

United States Court of Appeals
for the Fifth Circuit

No. 19-10751



A True Copy
Certified order issued Aug 04, 2020
Judy W. Gayle
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN LOVATO,

Defendant—Appellant.

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

ORDER

Jonathan Lovato, federal prisoner # 54704-177, who is currently # 135831 at Lubbock County Jail, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his convictions and sentences for possession with intent to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. He also moves for leave to proceed in forma pauperis (IFP).

In support of his motion for a COA, Lovato argues that (1) his guilty plea was unknowing and involuntary because his trial counsel provided ineffective assistance with regard to preparing for and investigating the case,

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erroneous advice about the maximum sentence Lovato would receive, and the existence of a conflict based on the death of counsel's son; (2) the district court violated his due process rights at sentencing by considering a fact that was not found by a jury beyond a reasonable doubt; and (3) his arrest was illegal. He also argues that he received ineffective assistance of counsel because his trial counsel (1) failed to object to the dangerous-weapon enhancement under U.S.S.G. § 2D1.1(b)(1); (2) failed to object to his sentence as procedurally and substantively unreasonable; (3) failed to object at sentencing to the district court's consideration of a fact that was not found by a jury beyond a reasonable doubt; (4) failed at sentencing to introduce mitigation evidence and call witnesses on Lovato's behalf; (5) advised Lovato to plead guilty under a plea agreement that waived his right to appeal without any benefit to him; and (6) failed to file a motion to suppress with regard to the search warrant in Lovato's case, the legality of Lovato's arrest, and Lovato's confession.

To obtain a COA, Lovato must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). When the district court has denied the claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). When the district court has denied relief based on procedural grounds, a COA should be granted "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Lovato has not made the requisite showing.

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Accordingly, his motions for a COA and leave to proceed IFP are
DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JONATHAN LOVATO,)	
)	
Movant,)	CIVIL ACTION NO.
)	5:18-CV-249-C
v.)	CRIMINAL NO.
)	5:16-CR-041-03-C
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

Jonathan Lovato ("Lovato"), proceeding *pro se*, filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on October 5, 2018. Respondent filed its Response on December 20, 2018, and Lovato filed a Reply thereto on January 23, 2019.

I. FACTUAL BACKGROUND

During an investigation of a methamphetamine-trafficking organization operating in the Lubbock area, law enforcement officers learned that Lovato obtained his narcotics from Jose Alberto Cibrian—the "dope man"—who was working with Juan Carlos Lara-Ochoa—the "money man." In March 2016, Cibrian was found in possession of a large quantity of methamphetamine, digital scales, a stolen pistol, ammunition, and other items indicative of drug trafficking. Later that month, officers were conducting surveillance on Room 128 at America's Best Value Hotel on 19th Street because they had information that an unknown Hispanic male associated with the West Texas Tango Blast gang was trafficking narcotics there. The officers observed a gray Chrysler Sebring, driven by an unknown Hispanic male—later identified as

Lovato—park in front of Room 128. Lovato and his female passenger got out of the car and went into Room 128, and shortly thereafter began loading duffle bags from the room into the car. Lovato and his passenger then got back into the car and were preparing to leave the area when the police tried to block them. Lovato escaped the containment and fled.

After a police chase, during which it appeared that Lovato's female passenger was attempting to throw evidence or contraband from the car, Lovato lost control of his car and collided with several other vehicles. One innocent motorist was pronounced dead at the scene. Lovato and his passenger were initially unconscious, but as they gained consciousness, they did not comply with officer commands to stay still. Once the officers were assured that they did not have immediate access to a weapon, they were handcuffed, and lethal coverage was maintained while emergency personnel removed the top of the vehicle and placed Lovato on a stretcher. An officer searched Lovato's person and found a loaded 9 millimeter pistol, a bag of methamphetamine weighing 3.17 grams, and a bag of marijuana. Officers then executed two search warrants—one for Room 128 that was obtained prior to the police chase, and one for the car. In the car, officers found 114.96 grams of methamphetamine, six cell phones, three memory cards, syringes, scales, a bong, and 41 rounds of 9 millimeter ammunition.

Almost a month after the crash, Lovato waived his *Miranda* rights and spoke with law enforcement. He admitted that this was not his first police chase and that he usually "gets away." He also admitted to possessing the firearm and to dealing drugs.

