APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 20-10731

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BENNY DENNIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:17-CV-2

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

EXHIBIT-A 2 pages

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Appeal from the United States District Court
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USDC No. 7:17-CV-2

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:*

Benny Dennis, federal prisoner number # 48551-177, applies for a certificate of appealability (COA) following the district court's denial of his 28 U.S.C. § 2255 motion, wherein he sought to challenge his conviction on one count of possession with intent to distribute methamphetamine. Dennis argues that his guilty plea was not knowingly and voluntarily entered due to

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

ineffective assistance of counsel, and that the district court failed to hold an evidentiary hearing.

To obtain a COA, a defendant must first make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies a COA on the merits, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Dennis has made no such showing. Accordingly, his motion for a COA is DENIED. Dennis's motion for the appointment of counsel is also DENIED.

As Dennis fails to make the required showing for a COA on his constitutional claim, "we have no power to say anything about his request for an evidentiary hearing." *United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020), *petition for cert. filed* (U.S. Mar. 18, 2021) (No. 20-7553).

EXHIBIT-B 14 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNY DENNIS, Movant,	§	
v.	§	Civil Action No. 7:17-cv-002-O
UNITED STATES OF AMERICA, Respondent.	§	Criminal Action No. 7:14-cr-011-O

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is Benny Dennis's Motion to Vacate, Correct, or Set Aside Sentence filed pursuant to 28 U.S.C. § 2255. Upon review of the motion and of the record in this case, the Court finds that the motion should be denied.

Background

Benny Dennis entered a plea of guilty to the charge of Possession with Intent to Distribute a Schedule II Controlled Substance and was sentenced to 480 months confinement. *See United States v. Dennis*, No. 7:14-cr-011-O (N.D. Tex. 2015) (hereinafter "CR, ECF No. ___"), Judgment, ECF No. 65. His conviction was affirmed on direct appeal. *Id.* at CR, ECF No. 81.

In support of the instant motion, Dennis presents the following grounds for relief:

1. ineffective assistance of counsel due to erroneous information provided by counsel which resulted in an involuntary plea of guilty;

2. ineffective assistance of counsel for failure to object to improper joinder of offenses in the indictment and for failure to file a motion for severance;

3. ineffective assistance of counsel for failure to object to the indictment under the prohibition of duplicity found in Rule 8, Federal Rules of Criminal Procedure;

4. ineffective assistance of counsel for failure to consult with him prior to filing objections to the Presentence Report;

5. ineffective assistance of counsel for counsel's failure to object to the Court's procedural error in determining the drug quantity attributable to him, and the Court's findings of possession of a firearm, maintaining a premises, and obstruction of justice;

6. ineffective assistance of counsel for failing to object to the Government's breach of the plea agreement;

7. ineffective assistance of counsel for failing to object to the Court's modification of the plea agreement; and,

8. ineffective assistance of counsel for failing to object to the Court's jurisdiction over Defendant Dennis and the subject matter of the offense charged.

See Motion to Vacate, ECF No. 1 at 7-9.

Legal Standards

28 U.S.C. § 2255 provides that a prisoner in custody under sentence of a federal court may file a motion to vacate, set aside, or correct the sentence in the court which imposed the sentence. The statute states four grounds upon which relief may be claimed:

1. that the sentence was imposed in violation of the Constitution or laws of the United States;

2. that the court was without jurisdiction to impose such sentence;

3. that the sentence was in excess of the maximum authorized by law; and,

4. that the sentence is otherwise subject to collateral attack.

28 U.S.C. § 2255(a); *Hill v. United States*, 368 U.S. 424, 426-27 (1962). Section 2255 does not mandate habeas relief to all who suffer trial errors. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A 1981). It is limited to grounds of constitutional or jurisdictional magnitude, *Limon-Gonzalez v. United States*, 499 F.2d 936, 937 (5th Cir. 1974), and for the narrow spectrum of other injury that "could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *Capua*, 656 F.2d at 1037.

