No: 24-6021

Case No: 5:18-cr-00208-D-1
Case No: 5:23-cv-00623-D

In The Supreme Court Of The United States

MARK LEON ANDREWS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Petition For A Writ Of Certiorari

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6021

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK LEON ANDREWS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:18-cr-00208-D-1; 5:23-cv-00263-D)

Submitted: May 21, 2024 Decided: May 24, 2024

Before WYNN and BENJAMIN, Circuit Judges, and KEENAN, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Mark Leon Andrews, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mark Leon Andrews seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Limiting our review of the record to the issues raised in Andrews' informal brief, we conclude that he has not made the requisite showing. *See* 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."); *see also Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (stating "this court does not consider issues raised for the first time on appeal, absent exceptional circumstances" (cleaned up)). Accordingly, we deny a certificate of appealability and dismiss the appeal.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:18-CR-208-D
No. 5:23-CV-263-D

MARK LEON ANDREWS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

On May 15, 2023, Mark Leon Andrews ("Andrews" or "petitioner") moved pro se under 28 U.S.C. § 2255 to vacate, set aside, or correct his 288-month sentence [D.E. 167]. On July 27, 2023, the government moved to dismiss [D.E. 173] and filed a memorandum in support [D.E. 174]. On August 2, 2023, the court notified Andrews of the motion to dismiss, the consequences of failing to respond, and the response deadline [D.E. 175]. See Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). On September 26, 2023, Andrews responded in opposition [D.E. 180]. As explained below, the court grants the government's motion to dismiss and dismisses Andrews's motion to vacate.

I.

On May 21, 2020, Andrews pleaded guilty to possession of a firearm by a felon. See [D.E. 126, 145]. On November 4, 2020, the court held Andrews's sentencing hearing. See [D.E. 149, 150]. The court adopted the facts as set forth in the Presentence Investigation Report ("PSR") and resolved Andrews's objections. See PSR [D.E. 139] ¶¶ 8–10; Sent. Tr. [D.E. 161] 4–21; Fed. R. Crim. P. 32(i)(3)(A)–(B). The court calculated Andrews's total offense level to be 34, his criminal

history category to be VI, and his advisory guideline range to be 262 to 327 months' imprisonment. See PSR ¶ 73; Sent. Tr. 21. After thoroughly considering all relevant factors under 18 U.S.C. § 3553(a), the court sentenced Andrews to 288 months' imprisonment. See id. at 34–40. On November 10, 2020, Andrews appealed. See [D.E. 152, 154]. On May 12, 2022, the Fourth Circuit affirmed this court's judgment. See [D.E. 163, 164, 165].

On May 15, 2023, Andrews moved pro se under 28 U.S.C. § 2255 to vacate, set aside, or correct his 288-month sentence [D.E. 167]. In Andrews motion, he argues: (1) the court denied him his right to self-representation in violation of the Sixth Amendment; (2) the court ignored his inquiries about subject-matter jurisdiction; (3) the court improperly denied him a hearing to dismiss his court-appointed counsel; (4) the court did not adequately address his confusion about the charge against him or the nature of the proceedings; (5) his guilty plea is void because the Assistant United States Attorney lacked a license, and a person without a license allegedly cannot enter a contract; (6) the court failed to respond to his requests that the court identify "a claim for which relief can be granted" and "an injured party to bring remedy to"; (7) 18 U.S.C. § 922(g)(1) is unconstitutional; (8) he should have received a new detention hearing following the second superseding indictment; (9) the court used "law cases that had nothing to do with the matter at hand"; (10) his trial counsel filed motions in his case without his consent, including a motion to determine his competency and a motion to continue; (11) his trial counsel "refused to assist" him in understanding his prior felony convictions; and (12) his trial counsel told him if he "didn't plea" he would receive a life sentence and not be allowed to attend his own trial. [D.E. 167] 4–8. The government moves to dismiss Andrews's motion for failure to state a claim upon which relief can be granted. See [D.E. 173].

II.

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted" tests a petition's legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–63, 570 (2007); Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008); accord Erickson v. Pardus, 551 U.S. 89, 93–94 (2007) (per curiam). In considering a motion to dismiss, a court need not accept a petition's legal conclusions. See, e.g., Iqbal, 556 U.S. at 678. Similarly, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 677–79. Moreover, a court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment. See, e.g., Fed. R. Evid. 201(d); Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

In reviewing a section 2255 motion, the court is not limited to the motion itself. The court may consider "the files and records of the case." 28 U.S.C. § 2255(b); see United States v. Dyess, 730 F.3d 354, 359–60 (4th Cir. 2013); United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993). Likewise, a court may rely on its own familiarity with the case. See, e.g., Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977).