A federal grand jury indicted Lovato for conspiracy to distribute and possess with intent to distribute methamphetamine (Count One), possession with intent to distribute 50 grams or more, but less than 500 grams, of methamphetamine (Count Seven), possession of a firearm in

furtherance of a drug trafficking crime (Count Eight), and being a convicted felon in possession of a firearm (Count Nine). Lovato pleaded guilty to Counts Seven and Eight pursuant to a written plea agreement. The plea agreement specifically stated that Lovato faced a penalty of not less than five years nor more than 40 years as to Count Seven and not less than five years nor more than life on Count Eight. Lovato also specifically acknowledged that the advisory guidelines are not binding on the Court, that no one could predict with certainty the outcome of the Court's consideration of the guidelines, and that the actual sentence imposed was solely within the discretion of the Court so long as it was within the statutory maximum. Lovato affirmed this same understanding in open court while under oath at the time of his guilty plea.

The presentence report ("PSR") held Lovato accountable for 113.13 grams of methamphetamine, which included only what was found on him at the time of the accident and what was found in his car. On the drug count, the PSR assigned a base offense level of 24 and recommended two-level enhancements for possessing a dangerous weapon and recklessly creating a substantial risk of death or serious bodily injury to another person in the course of fleeing from law enforcement. With an acceptance-of-responsibility reduction, his total offense level was 25. With that and a criminal history category of VI, his advisory guideline range as to Count Seven was 110 to 137 months' imprisonment. He faced a mandatory minimum sentence of 60 months, to run consecutively, on Count Eight.

At sentencing, the government noted that the victim's family members were present in the courtroom and had written letters about the "far-reaching and devastating effects" that Lovato's actions had on their family. Lovato's counsel expressed that Lovato felt "extreme remorse" for his actions and detailed his attempts to "take his life in a more positive direction[.]"

including his participation in the “Step Up” program. Lovato apologized for his actions and told the Court that he wanted “to use his story to help motivate others for a better future” The Court imposed a 480-month sentence on each count of conviction, explaining that the sentence was an upward variance warranted by the nature and circumstances of the offense, the history and characteristics of the defendant, and the fact that the defendant caused the death of an innocent victim while fleeing from the police.

The Fifth Circuit dismissed Lovato’s subsequent appeal as frivolous, noting that appellate counsel had identified one potentially non-frivolous issue for appeal but that the issue was barred by the appeal waiver, and the appellate court would not consider ineffective assistance of counsel claims because the record was insufficiently developed. Lovato then filed this § 2255 motion.

In his motion, Lovato raises eight grounds for relief: (1) whether Lovato received ineffective assistance of counsel pretrial when counsel failed to challenge the state search warrant issued for his hotel room (Ground Eight); (2) whether Lovato’s guilty plea was knowing and voluntary (Ground Seven); (3) whether Lovato received ineffective assistance of counsel at the time of his guilty plea with respect to his appeal waiver (Ground Five); (4) whether Lovato received ineffective assistance of counsel at sentencing (Grounds One through Four); and (5) whether the Court violated Lovato’s due process rights at sentencing (Ground Six).

II. STANDARD

A prisoner may move the convicting court to vacate, set aside, or correct a conviction or sentence under 28 U.S.C. § 2255 if “(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is

otherwise subject to collateral attack.” *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (internal marks omitted).

“It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” *United States v. Addonizio*, 442 U.S. 178, 184 (1979). “Section 2255 does not offer recourse to all who suffer trial errors,” and it “may not do service for an appeal.” *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981); *United States v. Frady*, 356 U.S. 152, 165 (1982). After conviction and the exhaustion or waiver of all appeals, the Court is entitled to presume that a prisoner stands fairly and finally convicted. *United States v. Frady*, 456 U.S. 152, 165 (1982). “A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude, . . . and may not raise an issue for the first time on collateral review without showing both ‘cause’ for his procedural default, and ‘actual prejudice’ resulting from the error.” *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (internal citations omitted).

Motions under § 2255 are “reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). One such transgression of constitutional rights is ineffective assistance of counsel. *Massaro v. United States*, 538 U.S. 500, 504 (2003). To prevail on a claim of ineffective assistance of counsel, the claimant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense so gravely as to deprive the claimant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The claim fails if either prong is not satisfied, and the court need not address both components if there is an

insufficient showing on one. *United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000).

“[C]onclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding.” *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000). Even if counsel is proven deficient, a prisoner must prove prejudice by showing “a reasonable probability that the result of the proceedings would have been different but for counsel’s unprofessional errors.” *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 694). Demonstrating that reasonable probability “requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). To establish prejudice in the context of a guilty plea, the claimant must show a reasonable probability that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

“A guilty plea will be upheld on habeas review if entered into knowingly, voluntarily, and intelligently.” *United States v. Hernandez*, 234 F.3d 252, 254 (5th Cir. 2000). To be knowing and intelligent, a defendant must understand the true nature of the charge against him and “the direct consequences of the plea.” *Id.* at 255; *United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991). With respect to sentencing, the defendant must know the maximum sentence for the offense charged. *United States v. Hernandez*, 234 F.3d 252, 255 (5th Cir. 2000). A guilty plea is voluntary if it is not induced by threats, misrepresentation, unfulfilled promises, or promises of an improper nature. *Id.* at 254 n.3.

There is a strong presumption that counsel “rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment.” *Id.* The standard for judging counsel’s representation “is a most deferential one.” *Harrington v. Richter*, 562 U.S. 86,

105 (2011). The claimant has the burden to prove that their counsel was deficient. *Premo v. Moore*, 562 U.S. 115, 121 (2011). When the merits of a § 2255 motion can be conclusively determined by files and records, a hearing is not required. *Sosa v. United States*, 550 F.2d 244, 250 (5th Cir. 1977).

III. ANALYSIS

A. Lovato's claim that he received ineffective assistance of counsel pretrial when counsel failed to challenge the state search warrant issued for his hotel room (Ground Eight).

Lovato claims as Ground Eight that he received ineffective assistance of counsel based on counsel's failure to file a motion to suppress the search warrant on his hotel room. His argument appears to be that the search warrant failed to sufficiently identify him as the suspect based on an age discrepancy. Even assuming the warrant is somehow deficient, Lovato's claim fails. First, Lovato fails to show deficient performance because he has not demonstrated that the good-faith exception would not apply. *See United States v. Contreras*, 905 F.3d 853, 857-58 (5th Cir. 2018). He also fails to show prejudice because he does not identify a single piece of evidence from the hotel-room search that should have been suppressed. Additionally, the drugs that formed the basis of his offenses of conviction and that were used to calculate his sentence came from his car and his person after he had fled from police. Further, Lovato waived his *Miranda* rights and confessed to dealing drugs and carrying a firearm about a month later. This confession was sufficiently attenuated such that Lovato's own statements would have been admissible against him. *See United States v. Mendez*, 885 F.3d 899, 908 (5th Cir. 2018). Consequently, Lovato is not entitled to relief under Ground Eight.

B. Lovato's claim that his guilty plea was unknowing and involuntary (Ground Seven).

Lovato claims as Ground Seven that his guilty plea was “unlawfully induced and not made voluntarily nor with an understanding of the consequences of the plea.” Specifically, he claims he was unaware that the Court could impose an above-guideline sentence up to the statutory maximum. However, this claim is belied by the record. At the time of Lovato's guilty plea, he affirmed under oath that he understood the sentencing discretion of the Court, that he was pleading guilty “voluntarily” and of his “own free will,” and that there had been no promises made outside the plea agreement to persuade him to plead guilty. Lovato persisted with his guilty plea even after being informed that the penalty range for his offense was five to 40 years.

Sworn testimony from a defendant at a plea hearing carries a “strong presumption of verity.” See *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Lovato's claim that he did not understand the sentencing discretion of the Court is not corroborated by independent and reliable evidence, and “[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” *Id.* Additionally, Lovato's written plea agreement specifically stated his understanding that “no one can predict with certainty” what his sentence would be and acknowledged that he would not be allowed to withdraw his plea if the sentence was higher than expected. It further stated that Lovato fully understood that the actual sentence imposed was in the sole discretion of the Court so long as it was within the statutory maximum. He also affirmed that there were no guarantees or promises from anyone as to what sentence the Court would impose. Unambiguous written plea documents are “entitled to a presumption of regularity and are accorded great evidentiary weight,” and Lovato has offered nothing to rebut those documents.

Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir. 1985). Nor does Lovato insist that he would have rejected the plea agreement if he had known the Court would impose a 40-year sentence.

