IN THE

Supreme Court of the United States

ERIC DYNELL MCGADNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Molina-Martinez*, this Court held that an erroneous Guidelines calculation "set[s] the wrong framework for the sentencing proceeding," and is enough standing alone "to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). A number of circuits have subsequently held that a court must vacate and set aside a sentence based on a miscalculated Guidelines range even when the sentencing court states it would have imposed the same sentence absent the Guidelines when the record indicates the erroneously calculated Guidelines may have factored into the court's decision. The Eleventh Circuit, in sharp contrast, concluded that a defendant cannot show he was prejudiced by the error in those circumstances no matter how heavily the court relied on the Guidelines elsewhere in its sentencing colloquy.

The questioned presented is:

Whether a sentencing court's statement that it would have imposed the same sentence regardless of the Guidelines creates a *per se* rule that a miscalculated Guidelines range did not affect the court's ultimate sentencing decision.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Eric Dynell McGadney is the petitioner here and was the petitioner-appellant below.

2. The United States is the respondent here and was the respondent-appellee below.

STATEMENT OF RELATED PROCEEDINGS

1. United States Court of Appeals for the Eleventh Circuit, Appeal No. 18-12607, Eric McGadney v. United States of America. Judgment Entered April 10, 2020. Petition for Rehearing or Rehearing En Banc denied June 30, 2020.

2. United States District Court for the Southern District of Alabama, Case No. 1:15-cv-00282-WS-B, Secondary Case No. 1:12-cr-00245-WS-B-1, Eric Dynell McGadney v. United States of America. District Court Order Denying Motion to Vacate, Set Aside, or Correct Sentence Denied June 7, 2018.

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INTRODUCTION

The Federal Sentencing Guidelines play a central role in the sentencing of tens of thousands of federal defendants every year. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342, (2016). "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious" because, in most cases, the error "will affect the [defendant's] sentence." *Id*. at 1345-46. Because "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar," when a defendant shows he was sentenced under an incorrect Guidelines range the error itself is sufficient to demonstrate that his ultimate sentence was affected by the error, unless the record "make[s] it clear" that the sentence was based only on factors independent of the erroneous Guidelines calculation. *Id*. at 1346.

Petitioner Eric Dynell McGadney is a defendant who was sentenced under a miscalculated Guidelines range. At his sentencing hearing on May 14, 2014, McGadney's trial counsel erroneously told the sentencing court that McGadney's previous conviction for second-degree escape under Alabama law qualified as a second predicate conviction for a "crime of violence" necessary for application of the career offender sentence enhancement, when, in fact, it did not. *See* App. at 47a. With the erronous enhancement applied, McGadney's Guidelines range increased from 57-71

months in prison to 188-235 months, and his criminal history score increased from a level V to a level VI. *Id*. at 51a.

The effect of the miscalculated Guidelines range on the sentencing court's thinking was apparent throughout the proceeding. The court dismissed other issues raised by McGadney off-hand, such as the correct base level offense or the drug amount at issue, determining that they "[didn't] really matter" and were "of no moment" because the misapplied enhancement "took over" and "[drove] punishment in this case." *Id*. at 43a, 51a, 56a. The court ultimately told McGadney that it would "give him the benefit of his [plea deal] for a sentence at the low end of the Guidelines," and sentenced McGadney to 188 months in prison. *Id*. at 58a. Despite directly declaring its intent to sentence McGadney to the low end of the Guidelines, when the government asked the court if it would have imposed the sentence "without regard to the application of any particular guideline or any other reduction" the court responded that it would have. *Id*. at 60a.

The same paradoxical reasoning held the day in McGadney's appeal to the Eleventh Circuit. Despite stating that "[i]t is true that the [sentencing] court relied heavily on the career-offender enhancement when calculating the guidelines" and that "*[i]t is equally clear that the enhancement was on the court's mind when fashioning a sentence*," the court nonetheless held that McGadney could not show a

reasonable probability that he was prejudiced by his counsel's error because of the court's disclaimer at the conclusion of the sentencing hearing.[1] *Id*. at 12a. In so holding, the panel followed Eleventh Circuit precedent, which holds that a statement made by a sentencing court disclaiming reliance on the Guidelines precludes a finding of prejudice so long as the ultimate sentence is not substantively unreasonable. *See United States v. McLellan*, 958 F.3d 1110, 1116 (11th Cir. 2020).

Had McGadney been sentenced in a different federal circuit, the result would have almost certainly been different. As discussed more fully below, at least seven circuits do not give such conclusive effect to a trial court's statements disclaiming reliance on the Guidelines when the record contains evidence indicating the Guidelines might have been a factor in the court's ultimate sentence. *See, e.g., United States v. Taylor*, 848 F.3d 476, 498-99 (1st Cir. 2017); *United States v. Seabrook*, 968 F.3d 224, 233-34 (2d Cir. 2020); *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011); *United States v. Segovia-Rivas*, 716 F. App'x 292, 296 (5th Cir. 2018); *United States v. Castro-Martinez*, 713 F. App'x 481, 484 (6th Cir. 2017); *United States v. Bankston*, 901 F.3d 1100, 1108 (9th Cir. 2018); *United States v. Porter*, 928 F.3d 947, 963-64 (10th Cir. 2019). In these circuits, when the record indicates that the

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[1] Because the panel determined McGadney could not show he was prejudiced by the erroneous Guidelines calculation, the panel did not reach the issue regarding whether his counsel's mistake constituted deficient performance. *See* App. at 11a-12a.

Guidelines were not "irrelevant" to the court's sentence the case should be remanded to the sentencing court for resentencing under the correct Guidelines range, the exact opposite of what occurred here. *See Taylor*, 848 F.3d at 499. The logic behind this approach is simple: when the record contains contradictory statements regarding the role the Guidelines played in the court's decision making, it is the sentencing court, not a panel on appeal, that is the best situated to tell us which statement actually represents its reasoning. Thus, the simplest (and best) solution is to remand the case for resentencing under the correct Guidelines, rather than turning a blind eye to one set of statements in favor of another, as the Eleventh Circuit did here.

The Eleventh Circuit's approach not only conflicts directly with the sound approach taken by its sister circuits, it also contradicts this Court's *Molina-Martinez* decision. Despite overwhelming evidence that the erroneous Guidelines calculation factored into the sentencing court's decision, a fact the panel itself acknowledged, the panel remarkably ruled that the enhancement had no effect on McGadney's ultimate sentence. *See* App. at 12a. This guts *Molina-Martinez's* central holding, that a defendant who shows he was sentenced under an incorrect Guidelines range has

shown he was prejudiced by the error unless the record is clear that the Guidelines were not a factor in the court's decision.

Eric McGadney was sentenced under an incorrectly calculated Guidelines range. The record is clear that the miscalculated Guidelines factored into the sentencing court's decision, a fact implicitly acknowledged by the Eleventh Circuit panel below. Yet despite this, the panel nonetheless held that McGadney could not show a reasonable probability that his sentence was affected by the error because the sentencing judge disclaimed reliance on the Guidelines at the conclusion of the sentencing hearing. The panel's approach conflicts with that of a number of its sister circuits, and contravenes this Court's *Molina-Martinez* precedent. McGadney therefore respectfully requests this Court grant his petition for a writ of certiorari.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 808 F. App'x 963 and reproduced in the Appendix ("App.") at App. 2a-14a. The magistrate's report and recommendation denying McGadney's habeas petition and the district court's order adopting that recommendation are unreported, and those decisions are reprinted at App. 21a-37a and App. 19a, respectively.

JURISDICTION

The Eleventh Circuit entered judgment on April 10, 2020, and denied a timely petition for rehearing *en banc* on June 30, 2020. This Court's March 19, 2020 Order extended the time to file this petition to November 27, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 28, Section 2255(a) of the United States Code provides:

> 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.

STATEMENT OF THE CASE

A. Mr. McGadney's Sentencing Hearing.

On October 25, 2012, a federal grand jury indicted Petitioner Eric Dynell McGadney on two counts, each connected with his possession of ecstasy. McGadney pled guilty to those charges on January 24, 2013.

The district court held a sentencing hearing on May 14, 2014, at which the United States requested McGadney's sentence be enhanced under the "career offender" enhancement in USSG §4B1.1(a), which greatly increases the sentence of any defendant whose "instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." The government argued that McGadney's prior Alabama state law convictions for Trafficking in Marijuana and Second Degree Escape qualified as predicate felony convictions, and asked that the court consider McGadney a career offender and enhance his sentence accordingly. *See* App. at 43a-44a.

McGadney's trial counsel briefly argued that the court should not consider McGadney's second degree escape conviction as a predicate felony because the government had failed to provide adequate notice of its intent to use the conviction to enhance McGadney's sentence, but the court disagreed. *Id*. at 43a-45a, 48a-49a. Following his notice argument, McGadney's counsel not only failed to argue that the second degree escape conviction did not qualify as a predicate crime of violence conviction warranting application of the career offender enhancement, but stated—unprompted by the court—that the conviction *did* qualify, and declared that he would make no argument to the contrary. *Id*. at 47a (McGadney's counsel: "Judge, just one other thing. With regards to the escape second charge, the Eleventh Circuit is pretty clear that that is a prior qualifying felony, so I'm not going to argue that point to the court"). This affirmative declaration erroneously provided the government with the second predicate felony conviction necessary for application of the career offender sentencing enhancement—an enhancement that increased McGadney's guidelines range by more than 100 months and increased his criminal history score from V to VI.

Following McGadney's counsel's incorrect statement, the district court announced its sentence. As it announced its sentence, the court made several statements demonstrating that the erroneously applied enhancement affected

McGadney's sentence, including: (1) determining that the amount of drugs at issue "doesn't really matter in this case" because *the career offender issue "controls"* McGadney's ultimate sentence, App. at 43a; (2) stating that "whether the base offense level should be a 16 or a 22 … [is] of no moment because *the career offender status takes over* in McGadney's case," *id*. at 50a-51a; and (3) declaring that "when I look at this case, it's - you know, *the thing that's driving it, driving punishment in this case … is [McGadney's] status as a career offender*," *id*. at 56a. While it is true that the court also made statements regarding McGadney's criminal history, its statements regarding his criminal history remained tethered to the court's erroneous application of the career offender enhancement. *See id*. at 57a ("I have here a situation where the guideline range is really high for you. I mean, it is, and it is what it is because of your prior history").

