NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

APPENDIX OF THE PETITIONER

BRUCE SIMMONS
283 S.W. 8th Street
Dania Beach, Florida, 33004, Apt. 4
Pro se Counsel

APPENDIX

INDEX OF APPENDIX

APPENDIX A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14385
Non-Argument Calendar

D.C. Docket No. 0:19-cv-61443-UU

BRUCE SIMMONS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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

(May 29, 2020)

Before WILLIAM PRYOR, GRANT and LUCK, Circuit Judges.

PER CURIAM:

Bruce Simmons appeals the denial of his *pro se* petition for a writ of error coram nobis under the All Writs Act. 28 U.S.C. § 1651(a). We affirm.

In 1999, the district court convicted Simmons of two counts of distributing cocaine. 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2. The jury heard testimony from Agent Adrienne Sullivan of the Federal Bureau of Investigation that he gave a confidential informant cash on two occasions to purchase cocaine from Simmons, from a second agent about Simmons's interview, and from Simmons, who denied any wrongdoing and blamed the informant for deceiving Sullivan. The district court sentenced Simmons to concurrent sentences of 240 months of imprisonment.

Simmons filed several unsuccessful challenges to his convictions and sentence. In his direct appeal, he argued that the evidence was insufficient to support his convictions, and we affirmed. *United States v. Simmons*, 237 F.3d 634 (11th Cir. 2000). Simmons later filed several petitions for the writ of error coram nobis in which he argued that he was legally innocent and requested that the district court vacate his convictions and sentence. He also moved to vacate his sentence on the ground that his counsel was ineffective for failing to challenge the sufficiency of the evidence, but the district court denied the motion as moot and later we denied Simmons a certificate of appealability. Undeterred, Simmons filed additional postconviction motions and petitions, which the district court dismissed, for the most part, as successive. *Id.* §§ 2255, 2241; *see Simmons v. Warden*, 589 F.

App'x 919 (11th Cir. 2014) (recounting Simmons's litigation history and affirming a limitation on challenging his convictions).

In 2019, Simmons filed the petition for a writ of coram nobis that is the subject of this appeal. He argued that he was wrongfully convicted because the government failed to present scientific evidence connecting him to the crimes or to call the confidential informant as a witness because she was imprisoned on unrelated drug charges. He also argued that Sullivan's testimony was insufficient to support his convictions. The district court denied Simmons's petition because he had failed to identify any evidence to support his claim of innocence and was "attempting to re-litigate his conviction[s]."

We review the denial of a petition for a writ of coram nobis for abuse of discretion. *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002). A writ of error coram nobis "is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice." *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). The district court can issue the writ only when "there is and was no other available avenue of relief" and "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000).

The district court did not abuse its discretion by denying Simmons's petition. Simmons alleged no facts to support a claim of actual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."). He also failed to identify any errors during his trial that a writ of coram nobis could remedy. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("[A] writ of coram nobis . . . was traditionally available only to bring before the court factual errors 'material to the validity and regularity of the legal proceeding itself' . . . ."). And the writ is unavailable to relitigate a conviction. *See United States v. Addonizio*, 442 U.S. 178, 186–88 (1979).

We **AFFIRM** the denial of Simmons's petition.

APPENDIX A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:19-cv-61443-UU/REID
Crim. No.: 0:98-cr-06232-ZLOCH

BRUCE SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER REJECTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS

THIS CAUSE is before the Court upon Petitioner's *pro se* Common Law Petition for Writ of Error *Coram Nobis* (D.E. 1) (the "Petition").

THE COURT has considered the Petition and is otherwise fully advised in the premises.

This matter was referred to Magistrate Judge Lisette M. Reid, who, on September 25, 2019, issued a Report (the "Report") (D.E. 13) recommending that the Petition be dismissed because: (1) Petitioner's claims, that he is actually innocent because the evidence at trial did not support a guilty verdict, have "previously been ruled upon"; and (2) he is barred from *coram nobis* relief because he has not provided sound reasons for failing to seek relief earlier. The Government has not been ordered to file a response to the Petition. D.E. 13 at 2.

Petitioner timely filed objections to the Report. D.E. 14. Petitioner argues that while the Court has previously ruled on his numerous post-conviction motions, "all of the dismissals relating to [his] efforts to have his claims heard by the Courts were dismissed *without a merits determination.*" *Id.* at 2 (emphasis in original).

Upon *de novo* review, the Court respectfully rejects Magistrate Judge Reid's recommendations and denies the Petition on the merits.

BACKGROUND

Petitioner is a former federal prisoner who served 18 years in prison and three years of supervised release after a jury found him guilty of two counts of distribution of cocaine. D.E. 1 at 2; 98-cr-06232 D.E. 73. He claims he was wrongfully convicted and that there was insufficient evidence to convict him. D.E. 1 at 2, 13–17.

I. Direct Appeal

Petitioner's convictions were affirmed on October 27, 2000. *United States v. Simmons*, No. 99-12064 (11th Cir. 2000) (per curiam); D.E. 100. The one-page, unpublished opinion reads, in full:

> The issue presented in this appeal is whether the district court properly limited Simmons's cross examination of a government witness concerning a non-testifying confidential informant's criminal history.
>
> This court reviews a question of whether the district court erred in limiting cross examination for clear abuse of discretion.
>
> After reviewing the record, we see no merit to any of the arguments[1] Simmons makes in his appeal. Simmons argues, without citing to authority, that he was entitled to impeach an individual who was not called as a witness at trial. However, Federal Rule of Evidence 609 provides that only those individuals called as witnesses may be impeached by evidence of a criminal conviction. Therefore, we reject this argument and all other arguments Simmons makes in his appeal.

United States v. Simmons, No. 99-12064 (11th Cir. 2000) (internal citations omitted). Oral arguments were not conducted. *Id.* Rehearing and rehearing *en banc* were denied, as was certiorari review. *See* D.E. 13 at 3.

[1] Petitioner raised additional arguments in a *pro se* supplemental filing. The Eleventh Circuit denied Petitioner's motion for leave to file supplemental briefing. *See* D.E. 1 at 50 (Judicial Compl. No. 11-10-90021). Petitioner asserts that he first raised his claim of innocence in the *pro se* supplemental filing. D.E. 1 at 11.

II. "*Coram Nobis*" Petitions

The issuance of a writ of error *coram nobis* is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody. *See United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). Petitioner was released from prison on or about June 10, 2016. Petitioner filed his first *coram nobis* petition after he was convicted but before he was sentenced, alleging that "fundamental error occurred . . . where the jury found that [he] aided and abetted himself." 98-cr-06232 D.E. 59 at 2. The Eleventh Circuit affirmed the district court's denial of the petition. *Id.* D.E. 97.