Consequently, Lovato is not entitled to relief under Ground Seven.

C. Lovato's claim that he received ineffective assistance of counsel regarding the appeal waiver (Ground Five).

Lovato claims as Ground Five that counsel provided ineffective assistance "in that he waived the right of the defendant to appeal without any benefit to the defendant." He claims that because, allegedly, Counts One and Nine would not have increased his sentence, he "essentially received no advantage or benefit for his waiver of appeal." This claim fails. First, Lovato himself, not his counsel, waived his right to appeal. Second, the claim is conclusory. Lovato fails to show anything that counsel could or should have done differently. To the extent that Lovato claims that counsel was ineffective for failing to obtain a plea agreement without an appeal waiver, his claim fails because he cannot show that the government would have been willing to offer a plea agreement without an appeal waiver. Lovato also fails to show, or even allege, prejudice with respect to the appeal waiver. Third, and contrary to his claim that there was no consideration for the plea waiver, the PSR indicated that if Lovato had been convicted of all counts in which he was named, he would have been subject to a minimum sentence of 15 years, up to life imprisonment. Thus, the plea agreement ostensibly reduced the mandatory-minimum sentence by ten years. And once Lovato is released and begins serving his supervised release, he will be subject to revocation on each count of conviction should he violate his conditions of supervision. Accordingly, a plea on two counts means he would be subject to revocation on only two counts instead of four. Consequently, Lovato is not entitled to relief under Ground Five.

D. Lovato's claim of ineffective assistance of counsel at sentencing (Grounds One through Four).

Lovato claims as Grounds One through Four various alleged instances of ineffective assistance of counsel at the sentencing phase. First, he claims that counsel was ineffective for failing to object to a two-level enhancement for possessing a dangerous weapon when he was also convicted under 18 U.S.C. § 924(c). Although the PSR does not indicate why the dangerous-weapon enhancement was assessed, the use of the car as a deadly weapon is sufficient to apply the enhancement. *See United States v. Hernandez-Conde*, 301 Fed. App'x 372, 374 (5th Cir. 2008); *see also United States v. Benbrook*, 119 F.3d 338, 339 (5th Cir. 1997) (noting that under the commentary to USSG § 2K2.4, a defendant should not ordinarily receive a two-level enhancement for possessing a dangerous weapon under USSG § 2D1.1(b)(1) if he is also convicted of possessing a firearm in relation to a drug-trafficking crime under 18 U.S.C. § 924(c).).

Second, Lovato claims that his counsel was ineffective for failing to object to the sentence as procedurally and substantively unreasonable and for failing to object in general to the upward variance. However, he does not identify any bases for any of these objections other than his own, personal disagreement with the sentence. He argues that “the sentencing factor that caused the court to vary upward was a fact that should be found by a jury before it can be used as an enhancement at sentencing,” but the Supreme Court has rejected that argument. *See Alleyne v. United States*, 570 U.S. 99, 116 (2013). Because Lovato has not demonstrated that any of his proposed objections would have been meritorious, he fails to show prejudice. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999).

Finally, Lovato argues that his attorney was ineffective for failing to introduce evidence at sentencing of Lovato's post-arrest rehabilitation, and specifically his success in the "Step Up" rehabilitation program. This claim fares no better than the others. First, counsel verbally informed the Court that Lovato was successfully progressing through the "Step Up" program. Second, Lovato cannot demonstrate prejudice because the record shows that the Court was aware that Lovato was successfully availing himself of the "Step Up" program, and imposed a 480-month sentence even with that knowledge. He cannot show that putting the paper certificates into evidence would have likely resulted in a lesser sentence. Consequently, Lovato is not entitled to relief under Grounds One through Four.

E. Lovato's due process claim (Ground Six).

Lovato claims as Ground Six that the Court was not entitled to consider at sentencing his relevant conduct—specifically, his flight from police that led to the death of an innocent person. This claim fails. First, it is procedurally barred. Because Lovato did not raise this claim at sentencing or on direct appeal, he must demonstrate both "cause" for his procedural default and "actual prejudice" resulting from the error. *See United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). He makes no attempt to, and does not, show either. And while the Supreme Court has recognized "a narrow exception" to this rule in the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent," *id.*, Lovato makes no showing that his case is extraordinary or that he is actually innocent of the federal offenses to which he pleaded guilty.

Second, it is waived by the appeal waiver in Lovato's binding plea agreement. Such waivers are generally enforceable, and the government has asserted the waiver here. *See United*

States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994). Lovato's due-process claim challenging his sentence is not a claim of mathematical error or a claim that the sentence exceeds the statutory maximum and thus does not fall within the narrow scope of the rights he preserved in his waiver.

Third, the Supreme Court has rejected the substance of this claim. *See Alleyne v. United States*, 570 U.S. 99, 116-17 (2013). The Court was not only permitted to consider Lovato's conduct in fashioning its sentence, it was statutorily required to under 18 U.S.C. § 3553(a). Consequently, Lovato is not entitled to relief under Ground Six.

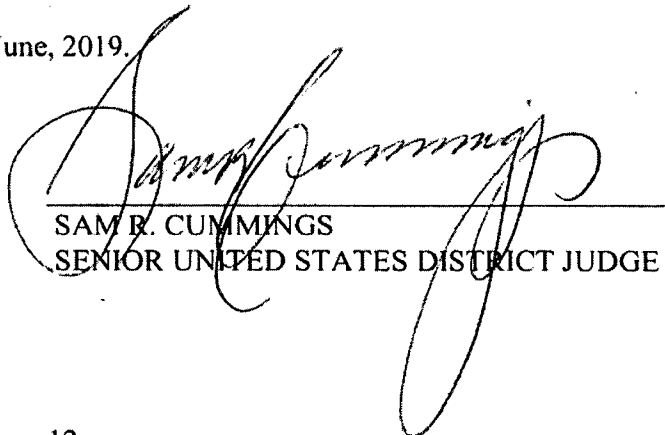
IV. CONCLUSION

For these reasons, it is **ORDERED** that Lovato's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is hereby **DENIED**.

Certificate of Appealability

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth herein, Movant has failed to show that a reasonable jurist would find (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED this 4th day of June, 2019.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10288
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 16, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JONATHAN LOVATO,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:16-CR-41-3

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

The attorney appointed to represent Jonathan Lovato has moved for leave to withdraw and has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). The brief indicates that the only potential nonfrivolous issues for appeal are barred by the appeal waiver contained within the plea agreement to which Lovato voluntarily agreed. The brief does raise one potentially nonfrivolous

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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claim for ineffective assistance of counsel related to the failure to object to a possible error in the Guidelines calculation, but notes that claims for ineffective assistance should generally be raised on collateral review rather than direct appeal.

Lovato has filed a response to the brief and requests the opportunity to file a brief on the merits pro se. He contends that his plea agreement was not voluntary in light of alleged ineffective assistance of counsel at the plea stage; that the district court made several errors in calculating his Guidelines sentence; that his trial counsel rendered ineffective assistance in failing to object to errors in the Guidelines calculation; and that his sentence is substantively unreasonable.

We have reviewed counsel's brief, the relevant portions of the record, and Lovato's response, and we concur with counsel's assessment. The record is not sufficiently developed to allow us to make a fair evaluation of Lovato's claims of ineffective assistance of counsel. Accordingly, we decline to consider his ineffective-assistance claims without prejudice to his right to pursue relief on collateral review. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014) (noting that the record is rarely sufficient to permit review of ineffective-assistance claims on direct appeal and declining to consider claims without prejudice to collateral review). Furthermore, any other potentially nonfrivolous challenges are barred by the plea agreement.¹

Finally, Lovato's request to proceed pro se is untimely because it was filed after counsel filed the *Anders* brief. *See United States v. Wagner*, 158 F.3d

¹ As explained in counsel's *Anders* brief and evidenced by the record, Lovato's guilty plea appears to have satisfied the requirements of Fed. R. Crim. P. 11. While Lovato now challenges the voluntariness of his plea on the ground that it was the result of ineffective assistance of counsel, the record is insufficient to permit us to evaluate that claim. As stated above, any such challenge should be brought on collateral review.

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901, 902-03 (5th Cir. 1998) (holding that a request to proceed pro se is not timely when made after appointed counsel has filed an *Anders* brief).

Accordingly, the motion for leave to withdraw is GRANTED, counsel is excused from further responsibilities herein, Lovato's motion to proceed pro se is DENIED, and the APPEAL IS DISMISSED. *See* 5TH CIR. R. 42.2.

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