When, as in the case at bar, a criminal defendant pleads guilty, he has entered more than a mere confession; a guilty plea is an admission that the defendant committed the charged offense. *North Carolina v. Alford*, 400 U.S. 25, 32 (1970); *Taylor v. Whitley*, 933 F.2d 325, 327 (5th Cir. 1991). Once a criminal defendant has entered a plea of guilty, all nonjurisdictional defects in the prior proceedings are waived except claims of ineffective assistance of counsel relating to the voluntariness of the guilty plea. *E.g., United States v. Daughenbaugh*, 549 F.3d 1010, 1012 (5th Cir. 2008); *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983); *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982).

The Sixth Amendment of the United States Constitution guarantees a criminal defendant "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a convicted defendant seeks relief on the ground of ineffective assistance of counsel, he must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687-91, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged ineffective by hindsight. [citations omitted]. Rather, inquiry must be made into the totality of the circumstances surrounding counsel's performance to determine whether reasonably effective representation was provided." *Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the

challenged action might be considered sound trial strategy. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993); *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988).

To satisfy the prejudice prong of the *Strickland* test in the context of a guilty plea, a petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *accord Craker v. McCotter*, 805 F.2d 538, 541 (5th Cir. 1986). It is not enough for a habeas petitioner to merely allege deficiencies on the part of counsel. He must affirmatively plead the resulting prejudice in his habeas petition. *Hill v. Lockhart*, 474 U.S. at 59-61; *Bridge v. Lynaugh*, 838 F.2d at 773. A court reviewing an ineffectiveness claim need not consider the two inquires under *Strickland* in any particular order since a failure to establish either requirement necessarily defeats the claim. *Strickland*, 466 U.S. at 697; *Smith v. Puckett*, 907 F.2d 581, 584 (5th Cir. 1990).

Discussion

In his first ground for relief, Movant Benny Dennis complains that his first attorney, Dustin Nimz, was ineffective because he provided erroneous information regarding Dennis's potential guideline sentence range and coerced him into pleading guilty which resulted in an involuntary plea and an involuntary waiver of the right to appeal. *See* Amended Brief in Support, ECF No. 5 at 3. Specifically, Dennis claims that counsel told him that, under the Sentencing Guidelines, his sentence would be calculated at a base offense level of 28 due to a drug quantity of 27.98 grams of methamphetamine and that the offense level would be reduced to 25 after a three-point reduction for acceptance of responsibility and then to level 23 after an additional two-point reduction due to an amendment to the November 2014 Sentencing Guidelines (Amendment 782). *Id.* at 4. Dennis

claims that counsel then calculated that his sentence exposure, at level 23 with a criminal history category of III, was 57 to 71 months. *Id.* Dennis claims to have repeatedly professed his innocence but was told by counsel, "sometimes you have to plea[d] guilty even though you are innocent." *Id.* at 5. Dennis claims that counsel failed to investigate the facts of his case, coerced his plea of guilty by threatening a sentence of 35 years or more if he went to trial, and instructed him to lie by admitting his guilt at the rearraignment hearing. *Id.* at 6-8.

In his second amended brief in support of his first ground for relief, Dennis additionally claims that he "has consistently alleged that attorney Nimz provided misleading and erroneous advice regarding the consequences of Dennis pleading guilty." *See* ECF No. 24 at 12. Dennis brought this issue to the Court's attention at sentencing and now argues that he "moved to withdraw his guilty plea several times prior to sentencing, and has consistently maintained his innocence and avowed he would have gone to trial" but for the erroneous advice of counsel. *Id.* at 14, 15.

A defendant's guilty plea must be made voluntarily, and the defendant must "make related waivers knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). A determination of whether a defendant understands the consequences of his guilty plea does not require a trial court to determine that the defendant has a perfect understanding of the consequences. The court must only ascertain whether the defendant has a realistic or reasonable understanding of his plea. *See United States v. Gracia*, 983 F.2d 625, 627-28 (5th Cir. 1993).

Courts considering challenges to guilty plea proceedings "have focused on three core concerns: absence of coercion, the defendant's understanding of the charges, and a realistic

understanding of the consequences of the guilty plea." *Gracia*, 983 F.2d at 627–28. A realistic understanding of the consequences of a guilty plea means that the defendant knows the "immediate and automatic consequences of that plea such as the maximum sentence length or fine." *Duke v. Cockrell*, 292 F.3d 414, 416 (5th Cir. 2002). Further, "[w]hen the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, . . . the defendant will be held to the bargain to which he agreed." *United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005) (quoting *United States v. Portillo*, 18 F.3d 290, 293 (5th Cir. 1994)).