In 2016, while he was still in custody, Petitioner filed two more *coram nobis* petitions. On March 18, 2016, he filed a petition alleging that he was "actual[ly] innocen[t] of the crimes . . . but more importantly, that [he] was convicted for a non-existent offense, aiding and abetting himself." 98-cr-06232 D.E. 120 at 2. The Court dismissed the petition because he was still in custody. *Id.* D.E. 121. On June 13, 2016, Petitioner filed his third *coram nobis* petition, alleging his "actual innocence" and that his supervised release term was unconstitutional. *Id.* D.E. 122. The Court again dismissed the petition because Petitioner was still in custody serving his supervised release term. *Id.* D.E. 123; 0:16-cv-61256 D.E. 8, 11. The instant Petition appears to be Petitioner's first properly filed *coram nobis* petition.

III. Habeas Petitions

Petitioner has filed at least seven motions seeking habeas relief under 28 U.S.C. §§ 2255, 2241. His first § 2255 motion, in which he alleged ineffective assistance of counsel for failing to challenge the sufficiency of the evidence, prosecutorial misconduct, and other issues with his indictment and jury instructions, was denied as moot because the "Eleventh Circuit rejected these similar claims in Simmons' direct appeal." 0:01-cv-06504-CMA D.E. 1, 28 at 1. The Eleventh

Circuit declined to issue a certificate of availability. Petitioner filed dozens of motions for reconsideration and relief from judgment, all of which were denied. Petitioner now argues that because he was deprived of "any opportunity to have his first § 2255 motion addressed on the merits . . . every subsequent motion [that has been denied] as procedurally barred . . . was in error." D.E. 1 at 9.

Each of his other six habeas motions were also denied on procedural grounds. 04-cv-60696-COHN D.E. 4, 6; 05-cv-60353-ZLOCH D.E. 3, 5; 08-cv-60303-CMA D.E. 15; 12-cv-60031-ZLOCH D.E. 6; 13-cv-22401-ZLOCH D.E. 8; 14-cv-20995-CMA D.E. 14. In two of those motions, Petitioner alleged he was innocent because the evidence at trial did not establish his guilt. 04-cv-60696-COHN D.E. 1 at 6–13; 13-cv-22401-ZLOCH D.E. 1 at 11.

In sum, the instant claim has never been addressed on the merits and Petitioner has sought relief for this specific claim at least four times.

DISCUSSION

Petitioner claims he suffered a fundamental miscarriage of justice because the entirety of the Government's case-in-chief rested on the testimony of one person, Special Agent Adrienne Sullivan, and the Government failed to call the confidential informant ("CI"), who was incarcerated on unrelated drug charges. D.E. 1 at 13–14. He further alleges, *inter alia*, that Agent Sullivan testified that she never saw Petitioner deliver the cocaine to the CI; she never discussed the drug purchase price with Petitioner; and she did not hear the conversation Petitioner had with the CI. *Id.* at 14–15. Petitioner testified at trial. He continues to maintain his "factual and legal innocence." D.E. 1 at 2.

"The writ of error *coram nobis* is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice" or where the error is "of the most

fundamental character." *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). It is "difficult to conceive of a situation in a federal criminal case today where *coram nobis* relief would be necessary or appropriate." *Lowery v. United States*, 956 F.2d 227, 229 (11th Cir. 1992) (per curiam) (internal quotation marks omitted).

Traditionally, *coram nobis* relief has been available "only to bring before the court factual errors 'material to the validity or regularity of the legal proceeding itself,' such as the defendant's being under age or having died before the verdict." *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Mayer*, 23 U.S. 55, 67–68 (1914)). Jurisdictional errors have long been recognized as fundamental errors "since jurisdictional error implicates a court's power to adjudicate the matter before it." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). In a rare decision granting *coram nobis* relief, the Eleventh Circuit in *Peter* did so because the acts forming the basis of the petitioner's RICO conviction did not establish his predicate crime of mail fraud under a subsequently-decided U.S. Supreme Court case. 310 F.3d at 711.

Coram nobis relief has been judicially constrained. For example, "The writ of error coram nobis . . . cannot be available for *new evidence only potentially relevant* to a factual issue decided long ago by a jury for, if it were, the limitations of Rule 33 [regarding a motion for a new trial] would be meaningless and the writ would no longer be extraordinary. More troublesome still, such a remedy would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal convictions." *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (emphasis added).

"To establish actual innocence, a petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him" *Bousley v. United States*, 523 U.S. 614, 623 (1998). "A substantial claim that constitutional error has caused

the conviction of an innocent person is extremely rare . . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with *new reliable evidence*—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added). "Actual innocence" requires the petitioner to show "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623.

Petitioner has not established that he was charged with a non-offense, nor has he alleged any new evidence, let alone new *reliable* evidence, of his actual innocence. His claim is one of legal innocence, not factual innocence.

Coram nobis is inapplicable if the petitioner merely wishes to re-litigate criminal convictions. *See United States v. Addonizio*, 442 U.S. 178, 186–88 (1979). That is exactly what Petitioner is attempting to do in this proceeding. *Burns v. United States*, No. 17-cv-62386-COOKE, 2017 LEXIS 202665, *8-9 (S.D. Fla. Dec. 7, 2017). The Court denied his motion for judgment of acquittal at the close of the Government's case, his post-trial *pro se* motion for judgment of acquittal, and his amended post-trial *pro se* motion for judgment of acquittal. 98-cr-06232 D.E. 54, 55, 61. In his post-trial *pro se* motion for judgment of acquittal, he argued that "the evidence was legally insufficient to sustain a verdict of guilt" and made other claims similar to those in the instant Petition. *Id.* D.E. 54 at 1. The Court denied the post-trial motions for judgment of acquittal after "carefully review[ing] the merits of the two motions," and dismissed them as untimely or "in the alternative, assuming that this Court has jurisdiction . . . the two motions . . . are denied." *Id.* D.E. 61. The Court also denied Petitioner's motion for a new trial and *pro se* supplements to the motion. *Id.* D.E. 49, 50, 51, 52. Thus, even taking Petitioner's factual

allegations as true, he is not entitled to *coram nobis* relief because he is attempting to re-litigate his conviction.

CONCLUSION

Because the Court has never ruled on the merits of Petitioner's actual innocence claim and because Petitioner has sought relief earlier, the Report is rejected. However, the Petition is denied because it fails on the merits. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report, D.E.13, RESPECTFULLY REJECTED. It is further

ORDERED AND ADJUDGED that the Petition, D.E. 1, is DENIED. It is further

ORDERED AND ADJUDGED that this case is closed.