A prisoner generally cannot use section 2255 to raise claims he did not raise on direct appeal. See, e.g., Massaro v. United States, 538 U.S. 500, 504 (2003); Bousley v. United States, 523 U.S. 614, 621 (1998); United States v. Fugit, 703 F.3d 248, 253 (4th Cir. 2012); United States v. Sanders, 247 F.3d 139, 144 (4th Cir. 2001), abrogated on other grounds by Clay v. United States, 537 U.S. 522 (2003). In order to avoid such procedural default, a prisoner must plausibly allege "actual

innocence" or "cause and prejudice" resulting from an alleged sentencing error about which he now complains. See Bousley, 523 U.S. at 622–24; Coleman v. Thompson, 501 U.S. 722, 753 (1991); United States v. Frady, 456 U.S. 152, 170 (1982); United States v. Pettiford, 612 F.3d 270, 280–85 (4th Cir. 2010); Sanders, 247 F.3d at 144; United States v. Mikalajunas, 186 F.3d 490, 492–95 (4th Cir. 1999).

Andrews appealed his conviction. See [D.E. 152, 154]. Andrews, however, failed to raise his first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth claims on appeal. See [D.E. 20].[1] Andrews does not allege that he is actually innocent of the crime to which he pleaded guilty. Rather, he argues that he faced cause and prejudice when his appellate counsel refused to raise these claims. See [D.E. 167] 5–6.

For an ineffective assistance of counsel claim, the "Sixth Amendment entitles criminal defendants to the effective assistance of counsel—that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam) (quotations omitted). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding, including plea negotiations, trial, sentencing, and appeal. See, e.g., Lee v. United States, 582 U.S. 357, 363–65 (2017); Lafler v. Cooper, 566 U.S. 156, 164–65 (2012); Missouri v. Frye, 566 U.S. 134, 140 (2012); Glover v. United States, 531 U.S. 198, 203–04 (2001). "[S]entencing is a critical stage of trial at which a defendant is entitled to effective assistance of counsel, and a sentence imposed without effective assistance must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed." United States v. Breckenridge, 93 F.3d 132, 135 (4th Cir. 1996). To state a claim of ineffective assistance

[1] This citation is to Andrews's appeal docket, No. 20-4562.

of counsel in violation of the Sixth Amendment, Andrews must show that his attorney's performance fell below an objective standard of reasonableness, and he suffered prejudice as a result. See Strickland v. Washington, 466 U.S. 668, 687–91 (1984).

When determining whether counsel's representation was objectively unreasonable, a court must be "highly deferential" to counsel's performance and must attempt to "eliminate the distorting effects of hindsight." Id. at 689. Therefore, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. A party also must show that counsel's deficient performance prejudiced the party. See id. at 691–96. A party does so by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694.

Andrews alleges his appellate counsel was ineffective by failing to raise the claims he asked her to raise on appeal. See [D.E. 167] 5–6. Under Strickland, "[w]ith respect to performance, effective assistance of appellate counsel does not require the presentation of all issues on appeal that have merit." United States v. Allmendinger, 894 F.3d 121, 126 (4th Cir. 2018) (cleaned up); see United States v. Mason, 774 F.3d 824, 828–29 (4th Cir. 2014). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quotation omitted). As applied to appellate counsel, "[t]he ineffective assistance inquiry therefore requires a court to compare the strength of an issue not raised on direct appeal . . . with the strength of the arguments that were raised." Allmendinger, 894 F.3d at 126. Andrews fails to explain what his preferred appellate arguments were. See [D.E. 167] 5–6. Moreover, Andrews fails to plausibly allege that his suggested arguments

were stronger than those that appellate counsel raised. Accordingly, Andrews's first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth claims fail. See Strickland, 466 U.S. at 687–96.

In Andrews's tenth claim, he alleges his trial counsel was ineffective by filing motions without his consent, including a motion to determine Andrews's competency and a motion to continue. See [D.E. 167] 8. Trial counsel, however, did not have to obtain Andrews's consent before filing these pretrial motions. See Florida v. Nixon, 543 U.S. 175, 187 (2004); United States v. Chapman, 593 F.3d 365, 367–68 (4th Cir. 2010); Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998). Moreover, Andrews never "unequivocally declared" that he wanted to represent himself. Faretta v. California, 422 U.S. 806, 835 (1975). Thus, the court properly declined to permit Andrews to represent himself. Furthermore, at Andrews's Rule 11 hearing, Andrews swore that he was "completely and fully satisfied with [his] lawyers' legal services." Rule 11 Tr. [D.E. 145] 29. Accordingly, Andrews's tenth claim fails.

