Appx "A"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 19, 2023

Cornelius R. Caple
FCI Coleman Medium - Inmate Legal Mail
PO BOX 1032
COLEMAN, FL 33521-1032

Appeal Number: 23-10957-J
Case Style: Cornelius Caple v. USA
District Court Docket No: 9:22-cv-80454-RLR
Secondary Case Number: 9:19-cr-80177-RLR-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10957

CORNELIUS R. CAPLE,
a.k.a. Murda,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cv-80454-RLR

ORDER:

Cornelius Caple moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion. He also moves for leave to proceed on appeal *in forma pauperis*. Caple's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed on appeal *in forma pauperis* is DENIED as moot.

Britt C. Grant

UNITED STATES CIRCUIT JUDGE

Appx B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CV-80454-ROSENBERG
(19-CR-80177-ROSENBERG)

CORNELIUS R. CAPLE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Movant's 28 U.S.C. § 2255 Motion to Vacate in which he raises three claims [DE 1]. The Court has considered the Motion [DE 1], supporting Memorandum of Law [DE 1-1] ("Motion"), the Government's Answer [DE 6], Movant's Response to Answer [DE 7], Supplement to Movant's Memorandum of Law [DE 8], pertinent parts of the record and is otherwise fully advised in the premises. For the reasons discussed below, the Motion is **DENIED**.

BACKGROUND

Movant was convicted on charges of selling controlled substances to Palm Beach County Sheriff's Office undercover officers on several occasions in early 2019: February 22 (0.0693 grams of heroin and 0.1384 grams of fentanyl) [DE-CR 24 ¶ 4], March 5 (0.0946 grams of heroin) [*id.* ¶ 5], March 8 (0.478 grams of heroin) [*id.* ¶ 6], and July 17 (0.1012 grams of 6-Monoacetylmorphine) [*id.* ¶ 7]. [1]

[1] Citations to Movant's criminal case are noted as DE-CR.

On September 24, 2019, a federal grand jury returned a four-count Indictment against Movant, charging four counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(c) [DE-CR 11]. On November 13, 2019, Movant pled guilty to all counts of the Indictment pursuant to an open plea agreement. DE-CR 38 at 15–16. During the change of plea hearing, Movant affirmed under oath that he had received a copy of the Indictment and discussed the charges fully with his attorney. *Id.* at 3. He further testified that he completed the ninth grade, he could read and write in English, and he was not under the influence of drugs, alcohol, or other intoxicants. *Id.* The Court informed Movant that it had jurisdiction and authority to impose any sentence up to the maximum permitted by law, which was 20 years. *Id.* at 6–9. The Government recited the essential elements and the factual basis for each charge. *Id.* at 11–13. The Court accepted Movant's guilty plea and found that it was "freely, voluntarily, and intelligently entered . . . with no promises or threats, and without any mental impediment of any kind." *Id.* at 16.

After entry of the plea, the United States Probation Office ("USPO") prepared a presentence investigation report ("PSI") that determined Movant's total offense level to be 29. DE-CR 22 ¶ 23. The PSI stated Movant was responsible for 1.027 kilograms of converted drug weight. *Id.* ¶ 13. Pursuant to United States Sentencing Commission Guidelines Manual ("U.S.S.G.") § 2D1.1, the minimum offense level for any combination of controlled substances is level 12. U.S.S.G. § 2D1.1(8)(C)(D). The PSI classified Movant as a "career offender" under U.S.S.G. § 4B1.1 because the Movant had at least two prior felony convictions for a controlled substance offense and/or a crime of violence. DE-CR 22 ¶ 20. The predicate offenses for the enhancement were Movant's (1) 2006 Florida state court conviction for possession of cocaine, heroin, and less than 20 grams of marijuana, with intent to sell in docket number 2006CF002401A

(11th Cir. 2020). On December 4, 2020, the Eleventh Circuit affirmed. *Id.* On October 4, 2021, the Supreme Court denied Movant's petition for a writ of certiorari. CR-DE 43.

On March 22, 2022, the Movant timely filed the instant Motion. The Motion sets forth three primary arguments: (1) Movant's career criminal sentence enhancement is unconstitutional because of the holding in *Borden v. United States*, 141 S. Ct. 1817 (2021); (2) Movant's plea was not intelligently made because he entered it without considering *Borden*; and (3) appellate counsel was ineffective for failing to challenge Movant's career offender enhancement on appeal. DE 1 at 4–5. The Government filed an Answer [DE 6] to this Court's Order to Show Cause [DE 3] and Movant filed a Response [DE 7] and Supplement to Movant's Memorandum of Law [DE 8]. The Motion is now ripe for review.