DONE AND ORDERED in Chambers in Miami, Florida this _31st_ day of October, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
Bruce Simmons, *pro se*
Counsel of record via CM/ECF

APPENDIX A-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14385-DD

BRUCE SIMMONS,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

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

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

BEFORE: WILLIAM PRYOR, Chief Judge, 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)

ORD-46

APPENDIX A-4

8-99 STATUS
PTD - 2-23-99 @ 10:00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

98-6232 CR-ZLOCH

UNITED STATES OF AMERICA, Plaintiff, v. BRUCE SIMMONS, Defendant.	CASE NO.	21 USC 841(a)(1) 18 USC 2 MAGISTRATE JUDGE SELTZER
	INDICTMENT	

The Grand Jury charges that:

COUNT I

On or about January 2, 1998, at Broward County, Southern District of Florida and elsewhere, the defendant,

BRUCE SIMMONS,

did knowingly and intentionally distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT II

On or about January 23, 1998, at Broward County, Southern District of Florida and elsewhere, the defendant,

BRUCE SIMMONS,

did knowingly and intentionally distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code,

EXHIBIT

Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

FOREPERSON

THOMAS E. SCOTT
UNITED STATES ATTORNEY

TERRENCE J. THOMPSON
ASSISTANT UNITED STATES ATTORNEY

APPENDIX A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 01-6504-CIV-ZLOCH
98-6232-CR-ZLOCH

BRUCE SIMMONS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 25) filed herein by United States Magistrate Judge Charlene H. Sorrentino and upon the Objections To Magistrate's Report And Recommendation (DE 26) filed by the Movant, Bruce Simmons. The Court has conducted a de novo review of the entire record herein and is fully advised in the premises. In her Report the Magistrate concluded that Simmons' claims 1-4, and 4a-d, are barred as the Court of Appeals for the Eleventh Circuit rejected these similar claims in Simmons' direct appeal of his sentence. Simmons contends that his claims should not be barred as he raised the claims in question via a supplemental brief to the Court of Appeals and new issues cannot be raised in a supplemental brief. See United States v. Padilla-Reyes, 247 F.3d 1158, 1164 (11th Cir. 2001). However, this Court agrees with the Magistrate's conclusion, as in its Mandate the Eleventh Circuit stated that it "rejected all other arguments Simmons' makes in [his] appeal." (Case No. 98-6232-CR, DE 100). Thus, based on this specific language used by the Eleventh Circuit, the Court finds that Simmons' claims 1-4, and 4a-d are barred.

Accordingly, after due consideration, it is

EXHIBIT

103

ORDERED AND ADJUDGED as follows:

1. The Movant, Bruce Simmons' Objections To Magistrate's Report And Recommendation (DE 26) be and the same are hereby **OVERRULED;**

2. The Report Of Magistrate Judge (DE 25) filed herein by United States Magistrate Judge Charlene H. Sorrentino, be and the same is hereby approved, ratified and adopted by the Court;

3. The Movant's Motion To Vacate (DE 1) be and the same is hereby **DENIED;**

4. The above-styled cause be and the same is hereby **DISMISSED;** and

5. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of August, 2002.

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

The Honorable Charlene H. Sorrentino
United States Magistrate Judge

Bruce Simmons, Pro Se
Reg. No. 54822-004
FCI - Miami
P. O. Box 779800
Miami, FL 33177-0200

Terrence J. Thompson, Esq., AUSA
For Respondent

EXHIBIT

APPENDIX A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-61443-CV-UNGARO
(CASE NO. 98-06232-CR-UNGARO)
MAGISTRATE JUDGE REID

BRUCE SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

REPORT OF MAGISTRATE JUDGE RE PETITION FOR WRIT OF ERROR CORAM NOBIS - 28 U.S.C. § 1651

I. Introduction

Petitioner, a former federal prisoner having been released from custody, has filed a petition for writ of error *coram nobis* pursuant to 28 U.S.C. § 1651, seeking an order from this court vacating his criminal judgment of conviction, and dismissing the indictment, with prejudice in Case No. 98-06232-CR-UNGARO. [ECF 1].[1] Petitioner seeks relief on the basis that: (1) he is actually and factually innocent of his convicted crimes [*Id.* p. 2]; and (2) that "[t]here was absolutely no

[1] Citations to [ECF] refer to docket entries in the instant case, Case No. 19-61443-CV-UNGARO. Citations to [CR ECF] refer to docket entries in the underlying criminal case, Case No. 98-06232-CR-UNGARO. All citations which include a reference to [CV ECF], refer to docket entries in all other civil cases where Bruce Simmons was either a Petitioner and/or Movant.

evidence presented to prove that [Petitioner] possessed, sold, or distributed cocaine to FBI Agent Sullivan, or anyone else." [*Id.* p. 16].

Petitioner has previously filed multiple motions and petitions for post-conviction relief in an effort to circumvent the restrictions on successive filings imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Accordingly, for the reasons discussed below, Petitioner has not demonstrated an acceptable basis for granting *coram nobis* relief. Because summary dismissal is warranted and Petitioner is not entitled to *coram nobis* relief, no order to show cause has been issued, and Respondent has not been required to file a response. *See Broadwater v. United States,* 292 F.3d 1302, 1303-04 (11th Cir. 2002) (a district court has the power to summarily dismiss a case so long as there is a sufficient basis in the record for an appellate court to review the district court's decision).

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B), S.D. of Fla. Admin. Order 2019-02. [ECF 8].

II. Background

On June 25, 1999, Petitioner was originally charged with and convicted of distribution of cocaine under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, following a jury verdict [CR ECF 40], in Case No. 98-06232-CR-ZLOCH.[2] *See United States v.*

[2] On August 26, 2019, the underlying criminal case, Case No. 98-06232 was assigned to Judge Ursula Ungaro. [CR ECF 126].

Simmons, Case No. 98-06232-CR-ZLOCH, Judgment [CR ECF 73] (S.D. Fla. June 29, 1999). Petitioner was sentenced to a total term of 240 months and three years of supervised release. [CR ECF 73]. Petitioner concedes that he has since been released from custody and that his supervised release has ended. *See* [ECF 1].