Alternatively, Andrews fails to plausibly allege that there is a "reasonable probability" that, but for his trial counsel's deficiency, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Andrews fails to plausibly allege that had his trial counsel not filed these motions without his consent that the result would have been different. Thus, Andrews has failed to plausibly allege that he was prejudiced by counsel's allegedly deficient performance. See Strickland, 466 U.S. at 691–92. Accordingly, Andrews's tenth claims fails. See Strickland, 466 U.S. at 687–96.

In Andrews's eleventh claim, he alleges his trial counsel was ineffective by allowing the court to mislead him at his Rule 11 hearing about his prior felony convictions. When a defendant pleads guilty and later attacks his guilty plea, "to satisfy the 'prejudice' requirement, the defendant

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); see Lee, 582 U.S. at 369. "Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has special force with respect to convictions based on guilty pleas." Lee, 582 U.S. at 368–69 (citations and quotation omitted).

Andrews's sworn statements at his Rule 11 hearing bind him and defeat this claim. See, e.g., Blackledge, 431 U.S. at 74; United States v. Moussaoui, 591 F.3d 263, 299–300 (4th Cir. 2010); United States v. Lemaster, 403 F.3d 216, 221–23 (4th Cir. 2005). At Andrews's Rule 11 hearing, he swore that he understood the relevant circumstances concerning his prior felony convictions. See Rule 11 Tr. 24–27. Moreover, Andrews's swore that he was "completely and fully satisfied with [his] lawyers' legal services." See id. at 29.

Alternatively, Andrews has failed to plausibly allege prejudice from his counsel's alleged deficiency. Andrews does not plausibly allege in his section 2255 motion that if he understood his prior felony convictions, then Andrews would not have pleaded guilty and proceeded to trial. See [D.E. 167] 9; cf. Lee, 582 U.S. at 368–69; Lockhart, 474 U.S. at 59. Accordingly, Andrews's eleventh claim fails. See Strickland, 466 U.S. at 687–96.

In Andrews's twelfth claim, he alleges his trial counsel was ineffective by misrepresenting relevant outcomes of pleading not guilty as opposed to pleading guilty. See [D.E. 167] 8. At Andrews's Rule 11 hearing, he swore that he understood the consequences of pleading guilty and that he could instead plead not guilty and proceed to trial with all the trial rights. See Rule 11 Tr. 31–35. He also swore that nobody had threatened him or anyone else and that nobody had forced him to plead guilty. See id. at 30. Moreover, to the extent Andrews's counsel failed to explain the

consequences of pleading guilty or not guilty, the court cured any such deficiency during the Rule 11 hearing and before Andrews pleaded guilty. See id. at 3–35.

Alternatively, Andrews has failed to plausibly allege prejudice from his counsel's alleged deficiency. Andrews does not plausibly allege in his section 2255 motion that if he understood the consequences of pleading guilty, then Andrews would not have pleaded guilty and proceeded to trial. See [D.E. 167] 8; cf. Lee, 582 U.S. at 368–69; Lockhart, 474 U.S. at 59. Accordingly, Andrews's twelfth claim fails. See Strickland, 466 U.S. at 687–96.

After reviewing the claims presented in Andrews's motion, the court finds that reasonable jurists would not find the court's treatment of Andrews's claims debatable or wrong and that the claims do not deserve encouragement to proceed any further. Accordingly, the court denies a certificate of appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

III.

In sum, the court GRANTS respondent's motion to dismiss [D.E. 173], DISMISSES petitioner's motion to vacate [D.E. 167], and DENIES a certificate of appealability.

SO ORDERED. This 16 day of November, 2023.

J. Dever

JAMES C. DEVER III
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Mark Leon Andrews

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Judgment in a 2255 Action

Criminal Case No. 5:18-CR-208-1D
Civil Case No. 5:23-CV-263-1D

Decision by Court.

This action came before the Honorable James C. Dever III, United States District Judge, for consideration of a Motion to Dismiss Petitioner's 28 U.S.C. § 2255 motion.

IT IS ORDERED AND ADJUDGED that respondent's motion to dismiss is GRANTED, petitioner's section 2255 motion is DISMISSED, and a certificate of appealability is DENIED.

This Judgment Filed and Entered on November 16, 2023, with service on:
By US Mail to Mark Leon Andrews #65790-056 USP McCreary PO Box 3000 Pine Knot, KY 42635 and David Beraka (via CM/ECF Notice of Electronic Filing)

November 20, 2023

/s/ Peter A. Moore, Jr.
Clerk of Court