APPLICABLE LAW

A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). If a § 2255 claim is meritorious, the court must vacate and set aside the judgment, discharge the prisoner, grant a new trial, or correct the sentence. The burden of proof is on Movant, not the Government, to establish that vacatur of the conviction or sentence is required. *See Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *rehearing en banc denied*, 899 F.3d 1218 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019).

A movant challenging counsel's effectiveness must demonstrate that (1) counsel's performance was deficient, and (2) there is a reasonable probability that the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Deficient performance requires Movant to demonstrate that counsel's actions were unreasonable or fell below prevailing

[CR-DE 22 ¶ 20] and (2) 2018 Florida state court conviction for shooting into an occupied vehicle, aggravated assault with a firearm, and discharging a firearm in public in docket number 2017CF011869A. *Id.*

With the career offender enhancement, the Movant's offense level was increased to 32. DE-CR 22 ¶ 20. He received a three-level reduction for accepting responsibility, for a total offense level of 29. *Id.* ¶¶ 21–23. The Movant had a Criminal History Category of VI. *Id.* ¶ 64. The sentencing guideline range was 151 to 188 months, and the maximum term of imprisonment was 20 years as to each count. *Id.* ¶ 115.

Counsel for Movant filed several objections to the PSI, including Movant's classification as a career offender. DE-CR 23. Movant's counsel also filed a sentencing memorandum requesting a downward variance if the Court found him to be a career offender. CR-DE 26.

On January 22, 2020, the Court imposed a below-guidelines sentence of 132 months' imprisonment as to each of the counts, to run concurrently, followed by three years of supervised release. DE-CR 30. During sentencing, defense counsel again objected to Movant's career offender enhancement. DE-CR 39 at 12. Defense counsel stated that without the career offender enhancement, the guideline range would be 24 to 30 months based on an adjusted offense level 10 and a criminal history category VI. *Id.* The Court found that Movant was a career offender because Eleventh Circuit precedent determined the drug and assault statutes under which Movant was convicted qualified as predicate offenses for the career offender enhancement. *Id.* at 13.

Movant filed a direct appeal contending that his 2006 drug conviction was not a "controlled substance offense" and that his 2018 aggravated assault conviction did not constitute a "crime of violence," respectively, under U.S.S.G. § 4B1.1. *United States v. Caple*, 830 F. App'x 632, 633

professional competence demanded of defense attorneys. *Id.* at 688. The *Strickland* deficiency prong does not require a showing of what the best or good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). *Strickland*'s prejudice prong requires Movant to establish that, but for counsel's deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Bare and conclusory allegations of ineffective assistance do not satisfy the *Strickland* test. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012). Further, if Movant cannot meet one of *Strickland*'s prongs, the Court need not address the other prong. *Id.* at 697.

DISCUSSION

I. Application of Career Criminal Sentencing Enhancement

In Claim 1, Movant argues that his 132-month sentence was "imposed in violation of the . . . laws of the United States" (28 U.S.C. § 2255(a)) because the career criminal enhancement (U.S.S.G. § 4B1.1) can no longer be constitutionally applied to his sentence. DE 1-1 at 7. Specifically, Movant claims that his aggravated assault conviction no longer qualifies as a "violent felony" because "*Borden*, supra, is now new law . . . Movant's Florida aggravated assault does not apply to the Movant's career offender status because it can be proven with a mens rea of willful and reckless disregard for the safety of others." DE 1-1 at 7.

As the Government correctly notes in its Answer [DE 7], the first task is for the Court to determine whether Movant's claim is cognizable on collateral review, given that it a collateral attack on a sentence that is below the statutory maximum. *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014). The Court finds that Movant's argument regarding the career criminal enhancement does not present a cognizable issue, and even if it did, Movant is procedurally barred

from raising this argument because it was raised and rejected by the Eleventh Circuit on appeal. *Caple*, 830 F. App'x at 633.

a. Movant's claim is not cognizable under § 2255.

"Section 2255 does not provide a remedy for every alleged error in conviction and sentencing." *Spencer*, 773 F.3d at 1138. An error of law does not provide a basis for collateral attack "unless the claimed error constitute[s] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Addonizio*, 442 U.S. 178, 185–86 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). There are only three circumstances in which a complete miscarriage of justice occurs: (1) the movant's sentence exceeds the statutory maximum, (2) a prior conviction that was used to enhance the movant's sentence has been vacated, or (3) the movant demonstrates his or her actual innocence. *Spencer*, 773 F.3d at 1139.

In its Answer, the Government argues that "[the Movant's] claim is not cognizable on collateral review." DE 7 at 5 (citing *Spencer*, 773 F.4d at 1138–44). The Court agrees because the Movant has not shown a fundamental defect resulting in "a miscarriage of justice." *Hill*, 368 U.S. at 428. First, Movant's 132-month (or 11-year) sentence is below the 20-year statutory maximum. *See* 21 U.S.C. § 841(b)(1)(c). Second, Movant does not allege that a prior conviction used to enhance his sentence was vacated. Third, as described below, the Movant has not alleged any facts regarding his actual innocence of the crimes.

Movant claims that "he is not [ ] a career offender based on his actual innocence of being a career offender." DE 1 at 4. To demonstrate actual innocence, "a movant 'must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt' in light of the new evidence of innocence." *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "It is important to note . . .

that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Here, Movant does not argue that he is actually innocent of any crime. His argument is one of legal sufficiency—that he is not eligible for the career criminal enhancement because his 2018 aggravated assault conviction cannot constitutionally be used as a predicate "crime of violence." DE 1-1 at 7 (citing *Borden*, 141 S. Ct. at 1829). Accordingly, this is not an argument for actual innocence. *See Bousley*, 523 U.S. at 623.

In *Spencer*, the Eleventh Circuit considered a similar argument to that of Movant. The prisoner's sentence had been enhanced under the Armed Career Criminal Act ("ACCA") and one of his predicate offenses was felony child abuse. *Spencer*, 773 F.3d at 1136. After the Supreme Court issued a ruling narrowing the definition of "violent felony" in the ACCA, the prisoner filed a § 2255 motion to be resentenced without the career offender enhancement. *Id.* at 1137. The court rejected the prisoner's argument as one purporting "legal innocence" and explained that "[i]f we were to conclude that felony child abuse was not a 'crime of violence,' that legal conclusion would not negate the fact that [movant] committed a serious crime." *Id.* at 1143.

The same conclusion applies here. Movant does not deny selling controlled substances to undercover officers, which is the factual basis for his guilty plea. DE-CR 38 at 12. Therefore, the Movant does not argue that he is *actually innocent* but instead attacks the legal sufficiency of his career criminal designation. *See Spencer*, 773 F.3d at 1143 (noting "[e]ven if we were to agree with [movant] that he is 'innocent' as a career offender, that *legal* innocence falls far short of *factual* innocence . . . ."). Because Movant does not make a claim of actual innocence, his argument does not allege a "fundamental defect" cognizable on collateral review. *Spencer*, 773 F.3d at 1136; *Hill*, 368 U.S. at 428.

b. Movant's claim that the career criminal enhancement was improper is also procedurally barred.

Even if this claim is cognizable under *Spencer*, it is procedurally barred. "A procedural bar prevents a defendant from raising arguments in a § 2255 proceeding that he raised and we rejected on direct appeal." *Seabrooks v. United States*, 32 F.4th 1375, 1383 (11th Cir. 2022) (citing *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014)). In his direct appeal, Movant argued that his 2006 drug conviction is not a "controlled substance offense" because a mens rea element as to the substance's illegality should be implied for convictions under Florida's drug offense law, Fla. Stat. § 893.13. *Caple*, 830 F. App'x at 633. The Eleventh Circuit rejected this argument, citing precedent that a predicate state offense is not required to include a mens rea element of the controlled substance's illicit nature. *Id.* (citing *United States v. Smith*, 775 F.3d 1262, 1266 (11th Cir. 2014)). Movant also argued that his 2018 assault conviction is not a "crime of violence" and that Eleventh Circuit cases holding that aggravated assault under Florida's assault statute is a "violent felony" under the ACCA were wrongly decided. *Caple*, 830 F. App'x at 633. The court also rejected this argument. *Id.* (citing *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1338 (11th Cir. 2013) (holding that Florida aggravated assault qualifies as a violent felony under the ACCA)); *see also United States v. Lane*, 2023 WL 334400 (11th Cir. Jan. 20, 2023) (affirming *Turner*'s holding after *Borden*). Accordingly, this claim is procedurally barred.