III. Relevant Procedural History

1) Direct Appeal of Criminal Conviction

After judgment was entered in Case No. 98-06232-CR-ZLOCH, Petitioner filed a Notice of Appeal of his conviction and sentence. [CR ECF 74]. On October 27, 2000, Petitioner's convictions were *per curiam* affirmed in a written, but unpublished opinion. *United States v. Simmons*, 237 F.3d 634, 634 (11th Cir. 2000) (table); [CR ECF 100]. Rehearing and rehearing *en banc* were denied on December 18, 2000. *United States v. Simmons*, 245 F.3d 797 (11th Cir. 2000) (table). Certiorari review was denied on March 5, 2001. *Simmons v. United States*, 532 U.S. 913, 913 (2001).

2) Collateral Attacks to Criminal Conviction

Notably, after trial but before the imposition of sentence, Petitioner filed his first petition for writ of error *coram nobis*, *see United States v. Simmons*, Case No. 98-06232-CR-ZLOCH, Petition [CR ECF 59] (S.D. Fla. May 21, 1999), and the District Court Judge denied the petition. [CR ECF 67; 72]. The Eleventh Circuit Court of Appeals affirmed the denial of the petition. *See Simmons v. United States*,

Case No. 99-12589 (11th Cir. May 26, 2000) (citing *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000)); [CR ECF 97].

On March 30, 2001, Petitioner returned to this Court, filing his first *pro se* motion to vacate pursuant to 28 U.S.C. § 2255, assigned Case No. 01-06504-CV-ZLOCH.[3] *See Simmons v. United States*, Case No. 01-06054-ZLOCH, Motion to Vacate [CV1 ECF 1] (S.D. Fla. Mar. 30, 2001). The motion was denied in a Final Order of Dismissal, entered on August 22, 2002. [CV1 ECF 28].

Petitioner appealed, but the Eleventh Circuit declined to issue a certificate of appealability. [CV1 ECF 29; 34]. Review of that docket further reveals that between 2002 and 2010, Petitioner continued filing numerous motions seeking relief from the judgment in the § 2255 proceeding, as well as, in his underlying criminal case. [CV1 ECF 36-137].

Undeterred, petitioner also filed six additional post-conviction habeas proceedings in this court, assigned Case Nos. 04-60696-CV-COHN, 05-60353-CV-ZLOCH, 08-60303-CV-ALTONAGA,[4] 12-60031-CV-ZLOCH, 13-22401-CV-ZLOCH, 14-20995-CV-ALTONAGA, which were either filed as § 2255 motions to

[3] On August 7, 2006, Case No. 01-06054 was reassigned to Judge Cecilia M. Altonaga.

[4] It bears mentioning that the District Court Judge in Case No. 08-60303-CV-ALTONAGA, entered an Order where the court noted that Petitioner has filed "at least eleven different motions and three notices of appeal...requiring ten more orders by this court," the latest of which was Petitioner's indirect attempt to again challenge his conviction by "casting" his pleading as a "writ of *audita querela*." [CV2 ECF 72].

vacate or, in legal effect, construed as such. These motions/petitions were denied as unauthorized successive filings.

In 2016, Petitioner filed two more petitions for writ of error *coram* nobis, alleging actual innocence and requesting vacatur of his conviction and sentence. *See Simmons v. United States*, No. 16-60597-CV-ZLOCH, Motion for Writ of Error Coram Nobis [CV3 ECF 1] (Mar. 18, 2016); *see also Simmons v. United States*, Case No. 16-61256-CV-ZLOCH, Common Law Petition [CV4 ECF 1] (S.D. Fla. June 10, 2016). In both Case No. 16-60597-CV-ZLOCH and Case No. 16-61256-CV-ZLOCH, the District Court Judge dismissed the petitions. [CV3 ECF 13]; [CV4 ECF 11; 12].

Petitioner has once again returned to this Court, filing the instant Petition for Writ of Error Coram Nobis. [ECF 1].

IV. Standard of Review- *Coram Nobis*

Certain common-law writs may be used to "[f]ill the interstices of the federal post-conviction remedial framework . . . ." *United States v. Holt,* 417 F.3d 1172, 1175 (11th Cir. 2005) (quoting *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990)). Federal courts have the authority to issue writs of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a). *See Roggio v. United States,* 597 F. App'x 1051, 1052 (2015) (citing *United States v. Mills,* 221 F.3d 1201, 1203 (11th Cir. 2000)). The issuance of a writ of error *coram nobis* "[i]s a remedy available to vacate

a conviction when the petitioner has served his sentence, [as is the case here,] and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255." *See Roggio*, 597 F. App'x at 1052 (quoting *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002) (*per curiam*)).

A petitioner may only obtain *coram nobis* relief where: (1) "there is and was no other available avenue of relief;" and (2) "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Roggio*, 597 F. App'x at 1052 (quoting *Alikhani,* 200 F.3d at 734).

Both the United States Supreme Court and the Eleventh Circuit have acknowledged that "[i]t is difficult to conceive of a situation in a federal criminal case today where *coram nobis* relief would be necessary or appropriate." *Carlisle v. United States,* 517 U.S. 416, 429 (1996) (quoting *United States v. Smith,* 331 U.S. 469, 475 n. 4 (1947)); *see also Roggio,* 597 F. App'x at 1052 (quoting *Lowery v. United States,* 956 F.2d 227, 229 (11th Cir. 1992) (*per curiam*)).

More importantly, federal courts "[m]ay consider *coram nobis* petitions **only where . . . the petitioner presents sound reasons for failing to seek relief earlier.**" *Roggio,* 597 F. App'x at 1052 (quoting *Mills*, 221 F.3d at 1204) (emphasis added). If Petitioner cannot present sound reasons for his failure to seek relief earlier or cannot establish all of the requirements for *coram nobis* relief, dismissal of the

petition is appropriate. *See Roggio,* 597 F. App'x at 1052 (citing *Mills,* 221 F.3d at 1204).

V. Discussion

Petitioner is seeking *coram nobis* relief on the basis that he is factually innocent of his convicted crimes. [ECF 1, p. 2]. In sum, Petitioner claims that he has not had "any opportunity to have his first § 2255 motion address on the merits . . . ." [*Id.* p. 9] (emphasis omitted), and that "[t]here was absolutely no evidence presented to prove that [Petitioner] possessed, sold, or distributed cocaine to FBI Agent Sullivan, or anyone else." [*Id.* p. 16]. However, the above allegations have been previously addressed and ruled upon in former post-conviction proceedings.

Petitioner has filed multiple motions and petitions, multiple requests for certificates of appealability, and multiple appeals to the Eleventh Circuit and Supreme Court.

First, Petitioner's convictions were *per curiam* affirmed in a written, but unpublished opinion on October 27, 2000, where the Eleventh Circuit rejected all arguments Petitioner made in his appeal. *United States v. Simmons*, 237 F.3d 634, 634 (11th Cir. 2000) (table); [CR ECF 100, p. 5].

Second, Petitioner raises the same claims in the instant Petition, as he did in his first § 2255 Motion, in Case No. 01-06504-CV-ZLOCH. In that motion, Petitioner claimed that the "[e]vidence was clearly insufficient to convict" and that

the Government failed to prove its case because the evidence did not show that defendant "[s]old cocaine to Agent Sullivan." [CV1 ECF 2, pp. 21-22] (emphasis omitted). The former presiding magistrate judge found that Petitioner's claim, that "[t]he evidence was insufficient to support a conviction because the government failed to identify him as the person who committed the offense," [CV1 ECF 25, p. 3], and all other claims should be denied because these claims were raised and rejected on direct appeal. [*Id.* p. 5].

Third, Petitioner appealed the denial of the § 2255 Motion in Case No. 01-06504-CV-ZLOCH, but the Eleventh Circuit declined to issue a certificate of appealability because petitioner failed to make a substantial showing of the denial of a constitutional right. [CV1 ECF 29; 34].

Lastly, in Case No. 13-22401-CV-ZLOCH, Petitioner filed a petition pursuant to 28 U.S.C. § 2241, where he alleged, as he alleges here, that he is actually innocent of his convicted crimes. *Simmons-Restricted Filer v. Warden, Rob Wilson*, Case No. 13-22401-ZLOCH, Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 [CV5 ECF 1] (S.D. Fla. July 3, 2013). On August 23, 2013, the presiding District Judge entered a Final Order of Dismissal for failure to obtain from the Eleventh Circuit Court of Appeals the authorization required by 28 U.S.C. 2244(b)(3) to file a successive § 2255 motion. [CV5 ECF 8].

Accordingly, the Eleventh Circuit entered a Mandate, finding that: (1) petitioner's arguments challenging the validity of his sentences and that he is actually innocent of the crimes of conviction "[s]hould have been brought in a § 2255 motion [CV5 ECF 22, pp. 6-7]; (2) "[Petitioner] has not met his burden of presenting evidence affirmatively showing the inadequacy or ineffectiveness of the § 2255 remedy, such that he is entitled to file a habeas petition under § 2241 [*Id.* p. 7]; and (3) "remand with instructions for the district judge to limit to restriction on future filings to habeas petitions challenging [Petitioner's] federal sentences for his underlying drug conviction." [*Id.* p. 9].

In sum, as has been demonstrated here, Petitioners claims have been previously ruled upon. Given the foregoing, Petitioner has not demonstrated any purported errors alleged in matters of fact of the most fundamental character which have not been put in issue or passed upon which renders the proceeding itself irregular and invalid. *Roggio*, 597 F. App'x at 1052. As such, Petitioner has not demonstrated an acceptable basis for granting *coram nobis* relief. *See id.* at 1052 (quoting *United Mills,* 221 F.3d at 1204).

VI. Certificate of Appealability

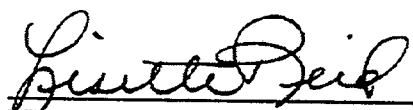
A certificate of appealability is unnecessary for an appeal following the denial of a petition for writ of error *coram nobis. See United States v. Perkins,* 424 F. App'x 328 (5th Cir. 2011).

VII. Conclusion

Based upon the foregoing it is recommended that the instant federal habeas petition be **DISMISSED,** and the case **CLOSED**.

Objections to this report may be filed with the district judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar Petitioner from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge, except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Williams v. McNeil,* 557 F.3d 1287, 1291 (11th Cir. 2009) (finding district court has discretion to decline consideration of arguments not presented to the magistrate judge in the first instance).

SIGNED this 25th day of September, 2019.



UNITED STATES MAGISTRATE JUDGE

cc: Bruce Simmons
283 SW 8th Street, Apt. B
Dania Beach, FL 33004
PRO SE

United States of America
represented by Noticing 2255 U.S. Attorney
Email: usafls-2255@usdoj.gov

APPENDIX A-7

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 99-12589-J

United States of America,

Appellee,

- versus -

Bruce Simmons,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

Thomas E. Scott
United States Attorney
Attorney for Appellee
99 N.E. 4th Street
Miami, Florida 33132-2111
(305) 961-9285

Adalberto Jordan
Chief, Appellate Division

Kathleen M. Salyer
Assistant United States Attorney

Matthew C. Dates
Assistant United States Attorney

Of Counsel

EXHIBIT

United States v. Bruce Simmons, 99-12589-J

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Robert Berube

Alvin Ernest Entin

Adalberto Jordan

Kathleen M. Salyer

Thomas E. Scott

Hon. Barry S. Seltzer

Bruce Simmons

Hon. Lurana S. Snow

Terrance Thompson

Kathleen Williams

Hon. William Zloch

Matthew C. Dates
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

Certificate of Type Size

The United States certifies that this brief uses 14 point Times Scalable type.

Table of Contents

Table of Citations

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

Statement of the Issues

I. Whether the district court properly denied Simmons's coram nobis petition.

Statement of the Case

1. **Course of Proceedings and Disposition in the Court Below.**

On December 22, 1998, a federal grand jury in the Southern District of Florida returned a sealed two count indictment charging Bruce Simmons with two counts of distributing cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (DE:3)[1].

Simmons proceeded to trial on April 12, 1999 (DE:39). On April 13, 1999, the jury returned guilty verdicts as to Count I and Count II of the indictment (DE:40). Following the district court's denial of his motion for judgment of acquittal or new trial (DE: 49, 50, 52), the district court sentenced Simmons to 240 months of imprisonment as to Counts I and II to run concurrently, supervised release for a term of 3 years, an assessment of $200.00, and a $5,000 fine (DE:73). Simmons filed a timely notice of appeal of the judgment of conviction (DE:74). That appeal is pending before this Court as Case No. 99-12064-J.

Before sentencing in this case, Simmons filed a petition for writ of error coram nobis that is at issue here (DE:59). The asserted basis for the motion was that Simmons

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[1] Docket entry numbers are denoted as "DE" with the docket number following the colon and page number after the docket number.

could not be guilty of aiding and abetting himself therapy making his conviction under 18 U.S.C. § 2 improper. On June 17, 1999, the court denied Simmons's petition for writ of error coram nobis (DE:67). Pusuant to an order of the district court, Simmons was permitted to take a belated appeal of the district court's denial of the coram nobis petition(DE:79) and he remains incarcerated.

