabb*, 949 F.3d at 88 (citing *Rivera-Constantino*, 798 F.3d at 904). That cannot be, so we are not persuaded by Smith's interpretation. Considering that "identical words and phrases within the same statute should normally be

given the same meaning," *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007), we conclude that reading § 4B1.2's Application Note 1 to include § 846 conspiracy would best preserve the internal consistency of the Sentencing Guidelines and avoid any textual or structural pitfalls. Smith's § 846 conspiracy conviction is thus a valid predicate offense under § 4B1.1, and the district court correctly applied the career offender enhancement to his sentence.

IV

For these reasons, we AFFIRM the district court's decision.