Movant does not allege that his claim fits within one of the exceptions to the procedural bar rule: ineffective assistance of counsel or retroactive intervening change of law. *Seabrooks*, 32 F.4th at 1383 (citing *Davis v. United States*, 417 U.S. 33, 346 (1974)). An intervening change in law may excuse a procedural bar when the new law makes prohibited conduct noncriminal so that a prisoner's "conviction and punishment are for an act that the law does not make criminal." *Davis*, 417 U.S. at 346 (holding that prisoner convicted of failing to report for military service induction had cognizable § 2255 claim after the Ninth Circuit invalidated previous interpretation of Selective

Services Act that had criminalized his conduct). If Movant demonstrated that his sentence is based on behavior that used to be illegal but that the law has retroactively de-criminalized, then he could avail himself of this exception to the procedural bar. However, as explained below, the behavior underlying Movant's 2019 aggravated assault *has not* been decriminalized.

Movant cites *Borden* to circumvent the procedural bar. DE 1; 1-1; *Borden*, 141 S. Ct. at 1833. The holding in *Borden* was that only offenses requiring a mens rea of "purposeful or knowing conduct" can qualify as a "violent felony" under the ACCA. *Id.* Movant claims that Florida's assault statute can be violated with a mens rea of recklessness. DE 1-1 at 7. While he correctly presents *Borden*'s holding that "violent felony" enhancements under the ACCA based on *recklessness* are unconstitutional, the case is not helpful to Movant's argument. Post-*Borden*, the Supreme Court of Florida held that the Florida assault statute, Fla. Stat. § 784.011(1), "simply cannot be violated without the actor 'direct[ing] his action at[] or target[ing] another individual'" and required "at least knowing conduct." *Somers v. United States*, No. SC21-1407, 2022 WL 16984702, at *4 (Fla. Nov. 17, 2022).[2] Movant was subjected to the career criminal enhancement based on an assault conviction that required, as an element of the offense, "that the intentional threat to do violence be directed at or targeted towards another individual . . . ." Fla. Stat. § 784.011(1). Because the assault statute does not criminalize reckless conduct, it can be used to enhance a sentence under the U.S.S.G. career criminal provision or the ACCA. *Somers*, 2022 WL 16984702, at *4. For this reason, there has not been an intervening change in law to excuse the Movant's procedural bar on Claim 1. *Davis v. United States*, 417 U.S. 333, 346 (1974).

[2] While *Somers* concerned the definition of "violent felony" in the ACCA, that provision "closely tracks" the U.S.S.G.'s "crime of violence" provision. *James v. United States*, 550 U.S. 192, 206 (2007). "In determining whether a conviction is a 'crime of violence' under [the guidelines] we rely on cases interpreting the definition of 'violent felony' under the [ACCA] . . . because the definitions are substantially the same." *United States v. Dixon*, 874 F.3d 678, 680 (11th Cir. 2017).

c. Movant's predicate drug offense argument was procedurally defaulted.

In his Response and Supplement, Movant raises additional arguments about why his 2006 felony drug conviction cannot be used as a predicate offense for the career criminal enhancement. DE 7 at 4; DE 8 at 2. Movant argues in his Supplement–which he filed after his Response–that his 2006 drug conviction does not qualify as a "controlled substance offense" because the controlled substance in question "had ioflupane in [it]" and ioflupane is now exempted from list of controlled substances. DE 8 at 2. Movant did not raise this argument in his initial Motion or Memorandum. Therefore, the argument is waived. *In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) (holding that "[a]rguments not fully presented in a party's initial brief or raised for the first time in the reply brief are deemed waived."); *Oliveiri v. United States*, 717 F. App'x 966, 967 (11th Cir. 2018) (movant under § 2255 waived argument raised for the first time in reply brief).

Movant next argues that his 2006 drug conviction cannot be a predicate "controlled substance offense" for career criminal enhancement purposes because the applicable Florida statute did not require proof of express or implied mens rea. DE 7 at 4. Movant did not raise this argument in his Motion or Memorandum, and it is therefore waived. *Egidi*, 571 F.3d at 1163; *Oliveiri*, 717 F. App'x at 967. Additionally, the Eleventh Circuit rejected this argument on direct appeal. *Caple*, 830 F. App'x at 633. A conviction under Fla. Stat. § 893.13 constitutes a "controlled substance offense" within the meaning of the guidelines. *Smith*, 775 F.3d at 1266-68. Movant's argument that his previous felony drug conviction cannot serve as a predicate offense is therefore procedurally barred. *Seabrooks*, 32 F.4th at 1383.

II. Voluntariness of Guilty Plea

In Claim 2, the Movant argues that the "Movant's plea is an unknowing plea because had Movant known he would be unconstitutionally a career offender, he would never have pled guilty

. . . ." DE 1-1 at 8. Further, he argues that "[h]ad Movant known that he was not a career offender or that his State priors violated his Fifth and Sixth Amendment rights, he would not have pled guilty at all, but would have instead proceeded to trial and proved his innocence in a court of law." DE 1-1 at 8.

A guilty plea is open to collateral attack "if induced by promises or threats which deprive it of the character of a voluntary act . . . ." *Machibroda v. United States*, 368 U.S. 487, 493 (1962). However, a "voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be attacked." *Bousley v. United States*, 523 U.S. 614, 621 (1998). In this case, Movant does not claim that his attorney performed deficiently in representing him during plea negotiations. DE 1-1 at 7. "Counsel was not ineffective in this case, because counsel could not anticipate the future of *Borden* becoming the law of the land in the Supreme Court." *Id.* Rather, Movant's claim is that his plea was involuntary–not because it was coerced–but because it was unintelligently made.

The Court finds that this claim is procedurally defaulted because Movant did not raise it on appeal. *Seabrooks*, 32 F.4th at 1384; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990); *Montemoino v. United States*, 68 F.3d 416, 417 (11th Cir. 1995) (holding that "a defendant has no right to raise Guidelines sentencing issues in a § 2255 proceeding"). "[T]he voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley*, 523 U.S. at 621.

To overcome a procedural default, Movant must show cause and prejudice, miscarriage of justice, or actual innocence. *Seabrooks*, 32 F.4th at 1384. Movant does not allege that any of these apply. As for miscarriage of justice and actual innocence, the Movant does not state an actual innocence claim for the reasons explained in Section I(b), *supra*. Movant's citation to *Borden* does

not help because *Borden* did not hold that a conviction under Florida's assault statute could not be a predicate offense under the career criminal enhancement. As for cause and prejudice, Movant fails to allege either cause or prejudice and, accordingly, does not meet this exception. *Cross*, 894 F.2d at 1292.

Even if this claim were not procedurally defaulted, the Court finds that the Movant's plea was entered knowingly, voluntarily, and intelligently. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). In *Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977), the Supreme Court explained that "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea." Because of this, "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Id.* at 73-74. "There is a strong presumption that the statements made during the colloquy are true." *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994).

In this case, Movant swore under oath during his plea colloquy that no one forced him to plead guilty or made any promises or assurances to persuade him to plead guilty. DE-CR 38 at 3. He stated he wished to plead guilty because he was guilty. *Id.* at 5. Movant affirmed that he discussed the Sentencing Guidelines with his attorney, he did not need more time to review them, and he understood that if the Court imposed a higher sentence than expected, that would not be grounds to withdraw his guilty plea. *Id.* The Court entered a finding that Movant was "alert and intelligent, that he is fully competent and capable of entering an informed plea, and that . . . the plea is a knowing and voluntary plea, supported by an independent basis in fact containing each of the essential elements of the offense." DE-CR 38 at 16.

With this record, Movant cannot overcome the "strong presumption" that the representations he made during the colloquy were true. *Medlock*, 12 F.3d at 187. The Movant indicated that he was entering a plea agreement voluntarily and that he understood that the Court would issue a sentence after reviewing the PSI. The Court found that the Movant's plea was "knowing and voluntary." DE-CR 38 at 16; *United States v. Green*, 767 F. App'x 793, 798 (11th Cir. 2019) (district court's positive assessment of defendant's understanding of the plea agreement weighed in favor of finding that defendant understood the agreement).

III. Ineffective Assistance of Counsel

Movant argues appellate counsel was constitutionally ineffective for failing to argue on direct appeal that his career offender designation was invalid. DE 1 at 4. He also alleges that his counsel was ineffective for failing to appeal this issue in a post-conviction motion. *Id.* at 4–5. This claim fails because appellate counsel's performance was within "the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Johnson v. Sec'y, Fla. Dep't of Corr.*, 643 F.3d 907, 928 (11th Cir. 2011). In fact, appellate counsel did challenge the career offender designation on direct appeal. DE-CR 42 at 4. As to the Movant's second argument, movants are not entitled to assistance of counsel in postconviction proceedings. 18 U.S.C. § 3006A(a)(2)(B).

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2255 motion to vacate has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. §2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §2253(c)(2). Where a district court has rejected Movant's

constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Upon consideration of the record, a certificate of appealability shall not issue.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant's Motion to Vacate is **DENIED**.
2. Final judgment is entered in favor of Respondent.
3. No Certificate of Appealability shall issue.
4. Any pending motions are **DENIED** as moot.
5. The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED Chambers at West Palm Beach, Florida, this 2nd day of March, 2023.

Robin L. Rosenberg

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

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