2. **Statement of the Facts.**

The Offense Conduct

The evidence presented at trial showed Simmons's involvement in furnishing a total of $7,700 worth of cocaine on two occasions in January 1998 to a confidential informant and an undercover FBI agent who were posing as buyers. Special Agent Adrienne C. Sullivan of the Miami Division of the Federal Bureau of Investigation (FBI) began working in an undercover capacity in relation to this case in January 1998 (DE:82, 93). SA Sullivan was portraying the girlfriend of the confidential informant (CI) in this case (DE:82, 94). In preparation for the first transaction on or about January 2, 1998, SA Sullivan gave the CI $1,100 prior to meeting with Simmons (DE: 82, 99). The CI gave the $1,100 to Simmons for the purchase of four ounces of cocaine (id.). While waiting for Simmons at a 7-Eleven, SA Sullivan gave the CI an additional $1,100 to complete the transaction (DE:82, 100-101). When Simmons arrived at the 7-Eleven, he parked perpendicular to the undercover vehicle and the CI

got out of the undercover vehicle joining Simmons (DE:82, 101). When the CI got back into the vehicle with SA Sullivan, the CI handed SA Sullivan a bag of cocaine (DE:82, 101-102).

On or about January 22, 1998, SA Sullivan and the CI met in order to facilitate another transaction with Simmons (DE:82, 104). SA Sullivan gave the CI $5,500 and the two proceeded to Farah's Market (DE:82, 105). When they arrived, the CI exited the vehicle and talked to Simmons while SA Sullivan waited in the car (DE:82, 105). SA Sullivan observed a distinct brown vehicle pull out of the area where Simmons had originally been standing (id.). SA Sullivan saw Simmons make a telephone call from a pay phone (DE:82, 105-106). SA Sullivan then saw that same brown vehicle pull up and Simmons get into the car (DE:82, 106). The CI waited in the vehicle with SA Sullivan until Simmons returned (DE:82, 107). The CI and Simmons talked and the CI returned to the vehicle (id.).

Later that same day, the CI and SA Sullivan met to go to the area where the transaction with Simmons occurred (DE:82, 108). While driving to the area, SA Sullivan observed Simmons riding a motor scooter (DE:82, 109). SA Sullivan saw Simmons leave the motor scooter and get into the same brown vehicle with another individual later identified as Melvin Brown (id.). SA Sullivan followed Simmons and Brown to an address where Simmons spoke with an individual, to a second address,

and to a third address where Simmons spoke with another individual (DE:82, 110). At the third address, Brown and Simmons switched vehicles (id.). SA Sullivan and the CI waited at the same 7-Eleven where the initial transaction had occurred (DE:82, 111). Brown and Simmons pulled up approximately ten minutes later (id.). Simmons told SA Sullivan that in order to make the purchase of nine ounces of cocaine the CI had to go with Brown and Simmons (DE:82, 112). Approximately fifteen minutes later, the car returned and the CI got out, reentering the vehicle with SA Sullivan (id.). SA Sullivan and the CI followed Brown and Simmons back to a residence and observed Simmons go inside (DE:82, 113). The CI went into the residence while SA Sullivan and Brown remained outside (id.). The CI exited the residence and got into the car with SA Sullivan and produced a bag of cocaine (DE:82, 113-114). Simmons was arrested on February 17, 1999 (DE:12).

The Defense Case

Simmons testified on his own behalf claiming that the CI had asked Simmons to cheat his "girlfriend" (SA Sullivan) in connection with the drug deal (DE:82, 179). Simmons admitted to being involved in some prior drug activity (DE:83, 212). Simmons claimed that Brown took the money and received the cocaine from the CI (DE:83, 181). Simmons testified to being in the car with Brown during the transaction (DE:82, 187, DE:83, 214). Finally, in order to "cheat" the CI's "girlfriend" Simmons

testified that while in the car with Brown he (Simmons) poured another substance into a bag of cocaine held by Brown in order to "cut" the cocaine (DE:83, 214).

3. **Standard of Review.**

The availability of coram nobis relief presents a question of law. As a result, de novo review is appropriate. See, e.g., Lowery v. United States, 956 F.2d 227, 229-30 (11th Cir. 1992).

Aiding and abetting under 18 U.S.C. § 2 is not a separate crime, "but is inherently embodied in all indictments for substantive offenses." United States v. Stitzer, 785 F.2d 1506, 1518 n.7 (11th Cir. 1986) (citing United States v. Pearson, 667 F.2d 12, 13 (5th Cir., Unit B, 1982)(per curiam)).

Summary of the Argument

The district court properly denied Simmons's petition for writ of coram nobis because there was no defect, much less the type of fundamental defect that a writ of coram nobis is designed to cure, in either the indictment or the trial. This Court has held that aiding and abetting is embodied in all substantive offenses. Simmons was properly convicted of distributing cocaine, a crime he participated in with another individual. Therefore, the government's reliance at trial on an aiding and abetting theory in order to convict Simmons as a principal was proper given the government's theory that Simmons may or may not have completed all of the predicate acts himself.

Argument

I. The District Court Properly Denied Simmons's Petition for Coram Nobis.

Simmons contends that he is entitled to coram nobis relief because he could not be convicted of violating 18 U.S.C. § 2 where there was no evidence that anyone other than he was involved in the offense. Simmons claims that because he can not aid and abet himself, the charge is not valid. Coram nobis jurisdiction is available only when the error alleged is 'of the most fundamental character' . . . . and when 'no statutory remedy is available or adequate' . . . ." (citations omitted). Lowery v. United States, 956 F.2d 227, 228-229 (11th Cir. 1992).

Simmons was not entitled to a writ of error coram nobis, which is limited for the correction of fundamental defects that render a proceeding irregular because the claims asserted by Simmons are not the sort of fundamental irregularities for which coram nobis provides a remedy. In addition Simmons is not properly invoking the coram nobis procedure because, "[t]he writ of coram nobis is not a substitute for direct appeal; instead, it is available only in those 'extraordinary circumstance' in which 'errors of the most fundamental magnitude have rendered [a] proceeding . . . irregular and invalid.'" Frank v. United States, 175 F.3d 1007, 1999WL 88944, **2 (2d Cir. 1999)(quoting Foont v. United States, 93 F.3d 76, 78 (2d Cir. 1996).

The district court correctly found that coram nobis relief was not warranted (R:59). A writ of error coram nobis is "a limited remedy of last resort" reserved for defects which render the proceeding in question irregular and invalid. Id. Stated differently, coram nobis is an "extraordinary" remedy to be granted "`only under such circumstances compelling such action to achieve justice.'" Moody v. United States, 874 F.2d 1575, 1576 (11th Cir. 1989) (quoting United States v. Morgan, 346 U.S. 502, 507-11 (1954)).