The record in this case reflects that Dennis freely and voluntarily entered a plea of guilty to the charge of Possession with Intent to Distribute a Schedule II Controlled Substance. Dennis signed the Factual Resume admitting to the facts underlying the charge against him and admitting his guilt in committing the offense. *See* CR, ECF No. 14. He was fully aware that he faced a sentence between five and 40 years in prison, that the Court would impose his sentence at its discretion (so long as it was within the statutory maximum), that his guilty plea must not be induced or prompted by any promises, pressures, threats, force, or coercion of any kind, that he was pleading guilty only because he was guilty and for no other reason, and with no promises or assurances by anyone as to what his sentence would be. *See* CR, Plea Agreement, ECF No. 13 at 2-3; Transcript of Rearraignment, ECF No. 36 at 12-13, 17, 21. Dennis understood that his sentence would be determined after the Presentence Report was complete and that stipulated facts and also facts not mentioned in any stipulation could be taken into consideration by the Court in determining his sentence. *See* CR, Transcript of Rearraignment, ECF No. 36 at 13-14.

At his rearraignment, the Court advised Dennis of his constitutional and other rights during its guilty plea colloquy as required under Rule 11. *Id.* at 8-10. Dennis stated under oath that he

understood his rights as explained by the Court. *Id.* at 10. The elements of the offense were explained to Dennis and he admitted to committing the offense as charged. *Id.* at 15-16, 24. He further testified that there were no promises or assurances of any kind made in order to induce him to enter a plea of guilty, *id.* at 21, that he had discussed the sentencing guidelines and how they applied to his case with counsel, *id.* at 16, that he had discussed the case and charges against him with his attorney, *id.*, that the facts stated in the Factual Resume were true, *id.* at 25, and that he was guilty of the offense charged, *id.* at 24.

"Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* When a § 2255 movant's factual allegations are refuted by his own testimony given under oath during his plea proceedings, he is not entitled to be heard on the new factual allegations absent corroborating evidence such as the affidavit of a reliable third person. *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985); *United States v. Sanderson*, 595 F.2d 1021, 1022 (5th Cir. 1979). "This result is necessitated by the interest of finality in the criminal process." *Sanderson*, 595 F.2d at 1022.

The record reflects that Dennis's constitutional and other rights were explained to him in detail and that his plea of guilty was knowing and voluntary. The fact that counsel may not have explained all of these rights to Dennis is of no moment. *See United States v. Cervantes*, 132 F.3d 1106, 1110-11 (5th Cir. 1998) (holding that a hearing was not necessary for a petitioner who alleged that counsel promised a lesser sentence where plea agreement and rearraignment colloquy contradicted his claim). Dennis's rights were fully explained to him by the Court and he stated

under oath that he understood his rights as explained. He has not identified any error on the part of the Court regarding its explanation of his rights during the rearraignment colloquy.

A guilty plea may be invalid if induced by unkept promises from counsel. *Id.* at 1110. For a defendant who seeks habeas relief on the basis of alleged promises that are inconsistent with representations he made in open court when entering his plea of guilty to prevail, he must prove: "(1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of the eyewitness to the promise." *Id.* To be entitled to an evidentiary hearing, the defendant must produce "independent indicia of the likely merit of [his] allegations, typically in the form of one or more affidavits from reliable third parties." *Id.* "If, however, the defendant's showing is inconsistent with the bulk of [his] conduct or otherwise fails to meet [his] burden of proof in the light of other evidence in the record, an evidentiary hearing is unnecessary." *Id.*; *see also United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985). Dennis's guilty plea was knowing and voluntary and made with sufficient awareness of the relevant circumstances and likely consequences. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). And he has failed to provide any independent evidence in support of his contentions that are at variance with the statements he made, or the answers he gave, while under oath at the rearraignment hearing, save a few motions filed by Dennis and statements made by him at sentencing.

Dennis's Rearraignment Hearing was conducted on September 30, 2014. *See* CR, ECF No. 19. The Presentence Report was filed on November 20, 2014. *See* CR, ECF No. 23 (SEALED). On December 22, 2014 Dennis filed a *pro se* motion to dismiss Dustin Nimz as his attorney for a variety of reasons. *See* CR, ECF No. 28. Among those reasons are Dennis's claims that Nimz coerced him into pleading guilty, even though Dennis told him he was innocent, and that Nimz

told Dennis that, if he entered a guilty plea, he was looking at a sentence range of eight to ten years (96 to 120 months). *Id.* at 3. On December 30, 2014, Attorney Nimz was replaced by attorney Bob Perry pursuant to Dennis's motion. *See* CR, ECF No. 31.

On March 1, 2015, five months after pleading guilty, Dennis filed a Motion to Withdraw Guilty Plea based in part on claim of "legal innocence" based on Fourth Amendment grounds of illegal search and seizure and because "withdrawal of the plea would not likely result in a trial, and even if it did, it would be very brief." *See* CR, ECF No. 35 at 4-5. Dennis also reasserted his earlier claims against Nimz, including his claims that Nimz coerced him into pleading guilty, even though Dennis told him he was innocent, and that Nimz told Dennis that, if he entered a guilty plea, he was looking at a sentence range of eight to ten years (96 to 120 months). *Id.* at 2. The motion was denied on March 19, 2015. *See* CR, ECF No. 42. On April 9, 2015 Dennis filed a Second Motion to Withdraw Guilty Plea, *pro se*, wherein he sought to withdraw his guilty plea based on his claims of ineffective assistance of attorneys Nimz and Perry. *See* CR, ECF No. 59. In this motion, Dennis stated that Nimz told him that, if he entered a guilty plea, he faced a sentence of 57 to 71 months. *Id.* at 6-7. Although he again claims to have "asserted his [innocence]," *id.* at 4, his testimony given under oath at his rearraignment belies that claim. Dennis did not assert his innocence, at least not to the Court. On April 10, 2015, Dennis filed *pro se* objections to the Presentence Report. *See* CR, ECF No. 62 (SEALED). Defendant's objections elaborate on defenses he believed that he had against the charged offense rather than any claim of actual innocence. *See id.*

At sentencing, Dennis raised a variety of claims of ineffective assistance of counsel against both attorney Nimz and attorney Perry. *See* Transcript of Sentencing, CR, ECF No. 79. Among his

statements was Dennis's claim that Nimz had told him that he was facing a sentence range of 57 to 71 months if he entered a guilty plea. *Id.* at 7. During his criticism of attorney Perry's performance, Dennis stated that he told Perry he was innocent and that Perry said he was going to withdraw from the case. *Id.* at 8. Perry stated to the Court, "Your Honor, that's not true." *Id.*

Plaintiff continued with his statements after which the Government responded. The Government noted, among other things, that Dennis benefitted greatly from the plea agreement. In exchange for his plea, the Government did not pursue all charges returned in the indictment, felon in possession and conspiracy to distribute methamphetamine. *Id.* at 35. Had the government pursued those charges and obtained a conviction, Dennis would have been facing a sentence of 15 years to life. *Id.* at 35. The Government also explained many more aspects involved in the case. *Id.* at 29-36. In response, Dennis told the Court that if he had known everything just explained by the Prosecutor, he would have had a better understanding of what was going on with the case and that's why he asked to withdraw his guilty plea and get another attorney who would explain the situation in a manner that he could understand. *Id.* at 38. Notably, Dennis did not profess his innocence at sentencing nor did he ask for a trial.

With regard to his first ground for relief, Dennis has failed to present any independent indicia, such as an affidavit of a credible third party, to support the likely merit of his allegation that Nimz coerced him into pleading guilty and promised him a much lower sentence than the sentence imposed. Moreover, the bulk of his conduct leading up to final judgment supports the veracity of his guilty plea. Dennis signed the Factual Resume and the Plea Agreement and stated under oath that he was guilty of the offence charged, that he had not been coerced into pleading guilty, and that no promises had been made with regard to the sentence that might be imposed.

Dennis's claim of a statement as to the sentencing guideline range calculate by Nimz changes from a range of 96 to 120 months, to a later claim of 57 to 71 months. The Court finds that, in light of the absence of any independent evidence to support Dennis's first ground for relief along with inconsistencies in his earlier claims of an erroneous sentence range calculated by attorney Nimz, Dennis has failed to overcome the evidence found in the Factual Resume, the Plea Agreement, and most importantly, Dennis's statements made under oath at rearraignment. The Court finds that Dennis is not entitled to relief on this ground. Rather, he is bound by his plea of guilty.

In his second and third grounds for relief, Dennis claims that counsel was ineffective for failing to object to improper joinder and duplicity in the indictment. *See* ECF No. 1 at 7-8. But he has not explained how or why the indictment was flawed or specifically, what objections counsel should have made. Therefore, Dennis cannot prevail on these claims.

Conclusory allegations are insufficient to obtain relief under § 2255. *United States v. Woods*, 870 F.2d 285, 288 n. 3 (5th Cir. 1989) ("mere conclusory allegations on a critical issue" are insufficient to support Section 2255 relief); *United States v. Daniels*, 12 F. Supp. 2d 568, 575-76 (N.D. Tex. 1998) (conclusory allegations cannot serve as the basis for a claim of ineffective assistance of counsel). A movant alleging ineffective assistance of counsel "must identify specific acts or omissions; general statements and conclusory charges will not suffice." *Knighton v. Maggio*, 740 F.2d 1344, 1349-50 (5th Cir. 1984). Without more and without the required showing of prejudice, Movant's ineffective assistance of counsel claim fails. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). "[C]onclusory allegations of ineffective assistance of counsel do not raise a constitutional issue" on federal collateral review. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000).

In his fourth ground for relief, Dennis claims that counsel was ineffective for failing to consult with him prior to filing objections to the Presentence Report. *See* ECF No. 1 at 8. Here, Dennis presents another conclusory allegation which fails to merit relief. Moreover, he has failed to describe how counsel's alleged failure to consult with him prior to filing objections to the Presentence Report resulted in prejudice as required under *Strickland*. Dennis cannot prevail on this claim.

In ground for relief number five, Dennis claims that counsel was ineffective at sentencing for failing to object to the drug quantity attributed to him, the Guideline points added for obstruction of justice, the points added for possession of a firearm, and the points added for maintaining a premises for manufacturing or distributing a controlled substance. *See* Brief in Support, ECF No. 5 at 11-12. Dennis claims that counsel was ineffective for failing to object to these sentencing enhancements because they were not set forth in the Factual Resume or in the Plea Agreement. *Id.*

Here, Dennis appears to raise an argument under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490-91. The United States Court of Appeals for the Fifth Circuit has held that "*Apprendi* only applies when the defendant is sentenced above the statutory maximum and that *Apprendi* has no effect on the district court's determination of drug quantity under U.S.S.G. § 2D1.1(c)." *United States v. McWaine*, 290 F.3d 269, 274 (5th Cir. 2002) (citing *United States v. Doggett*, 230 F.3d 160, 165-66 (5th Cir. 2000)). "*Apprendi* [is] limited to facts [that] increase the penalty beyond the statutory maximum and does

not invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines." *Id.* In the case at bar, Defendant Dennis was not sentenced beyond the statutory maximum. *See* Addendum to Presentence Report, CR, ECF No. 55-1 at 7 (stating that the statutory maximum sentence was 480 months). Therefore, he is not entitled to relief under *Apprendi.*

Witness statements providing information as to drug quantities may be included in a presentence report and, absent competent rebuttal evidence, a district court may rely upon such statements at sentencing. *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009). In making a factual finding as to the applicable quantity of drugs for sentencing purposes based on relevant conduct, the court is entitled to consider estimates, provided that the estimates are reasonable and based on "relevant and sufficiently reliable evidence." *United States v. Betancourt*, 422 F.3d 240, 247-48 (5th Cir. 2005); *see United States v. Medina*, 161 F.3d 867, 876 (5th Cir. 1998) (noting that the quantity of drugs need not be limited to the actual quantities seized; the district judge can make an estimate).

Review of the record reflects that all four objections that Dennis claims counsel failed to make at sentencing were actually made by attorney Dustin Nimz in Defendant's Objections to Presentence Report. *See* ECF No. 25. At sentencing, the objections were overruled. *See* CR, ECF No. 29 at 28. Counsel may not be deemed ineffective for raising objections that were overruled by the Court. *Youngblood v. Maggio*, 696 F.2d 407, 410 (5th Cir. 1983). Moreover, facts resulting in additional guideline points may be stated in a Presentence Report and need not be set forth in a Factual Resume or Plea Agreement. Absent proof from a Defendant that the Presentence Report is inaccurate, the District Court is free to rely on information presented in the Report at the sentencing stage. *United States v. Patten*, 40 F.3d 774, 777 (5th Cir. 1994). Here, Dennis does not

identify the proof that would have been available to counsel to show that he did not attempt to obstruct justice, did not possess a firearm, did not maintain a premises for manufacturing or distributing a controlled substance, and did not possess the drug quantity set forth in the Presentence Report. Dennis is not entitled to relief in this ground.

In his sixth ground for relief, Dennis claims that attorney Bob Perry rendered ineffective assistance for failing to object to the Government's breach of the plea agreement. *See* ECF No. 1 at 9. Dennis argues that the government breached the Plea Agreement and the Factual Resume because both documents stipulated to a drug quantity of 27.98 grams of methamphetamine but, at sentencing, he was held accountable for 530.9 grams. *See* ECF No. 5 at 21-24.

The Plea Agreement and Factual Resume filed in this case both state that Dennis possessed with intent to distribute "five grams or more" of methamphetamine. *See* CR, ECF Nos. 13, 14. Neither document contains a stipulation limiting the drug quantity attributable to Dennis to 27.98 grams of methamphetamine. Therefore, the Government did not breach the Plea Agreement or the Factual Resume and any objections made by counsel regarding such breaches would have been frivolous. Counsel may not be deemed ineffective for failing to make a frivolous objection. Dennis is not entitled to relief on this ground.

In his seventh ground for relief, Dennis claims that attorney Bob Perry provided ineffective assistance when he allowed the Court to piece-meal and modify the Plea Agreement. In his eighth ground for relief, Dennis claims that attorney Dustin Nimz rendered ineffective assistance by failing to object to the Court's lack of personal jurisdiction over Benny Dennis and lack of subject matter jurisdiction over the offense charged. *See* ECF No. 1 at 9. These allegations are conclusory in nature and, as such, fail to warrant relief. Moreover, Dennis has failed to describe how the

alleged deficiencies on the part of his attorneys resulted in prejudice as required under *Strickland*. Dennis cannot prevail on these grounds for relief.

Conclusion

Where it "plainly appears" that a movant "is not entitled to relief" on his Section 2255 motion, the motion should be dismissed. Rule 4(b), RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS.

For the foregoing reasons, the Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**.

SO ORDERED this **1st day** of **June, 2020**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNY DENNIS,	§	
	§	
Movant,	§	
	§	**Civil Action No. 7:17-cv-002-O**
v.	§	
	§	**Criminal Action No. 7:14-cr-011-O**
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that the motion to vacate, set aside, or correct sentence is **DENIED**.

SIGNED this **1st day** of **June, 2020**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNY DENNIS,	§	
	§	
Movant,	§	
	§	**Civil Action No. 7:17-cv-002-O**
v.	§	
	§	**Criminal Action No. 7:14-cr-011-O**
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER OF THE COURT ON
CERTIFICATE AS TO APPEALABILITY

This is a motion to vacate, set aside, or correct sentence brought under 28 U.S.C. § 2255. The Court has entered its decision and, pursuant to 28 U.S.C. § 2253(c), a certificate of appealability is hereby **DENIED**.

REASONS FOR DENIAL: For the reasons stated in the Court's Findings of Fact and Conclusions of Law, which are hereby adopted and incorporated by reference, Benny Dennis has failed to demonstrate that reasonable jurists would find it debatable whether the District Court was correct in its ruling. *See Slack v. McDaniel*, 529 U.S. 478 (2000); *Morris v. Dretke* 379 F.3d 199, 204 (5th Cir. 2004).

SO ORDERED this **1st day** of **June, 2020**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE