UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7060

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LORENZO LIWAYNE BARNES, a/k/a L.B.,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (2:18-cr-00150-RGD-RJK-3; 2:19-cv-00700-RGD-RJK)

Submitted: September 22, 2020 Decided: September 25, 2020

Before NIEMEYER, KEENAN, and FLOYD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Lorenzo Liwayne Barnes, Appellant Pro Se.

PER CURIAM:

Lorenzo Liwayne Barnes seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Barnes has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: September 25, 2020

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UNITED STATES OF AMERICA

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LORENZO LIWAYNE BARNES, a/k/a L.B.

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LORENZO LIWAYNE BARNES,

Petitioner

CRIMINAL NO. 2:18cr150-3
CIVIL NO. 2:19cv700

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter comes before the Court on Lorenzo Liwayne Barnes's ("Petitioner") Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 ("2255 Motion"). ECF 103. In such motion, Petitioner asks the Court to vacate his judgment of conviction and sentence on the grounds that his defense counsel rendered constitutionally deficient assistance. For the reasons set forth herein, Petitioner has failed to state a cognizable claim for relief. Accordingly, the Court **DENIES** Petitioner's § 2255 Motion. ECF No. 103.

I. FACTUAL AND PROCEDURAL HISTORY

A brief description of the material facts follows: From in or about June 2017 to December 2017, Petitioner engaged in a straw-purchasing conspiracy with his two-codefendants among other unnamed individuals. Presentence Investigation Report ("PSR"), ECF No. 68, ¶ 1. On December 19, 2019, Petitioner asked one of his co-defendants to purchase a firearm for him. Id. ¶ 2. After Petitioner selected the firearm, the co-defendant made the purchase at Exodus Outdoors in Franklin, Virginia, completing an ATF Form 4473 in the process. Id. ¶ 3. The co-defendant then transferred the firearm to Petitioner, and both were involved in a shootout that same day in which

Petitioner utilized the instant firearm. Id. ¶ 4.

On May 8, 2018, law enforcement executed a lawful search warrant on Petitioner's home. Id. ¶ 5. In said search, officers recovered a pistol, extended clip, 3.2 grams of cocaine, a digital scale, three 9mm rounds, .40 caliber rounds, drug-cutting agents, packaging materials, another digital scale with drug residue, a drum magazine with loaded rounds, and a fourteen (14) round magazine. Id. Petitioner possessed said pistol, which had been reported stolen, in furtherance of drug-trafficking crimes, namely possessing with intent to distribute cocaine and maintaining drug premises. Id. ¶ 8. In the shed behind Petitioner's home, officers found a firearms box with magazines and bullets, four (4) cell phones, a bag of drug manufacturing items, including packaging materials, a digital scale, and pyrex containers. Id. ¶ 6. Lastly, in the car parked in front of Petitioner's home, officers discovered a Glock magazine and a spent .40 caliber shell that matched shells obtained during an investigation into a shots-fired call. Id. ¶ 7.

On September 20, 2018, a federal grand jury sitting in Norfolk named Petitioner and two co-conspirators in a twelve-count criminal indictment, charging Petitioner with Conspiracy (Count 1), False Statement During Purchase of Firearm (Count 6), False Statement Causing Federally Licensed Firearms Dealer to Maintain False Records (Count 7), Possession with Intent to Distribute Narcotics (Count 9), Maintain a Drug-Involved Premises (Count 10), and Use, Carry, and Possess Firearm in Relation to and in Furtherance of Drug-Trafficking Crime (Count 11). ECF No. 3. On December 6, 2018, Petitioner appeared before the Court and pled guilty to False Statement During Purchase of Firearm (Count 6) and Use, Carry, and Possess Firearm in Relation to and in Furtherance of Drug-Trafficking Crime (Count 11) pursuant to a written plea agreement with the Government. ECF No. 39. On April 2, 2019, this Court sentenced Petitioner to a term of ninety (90) months, consisting of thirty (30) months on Count 6 and sixty (60) months on Count

11. ECF No. 74. Supervised release was set for a five-year term. Id. at 3.

On December 23, 2019, Petitioner filed the instant § 2255 Motion along with a supporting memorandum. ECF Nos. 103, 104. On March 20, 2020, the Court ordered the Government to respond to Petitioner's § 2255 Motion within sixty (60) days from the date therein. ECF No. 110. The Government filed its response on May 19, 2020. ECF No. 122. Petitioner filed his reply on June 8, 2020. See ECF No. 135. The Court now considers Petitioner's § 2255 Motion. ECF No. 103.