After applying the career offender enhancement, the court calculated McGadney's sentencing guidelines range as 188-235 months. *Id*. at 51a. The court then declared that it would "give [McGadney] the benefit of his [plea deal] for a sentence at the low end of the Guidelines," and sentenced McGadney to 188 months' imprisonment, the lowest possible sentence called for under the erroneously calculated Guidelines range. *Id*. at 58a. Without the erroneously applied enhancement, McGadney's sentencing guidelines range would have called for, at

most, 57-71 months' imprisonment. Following pronouncement of the sentence, the government asked if the "sentence is the sentence that the court would impose without regard to the application of any particular guideline or any other reduction," and the court responded "Yeah. I think I've indicated that, that that's the sentence that satisfies the sentencing objectives of Section 3553(a), and that's the sentence that's entered according to that statute." *Id*. at 60a.

B. McGadney's Motion to Vacate, Set Aside, or Correct His Sentence.

McGadney filed a motion to vacate, set aside, or correct his sentence, arguing that his trial counsel's failure to investigate whether his previous convictions qualified as predicate felonies for the career offender enhancement and his counsel's failure to file a notice of appeal on his behalf despite being requested to do so rendered his assistance ineffective. The motion was referred to a magistrate, who recommended McGadney's claims related to the career offender enhancement be denied, but recommended holding an evidentiary hearing to determine whether McGadney's counsel's failure to file a notice of appeal constituted deficient performance. An evidentiary hearing was held on September 7, 2017, following which the magistrate issued a report and recommendation recommending McGadney's claims be denied in full. *See id*. at 21a-37a. The district court adopted the report and

recommendation, and denied McGadney's request for a certificate of appealability. *See id*. at 19a.

C. McGadney's Appeal to the Eleventh Circuit

The Eleventh Circuit, however, granted McGadney a certificate of appealability to address (1) whether his counsel was ineffective for failing to object to his enhanced career-offender sentence on the basis that his prior Alabama conviction for escape in the second degree did not qualify as a predicate crime of violence under the Sentencing Guidelines and (2) whether his counsel was ineffective for failing to file a notice of appeal, despite being instructed to do so.

On appeal, McGadney demonstrated that his trial counsel's performance was deficient. First, McGadney showed that his trial counsel provided constitutionally deficient assistance when he affirmatively pronounced that McGadney's second-degree escape conviction qualified as a crime of violence and condemned McGadney to be sentenced with an erroneously applied sentencing enhancement. At the time of McGadney's sentencing, Eleventh Circuit precedent was clear that no conviction for a second-degree escape under Alabama law could be considered a conviction for a crime of violence for purposes of the career offender enhancement. Second, McGadney demonstrated that, in light of this Court's decision in *Molina-Martinez* and the sentencing court's repeated pronouncements that the career offender enhancement

was "driving" punishment, it was at least reasonably probable that he was prejudiced by his counsel's error.

The Eleventh Circuit nevertheless issued a per curium decision affirming the district court. *See* App. at 13a. The court of appeals determined that it need not reach the issue regarding the effectiveness of McGadney's trial counsel's performance. *Id.* at 11a-12a. Instead, despite the sentencing court's direct statements to the contrary, the court found it was not even reasonably probable that McGadney's sentence was affected by counsel's deficient performance. *Id.* at 12a. That is so, the Eleventh Circuit held, because the sentencing court had commented on McGadney's criminal history during the proceedings and because the sentencing court had responded affirmatively to the Government's question asking if the sentence imposed was the sentence that would be imposed "regardless of any guideline or other reduction." *See id.* The court of appeals nonetheless acknowledged that the Guidelines had played a role in the sentencing court's analysis, stating that "[i]t is true that the court relied heavily on the career-offender enhancement when calculating the guidelines" and that "*[i]t is equally clear that the enhancement was on the court's mind when fashioning a sentence*." *Id.* But despite this acknowledgment, the panel ruled that McGadney could not demonstrate even a reasonable probability that the misapplied enhancement factored into his sentence at all. *See id.*

McGadney timely filed for a petition for panel rehearing or rehearing en banc, which was denied on June 30, 2020. This petition follows.

REASONS FOR GRANTING THE WRIT

In order to demonstrate he was prejudiced by his counsel's error, McGadney needed to show only that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). The "reasonable probability" standard is not stringent. Indeed this Court has held that it is less demanding than the "preponderance of the evidence" standard applicable in civil cases. *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (determining a litigant "need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice"). Thus, a defendant who shows that his counsel's error caused an incorrect Guidelines calculation will satisfy his burden if he shows there is a reasonable probability that, absent his counsel's mistake, his sentence would have been different.

Whether McGadney showed a "reasonable probability" that his sentence would have been different hinges on the correct interpretation of the prejudice prong of this Court's *Molina-Martinez* decision. As demonstrated below, the Eleventh Circuit's approach to the issue contrasts sharply with the approach taken by other federal

circuits and directly undermines *Molina-Martinez's* central holding. This case thus provides the ideal vehicle for the Court to provide clarity regarding the proper way to evaluate the likelihood a defendant was prejudiced by a sentencing court's error in calculating the applicable sentencing Guidelines—particularly when the record contains evidence that the sentencing court relied upon the Guidelines at sentencing, but nonetheless states that the Guidelines did not factor into its decision.

I. THE ELEVENTH CIRCUIT'S DECISION CREATES A DIRECT CIRCUIT CONFLICT

The Eleventh Circuit's decision is not only wrong, but conflicts with the decisions of at least seven other circuits. In the Eleventh Circuit, any statement made by a sentencing court disclaiming reliance on the Guidelines precludes a finding of prejudice so long as the ultimate sentence is not substantively unreasonable. *See United States v. McLellan*, 958 F.3d 1110, 1116 (11th Cir. 2020) ("[W]e need not review an issue when (1) the district court states it would have imposed the same sentence, even absent an alleged error, and (2) the sentence is substantively reasonable"); see also *United States v. Perez*, 806 F. App'x 725, 727 (11th Cir. 2020) ("When a district court states that it would have imposed the same sentence irrespective of an alleged guidelines calculation error, however, the assumed error is harmless, and we will affirm the sentence if it is reasonable"). Indeed, the decision

below treats such statements as not only determinative but talismanic, blinding the panel to the court's previous, unprompted statements indicating that not only were the miscalculated sentencing Guidelines a factor in McGadney's ultimate sentence, they were the "driving" force that "took over" and "controlled" the ultimate outcome. *See* Doc. 49 at 5, 12-13, 18.

Several other circuits, in sharp contrast, do not give such conclusive effect to a trial court's statements disclaiming reliance on the Guidelines. *See, e.g.*, *United States v. Taylor*, 848 F.3d 476, 498-99 (1st Cir. 2017) (Judge's affirmative response to government's question asking if she would impose the same sentence regardless of the Guidelines insufficient to show erroneously applied career offender enhancement had no effect on sentence when record indicated that judge considered erroneous Guidelines when fashioning sentence); *United States v. Seabrook*, 968 F.3d 224, 233-34 (2d Cir. 2020) ("We note that the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did"); *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("[A] statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless unless that "alternative sentence" was, itself, the product of the three step sentencing process"); *United States v. Segovia-Rivas*, 716 F. App'x 292, 296

(5th Cir. 2018) (Judge's statement that the "[s]entence I impose would be the same sentence I'd impose either with or without an advisory guideline sentence—system" insufficient to render miscalculation of Guidelines harmless primarily because "the court emphasized again and again the role of [defendant]'s crime-of-violence conviction in the sentencing decision"); *United States v. Castro-Martinez*, 713 F. App'x 481, 484 (6th Cir. 2017) (Court's response that sentence "would have been the same" under correct Guidelines range did not prevent finding of prejudice because record did not indicate "with certainty that [defendant]'s substantial rights were unaffected"); *United States v. Bankston*, 901 F.3d 1100, 1108 (9th Cir. 2018) ("[D]istrict court's mere statement that it would impose the same above-Guidelines sentence no matter ... the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range, and because the extent of a variance from the Guidelines could have affected the court's analysis"); *United States v. Porter*, 928 F.3d 947, 963-64 (10th Cir. 2019) ("It is not enough for the district court to say that its conclusion would be the same even if all the defendant's objections to the presentence report had been successful. In short, we will find the district court's error was harmless only when it is clear from the record that the court would have imposed

the same sentence regardless of the correct Guidelines calculation") (internal citations omitted).

The First and Second Circuits' decisions in *Taylor* and *Seabrook* vividly illustrate that the Eleventh Circuit is an outlier. In *Taylor*, the First Circuit was presented with a case remarkably similar to the one faced by the Eleventh Circuit here, but reached an opposite conclusion. In *Taylor*, the government requested the sentencing court enhance the defendant's sentence under the career offender enhancement based, in part, on his previous conviction for larceny, which the government argued qualified as the defendant's second predicate conviction for a "crime of violence." 848 F.3d at 496-97.

The court agreed, and calculated the defendant's sentence with the career offender enhancement applied, resulting in a Guidelines range of 360 months to life. *Id*. at 497. Absent the enhancement, the defendant's Guidelines range would have been 235 to 293 months. *Id*. In announcing its sentence, however, the court varied downward, applied what it termed "straight non-career offender scoring," and sentenced the defendant to 235 months in prison. *Id*. Like here, at the conclusion of the hearing "the trial court judge was asked by the prosecutor whether she would have imposed the same sentence whether or not [the defendant] was considered a career offender," and the court responded affirmatively. *Id*.

On appeal, the defendant argued that his Guidelines range was wrong because his conviction for larceny could not be considered a crime of violence, and he therefore lacked the second predicate conviction necessary for the career offender enhancement. *Id*. at 497. The government agreed that the larceny conviction could not be considered a crime of violence, but nonetheless argued that the defendant was not prejudiced by the error because, it claimed, "the trial court judge made a clear statement showing she based [the defendant's] sentence on factors independent of the Guidelines: she said she would have imposed the same sentence regardless of [the defendant's] "career offender" status," a statement the government claimed was implicitly supported in the court's reasoning. *Id*. at 498.

The First Circuit determined that the defendant was prejudiced by the court's error, vacated his sentence, and remanded for resentencing. *Id*. at 498. The court determined that the sentencing court's statement disclaiming reliance on the Guidelines could not overcome the fact the erroneously calculated Guidelines created the "framework or starting point" that guided the court throughout its analysis. *Id*. at 498-99. The court reasoned that when "the starting point is moved forward because of error, it is reasonable to assume that the end point will also be further down the track than it would have been if not for the error," and that the sentencing court had not done enough to ensure the court that this erroneous starting point "did

not influence the sentence ultimately imposed." *Id*. at 498. The court further noted that, because the sentencing court's discussion of the defendant's criminal history referenced the criminal history score contained in his erroneously calculated Guidelines range, the sentencing court's statements referencing the defendant's criminal history "[did] not show that the Guidelines were irrelevant, or that the trial court judge intended to untether [the defendant's] sentence from the Guidelines range." *Id*. at 499. In short, the First Circuit looked beyond the sentencing court's simple responsive statement disclaiming reliance on the Guidelines to the record as a whole, which made it clear that it was at least reasonably probable that the Guidelines were not "irrelevant" to the court's sentencing determination. *Id*. at 498-99. Because it was not clear that the Guidelines were wholly irrelevant to the court's sentencing decision, the court determined the defendant was prejudiced by the erroneously applied career offender enhancement.