This Court, for example, has held that claims of newly discovered evidence and challenges to sentences based on incorrect PSIs are not cognizable under coram nobis. Lowery, 956 F.2d at 230; Moody, 874 F.2d at 1577.

In Lowery, the Court ruled that the petitioner, who alleged that a prior guilty plea had been involuntary due to his multiple personality disorder, was not entitled to coram nobis relief because he should have asserted that same claim in habeas corpus proceedings. 956 F.2d at 229. And in Moody, the Court held that an ineffective assistance of counsel claim could not be raised in a coram nobis proceeding because the petitioner had known of the grounds supporting the claim earlier, but had not raised the claim in a habeas corpus proceeding. 874 F.2d at 1578.

In any event, Simmons's claims do not allege the sort of fundamental defects necessary for coram nobis relief. Simmons's challenge to his conviction under the

aiding and abetting statute is one which he can properly raise on the direct appeal of his conviction and sentence that is pending before this Court as Case No. 99-12064-J.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

Thomas E. Scott
United States Attorney

By: 
Matthew C. Dates
Assistant United States Attorney

Adalberto Jordan
Chief, Appellate Division

Kathleen M. Salyer
Assistant United States Attorney

Of Counsel

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief for the United States was mailed this 20th day of September, 1999, to Bruce Simmons, Reg. No. 54822-004, FCI-Miami, P.O. Box 979137, Miami, Florida 33197.

Matthew C. Dates
Assistant United States Attorney

APPENDIX A-8

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

February 24, 2021

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

Appeal Number: 19-14385-DD
Case Style: Bruce Simmons v. USA
District Court Docket No: 0:19-cv-61443-UU

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14385

District Court Docket No.
0:19-cv-61443-UU

BRUCE SIMMONS,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 29, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

APPENDIX A-9

Gov't 1st Resp.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-6504-CIV-ZLOCH/SORRENTINO
(CASE NO. 98-6232-CR-ZLOCH)

BRUCE SIMMONS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

GOVERNMENT'S RESPONSE TO MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO TITLE 28, U.S.C., SECTION 2255

The United States of America, by and through its undersigned Assistant United States Attorney, hereby responds to movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28, U.S.C., Section 2255 as follows:

STATEMENT OF THE CASE

On December 22, 1998, a federal grand jury at Fort Lauderdale, Florida, returned an indictment charging movant in two counts with possession with intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (CR-DE 3). The indictment was sealed until movant was arrested and arraigned on February 17, 1999 (CR-DE 6).

On April 12, 1999, movant proceeded to trial by jury (CR-DE 39). On April 13, 1999, the jury found movant guilty as charged (CR-DE 40, 45). On June 25, 1999, this Court sentenced movant to

two hundred forty months' imprisonment on each count, to run concurrently with each other, followed by three years' supervised release, also to run concurrently with each other. The Court further ordered that movant immediately pay a $200 assessment and a $5,000 fine (CR-DE 71, 73).

Movant appealed. On October 27, 2000, the Eleventh Circuit Court of Appeals affirmed movant's conviction in an unpublished per curiam decision (CR-DE 100). On March 5, 2001, the United States Supreme Court denied certiorari. Simmons v. United States, 121 S.Ct. 1247 (2001).[1]

On March 30, 2001, movant filed this §2255 motion and memorandum of law in support (CR-DE 101, 102). On July 9, 2001, Magistrate Judge Sorrentino granted the government's motion for an enlargement of time within which to respond to the motion to on or before August 6, 2001 (CV-DE 11).

STATEMENT OF FACTS

The facts of this case have been excerpted from the government's brief on direct appeal and are attached hereto as Exhibit A.

MEMORANDUM OF LAW

Movant contends his conviction and sentence are illegal based on the following claims:

---

[1] Movant's §2255 motion is timely filed within one year from the date his conviction became final.

1. The district court's jury instruction on aiding and abetting was improper, unjustified, plain error, and requires reversal of convictions (CV-DE 12);

2. The district court's jury instruction and prosecutor's arguments constructively amended indictment in violation of federal Constitution's Fifth Amendment (CV-DE 2, p. 18);

3. The evidence was clearly insufficient to convict and counsel failed to challenge or adequately challenge its sufficiency under Rule 29 motion (CV-DE 2, p. 21);

4. The cumulative nature of trial errors deprived defendant of due process and a fair trial (CV-DE 2, p. 26):

   (a) Speedy trial/Failure to indict within 30 days (CV-DE 2, p. 26);

   (b) Prosecutorial misconduct (CV-DE 2, p. 27);

   (c) Miranda warning violation (CV-DE 2, p. 29);

   (d) Improper career offender enhancement (CV-DE 2, p. 30);

   (e) Bureau of Prisons cannot act as collection agency (CV-DE 2, p. 32); and

5. The indictment fails to state an offense (CV-DE 2, p. 33).

Movant's allegations have either been previously rejected on direct appeal or are otherwise meritless.

I. ISSUES PREVIOUSLY REJECTED ON DIRECT APPEAL

Many of the issues raised by movant in this proceeding were

previously raised and rejected on direct appeal. On direct appeal, movant succeeded in dismissing counsel and proceeding pro se. See August 1, 2000 order from the Eleventh Circuit granting movant's motion to proceed pro se and allowing appointed counsel to withdraw, attached hereto as Exhibit B. Movant then filed a supplemental appellate brief which raised the same issues which are addressed in Grounds 1-3, and 4(a)-(d) supra. See August 24, 2000 order from the Eleventh Circuit noting the filing of movant's supplemental appellate brief, attached hereto as Exhibit C, and the supplemental appellate brief, attached hereto as Exhibit D.

Although, in rendering its decision, the Eleventh Circuit discussed in detail only the issue which had been raised in the brief filed by counsel on movant's behalf, the decision clearly reflects that the Court had also reviewed and rejected the arguments presented in movant's pro se supplemental appellate brief. The Court began its discussion by stating: "After reviewing the record, we see no merit to any of the arguments Simmons makes in this appeal." It then specifically discussed the issue which had been raised by court-appointed counsel before he was allowed to withdraw, i.e., whether the district court had properly limited the defense's cross-examination of a government witness concerning a non-testifying confidential informant's criminal history. The Court, however, then concluded: "Therefore, we reject this argument and *all other arguments Simmons makes in*

this appeal" (CR-DE 100) (emphasis added).