II. LEGAL STANDARD FOR § 2255 MOTIONS

A. GENERAL STANDARD OF REVIEW

Collateral review created by 28 U.S.C. § 2255 allows a prisoner in federal custody to challenge the legality of a federal sentence on four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing Court lacked jurisdiction; (3) the sentence imposed was in excess of the maximum amount authorized by law; or (4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255. On such grounds, the petitioner may move the court to vacate, set aside, or correct a sentence. The Supreme Court has held that § 2255 is the appropriate vehicle by which a federal prisoner may challenge both a conviction and the post-conviction sentence. Davis v. United States, 417 U.S. 333, 343–44 (1974).

A district court may dismiss a petitioner's § 2255 motion in several clearly defined circumstances. The statute provides that, "[u]nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney [and] grant a prompt hearing thereon . . . ." 28 U.S.C. § 2255. Thus, as a corollary, a court may dismiss a § 2255 motion if it is clearly inadequate on its face and if the petitioner would not be entitled to relief assuming the facts alleged in the motion are true. If the motion when viewed against the record shows that the petitioner is entitled to no

relief, the court may summarily deny the motion. Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

When filing a § 2255 petition to vacate, set aside, or correct a sentence, a petitioner "bears the burden of proving his grounds for collateral attack by a preponderance of the evidence." Hall v. United States, 30 F. Supp. 2d 883, 889 (E.D. Va. 1998) (citing Vanater v. Boles, 377 F.2d 898, 900 (4th Cir. 1967)); Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958)). A motion under § 2255 may not "do service for an appeal." United States v. Frady, 456 U.S. 152, 165 (1982).

Any matter that could have been asserted either at trial or on appeal but was not so asserted is not appropriate for review on motion under § 2255—thereby subjecting it to procedural default—unless there is a showing of "cause" sufficient to excuse the procedural default and of "actual prejudice" resulting from the error. Thus, "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and 'actual prejudice,' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (quoting Murray v. Carrier, 477 U.S. 478, 485, 496 (1986)); see also United States v. Mikalajunas, 186 F.3d 490, 492–93 (4th Cir. 1999).

"The existence of cause for procedural default must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel." Mikalajunas, 186 F.3d at 493; see also McCleskey v. Zant, 499 U.S. 467, 493–94 (1991). Moreover, when a movant has knowingly and voluntarily pled guilty and waived his right to appeal, he cannot demonstrate cause sufficient to warrant habeas review. United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) (a knowing and voluntary plea agreement in which the defendant expressly waives his right to appeal is valid and enforceable).

A showing of "actual prejudice" requires a petitioner to establish that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116 (2007) (quoting Brecht v. Abrahamson, 507 U.S. 619, 631 (1993)). Thus, showing actual prejudice requires a petitioner to show that the errors not only created the possibility of prejudice but that they worked to his actual and substantial disadvantage. Frady, 456 U.S. at 170.

However, a showing of cause and prejudice is not required if the movant seeks relief based on a constitutional violation that may have resulted in a fundamental miscarriage of justice, McCleskey, 499 U.S. at 494; or the movant raises certain constitutional claims that may be adequately addressed only on collateral review, such as ineffective assistance of counsel, Massaro v. United States, 538 U.S. 500, 509 (2003); see also Mikalajunas, 186 F.3d at 493. Finally, a petitioner must establish actual innocence by clear and convincing evidence. Id.

B. SECTION 2255 CLAIMS FOLLOWING GUILTY PLEAS

As considerations of finality carry "special force with respect to convictions based on guilty pleas," a guilty plea may be attacked on collateral review only in "strictly limited" circumstances. Bousley, 523 U.S. at 621 (quoting United States v. Timmreck, 441 U.S. 780, 784 (1979)). Thus, a "voluntary and intelligent plea of guilty" made by one "who has been advised by competent counsel . . . may not be collaterally attacked." Mabry v. Johnson, 467 U.S. 504, 508 (1984).

A defendant who has pleaded guilty may file a § 2255 motion to raise a claim that his plea was not voluntary and intelligent. Bousley, 523 U.S. at 618–19. Bousley held that where a defendant had been misinformed as to the elements of the offense against him, the guilty plea was unintelligent and therefore "constitutionally invalid." Id. A defendant may also raise a claim pursuant to a § 2255 motion that he or she received ineffective assistance of counsel prior to entering a plea.