The Second Circuit's *Seabrook* decision also contrasts with the decision here. In *Seabrook*, the defendant was sentenced under the Guidelines applicable to commercial bribery--even though he was not charged with bribery and the superseding information did not allege the elements of the charge. 968 F.3d at 231-32. After sentencing the defendant, the court stated that it would have arrived at the same sentence irrespective of the Guideline it used, saying, "Whether I start with a

12-month guideline and vary upwards from it or whether I use the guideline calculation that led to 30 to 37 months of a guideline, I sentence [defendant] to 30 months in custody." *Id*. at 231.

On appeal, the Second Circuit determined the defendant was prejudiced by the court's error, holding that it could not be "confident, despite the district court's assertion to the contrary, that if the proper Guidelines range was before it—or even if it had properly calculated the commercial-bribery guideline range—the court would have imposed the same sentence of 30 months' imprisonment." *Id*. at 234. The court began its analysis by noting that "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did." *Id*. at 233-34. The court reasoned that the record was clear that, despite the sentencing court's disclaimer, its thinking was "anchor[ed]" to the miscalculated Guidelines for several reasons. *Id*. at 234. First, the court noted that "the district court repeatedly acknowledged the importance of the Guidelines, stating 'I need to find the guidelines first. I'm required to make a finding on the guidelines,'—and that to 'find a just punishment,' the guidelines 'are a means of getting there.'" *Id*. The district court then "returned multiple times to the Guidelines range in framing its choice of the appropriate sentence." *Id*. Finally, the court noted that "[t]he importance of the correct Guidelines

range is particularly evident in this case because the sentence was conspicuous for its position as the lowest sentence within what the District Court believed to be the applicable range." *Id*. (citing *Molina-Martinez*, 136 S. Ct. at 1347). Because the record evidence contradicted the sentencing court's statement that it would have applied the same sentence irrespective of the Guidelines, the court vacated the defendant's sentence and remanded for resentencing. 968 F.3d at 935.

There is simply no way to reconcile the decisions of the First Circuit in *Taylor* and the Second Circuit in *Seabrook* with the decision reached by the Eleventh Circuit here. As in *Taylor*, the sentencing court here started its analysis based on an erroneous Guidelines calculation, and anchored its statements on the miscalculated Guidelines range. In fact, near the outset of the sentencing hearing the court made clear that other factors that might have impacted McGadney's sentence were of no importance in its calculations, which were "controlled" by the erroneously applied career offender enhancement. *See, e.g.,* App. at 43a ("Isn't [whether or not McGadney is a career offender] the issue that we really have to address? Because if that controls, then the drug amount doesn't really matter in this case; right?"), 50a-51a ("So what I'm dealing with here is, you know, the career offender status which I think clearly Mr. McGadney is based on his prior convictions and the nature of the offense for which he's pled guilty. That subsumes the issue of whether the base offense level

should be a 16 or a 22. I think the 22 level is accurate, *but it's of no moment because the career offender status takes over in Mr. McGadney's case*"). Also like *Taylor*, the sentencing court's analysis of McGadney's criminal history was tethered to his erroneous classification as a career offender, a fact made obvious by the very passages cited by the Eleventh Circuit panel below. *See* App. at 5a (Quoting portion of sentencing hearing in which sentencing court notes that McGadney's status as career offender is "driving punishment in this case" and stating that career offender enhancement was the result of McGadney's criminal history, then observing that "I have here a situation where the guideline range is really high for you. I mean, it is, and it is what it is because of your prior history").

The facts here also mirror those faced by the Second Circuit in *Seabrook*. As in *Seabrook*, the court began its analysis by calculating the Guidelines range, and repeatedly referred to the erroneously enhanced Guidelines during the sentencing pronouncement. *See* App. at 43a, 50a-51a, 56a. And, as both *Molina-Martinez* and *Seabrook* made clear, "the [t]he importance of the correct Guidelines range is particularly evident in [McGadney's] case because the sentence was conspicuous for its position as the lowest sentence within what the District Court believed to be the applicable range." *See id*. at 58a (Sentencing McGadney to 188 months, the low end of the erroneous Guidelines calculation). In fact, the sentencing court here went a

step further, stating directly on the record that it intended to give McGadney a sentence "at the low end of the Guidelines." *Id.* (Telling McGadney the court "will give you the benefit of your bargain for sentence at the low end of the Guidelines").

Unlike the First and Second Circuits, however, the Eleventh Circuit here held that, in spite of its own direct statements to the contrary, the court's erroneous Guidelines calculations were not a factor in its sentencing decision. *See* App. at 12a. Such disparate outcomes on such similar facts cannot be allowed to stand.

II. THE ELEVENTH CIRCUIT'S RULING UNDERMINES THIS COURT'S *MOLINA-MARTINEZ* DECISION

Not only is the Eleventh Circuit's approach here irreconcilable with that of its sister circuits, it is also contrary to this Court's *Molina-Martinez* decision. *See* 136 S. Ct. 1338 (2016). In *Molina-Martinez*, the district court sentenced petitioner under a Guidelines range higher than the applicable one, but the error went unnoticed until petitioner himself identified it on appeal. *Id.* at 1341. Under that circuit's precedent at the time, however, if a defendant's ultimate sentence fell within what would have been the correct Guidelines range, he was required to present "additional evidence" indicating the error actually affected his sentence. *Id.* Because petitioner's ultimate sentence would have fallen within the correct Guidelines range, and he could not present any additional evidence indicating the incorrect Guidelines calculation

affected his sentence, the court determined that he could not demonstrate that he was prejudiced by the error. *Id*.

Noting that circuits were split regarding regarding the evidence necessary to demonstrate prejudice from an inaccurate Guidelines calculation, this Court granted certiorari "to resolve the disagreement among Courts of Appeals over how to determine whether the application of an incorrect Guidelines range at sentencing affected the defendant's substantial rights." *Id*. at 1345. The Court first noted that the goal of the Sentencing Guidelines, which "provide the framework for the tens of thousands of federal sentencing procedures that occur each year," was to achieve "uniformity in sentencing ... imposed by different federal courts for similar criminal conduct, as well as proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Id*. at 1342. The Court next observed that this goal for uniformity was achieved by "the Guidelines' significant role at sentencing." *Id*. Indeed, a federal court at sentencing "must begin [its] analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id*. at 1345. Though advisory, the Guidelines form the "framework for sentencing," and the "anchor" for any exercise of discretion. *Id*. Thus "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to

deviate from it, then the Guidelines are in a real sense the basis for the sentence," a fact supported by the Sentencing Commission's own research. *Id*. at 1345-46 ("[T]here is considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges"). As the Court put it, "[t]hese sources confirm that the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Id*. at 1346.

In light of the centrality of the Guidelines at sentencing, this Court reversed the judgment of the Fifth Circuit, determining that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id*. at 1345. While the Court's holding meant that "[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome," the Court left open the possibility "there may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist[:]

> The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range. Judges may find that some cases merit a detailed

> explanation of the reasons the selected sentence is appropriate. And that explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines. The Government remains free to poin[t] to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make.

Id. at 1346. In sum, because the Guidelines play such a central role in federal sentencing, when a defendant shows he was sentenced under an incorrect Guidelines range the error itself is sufficient to demonstrate prejudice, unless the record "make[s] it clear" that the sentence was based *only* on factors independent of the erroneous Guidelines calculation. *Id*; *see also Taylor*, 848 F.3d at 498-99 (Holding that Guidelines error prejudicial unless court's statement of reasons makes it clear that Guidelines were "irrelevant" to the court's ultimate sentence).

The Eleventh Circuit's reasoning here cannot be squared with the central holding of *Molina-Martinez*. Despite the court's disclaimer of reliance on the Guidelines at the end of McGadney's sentencing hearing, the sentencing court's own words conclusively show that the erroneous Guidelines factored into its sentencing decision. *See* App. at 43a, 50a-51a, 56a. The panel below implicitly acknowledged this, observing that it was clear the sentencing court "relied heavily on the career offender enhancement when calculating the guidelines" and that it was equally clear that the enhancement was "on the court's mind as it fashioned its sentence." App. at 12a.

What's more, McGadney was sentenced to "the lowest sentence within what the District Court believed to be the applicable range," a fact that the *Molina-Martinez* court held was "particularly conspicuous … [evidence of] an intention to give the minimum recommended by the Guidelines." 136 S.Ct. at 1347-48; App. at 58a. Indeed, the sentencing court flatly stated its intent to do just that, telling McGadney it would "give [him] the benefit of [his] bargain for a sentence at the low end of the Guidelines," as called for in McGadney's plea deal. App. at 58a. Despite this overwhelming evidence that the erroneous Guidelines calculation factored into the sentencing court's decision, the panel remarkably ruled that the enhancement had no effect on McGadney's ultimate sentence. Such a ruling guts this Court's holding in *Molina-Martinez*, and simply cannot be correct.

Finally, this Court should grant certiorari in order to further realize the uniformity that is the goal of the both the Sentencing Guidelines and this Court's *Molina-Martinez* decision. Given the obvious disagreement among the circuits, it is likely that, had McGadney's sentencing hearing occurred in Massachusetts rather than Alabama, his sentence would have been vacated and his case remanded for resentencing absent the erroneously applied enhancement. Had the sentencing court again "given him the benefit of his bargain," his resulting sentence would have been 57, rather than 188, months. Importantly, this 131-month difference based on simple

location is not the result of some disparity in state law, but of differing interpretations of this Court's binding precedent within the single, federal sovereign. In a system with the stated goal of uniformity, such disparity is unacceptable. This Court should grant McGadney's petition for a writ of certiorari and correct the disparity.

CONCLUSION

For the foregoing reasons, McGadney respectfully requests this Court grant his petition for a writ of certiorari.

Respectfully Submitted,

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Counsel for Petitioner

November 27, 2020

APPENDIX

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12607
Non-Argument Calendar

D.C. Docket Nos. 1:15-cv-00282-WS-B,
1:12-cr-00245-WS-B-1

ERIC DYNELL MCGADNEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 10, 2020)

Before BRANCH, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Eric McGadney appeals the district court's denial of his 28 U.S.C. § 2255 motion. McGadney contends that his counsel's representation at sentencing was

deficient because counsel made an affirmative representation to the court that his Alabama conviction for escape in the second degree qualified as a "crime of violence" for career offender purposes and because counsel failed to file a notice of appeal after McGadney instructed him to do so. We affirm.

I. Background

In 2012, a federal grand jury in the Southern District of Alabama indicted McGadney on two criminal charges related to his possession of ecstasy, a controlled substance.[1] McGadney entered into a written plea agreement with the government, in which he pleaded guilty to both counts.[2]

Prior to sentencing, the Probation Office prepared a presentence investigation report ("PSI"). The PSI determined that, because McGadney had two prior felony convictions of either a crime of violence or a controlled-substance offense, and his current conviction was likewise a felony crime of violence or controlled-substance offense, McGadney was a career offender under the Sentencing Guidelines, pursuant to U.S.S.G. § 4B1.1(b)(2).[3] His offense level

[1] Specifically, the indictment asserted that (1) he possessed ecstasy with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count 1); and (2) he used the U.S. mail in facilitating the commission of his crime, in violation of 21 U.S.C. § 843(b).

[2] Although this plea agreement contained an appeals waiver, the waiver excepted a limited set of claims, including ineffective assistance of counsel.

[3] In relevant part, Section 4B1.1 of the Sentencing Guidelines states: "A defendant is a career offender if . . . the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. . . . Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense

was, therefore, enhanced to 34, a 12-level increase from what it would otherwise have been. He received a three-level decrease for acceptance of responsibility, bringing his total offense level to 31. The PSI also contained McGadney's criminal history, of which three felony convictions are particularly relevant to the resolution of this appeal. First, in 2001, McGadney pleaded guilty to possessing at least 400 grams of cocaine in Texas. Second, in 2006, McGadney was convicted of second-degree escape in Mobile County, Alabama. Third, in 2008, McGadney pleaded guilty in connection with a marijuana trafficking offense. With the career-offender enhancement, McGadney's criminal history category was VI. These calculations resulted in a guidelines range of 188 to 235 months' imprisonment.

The district court held a sentencing hearing on May 14, 2014. McGadney's counsel initially objected to the use of the Alabama conviction for second-degree escape as a qualifying felony for the career-offender enhancement, arguing that McGadney lacked adequate notice that this conviction would be used as part of the career-offender enhancement, and so its use violated due process. After this argument failed, counsel conceded that "the Eleventh Circuit is pretty clear that [second degree escape] is a prior qualifying felony, so I'm not going to argue that point to the Court," but asked the court to consider "the underlying facts regarding

level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI." U.S.S.G. § 4B1.1.

that escape second" when deciding whether to enhance his sentence. The district court overruled these objections raised by McGadney to the career-offender enhancement. Although the court suggested that the Texas cocaine conviction would not qualify based on some recent caselaw, it concluded that the second-degree escape and marijuana trafficking convictions otherwise qualified as predicate offenses for the enhancement.

After considering the arguments, the district court emphasized the 18 U.S.C. § 3553(a) factors and gave significant weight to McGadney's lengthy criminal history. The court also stated:

> And so when I look at this case, it's – you know, the thing that's driving it, driving punishment in this case is a lot of what we've already talked about here, and that's your status as a career offender. And you get there because of your prior history, and you've got a lot of criminal history here. You've generated 12 criminal history points, three felony convictions, and now this is your fourth felony conviction.

The court further stated, "[s]o, you know, I have here a situation where the guideline range is really high for you. I mean, it is, and it is what it is because of your prior history." Thus, the court imposed a 188-month sentence for Count 1, at the low end of his guidelines, and a concurrent 48-month sentence for Count 2, reasoning that this sentence "addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation."

At the end of the sentencing hearing, the government asked whether the district court would have imposed this same sentence regardless of the Guidelines calculations. The district court stated that it would have: "Yeah. I think I've indicated . . . that's the sentence that satisfies the sentencing objectives of Section 3553(a), and that's the sentence that's entered according to that statute." McGadney's counsel did not advance any objections after the district court imposed the sentence. The district court entered a final judgment on May 20, 2014, confirming McGadney's convictions and sentences. McGadney did not file a notice of appeal.

In May 2015, McGadney submitted a *pro se* motion to vacate sentence, pursuant to 28 U.S.C. § 2255. McGadney claimed that his counsel was ineffective for failing to conduct an adequate investigation into whether McGadney's prior criminal convictions qualified as career offender predicates and for not filing a notice of appeal despite McGadney's requests that he do so.

In June 2017, a magistrate judge concluded that the second-degree escape and marijuana trafficking convictions were both qualifying felonies for purposes of the career-offender enhancement and that McGadney could not establish prejudice given the court's unambiguous statement that it would have imposed this sentence regardless of the Guidelines range. Nonetheless, the magistrate judge concluded

that an evidentiary hearing was necessary on McGadney's claim that he directed counsel to file a notice of appeal.

At the hearing, McGadney presented testimony from three witnesses, including himself. First, Kimberly Busby, a former girlfriend, testified that she spoke to McGadney's counsel on his behalf regarding an appeal, and counsel had indicated the appeal "was being processed." However, she was unaware that McGadney had chosen to plead guilty, had no knowledge of his cooperation with law enforcement to obtain a reduced sentence, could not say when McGadney found out an appeal had not been filed, and never contacted the court to find out if an appeal had been filed. Second, Felicia Dorsey testified that McGadney expressed an interest in appealing at the courthouse after the district court imposed its sentence. She conceded, though, that she had no way of knowing if McGadney subsequently changed his mind.

Third, McGadney testified that he had consistently indicated an intent to appeal. He admitted trying to cooperate with the government for a reduced sentence and could not specify when he found out no appeal had been filed. McGadney explained that he first told his counsel in the courtroom after sentencing that he wanted to appeal, he then told counsel on a call from jail that he wanted to appeal, but did not have any further contact or discussions with his counsel and never asked the court about his appeal. McGadney then clarified that

he sent emails from jail to his counsel asking him to appeal, but that counsel kept asking about cooperating with the government instead.

The government called McGadney's trial counsel as a witness. He explained that his protocol was to file an appeal "if there's any doubt" as to a client's intentions. He noted that the process to file a notice of appeal took only several minutes and that he "[n]ever" had refused to file a notice of appeal if the client requested one. He testified that McGadney initially told him right after sentencing that he wanted to appeal, but on May 21 he received a voicemail from McGadney stating that he did not want to appeal. On May 22, counsel had a conversation with Busby about McGadney's efforts to cooperate, as reflected in his attorney time records. Over the next three to five months, counsel assisted McGadney in his cooperation efforts by forwarding to the government information from McGadney about other possible drug dealers. During these email exchanges, there was "absolutely no discussion of an appeal" because the strategy was to seek a substantial assistance reduction from the government.

After the hearing, the magistrate judge entered a report and recommendation ("R&R"), rejecting McGadney's claim regarding his intent to appeal his sentence.[4]

[4] Regarding the conflict in the evidence, the magistrate judge credited counsel's testimony that "while McGadney and his family initially expressed a desire to appeal, McGadney later instructed him, via voice message, not to pursue the appeal, and that Busby, through whom McGadney often used to communicate with counsel, confirmed such." The magistrate judge concluded that McGadney's testimony about directing counsel to file an appeal was not entirely credible, as his testimony was contradictory and was disputed by counsel's emails indicating that

The district court adopted the R&R, issued an order denying the § 2255 motion and a certificate of appealability ("COA"), and entered a separate judgment. McGadney submitted a *pro se* notice of appeal and sought a COA from this Court. A single judge of this Court granted McGadney's motion for a COA on the following two issues: (1) Whether McGadney's counsel was ineffective for failing to object to his enhanced career-offender sentence on the basis that his prior Alabama conviction for escape in the second degree did not qualify as a predicate crime of violence under the Sentencing Guidelines; and (2) Whether McGadney's counsel was ineffective for failing to file a notice of appeal, despite being instructed to do so. This court also appointed counsel.

II. Standard of Review

With respect to proceedings under 28 U.S.C. § 2255, we review legal issues *de novo* and factual findings for clear error. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999). Under the clear error standard, "[a] factual finding is clearly erroneous only when [we], after reviewing all of the evidence, [are] left with 'the definite and firm conviction' that a mistake has been committed." *In re Piazza*, 719 F.3d 1253, 1273 (11th Cir. 2013). As the §2255 movant, McGadney bears the burden of proof. *See LeCroy v. United States*, 739 F.3d 1297, 1321 (11th Cir. 2014).

McGadney wanted to pursue cooperation instead of an appeal.

Additionally, in an appeal from a § 2255 proceeding, "[w]e allot substantial deference to the factfinder . . . in reaching credibility determinations with respect to witness testimony. Generally, we refuse to disturb a credibility determination unless it is "so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Rivers v. United States*, 777 F.3d 1306, 1316–17 (11th Cir. 2015) (internal citations and quotations omitted). Accordingly, we will uphold the district court's credibility determinations "unless the court's understanding of the facts appears to be unbelievable." *Id.* at 1317.

III. Discussion

We evaluate ineffective-assistance claims under a two-part standard: first, McGadney must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and, second, he must demonstrate "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The prejudice prong of the *Strickland* test requires the movant to "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.

McGadney argues that his counsel was ineffective for failing to recognize and argue that his prior conviction for Alabama second-degree escape did not qualify as a crime of violence as required for purposes of the career offender

enhancement.[5] Ala. Code § 13A-10-32 states that a person "commits the crime of escape in the second degree if he escapes or attempts to escape from a penal facility." Ala. Code § 13A-10-32. The Commentary to this statutory scheme provides that § 13A-10-32 "covers escape from a penal facility regardless of the underlying charge because a penal facility is an institution which has substantial security requirements and there is, therefore, a great element of danger in planning and executing escapes." *Id.* § 13A-10-33, comment. Moreover, it provides that a "penal facility may be a state prison, jail, or reformatory." *Id.*

We have not "clearly" stated whether Alabama's second degree escape constitutes a crime of violence, as counsel erroneously suggested at McGadney's sentencing.[6] However, even assuming *arguendo* that counsel's performance was

[5] At the time of sentencing, U.S.S.G. § 4B1.1 provided that a defendant is a career offender if (1) he was at least 18 years old when he committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant 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) (Nov. 1, 2012). A "crime of violence" was defined as a felony 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; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, "or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (Nov. 1, 2012).

[6] Though we have not clearly decided, we note that in *United States v. Proch*, we held in 2011 that the Florida offense of escape from a jail or from custody while being transported to or from jail, pursuant to Fla. Stat Ann. § 944.40, was a violent felony for purposes of the Armed Career Criminal Act's residual clause because "[e]scapes from custody, like burglary, will almost always involve the police attempting to apprehend the escapee and are likely to cause 'an eruption of violence' upon discovery.'" 637 F.3d 1262, 1268–69 (11th Cir. 2011). And the case McGadney's counsel relied on, *Newman v. United States*, No. 2:11CV884-MHT, 2014 WL 1047113 (M.D. Ala. Mar. 18, 2014), itself relied heavily on *Proch*. *See id*. at *3.

deficient in this regard, McGadney cannot establish prejudice. It is true that the court relied heavily on the career-offender enhancement when calculating the guidelines. It is equally clear that the enhancement was on the court's mind when fashioning a sentence. However, the district court also continuously referred to McGadney's lengthy criminal history. Further, the district court stated that it would have imposed the sentence regardless of what the guidelines calculations were. Thus, McGadney cannot establish a reasonable probability that, but for counsel's alleged error, the outcome would have been different. *See Osley v. United States*, 751 F.3d 1214, 1228 (11th Cir. 2014) (holding that a § 2255 movant could not establish prejudice based on counsel's failure to object to an alleged Guidelines miscalculation where "the record abundantly reveals that the district court would have imposed the same sentence even without the alleged [error]"); *see also United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006) (holding, in the context of a direct appeal, that a guideline error is harmless if the district court unambiguously expressed that it would have imposed the same sentence, even without the erroneous calculation). We thus affirm the district court's denial of McGadney's first claim of ineffective assistance.

As to McGadney's second claim, that his counsel was ineffective for failing to file the requested notice of appeal, it is true that failure to file an appeal when requested by the defendant is generally ineffective assistance of counsel. *See Roe*

v. Flores-Ortega, 528 U.S. 470, 477 (2000). But the district court credited counsel's testimony—that McGadney ultimately decided against filing an appeal—over McGadney's testimony and his two witnesses' testimonies. McGadney has not shown that counsel's testimony was "so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Rivers*, 777 F.3d at 1317 (internal quotations omitted). Thus, we will not disturb this credibility determination. *Id.* In light of the district court's credibility determination, McGadney failed to establish that his counsel's performance was deficient under *Strickland*. Accordingly, we affirm.

AFFIRMED.

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

April 10, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12607-HH
Case Style: Eric McGadney v. USA
District Court Docket No: 1:15-cv-00282-WS-B
Secondary Case Number: 1:12-cr-00245-WS-B-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Christopher Bergquist, HH at 404-335-6169.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Appendix 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

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August 06, 2019

Mr. Christopher S. Burkhalter
Burr & Forman, LLP
11 N WATER ST STE 22200
PO BOX 2287
MOBILE, AL 36602

Appeal Number: 18-12607-HH
Case Style: Eric McGadney v. USA
District Court Docket No: 1:15-cv-00282-WS-B
Secondary Case Number: 1:12-cr-00245-WS-B-1

Party To Be Represented: Eric McGadney

Dear Counsel:

We are pleased to advise that you have been appointed to represent on appeal the indigent litigant named above. This work is comparable to work performed pro bono publico. The fee you will receive likely will be less than your customary one due to limitations on the hourly rate of compensation contained in the Criminal Justice Act (18 U.S.C. § 3006A), and consideration of the factors contained in Addendum Four § (g)(1) of the Eleventh Circuit Rules.

Supporting documentation and a link to the CJA eVoucher application are available on the internet at http://www.ca11.uscourts.gov/attorney-info/criminal-justice-act. **For questions concerning CJA eVoucher please contact our CJA Team by email at cja_evoucher@ca11.uscourts.gov or phone 404-335-6167.** For all other questions, please call the "Reply To" number shown below.

Every motion, petition, brief, answer, response and reply filed must contain a Certificate of Interested Persons and Corporate Disclosure Statement (CIP). Appellants/Petitioners must file a CIP within 14 days after the date the case or appeal is docketed in this court; Appellees/Respondents/Intervenors/Other Parties must file a CIP within 28 days after the case or appeal is docketed in this court, regardless of whether appellants/petitioners have filed a CIP. See FRAP 26.1 and 11th Cir. R. 26.1-1.

On the same day a party or amicus curiae first files its paper or e-filed CIP, that filer must also complete the court's web-based CIP at the Web-Based CIP link on the court's website. Pro se

filers (except attorneys appearing in particular cases as pro se parties) are **not required or authorized** to complete the web-based CIP.

Your claim for compensation under the Act should be submitted within 60 days after issuance of mandate or filing of a certiorari petition. We request that you enclose with your completed CJA Voucher one additional copy of each brief, petition for rehearing, and certiorari petition which you have filed. Please ensure that your voucher includes a detailed description of the work you performed. Thank you for accepting this appointment under the Criminal Justice Act.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH
Phone #: 404-335-6169

CJA-1 Appointment of Counsel Letter

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ERIC DYNELL MCGADNEY,	*	
	*	
Petitioner,	*	**CRIMINAL NO. 12-00245-WS-B**
	*	**CIVIL ACTION NO. 15-0282-WS-B**
vs.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court. It is **ORDERED** that McGadney's Motion To Vacate, Set Aside, Or Correct Sentence under § 2255 (Doc. 45) be **DENIED**, and that McGadney is not entitled to the issuance of a certificate of appealability or to proceed *in forma pauperis* on appeal.

DONE this 7th day of June, 2018.

s/WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ERIC DYNELL MCGADNEY,	*	
	*	
Petitioner,	*	
	*	**CIVIL ACTION NO. 15-00282-WS-B**
vs.	*	**CRIMINAL NO. 12-00245-WS-B-1**
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner Eric Dynell McGadney's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. 45). The motion, which was referred to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 8(b) of the rules Governing Section 2255 Cases, has been fully briefed and is now ready for consideration. In his motion, McGadney claims that his trial counsel, Christ Coumanis, was ineffective for failing to file a notice of appeal when requested to do so.[1] (Doc. 45). Based upon the evidence presented at the evidentiary

[1] Though McGadney raised two claims in his initial petition (doc. 45), the undersigned, in a report and recommendation filed on June 5, 2017, recommended that his claim that his trial counsel was ineffective for failing to investigate his prior convictions as predicates for his career offender status be denied as meritless. (Doc. 77). Thus, the instant report and recommendation is limited to the above claim.

hearing conducted on September 7, 2017, and upon consideration of McGadney's petition, the Government's response in opposition, the parties' supporting documents, and all other pertinent portions of the record, it is recommended that McGadney's claim that Coumanis failed to file a notice of appeal, as directed, be **DENIED**.

I. BACKGROUND

A federal grand jury returned an indictment against McGadney in October 2012, and Christ Coumanis was appointed to represent him pursuant to the Criminal Justice Act (hereinafter "CJA"). (Docs. 1, 12). Pursuant to a plea agreement, McGadney entered a counseled guilty plea, and was convicted of possession with intent to distribute MDMA, in violation of 21 U.S.C. § 841(a)(1) (Count One); and use of an interstate facility to facilitate the commission of a drug trafficking felony, in violation of 21 U.S.C. § 843(b) (Count Two). (Doc. 22). On May 14, 2014, McGadney was sentenced to 188 months imprisonment, followed by a supervised release term of six (6) years. (Doc. 39).

Proceeding *pro se*, McGadney timely filed the instant petition on May 18, 2015.[2] (Doc. 45). McGadney seeks to

[2] At McGadney's request, his habeas petition was held in abeyance from June 16, 2016, through March 7, 2017, due to an impending Supreme Court decision that has no bearing on the instant issue before the Court. (Docs. 63, 71).

have his conviction and sentence set aside on the basis of ineffective assistance of counsel. (Id.). Along with his petition, McGadney submitted a supporting memorandum with attachments, where he specifically argued that his trial counsel, Coumanis, was ineffective for "failing to file a notice of appeal challenging the career offender application when [McGadney] specifically and unequivocally requested his counsel to do so." (Doc. 45-1 at 15). In the memorandum, McGadney asserts that:

> The petitioner . . . requested his counsel to file an appeal. Counsel initially advised the petitioner that an appeal would be frivolous; however the petitioner being adamant about exercising his right to appeal, counsel advised the petitioner that he would file said notice of appeal. The petitioner discovered several months past that counsel did not file said notice of appeal, and thus, the petitioner files the instant action.

(Id. at 16.). In his initial petition, McGadney also included a signed affidavit, where he contended that he had his "significant other to call [his] counsel to see if [his counsel] had filed [McGadney's] appeal." (Id. at 32).

In the Government's response in opposition to McGadney's petition, the Government argues that Coumanis never received an instruction to file an appeal. (Doc. 50 at 10). However, in his signed affidavit accompanying the response, Coumanis avers that McGadney initially wanted to

consider an appeal, but ultimately decided against pursuing the appellate process and instead sought to become a cooperating witness for the Government in an effort to obtain sentencing relief under Rule 35 of the Federal Rules of Criminal Procedure. (Doc. 50-1 at 3, 4). The Government acknowledged that an evidentiary hearing was necessary to resolve the conflicting statements made by McGadney and Coumanis. (Id. at 10, 11).

Upon review of McGadney's petition (doc. 45), the Government's response in opposition (doc. 50), and McGadney's reply (doc. 56), the undersigned determined that an evidentiary hearing was required to resolve McGadney's contention that Coumanis failed to file a notice of appeal as directed. (Doc. 77). An evidentiary hearing was scheduled for September 7, 2017, and counsel was appointed to represent McGadney at the hearing. (Docs. 81, 83). At the hearing, testimony was offered by McGadney; Christ Coumanis, his former counsel; Kimberly Busby, his former girlfriend; and Felicia Peoples Dorsey, a family friend.

II. STANDARDS OF REVIEW

The Sixth Amendment guarantees criminal defendants a right to reasonably effective legal assistance. Roe v. Flores-Ortega, 528 U.S. 470, 476, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000). To prove ineffective assistance of

counsel, petitioners must satisfy the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires a petitioner to show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" meaning that counsel's representation fell below an objective standard of reasonableness, id. at 687-88; and (2) that counsel's deficient performance prejudiced the petitioner by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 694.

It is well-settled that "a lawyer who disregards instructions from his client to appeal has acted in a manner that is professionally unreasonable." Gomez-Diaz v. United States, 433 F.3d 788, 790 (11th Cir. 2005). If an attorney fails to file an appeal that his client wants filed, prejudice is presumed. Id. at 792. Accordingly, to satisfy the prejudice prong of the Strickland test, a defendant who shows that his attorney has ignored his wishes and failed to appeal his case need only demonstrate that, but for the attorney's deficient performance, he would have appealed. Id. Moreover, when counsel fails to file a requested appeal, "a defendant is entitled to [a

new] appeal without showing that his appeal would likely have had merit." Flores-Ortega, 528 U.S. at 477 (internal quotes omitted).

Even where a client has not made a specific appeal request, the Supreme Court has held that:

> [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want an appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Flores-Ortega, 528 U.S. at 480.

III. DISCUSSION

At the evidentiary hearing conducted on September 7, 2017, McGadney testified that immediately after his sentencing, while still in the courtroom, he told Coumanis that he wanted to appeal his sentence. McGadney felt that he had gotten a "raw deal" because he was improperly sentenced as a career offender. According to McGadney, approximately one week after his sentencing, he used a prepaid card to telephone Coumanis, from the Baldwin County jail, and reiterate to him that he wanted to file an appeal. McGadney testified that Coumanis told him that he would file the appeal. McGadney further testified that

within the same week, Busby visited him at the local county jail, and he told her to speak to Coumanis about appealing his sentence. Additionally, McGadney testified that once he was moved to a facility in Perry County, the guard allowed him to make a phone call, and he called Busby and again asked her to speak with Coumanis about his appeal. McGadney also testified that he figured no appeal had been filed when Busby reported to him that Coumanis was no longer answering her phone calls or returning her phone messages. He further testified that he wrote the Court and requested a docket sheet in June 2014 and learned that no appeal had been filed. As a result, he had someone in the law library at FCI Pollock help him prepare the instant petition.

On cross-examination, McGadney provided conflicting information about his efforts to cooperate with the Government. At one point, McGadney acknowledged that both before and after his sentencing, there were efforts to cooperate. Later, McGadney testified that while he exchanged at least three emails with Coumanis after his sentencing, he was only asking about his appeal, not about cooperation. According to McGadney, Coumanis was raising the issue of cooperation; however, he was finished with trying to cooperate, and only wanted to know about his

appeal at that point.

Busby and Felicia Peoples Dorsey, McGadney's family friend, both testified that immediately following McGadney's sentencing, they spoke with Coumanis in the Court hallway, and he stated that he would be appealing the sentence. Dorsey further testified that she was not privy to any other discussions with Coumanis concerning the appeal. Busby testified that approximately two weeks after McGadney was sentenced, McGadney called her and told her to call Coumanis about the appeal. According to Busby, she called Coumanis to discuss McGadney's appeal, and he told her that an appeal had been filed. Then, two to three weeks after her initial call, she spoke with Coumanis a second time and was told that the appeal was being processed. Busby testified that she attempted to reach Coumanis on other occasions after that, but he never answered her telephone calls nor did he return her telephone message. Busby further testified that she began to believe that Coumanis had not filed an appeal after he stopped answering her phone calls and did not return her messages. Aside from attempting to reach Coumanis by telephone, Busby testified that she did not take any other steps to determine if he had filed the appeal.

Christ Coumanis testified that he has practiced

criminal law since 1988 and has represented between 125 and 150 criminal defendants in federal court since 2005. He further testified that he is aware of his obligation to file an appeal when a client requests it, even if he believes it has no merit. He also testified that filing an appeal is not a difficult task and can be accomplished in a matter of minutes.

Coumanis testified that while reviewing the plea agreement, he had general discussions with McGadney about the pros and cons of an appeal, and that at the sentencing, they were disappointed with the sentence McGadney received because McGadney had attempted to cooperate in order to obtain a sentencing reduction. Coumanis further testified that, at sentencing, McGadney told him that he wanted to appeal, and that he told him he understood. Coumanis also acknowledged that he spoke with McGadney's family immediately after the sentencing, and that they told him they wanted him to appeal. According to Coumanis, he told the family that there may not be many issues to appeal, but that he would do whatever he could to try to help McGadney.

Coumanis testified that he was preparing to file an appeal on McGadney's behalf; however, on May 21, 2014, McGadney left him a voice message stating that he no longer wanted to appeal. Coumanis also testified that, because

McGadney was incarcerated at the time, he was under the impression that McGadney could not have called directly from the jail, and left him a message; thus, he assumed that McGadney had Busby or some family member place a three-way phone call for him.[3] Coumanis testified that he called Busby the next day, May 22, 2014, and confirmed that McGadney did not wish to pursue the appeal, but instead wanted to try cooperating again. Coumanis testified that he then focused his efforts on trying to facilitate McGadney's cooperation. He also testified that, for up to six months after that, he was attempting to facilitate cooperation in hopes that it would eventually lead to a sentence reduction for McGadney. According to Coumanis, he and McGadney communicated via Corrilinks, the Bureau of Prisons email system, about information that McGadney wanted him to relay to the case agent.

The undersigned has carefully weighed the evidence received at the evidentiary hearing in light of all the facts, and has taken into account the consistencies and inconsistencies in the witnesses' testimony, and their demeanor on the stand. Based on said review, the undersigned credits Coumanis' testimony that while McGadney

[3] However at the evidentiary hearing, McGadney testified that while at the Baldwin County facility, he had access to a prepaid calling card; thus, he was able to place telephone calls from that facility.

and his family initially expressed a desire to appeal, McGadney later instructed him, via voice message, not to pursue the appeal, and that Busby, through whom McGadney often used to communicate with Coumanis, confirmed such.[4]

First, the Court finds that McGadney's testimony about directing Coumanis to file an appeal was not entirely credible. While both McGadney and Coumanis agree that McGadney and his family initially instructed Coumanis to file an appeal, Coumanis' billing records, generated in close proximity to the events, support Coumanis' testimony that McGadney left him a telephone message on May 21, 2014, advising him that he did not want to appeal, and that he spoke with Busby, McGadney's then fiancée, the next day to confirm and discuss cooperation efforts. Further, if, as McGadney alleges, he had personally telephoned Coumanis *after* the sentencing and told him to proceed with the appeal, McGadney's testimony that he also instructed Busby, both in person and over the telephone, to contact Coumanis and tell him to file the appeal makes no sense since he had purportedly already personally given Coumanis this very instruction on two separate occasions.

Additionally, the emails Coumanis produced at the

[4] Coumanis' billing records document several telephone conferences between Coumanis and McGadney's fiancée during his representation of McGadney. The last documented conversation was on May 22, 2014.

hearing also support his testimony that McGadney decided against the appeal, and wanted to pursue cooperation instead. The emails, which are dated beginning May 27, 2014, and go through October 16, 2014, are consistent with Coumanis' testimony and his billing records. They document Coumanis' efforts to facilitate McGadney's cooperation after sentencing whereas, as noted *supra*, McGadney provided conflicting testimony about efforts to cooperate after his sentencing. The emails strongly suggest that after sentencing, McGadney was continuing to provide information to Coumanis, who, in turn, was relaying it to the case agent in order to facilitate cooperation.[5]

Finally, while Busby testified that she spoke with Coumanis on several occasions about McGadney's appeal, her testimony was not credible. Her testimony was not consistent with either McGadney's or Coumanis' testimony. McGadney testified that the same week of his sentencing, Busby visited him at the local jail, and he instructed her to contact Coumanis and tell him to file an appeal on his behalf, whereas Busby testified that two weeks *after* McGadney's sentencing, McGadney called her and told her to call Coumanis and tell him to file an appeal. Busby's

[5] Indeed, it seems contrary to logic that a defendant would be permitted to cooperate with the Government in order to seek a sentence reduction, while simultaneously attacking his sentence on appeal.

testimony also conflicts with Coumanis' testimony and with his billing records which document the telephone message from McGadney on May 21, 2014, and Coumanis' discussion with Busby on May 22, 2014 confirming that McGadney wanted to forgo the appeal, and attempt cooperation.

Accordingly, based on the record evidence, including the witnesses' testimony, Coumanis' billing records and emails, the undersigned finds that Coumanis' testimony that while McGadney initially expressed an interest in appealing his sentence, he later directed Coumanis to not pursue the appeal, was credible. Accordingly, McGadney's claim that Coumanis failed to file a petition as directed is due to be **DENIED**. It is so recommended. See Gomez-Diaz, 433 F.3d at 792-93; Flores-Ortega, 528 U.S. at 577-580.

IV. CERTIFICATE OF APPEALABILITY

PURUSANT TO RULE 11(a) of the Rules Governing § 2255 Proceedings, the undersigned recommends that a certificate of appealability be **DENIED**. 28 U.S.C. § 2255, Rule 11(a) ("[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear than an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28

U.S.C. § 2253(c)(1). A certificate of appealability may be issued only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Where a habeas petition is being denied on procedural grounds without reaching the merits of an underlying constitutional claim, "a COA" should be issued [only] 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 v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 542 (2000). Where a habeas petition is being denied on the merits of an underlying constitutional claim, a certificate of appealability should be issued only when the petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. ("To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot [v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394 77 L. Ed. 2d 1090 (1983)], includes a showing that reasonable jurists could debate whether (or,

for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.") (internal quotations marks omitted); *accord* Miller El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

McGadney's petition does not warrant the issuance of a certificate of appealability, as reasonable jurists could not conclude either that this Court is in error in dismissing the instant petition or that Petitioner should be allowed to proceed further. Accordingly, the undersigned recommends that the Court conclude that reasonable jurists could not find it debatable whether McGadney's petition should be dismissed and, as a result, he is not entitled to a certificate of appealability.

V. CONCLUSION

For the foregoing reasons, it is recommended that McGadney's Motion to Vacate, Set Aside, or Correct Sentence (doc. 45) be **DENIED**, that this action be dismissed, and that judgment be entered in favor of Respondent, the United States of America, and against Petitioner, Eric Dynell McGadney. The undersigned Magistrate Judge further opines that McGadney is not entitled to the issuance of a Certificate of Appealability, and, as a result, he should

not be permitted to appeal *in forma pauperis*.

Notice of Right to File Objections

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. See U.S.C. § 636(b)(1); **Fed. R. Civ. P.** 72(b); S.D. ALA GenLR 72(c). The parties should note that, under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice. *11th Cir. R. 3-1*.

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation

where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this **2nd** day of **April, 2018.**

/s/ SONJA F. BIVINS
UNITED STATES MAGISTRATE JUDGE

Appendix E

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	*	CRIMINAL NO.: 12-0245-WS
VS.	*	MAY 14, 2014
	*	COURTROOM 2A
ERIC DYNELL McGADNEY,	*	U.S. FEDERAL COURTHOUSE
	*	MOBILE, ALABAMA
Defendant.	*	

SENTENCING HEARING

BEFORE THE HON. WILLIAM H. STEELE

CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE GOVERNMENT:	Gloria A. Bedwell, Esquire Assistant U.S. Attorney U.S. Attorney's Office 63 S. Royal Street, Suite 600 Mobile, Alabama 36602
FOR THE DEFENDANT:	Christ N. Coumanis, Esquire Coumanis and York, P.C. Attorneys at Law P. O. Box 1646 Mobile, Alabama 36633
COURT REPORTER:	Mary Frances Giattina, CCR, RDR, CRR Official Court Reporter P. O. Box 3021 Mobile, Alabama 36652-3021 (251) 690-3003

Proceedings reported by machine stenography.

Transcript produced by computer

(May 14, 2014, 10:00 a.m.) (In open court.)

(Defendant present with counsel.)

THE COURT: Good morning.

ALL: Good morning, Judge.

THE CLERK: Case set for sentencing hearing in Criminal Action 12-245, United States of America versus Eric McGadney. What says the United States?

MS. BEDWELL: Ready, Your Honor.

THE CLERK: What says the Defendant?

MR. COUMANIS: Ready, Your Honor.

THE COURT: All right. Come on up, please. Mr. McGadney, if you'll come forward, please.

(Brief pause.)

THE COURT: Let me get you to stand in front of that microphone, if you would, please, sir. Raise your right hand and take an oath.

(The Defendant was placed under oath.)

THE COURT: Would you state your name for the record, please, sir.

DEFENDANT: Eric Dynell McGadney.

THE COURT: All right. Is that -- you want to turn that on, Mr. Coumanis?

MR. COUMANIS: Oh, I'm sorry, Judge.

THE COURT: There you go. All right.

DEFENDANT: Eric Dynell McGadney.

THE COURT: Mr. McGadney, we're here today for a sentencing hearing following entry of a guilty plea on January 24, 2013, to Counts 1 and 2 of an indictment, Count 1 charging possession with intent to distribute MDMA, and Count 2 charging use of a communication facility to facilitate a drug trafficking offense. The plea was entered subject to a written plea agreement.

The Presentence Report has been published in this case. Mr. Coumanis, I assume that you've received a copy of the Presentence Report and had a chance to discuss it with Mr. McGadney?

MR. COUMANIS: I did, Judge, and there is still an objection that we have outstanding on it.

THE COURT: All right. And Mr. McGadney, do you understand the information that's contained in the Presentence Report?

DEFENDANT: Yes, sir.

THE COURT: All right. I understand there is an objection, and I'll hear from you on your objection at this time.

MR. COUMANIS: Your Honor, one of the primary objections we have to the Presentence Report relates to paragraphs 15 and paragraph 22 and the base offense level that's been calculated in this case.

If you will look at, first, the paragraph 15, Judge, it

speaks of the base offense level that's contained in the Factual Resume as being a 16 based on a hundred and forty-four tablets. That was the agreement that was entered into that was the basis of the plea. That was part of the Factual Resume. That's the deal that the Defendant entered into with the Government in pleading guilty.

Judge, if you also note further down there in paragraph 15 that there is a note that "Toxicology reports are pending receipt. If necessary, the report will be revised." To date, Judge, we've been asking for the toxicology report. We've never been provided a copy of the toxicology report and, to my knowledge, one hasn't been provided to the Government either.

So it is our -- and going to paragraph 22, Judge, the base offense level is calculated on the basis of an amount further and different than that contained in 15 and results in a base offense level of 22. And it's our position that that is an error, that the Defendant should be sentenced on the basis of a base offense level of 16 as that is the amount that's contained in the Factual Resume and to which the Government has produced evidence of the amount of drugs involved in this case. There is no evidence of any of the other amounts that are asserted in the Presentence Report.

So that's our primary objection, Judge. Other than that, we have objections to his career offender status and those paragraphs in the Presentence Report that reflect that he's a

career offender based on two qualifying felonies.

THE COURT: Isn't that the issue that we really have to address? Because if that controls, then the drug amount doesn't really matter in this case; right?

MR. COUMANIS: It does, Judge. I mean, if the Court were to deem he's a career offender, then I guess my argument on the amount of drugs is of no moment to the Court.

THE COURT: All right.

MR. COUMANIS: But it is something that was significant that I saw and my client saw, and I wanted to object to the Court on that basis.

THE COURT: All right. Let's hear from you then on the career offender issue.

MR. COUMANIS: Judge, at the outset in this matter, the Government knew that Mr. McGadney had prior convictions. It was evident in his Probation Office conference report that I received. It was available to the Government as well.

In that initial information, there was a conviction of a drug offense out of Texas, an escape second charge in Alabama, and also there's a drug conviction out of Huntsville which we don't argue about, Judge. We concede that that is a qualifying felony.

At the time of the very beginning of this case, Judge, in Document 20, the Government gave notice of information that established prior convictions, and in that notice they set out

the conviction in Madison County, Alabama, which, again, we do not contest, and the trafficking in marijuana offense out of Texas. Nowhere in that document is it mentioned that there is an escape second conviction that the Government intends to rely on as a basis of his career offender status that they seek here today.

During the course of reviewing the Presentence Report leading up to his sentencing, the Defendant and the U.S. Probation went back and forth on the law as it related to the trafficking offense in marijuana out of Texas. I think the Government's position is that they concede that it is not a qualifying felony. And rather than allowing career offender status to lapse or not be maintained at that point, the U.S. Probation and the Government submitted that he had a second qualifying felony in terms of the escape second.

Again, Judge, that is not something that was contained in the initial information to establish prior convictions. It was something that was a fall-back position for the Government, and it is a position that the Defendant did not have -- it was a conviction that the Defendant did not have knowing to him at the time that he was considering the plea agreement in order to take that into account when he entered into the plea agreement. It was after the fact when sentencing was here and the Defendant and counsel were presented with, oh, yeah, here is the escape second, it

qualifies since that drug offense out of Texas doesn't.

Our position, Judge, is that violates his due process, his substantive process, and his equal protection under the law. And we don't -- we submit that that escape second should not qualify as a prior drug conviction -- or prior qualifying felony for operation of the career offender status.

THE COURT: All right. Ms. Bedwell?

MS. BEDWELL: Your Honor, the Government submits that the Defendant's argument conflates two separate issues, that being the statutory enhancement under 851 and the career offender enhancement, which is only -- only speaks to the Guidelines.

The 851 enhancement, under that statute, the Government is required to notify the Defendant of any prior qualifying drug convictions that would enhance the statutory maximum penalty, which the Government properly did. Those qualifying offenses are related -- are restricted only to prior drug convictions, and the Government properly notified the Defendant that because he had two priors, even if he only had one prior under the statute under which he's charged, the maximum penalty then would only increase in this case to 30 years.

In the -- with regard to the career offender guidelines, the Defendant was adequately notified, if it was necessary at all, during the Probation conference when the probation

officer noted that he was possibly considered for career offender treatment under the guideline calculations, which is a completely separate calculation that does not require notice. The only requirement for career offender for purposes of calculating the guideline is that the Defendant has any of the qualifying felonies which are not restricted only to drug priors.

The escape second is a proper qualifying felony conviction that is countable toward the career offender enhancement, and the Probation Office and the Presentence Report properly reflect the Defendant's criminal history which speaks to that career offense -- career offender enhancement.

So the Government submits that no prior notice was necessary in this case, although it was actually given in the Probation -- the report on the guideline calculations provided by the Probation Office prior to the Defendant's entering of the guilty plea. And even the career offender enhanced guideline total does not exceed the unenhanced 851 maximum penalty of 20 years. So the 851 enhancement has no application in this case.

The only issue is whether the Defendant qualifies as a career offender for purposes of the guideline calculation, and based on the information in the report, the Government thinks that he does, and we have advised counsel for the Defendant of that fact.

THE COURT: Mr. Coumanis, any response, reply?

MR. COUMANIS: Judge, I would note just for the record that the Probation Office conference report did have the escape second listed in there, so I wanted the Court to realize that. However, there was not the notice that we believe is appropriate under the law so that he can make an informed decision on his plea at the time.

THE COURT: What other notice under the -- appropriate under the law would be required?

MR. COUMANIS: Judge, I guess the information to establish prior convictions that Ms. Bedwell spoke to that's Document 20.

THE COURT: Which is the 851 notice?

MR. COUMANIS: Yes, sir.

THE COURT: All right. And she's argued that she was only obligated to inform your client of his drug convictions. Do you see that differently?

MR. COUMANIS: I understand her position, Judge.

THE COURT: Okay.

MR. COUMANIS: Judge, just one other thing. With regards to the escape second charge, the Eleventh Circuit is pretty clear that that is a prior qualifying felony, so I'm not going to argue that point to the Court.

But, Your Honor, if you consider some evidence that is not in the ilk of the -- the name of the case slips my mind --

the Deschamps decision that indicates that the court in looking at prior felonies should look at the charging instrument and the plea.

If the Court would be willing to look at the underlying facts regarding that escape second, it's contained in the Presentence Report --

THE COURT: Well, I mean, if you want to argue in mitigation, that's a different issue than whether it applies or not, and I don't think you're arguing that it does not apply.

MR. COUMANIS: No, sir.

THE COURT: I think what you're getting into now is whether I should give him credit as a variance or in mitigation for the application of that offense.

MR. COUMANIS: Yes, sir.

THE COURT: And I'll certainly allow you to argue that. What I want to do now is resolve the sentencing guidelines and make sure I'm doing that right.

MR. COUMANIS: Yes, sir.

THE COURT: So any further argument on the career offender issue?

MR. COUMANIS: No further argument on the career offender, Judge.

THE COURT: Okay. Well, you know, I hear what you're arguing here, and it's the -- and I think Ms. Bedwell

is right about conflating the two issues, that being notice under 851 and whether notice is even required under application of the Guidelines and, of course, notice before the plea.

And the problem I think Mr. McGadney has is that he did have notice before the plea. The record in this case -- specifically, I'm referring to the Report on Probation Office Conference, which is Document 10 in the file -- clearly outlines on page four his prior convictions, including the three felony convictions which initially seem to come into play. And that would be the Texas conviction on January 31 of 2002, the escape conviction on September 15, 2006, and the trafficking in marijuana conviction on September 19, 2008. Those were all outlined in the worksheet as part of the Probation Office conference report.

And then on page seven of the report, clearly delineated here is the statement, "Likely a career offender based on two prior felony drug convictions and also an escape second conviction. If enhanced penalty filed, statutory maximum is 30 years, base offense level is 34, and a Criminal History Category VI, and the guideline range is 262 to 327 months. This is range without acceptance of responsibility." So that was clearly part of the report.

And then in Document 19, Mr. McGadney signed a document stating that he had been advised of the calculations of the

probation officer and that he was aware of that information.

So, you know, in terms of notice, I think certainly there was notice and before the plea, and so that was out there, you know. The fact that he could be considered a career offender, the fact that he knew that he had three prior felony convictions which should or would qualify, and only by virtue of some case law that has developed here in recent years has the Texas conviction gone away in terms of a qualifying felony, but certainly the other two felonies were there and were outlined in the Probation Office conference.

And of course, that's part of the reason that we have those conferences is to make sure that everyone has information that's relevant to making decisions about whether you plead guilty and also what the range of punishment might be.

So if notice was required, and I'm not sure that it was, Mr. McGadney had that notice by virtue of the procedures of this Court, you know. So I don't think that he wins on an argument that he should not be considered a career offender because of some kind of lack or absence of notice. I think that's not a valid argument and, in fact, is rejected.

So what I'm dealing with here is, you know, the career offender status which I think clearly Mr. McGadney is based on his prior convictions and the nature of the offense for which he's pled guilty. That subsumes the issue of whether the base

offense level should be a 16 or a 22. I think the 22 level is accurate, but it's of no moment because the career offender adjustment takes over in Mr. McGadney's case.

So the objection to -- both objections are overruled at this time. If there's nothing further with regard to the Guidelines calculations, I find, as I've already stated, that Mr. McGadney is, in fact, a career offender. We start with a level 34. He's entitled to a three-level reduction for acceptance of responsibility, producing an adjusted offense level of 31. He has 12 criminal history points, which would ordinarily place him in Criminal History Category V but, as a career offender, that's adjusted to Category VI. That generates a guideline range of 188 to 235 months.

All right. Mr. Coumanis, you have anything you want to present -- anything further you want to present on Mr. McGadney's behalf before sentence is imposed?

MR. COUMANIS: Judge, just, I want to make a few -- address the factual circumstances, and Mr. McGadney would like to address the Court.

THE COURT: Sure.

MR. COUMANIS: Judge, Mr. McGadney is 36 years of age. He's a Mobile native. He pled guilty to the offense of simply essentially receiving Ecstasy through the mail. You know, but for the mail being involved in this action, this would have been a State Court proceeding. But it is what it

is, and he's pled guilty, accepted responsibility, and we're here before today on -- the Court on sentencing.

Judge, just as a side, Mr. McGadney would benefit from drug treatment while in the facility. That was part of the issue at play in this matter.

Judge, we fully expected to be here before Your Honor on a 5K1 motion, and Mr. McGadney has extensively met, remet, met, remet, and done whatever he could to achieve that relief. And we fully expected at the 11th hour that there would be a motion as is typically the case in some situations, but that -- we're not here on that motion today.

But the Court should note that since he's been incarcerated, he has done nothing but try to atone for his misbehaviors, misdeeds, his drug possession. He has tried to do what he could.

And Your Honor, further, Mr. McGadney is remorseful for what happened. He would like the Court to hear him out before the Court imposes sentence.

THE COURT: All right. Mr. McGadney?

DEFENDANT: I'd like to apologize to my family, first of all, for putting them in this situation and going through this mess that I put myself in. I accept responsibility.

And I just learned a valuable lesson in life, and no shortcuts in life. You've got to work for everything you get

out of life.

And I want to apologize to my father, my fiance, Kim, my friends and my aunt for putting them through this situation. And I just ask the Court to have mercy on me, Your Honor.

THE COURT: All right.

MR. COUMANIS: Judge?

THE COURT: Yes, sir.

MR. COUMANIS: I fully expect the Government is going to recommend the low end of the Government -- of the Guidelines given his career offender status, but that is of little consequence. We ask the Court to extend if the Court is able to downwardly depart from the guideline range based on the facts and circumstances of the case and the transaction at issue in this matter.

THE COURT: Ms. Bedwell?

MS. BEDWELL: Your Honor, the Defendant, just by way of background, the Defendant had agreed to cooperate with the Mobile Police Department in an underlying investigation which the Government was pursuing as a Federal case. It was only after he was allegedly cooperating in that case that he committed this crime which effectively put an end to his ability to assist the Government as a credible witness in that historical investigation.

Although the Defendant has indicated throughout this prosecution that he was willing to continue if needed in that

historical investigation, as it turned out, those defendants entered guilty pleas, and it was not necessary for this Defendant to testify or for the Government to rely on his information in any meaningful way in that prosecution because we were also required to disclose in that case that he had been arrested on new charges which, as I've indicated, effectively eradicated his ability to assist the Government in any meaningful way in that prosecution.

With regard to the Defendant's efforts in this case, although he was interviewed a number of times and progress was made in identifying his source of supply, because of his credibility issues, the Government is unable to proceed in that prosecution absent some additional corroborating circumstances. So we've asked the Court to postpone the sentencing over a period of time in an effort for some event to occur that would enable us to proceed in that investigation.

But at any rate, the Government maintains discretion over the decision whether or not to file a 5K motion. And what I have disclosed to the Court as well as other factors have been considered in this Defendant's case, and that motion is not forthcoming at this time.

With regard to what is an appropriate sentence in this case, the Government is obligated under the Plea Agreement to ask the Court to consider a sentence at the low end of the

advisory guideline range which, in this case, is one that has been enhanced by the career offender application. And the Government notes that the Defendant is deserving of that treatment. His criminal history goes all the way back to his activities beginning when he was 18 years old and continues throughout the current time. As I indicated, he was supposedly acting as an informant when he was arrested on this charge.

And looking at the other information in the Presentence Report, the Alabama Department of Corrections record for this Defendant shows that he engaged in additional criminal activity during the time that he was even serving a sentence of imprisonment. That's the kind of information that the Court considers with regard to the statutory factors to determine what is an appropriate sentence.

And in this Defendant's case, the Government submits that a sentence at the low end of the advisory guideline range enhanced by the career offender application is an appropriate sentence in this case.

THE COURT: Mr. Coumanis, anything further?

MR. COUMANIS: Judge, only that he has been in custody on this offense since day one so that he get credit for all the time that he's served to this date.

THE COURT: All right. Mr. McGadney, I have considered all of the information I have available to me, that

which is contained in the Presentence Report as well as what I've heard here in court today from counsel and your own statements. I take all that information into account as I'm required to under Section 3553(a) of Title 18. And I have considered your -- the factors under that statute, your personal history and characteristics, the nature of this offense, your criminal history, and the other factors that are set forth in the statute. And then I have to come up with a sentence that's supposed to be fair and reasonable and sufficient but not more than necessary to satisfy the objectives set forth in the statute.

I'm also obligated to consider the Sentencing Guidelines and to determine whether that sentence will fit into the sentencing structure that's offered or directed by Section 3553(a). So that's my burden here today.

And so when I look at this case, it's -- you know, the thing that's driving it, driving punishment in this case is a lot of what we've already talked about here, and that's your status as a career offender. And you get there because of your prior history, and you've got a lot of criminal history here. You've generated 12 criminal history points, three felony convictions, and now this is your fourth felony conviction.

So it makes it difficult for me to give you a break when you've created your own environment here. When you did the

things that brought you to this Court, violated the law in a way that violated Federal law, you were playing with fire because you had those convictions hanging around out there, you know. And even if you didn't know it was going to be a Federal conviction, you know, state law is such that judges are obligated to enhance your sentence because of your prior felony convictions.

And so you really were playing with fire when you decided to take delivery of illegal drugs by mail. It brought you into this Federal Court, and now we're confronted with treating you as a career offender which, you know, as I've already indicated, is the right thing to do. It may not be what you want or what others would want, but it is under the law the right thing to do, and I've already made that decision -- right, I mean, the lawful thing to do.

So, you know, I have here a situation where the guideline range is really high for you. I mean, it is, and it is what it is because of your prior history.

It appears that you've attempted to cooperate in this case. That has not generated a motion from the Government. I have no authority to direct them to file a motion. They have to do that on their own. And it sounds like it's possible that some relief could come in the future. Should the information that you have given them come to fruition, they certainly can file a Rule 35, and I would treat that favorably

and reduce the sentence accordingly.

When I look at everything here, it occurs to me that a sentence within the Guidelines will satisfy the sentencing objectives of punishment set forth in the statute, and that's the sentence that I will impose in this case.

I will give you the benefit of your bargain for a sentence at the low end of the Guidelines. And accordingly, and pursuant to the Sentencing Reform Act of 1984, it's the judgment of this Court that you, Eric Dynell McGadney, are hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months. This term consists of 188 months as to Count 1 and 48 months as to Count 2, said terms to run concurrently.

I'll direct that those -- that the sentence -- that you be given credit for the time that you've been in custody, and I believe that's back to November 27 of 2012 when you were writted into Federal custody.

I'll recommend that you be imprisoned at an institution where a residential, comprehensive substance abuse treatment program is available.

Upon release from imprisonment, you shall be placed on supervised release for a term of six years on Count 1 and 1 year as to Count 2, said terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, you are to report in person to the probation

office in the district to which you are released.

While on supervised release, you shall not commit any Federal, state, or local crimes, you shall be prohibited from possessing a firearm or other dangerous device, and shall not possess a controlled substance.

In addition, you shall comply with the standard conditions of supervised release as recommended by the Sentencing Commission and on record with this Court.

It's also ordered that you comply with the following special condition of supervised release: That is, that you are to participate in a program of testing and treatment for drug and/or alcohol abuse as directed by the Probation Office.

The Court finds that you do not have the ability to pay a fine; therefore, no fine is imposed.

For the reasons given, the Court finds that the sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation.

It's ordered that you pay a special assessment in the amount of $100 on each of Counts 1 and 2, for a total of $200, which is due immediately.

You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary or if there's some other fundamental defect in the proceedings not waived by your guilty plea or your plea agreement.

You have the right to apply for leave to appeal in forma pauperis, and the Clerk of Court will prepare and file notice of appeal upon your request. With few exceptions, any notice of appeal must be filed within 14 days of the date of judgment.

Is there anything further from the United States at this time?

MS. BEDWELL: Your Honor, we would ask the Court for record purposes if that sentence is the sentence that the Court would impose without regard to the application of any particular guideline or any other reduction?

THE COURT: Yeah. I think I've indicated that, that that's the sentence that satisfies the sentencing objectives of Section 3553(a), and that's the sentence that's entered according to that statute.

MS. BEDWELL: Yes, sir.

THE COURT: All right. From Probation, anything further?

PROBATION OFFICER MELISSA RANKIN: No, sir.

THE COURT: Mr. Coumanis, any objections or other matters we need to put on the record at this time?

MR. COUMANIS: No, Your Honor.

THE COURT: All right. Good luck to you, Mr. McGadney. That's all.

(Proceedings concluded at 10:45 a.m. this date.)

CERTIFICATE

STATE OF ALABAMA)
COUNTY OF MOBILE)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision using computer-aided transcription, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither of counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter as evidenced by the ACCR number following my name found below.

s/Mary Frances Giattina
Mary Frances Giattina, CCR, RDR, CRR
FCRR, ACCR #181
Official Court Reporter
U.S. District Court
Southern District of Alabama
P.O. Box 3021
Mobile, Alabama 36652-3021
(251) 690-3003

Appendix F

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

June 30, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12607-HH
Case Style: Eric McGadney v. USA
District Court Docket No: 1:15-cv-00282-WS-B
Secondary Case Number: 1:12-cr-00245-WS-B-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12607-HH

ERIC DYNELL MCGADNEY,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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