Thus, because the issues raised in Grounds 1-3, and 4(a)-(d) of movant's §2255 motion were already raised and rejected on direct appeal, they should not be reconsidered here. United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) ("[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255," citing United States v. Natelli (citation omitted)), cert. denied, 121 S.Ct. 892 (2001).

II. MOVANT'S REMAINING CLAIMS ARE PROCEDURALLY BARRED

Movant's remaining claims as set forth in Ground 4(e) and Ground 5 are procedurally barred for movant's failure to raise them at an earlier stage unless he can show cause excusing his failure to raise the issue previously and actual prejudice resulting from the alleged errors, or a fundamental miscarriage of justice. Holladay v. Haley, 209 F.3d 1243, 1254 (11th Cir. 2000); United States v. Nyhuis, supra 211 F.3d at 1344 (11th Cir. 2000). Furthermore, even though the law may have been settled against the defendant in his circuit on the legal questions involved, "the futility of presenting an objection ... cannot alone constitute cause for a failure to object at trial." Engle v. Isaac, 456 U.S. 107, 130 (1982); see also Bousley v. United States, 523 U.S. 614, 623 (1998).

Movant here claims that counsel was ineffective for failing to

previously present all the issues raised in the motion. Although ineffective assistance of counsel may satisfy the cause exception to a procedural bar, it will do so only if a review of the claims movant complains counsel failed to raise were significant enough to have affected the outcome of the case. Movant cannot make that showing here.

The standard for ineffective assistance of counsel is found in the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders that result unreliable.

Id. At 687. The Supreme Court instructed that courts need not address both prongs "if the defendant makes an insufficient showing on one." Id. at 697; Marek v. Singletary, 62 F.3d 1295, 1298 (11th Cir. 1995).

With respect to the first prong of the test, the Supreme Court advised that counsel's performance should be evaluated for

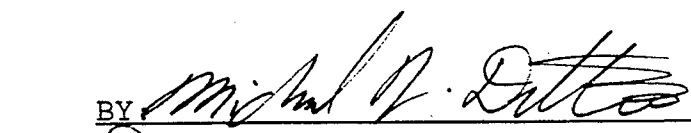
rejected by the Eleventh Circuit or are otherwise meritless as discussed supra, movant has not demonstrated any prejudice resulting from counsel's alleged deficient performance. Thus, his claims of ineffective assistance of counsel must also fail.

CONCLUSION

For the foregoing reasons, movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. §2255 should be denied.

Respectfully submitted,

GUY A. LEWIS
UNITED STATES ATTORNEY

BY 
TERRENCE J. THOMPSON
ASSISTANT UNITED STATES ATTORNEY
COURT NO. A5500063
500 E. BROWARD BOULEVARD, SUITE 700
FORT LAUDERDALE FL 33394
TEL. (954) 356-7254
FAX (954) 356-7228

CERTIFICATE OF SERVICE

This is to certify that a copy of the within and foregoing response has been mailed, postage prepaid, this 6th day of July, 2001, to: Bruce Simmons, Reg. No. 54822-004, F.C.I. - Miami, P.O. Box 779800, Miami, Florida, 33177-0200.

for TERRENCE J. THOMPSON
ASSISTANT UNITED STATES ATTORNEY

Received 8/14/01
M. Vallance

APPENDIX A-10

CONFIDENTIAL

BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT

Judicial Complaint No. 11-10-90021

IN THE MATTER OF A COMPLAINT FILED BY BRUCE SIMMONS

IN RE: The Complaint of Bruce Simmons against Joel F. Dubina, United States Circuit Judge for the United States Court of Appeals for the Eleventh Circuit, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

Mr. Bruce Simmons filed this Complaint against U.S. Circuit Judge Joel F. Dubina pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States.

The record shows that in Appeal No. 99-12064 the U.S. Court of Appeals for the Eleventh Circuit ("the Court") affirmed Mr. Simmons' criminal convictions in an opinion issued on October 27, 2000. Mr. Simmons filed a § 2255 habeas corpus petition in Case No. 01-civ-6504-Zloch that was dismissed by the district court on August 22, 2002. In Appeal No. 03-10043 Mr. Simmons moved to file a mandamus petition in forma pauperis, and that motion was denied by the Court on February 20, 2003. On June 27, 2006, Mr. Simmons filed a civil rights complaint against all active Eleventh Circuit judges in Case No. 1:06-cv-01541-WSD. On July 25, 2006, the district court *sua sponte* dismissed the complaint for failing to state a claim. In Appeal No. 06-15755, Mr. Simmons appealed the district court's decision, and in an opinion issued on March 16, 2007, the Court affirmed the district court's decision. Judge Dubina was on the merits panel in Appeal No. 06-15755.

In brief, Mr. Simmons complains that in its opinion in Appeal No. 06-15755, the Court stated that Mr. Simmons had asked for permission to file a supplemental brief in his direct criminal appeal, and that the Court had granted his request. Mr. Simmons points out that by Order dated January 21, 2000, the Court had in fact denied his motion for leave to file a supplemental brief.

Mr. Simmons alleges that the erroneous statement in the Court's opinion constitutes fraud and is a criminal act. Mr. Simmons alleges that the judges on the merits panel in Appeal No. 06-15755 "knowingly made false and misleading statements for the sole purpose of causing physical harm and injury to the complainant for exercising his

EXHIBIT C
1 of 2

constitutional right to file a Civil Action against the entire Eleventh Circuit panel of judges." (Emphasis provided by complainant)

Mr. Simmons provides no evidence, and I can determine no basis for concluding that Judge Dubina or any other panel member knew that the statement in the Court's opinion with respect to the filing of a supplemental brief was incorrect.

The allegations of this Complaint are "directly related to the merits of a decision or procedural ruling" or the Complaint "is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists," or both. Therefore, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.

U.S. Circuit Judge

Exh. C
2 of 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-11064-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRUCE SIMMONS,

Defendant-Appellant.

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

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O R D E R:

The "motion for leave to file supplemental brief . . .", filed by Appellant himself, is DENIED.

The motion to withdraw as counsel for Appellant filed by attorney Alvin Entin is DENIED.

Appellee's motion to strike Appellant's "motion for leave to file supplemental brief . . ." is DENIED.

Appellant's motion to stay the time for filing Appellant's reply brief is DENIED AS MOOT. Appellant is directed to file his reply within fourteen (14) days of the date of this Order.

Charles R. Wilson

UNITED STATES CIRCUIT JUDGE

Exh D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14385-DD

BRUCE SIMMONS,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

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

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

BEFORE: WILLIAM PRYOR, Chief Judge, GRANT and LUCK, Circuit Judges.

PER CURIAM:

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

ORD-46