As a guilty plea is an admission of all the elements of the charges in the indictment, United States v. Broce, 488 U.S. 563, 569 (1989), a defendant typically may not collaterally attack the plea on the grounds of insufficient evidence to prove an element of the offense. Thus, a claim that the evidence was insufficient to prove an element cannot be raised on collateral review, but a claim that the defendant was misinformed about the elements of the offense at the plea hearing may be raised under Bousley.

C. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW

To succeed on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). A petitioner's failure to satisfy either prong of the Strickland test renders it unnecessary for a reviewing court to consider the other element. United States v. Roane, 378 F.3d 382, 404 (4th Cir. 2004).

The first prong requires that the petitioner show that counsel's performance fell below an objective standard of reasonableness. To show that defense counsel's performance was objectively unreasonable, the petitioner must articulate specific acts or omissions whereby counsel's performance fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. When reviewing the propriety of these alleged acts or omissions, courts must give substantial deference to defense counsel's strategic judgments. Id. at 689–90.

The second prong requires that the petitioner demonstrate that he was prejudiced by counsel's deficient performance, in that it is "reasonably likely" that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Harrington v. Richter, 562 U.S. 86, 111–12 (2011) (citing Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. (citing Strickland, 466 U.S. at 693). The burden is on the petitioner to affirmatively prove prejudice. Strickland, 466 U.S. at 693. When

applying this test to the guilty plea process, the Supreme Court has held that, to show prejudice, the Petitioner "must show that there is a reasonable probability that, but for counsel's errors, [the Petitioner] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

III. PETITIONER'S § 2255 MOTION

In his § 2255 Motion, Petitioner contends that he received ineffective assistance of counsel because Ms. Mary Morgan, his defense attorney: (1) failed to request a Fatico hearing pursuant to United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979); (2) failed to properly pursue plea negotiations; (3) failed to argue the McCarthy rule under McCarthy v. United States, 394 U.S. 459 (1969); and (4) failed to conduct an adequate investigation into his case. ECF No. 104 at 5–8. Having reviewed the record, the materials presented, and the parties' arguments, the Court finds that Petitioner's claims do not satisfy the Strickland test and must therefore be denied as meritless.

A. COUNSEL'S ALLEGED FAILURE TO REQUEST A FATICO HEARING

Petitioner contends that Ms. Morgan was ineffective by allegedly failing to request a Fatico hearing, at which Petitioner sought to raise the matter of removing an "uncharged conduct statement" from his PSR, specifically in regard to a "murder conspiracy" that allegedly impacted his designation with the Bureau of Prisons ("BOP"). Id. at 5. In addition, Petitioner asserts that a Fatico hearing was necessary to show that Petitioner could have purchased the firearm on his own—instead of having his co-defendant purchase it for him—because Petitioner was not a felon. Id. According to Petitioner, if he had been able to explain this point at a Fatico hearing, he would not have been charged with Count 6 (False Statement During Purchase of Firearm). Id. at 5–6. For the following reasons, Petitioner's first claim is without merit.

As a threshold matter, Petitioner's reliance on the need for a Fatico hearing is misplaced. In Fatico, the United States Court of Appeals for the Second Circuit determined that an evidentiary hearing is sometimes a reliable manner through which disputed issues may be resolved. 603 F.2d at 1057–58 n.9. However, the United States Court of Appeals for the Fourth Circuit "has never held that an evidentiary hearing is required to resolve disputed matters at sentencing." United States v. Jackson, No. 97-4787, 1998 WL 454084, at *2 (4th Cir. July 28, 1998).

Moreover, there were no disputed matters at sentencing that would even necessitate a Fatico hearing. For example, Petitioner's PSR indicates, "On March 19, 2019, defense counsel, Mary T. Morgan, advised the probation officer that there are no objections to the presentence report." PSR at 24. Indeed, Petitioner himself confirmed this at his sentencing hearing when the Court inquired into Petitioner's review of the PSR:

THE COURT:	Have you had an opportunity to go over the Presentence Report with your attorney in this case, Ms. Morgan?
PETITIONER:	Yes, sir.
THE COURT:	Do you feel there's anything incorrect in the Presentence Report, and if so, would you tell me what it is that's incorrect?
PETITIONER:	No, sir.

Sentencing Hr'g Tr., ECF No. 100 at 3:2–9. Accordingly, as Petitioner himself failed to highlight any disputes prior to sentencing, Ms. Morgan certainly could not have been expected to request a Fatico hearing to resolve these non-existent disputes.

Even assuming arguendo that Ms. Morgan should have requested a Fatico hearing and that Petitioner would have been able to air his concerns at said hearing, Petitioner's disputes would have had no impact on his overall sentence. As briefly discussed above, Petitioner sought to present two primary assertions at a Fatico hearing: (1) to request the removal of an "uncharged

conduct statement" from his PSR, specifically in regard to a "murder conspiracy" that allegedly impacted his designation with the BOP; and (2) to show that he could have purchased the firearm on his own—instead of having his co-defendant purchase it for him—because he was not a felon. Id. As for Petitioner's first concern about an "uncharged conduct statement," it is somewhat unclear as to what Petitioner is referencing, although he sheds some light on this contention in his Reply, stating therein, "The Bureau of Prisons (BOP) uses this type of information and gives extra points for [sic], and stops you from getting into certain Educational Programs." ECF No. 135 at 4.

In its Response, the Government posits that Petitioner might be referencing the gang-affiliation listed in his PSR, which would impact his designation with the BOP. ECF No. 122 at 10; see PSR at 2 (listing Petitioner's gang-affiliation). In the alternative, the Government explains that Petitioner might be referencing the PSR's note of the "ambush-style, possibly gang-related shootout" that Petitioner engaged in the same day that his co-defendant purchased the firearm in question for him. ECF No. 122 at 11; see PSR ¶ 4 (detailing Petitioner's Statement of Facts). If Petitioner intends to reference the former, as discussed above, Petitioner advised the Court that he had no objections to the PSR, which includes his identified gang-affiliation. In regard to the latter option, the reference to the "ambush-style, possibly gang-related shootout" in the PSR originated with the Statement of Facts, a document that Petitioner confirmed the truth of at his guilty plea hearing:

> THE COURT: Mr. Barnes, you've heard the United States Attorney recite the facts in this case. Are these facts true, and if not, what do you contend is not true in the recital of the facts? Are they true?
>
> PETITIONER: Yes, sir.

Guilty Plea Hr'g, ECF No. 113 at 30:5–9. Accordingly, Petitioner raised no disputes as to the truth of these two areas—the gang-affiliation or the reference to the "ambush-style, possibly gang-related shootout" in his PSR—that he now voices concern over. In any event, neither of these references contained in Petitioner's PSR had any impact on his advisory Guidelines and therefore his ultimate sentence was unaffected by the instant claims. See generally Hillard v. United States, No. CR ELH-17-0191, 2020 WL 1440370, at *7 (D. Md. Mar. 24, 2020) (discussing how the defendant's status as a career offender "did not affect his Guidelines" and "did not enhance his sentence in any way").

Next, even if Petitioner had explained at a Fatico hearing that he himself could have purchased the firearm at issue instead of having his co-defendant do so, this fact would have had no impact on Petitioner's conviction of Count 6. Count 6 of the indictment charged Petitioner with False Statement During Purchase of Firearm, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). ECF No. 3. As the Court advised Petitioner during his guilty plea hearing, to be convicted of Count 6, the Government would have to prove the following essential elements of the offense beyond a reasonable doubt:

> In the Eastern District of Virginia, you knowingly made a false or fictitious oral or written statement, which was material to the lawfulness of the sale or disposition or a firearm and which was intended to deceive or likely deceive a firearms dealers, or you aided, abetted, induced, commanded, or procured another individual to do the same.

Guilty Plea Hr'g Tr. at 5:6–15. Petitioner's PSR indicates that he did just that:

> [Petitioner's co-defendant], aided and abetted by [Petitioner], purchased a Glock, Model 22, .40 caliber semi-automatic pistol, bearing serial number BECW844, from Exodus Outdoors, a licensed firearms dealer. In connection with that purchase, [Petitioner's co-defendant] completed an ATF Form 4473. On the Form 4473, [Petitioner's co-defendant] knowingly lied and intended to deceive the gun shop about two material fact [sic] about the lawfulness of the sale by (1) checking the box indicating that he was the actual buyer and transferee of the firearm even though he intended, then and there, to transfer the firearm to [Petitioner], and (2)

> checking the box indicating that he was not an unlawful user of, or addicted to, marijuana, when he really was an unlawful user of marijuana and had used the drug daily for several years.

PSR at ¶ 3. Based on the essential elements of Count 6 then, Petitioner's status as a felon or non-felon was entirely irrelevant to this Count. In other words, Petitioner's explanation that he could have purchased said firearm on his own would have had no impact on the offense conduct requisite to find Petitioner guilty of Count 6.[1] Ultimately then, Petitioner cannot demonstrate actual prejudice to satisfy Strickland's second prong, as he fails to show that he would have obtained a more favorable result if Ms. Morgan had insisted on a Fatico hearing.

Based on the above, the record sufficiently rebuts Petitioner's assertion that Ms. Morgan rendered constitutionally deficient assistance of counsel as it pertains to Petitioner's Fatico hearing claim. Therefore, said claim fails to allege any deficient performance or resulting prejudice as required to state an ineffective assistance of counsel claim under Strickland. Accordingly, Petitioner's first claim is without merit and must be denied.

B. COUNSEL'S ALLEGED FAILURE TO PROPERLY PURSUE PLEA NEGOTIATIONS

Petitioner next argues that Ms. Morgan was ineffective by allegedly failing to properly pursue plea negotiations. ECF No. 104 at 6. To such end, Petitioner asserts that Ms. Morgan encouraged him "to plea on a lie such as in count nine charge [sic] movant with possession with intent to distribute narcotics . . . ." and perjure himself. Id. More specifically, he alludes to his innocence, claiming he only utilized the narcotics at issue for his own personal use and never

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[1] Indeed, the Court finds Petitioner's explanation dubious, as the Government points out that Petitioner could not have lawfully purchased the firearm. As the Government aptly notes,

> [Petitioner] agreed that he is "a daily marijuana user, and he began using when he was 15." So his own statement shows he was prohibited from possessing a firearm at the time of the straw purchase, contrary to what he now claims. In fact, his claim that he possessed "narcotics" for his "personal" and "recreational use" further undermines his position that he could legally possess a firearm.

ECF No. 122 at 13 (internal citations omitted).

distributed them. Id. For the following reasons, Petitioner's second claim is without merit.

On a brief preliminary note, although Petitioner touts that his plea to Count 9 (Possession with Intent to Distribute Narcotics) was based on a lie, Petitioner did not plead guilty to Count 9. Rather, Petitioner pleaded guilty to Counts 6 (False Statement During Purchase of Firearm) and 11 (Use, Carry, and Possess Firearm in Relation to and in Furtherance of Drug-Trafficking Crime). ECF No. 39. As for Petitioner's assertion of innocence, the Court is intimately familiar with Petitioner's claims that the cocaine found in his possession was for personal use and not for distribution. The Court is also intimately familiar with the evolving truth of that claim. For instance, the Statement of Facts recounts that

> [Petitioner] also admitted to possessing the cocaine and handgun recovered from his room. He then claimed that the cocaine was for personal use and that he used $100 worth of cocaine a day since the December 2017 shooting. When asked how he came up with the money to pay for his expensive habit, he said that family members gave him money. When the agents told him that his purported cocaine habit would cost thousands of dollars a month, [Petitioner] said that he often obtained the drugs for free. He had no answer for all of the drug-distribution paraphernalia recovered from his room and from the shed. [Petitioner] acknowledges that he was untruthful in that interview and that the recovered cocaine was for distribution, not personal use.

Statement of Facts, ECF No. 40, ¶ 10. Petitioner's defense fails then because he acknowledged the distributive nature of his offense during the plea colloquy when he indicated that he read, signed, and initialed the Statement of Facts. The Court duly questioned Petitioner about the Statement of Fact at his plea hearing, stating:

> THE COURT: Mr. Barnes, you've heard the United States Attorney recite the facts in this case. Are these facts true, and if not, what do you contend is not true in the recital of the facts? Are they true?
>
> PETITIONER: Yes, sir.
>
> . . .

THE COURT:	Mr. Barnes, the United States Attorney recited the facts as contained in this document. This document indicates that you stipulated to these facts, and this document indicates that your counsel so stipulated with you. Did you sign the stipulation, sir?
PETITIONER:	Yes, sir.
THE COURT:	Did you agree to the stipulation?
PETITIONER:	Yes, sir.
THE COURT:	Have you executed the stipulation and initialed all the other pages?
PETITIONER:	Yes, sir.

Guilty Plea Tr., ECF No. 113 at 30:5–9; 30:11–21. At said hearing, Petitioner also confirmed that he was freely and voluntarily pleading guilty because he was guilty of the offenses in Counts 6 and 11, a sworn statement that runs contrary to his current claim of innocence. Id. at 23:4–9; 25:2–8. Such sworn statements "'carry a strong presumption of verity' and '[i]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established.'" Murphy v. United States, No. 2:15-CR-103, 2017 WL 6759420, at *5 (E.D. Va. Nov. 8, 2017) (internal citations omitted). Petitioner identifies no such extraordinary circumstances[2] here. See ECF No. 104.

At bottom, there is simply no evidence that Ms. Morgan's performance fell below an objective standard of reasonableness, as Petitioner's sworn statements during his guilty plea hearing conclusively established the truth of the Statement of Facts, including Petitioner's intent

[2] Extraordinary circumstances have been found to exist where, for example, "the petitioner introduced documentary evidence supporting his claim that he was severely ill, both physically and mentally, and uncounseled at the time of his Rule 11 colloquy." United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005) (describing Fontaine v. United States, 411 U.S. 213 (1973)). Extraordinary circumstances have also been found where the government conceded that the petitioner received ineffective assistance of counsel that rendered his guilty plea involuntary and the government refused to provide a sworn affidavit supporting its claim that it did not make the petitioner an oral promise not memorialized in the plea agreement. United States v. White, 366 F.3d 291, 296–97 (4th Cir. 2004).

to distribute the narcotics found in his possession. Therefore, this claim fails to allege any deficient performance by Ms. Morgan or resulting prejudice as required to state an ineffective assistance of counsel claim under Strickland. Accordingly, Petitioner's second claim is without merit and must be denied

C. COUNSEL'S ALLEGED FAILURE TO ARGUE THE MCCARTHY RULE

Petitioner argues that Ms. Morgan failed to argue "the McCarthy rule Whereas [sic], a defendant is supposed to be asked 62 interrogation questions before signing of a plea-agreement." ECF No. 104 at 6. To such end, Petitioner asserts that he "did not understand all of the rules of the plea agreement, and could have made a decision to go to trial . . . ." Id. In support of this claim, Petitioner cites McCarthy v. United States, 394 U.S. 459 (1969). For the following reasons, Petitioner's third claim is without merit.

In McCarthy, the Supreme Court of the United States reinforced the significance of the Rule 11 colloquy, stating that a judge must inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, as well as satisfy himself that there is a factual basis for the plea before accepting said plea. Id. at 467. If the judge fails to inquire accordingly, then the defendant "should be afforded the opportunity to plea anew . . . ." Id. at 472.

Here, the Court strictly adhered to the Rule 11 colloquy requirements, engaging in lengthy questioning as to Petitioner's understanding of the proceedings and the nature of his offense. Indeed, a review of the transcript from Petitioner's guilty plea hearing indicates that the Court recounted the essential elements of the counts to which Petitioner intended to plead guilty, as well as the penalties and collateral consequences associated with the same. See generally Guilty Plea Hr'g Tr. at 4:22–25:9. As discussed above, the Court directed that the United States Attorney to read the Statement of Facts associated with Petitioner's case, which indicated that said facts would

be sufficient at trial to obtain a conviction of Petitioner on Counts 6 and 11. Id. at 25:10–30:4. Petitioner also indicated that his plea was knowing and voluntary, which was substantiated by the Court's inquiry into Petitioner's mental state and comprehension. See id. at 3:19–4:15; 23:4–9; 25:2–8. As evidenced by Petitioner's answers throughout, Petitioner indicated his understanding every step of the way, leaving no reason for the Court to believe that Petitioner failed to comprehend the proceedings. Accordingly, the Court finds Petitioner's argument that he was unaware of the implications of his plea agreement—or the proceedings associated therewith—unpersuasive.

Based on the considerations above, Petitioner cannot attempt to morph this claim into one of ineffective assistance of counsel, as there is simply no evidence to indicate that Ms. Morgan's performance fell below the constitutionally mandated standard for assistance of counsel. Nor can Petitioner demonstrate requisite prejudice under Strickland. Accordingly, Petitioner's third claim is without merit and must be denied.

D. COUNSEL'S ALLEGED FAILURE TO CONDUCT AN ADEQUATE INVESTIGATION INTO PETITIONER'S CASE

Lastly, Petitioner argues that Ms. Morgan failed to conduct an adequate investigation into Petitioner's case. ECF No. 104 at 7. Much like his earlier claims, he once again asserts that Ms. Morgan failed to "investigate the buy of [sic] gun from defendant and would have found that neither party was a convicted felon and that either one could have purchased the gun." Id. In addition, Petitioner contends that Ms. Morgan should have "interview[ed] any witnesses, visit[ed] various witnesses, who could have been in favor of movant . . . ." Id. For the following reasons, Petitioner's final claim is without merit.

Although Petitioner contends that Ms. Morgan was deficient in her consideration of his case, Petitioner failed to air any concerns about the effectiveness of Ms. Morgan's representation when he had an opportunity to do so. Indeed, Petitioner's sworn statements at his guilty plea hearing revealed his satisfaction with Ms. Morgan's representation:

THE COURT:	Have you had the opportunity to thoroughly discuss your case with your attorney, Ms. Morgan?
PETITIONER:	Yes, sir.
THE COURT:	Have you discussed all the facts in the case with your attorney?
PETITIONER:	Yes, sir.
THE COURT:	Are you satisfied that your attorney has fully considered all the facts and discussed with you any possible defenses you may have to either of these charges against you in both of these charges? Has she discussed any possible defenses that you may have to these charges?
PETITIONER:	Yes, sir.

Guilty Plea Tr. at 16:17–17:4. As discussed above, such sworn statements "'carry a strong presumption of verity' and '[i]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established.'" Murphy, 2017 WL 6759420, at *5.

Even assuming arguendo that Ms. Morgan should have conducted further investigation into Petitioner's case, Petitioner neither identifies any specific documents or evidence in discovery nor how such documents or evidence would affect the outcome of his case. He merely touts that the "outcome would have been different" if Ms. Morgan had interviewed "any witnesses . . . who could have been in favor of [Petitioner]," which qualifies as a conclusory statement that Petitioner fails to support based on the record. ECF No. 104 at 7. Ultimately, Petitioner cannot demonstrate

actual prejudice to satisfy Strickland's second prong, as he cannot show that he would have obtained a more favorable result had he rejected the opportunity to plead guilty and proceeded to trial.

Based on the above and that Petitioner has failed to identify any extraordinary circumstances that would warrant discrediting his sworn statements at his guilty plea hearing, the record sufficiently rebuts Petitioner's assertion that Ms. Morgan rendered constitutionally deficient assistance of counsel as to her investigation of Petitioner's case. Therefore, this claim fails to allege any deficient performance or resulting prejudice as required to state an ineffective assistance of counsel claim under Strickland. Accordingly, Petitioner's final claim is without merit and must be denied.

IV. CONCLUSION

Finally, the Court finds appropriate to emphasize that Petitioner declared the content of his § 2255 Motion to be true. Specifically, he signed his § 2255 Motion, which stated, "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct . . . ." ECF No. 103 at 13. In addition, in his memorandum in support, Petitioner averred, "This pleading is made and sworn under penalty of perjury." ECF No. 104 at 1. Petitioner's allegations seem to be riddled with inconsistent statements, especially in regard to his "personal use of cocaine" argument.

For the reasons set forth above, the Court **FINDS** that Petitioner's § 2255 Motion, along with the files and the records of the instant case, conclusively show that Petitioner is not entitled to relief under 18 U.S.C. § 2255. Accordingly, for the reasons stated herein, Petitioner's § 2255 Motion is **DENIED** without a hearing. ECF No. 103.

Petitioner is **ADVISED** that he may appeal from this final Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within 60 days from the date of this Order. Furthermore, as Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," the Court declines to issue a certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

The Clerk is **DIRECTED** to forward a copy of this Order to the Petitioner and to all Counsel of Record, including Ms. Mary Morgan.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Norfolk, VA
June 22, 2020

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AO 450 Judgment in a Civil Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LORENZO LIWAYNE BARNES,

Petitioner,

v.

Criminal Case Number: 2:18cr150-3
Civil Case Number: 2:19cv700

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

[X] **Decision by Court.** This action came on for decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner's 2255 Motion is DENIED.

FERNANDO GALINDO, CLERK

June 24, 2020

By: /s/
T. Armstrong, Deputy Clerk

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FILED: November 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7060
(2:18-cr-00150-RGD-RJK-3)
(2:19-cv-00700-RGD-RJK)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LORENZO LIWAYNE BARNES, a/k/a L.B.

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk